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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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A Long Time Ago, In a Court Far, Far Away . . . —Retirement Wars: Episode II — The Payor Strikes Back

***Starra v. Starra*, 2026 CarswellOnt 12173 (C.A.) — Rouleau, Thorburn and Favreau JJ.A.**

***Huber v. Atwal* (2026), 25 R.F.L. (9th) 247 (B.C. C.A.) — Mayer, Butler and Riley JJ.A.**

It is a dark time for retirement law . . . OK . . . maybe not so dark . . .

In the March 17, 2025 (2025-10) edition of *TWFL* — "The Retirement Edition (Now with 100% less payments!)" — we tried to make sense of what happens when a long-term support payor wants to retire.

We discussed *Fielding v. Fielding* (2024), 18 R.F.L. (9th) 303 (Ont. C.A.); *T.D.M. v. R.M.M.* (2024), 6 R.F.L. (9th) 202 (P.E.I. S.C.), and the trial decision in *Starra v. Starra* (2024), 11 R.F.L. (9th) 396 (Ont. S.C.J.), and we started with the basic point that there is no hard-and-fast rule about when, or at what age, a support payor is "entitled" to retire and seek a reduction or termination of support. We emphasized that the issue was a hard one to predict, but that "discretion" is not (or should not be) the same thing as "guesswork."

These two new appeals help bring into focus that which we discussed in the Retirement Edition. *Starra* shows what happens when the trial judge properly analyzes retirement. On the flip-side, *Huber* shows what happens when a judge allegedly fails to analyze whether a late-career reduction in work is reasonable before imputing income.

When dealing with the impact of retirement on spousal support, the basic questions are not complicated: Is the support recipient still entitled to support? Has there been a material change — Is the support payor's retirement or semi-retirement reasonable in the circumstances? If it is, what income is actually available and should be used? Those questions are related, but they are not interchangeable, and conflating them is where retirement analyses often go astray.

The separation of entitlement, reasonableness of retirement, and income serves an important analytical purpose. It prevents courts from assuming that continued entitlement automatically means that employment-era income remains available, and ensures that retirement itself does not become an automatic basis for reducing or terminating support. Blur them and you risk either punishing a support payor by requiring support to be calculated on income they can no longer reasonably earn, or assuming that retirement *automatically* terminates support. Neither approach is right.

***Starra*: Deference When the Analysis Is Done Right**

We start with *Starra*, because it is the direct sequel to the trial decision we discussed in the Retirement Edition.

The parties had been married for 25 years. The husband, a doctor, had been paying support for about 11 years under a final order. The wife had serious health issues and could not work. He was 63. She was 62 at the time of the motion. He was looking to retire. The parties had similar net worths.

On the motion, Justice Desormeau found the husband's move toward retirement and the corresponding decrease in income to be a material change. After reviewing expert evidence about the parties' expected retirement incomes and imputing income for 2024 to 2026, she ordered mid-range support of $5,999 per month from June 1 to December 31, 2024; and then $1,423 per month from January 1, 2025 to September 30, 2026; and then — finito — support would terminate. The first figure covered the transition into retirement; the second reflected the income picture the court accepted for the retirement period.

On appeal, the wife argued that the motion judge failed to give proper weight to family violence evidence, the compensatory component of support, and retroactive support principles. The Court of Appeal, unmoved, dismissed the appeal.

The Court of Appeal emphasized the deferential standard of review for support orders: an appellate court does not interfere simply because it might have balanced the factors differently. The court also accepted the motion judge's use of the retirement-specific SSAG guidance that, eventually, older parties may have to live off capital, draw down RRSPs or RRIFs, sell businesses or farms, and stop pretending that investment income will solve the world's problems. It also noted the point from *Boston v. Boston* (2001), 17 R.F.L. (5th) 4 (S.C.C.), that where a pension has been equalized by lump sum, the recipient spouse has an obligation to use equalized assets in an income-producing way for retirement.

This does not mean that recipients automatically lose when payors retire. It means the income-in-retirement analysis is not forever frozen around what the payor earned before retirement.

So *Starra* gives us half of the follow-up lesson: where the retirement analysis is actually done, appellate courts will be slow to interfere. So when acting for a retiring payor, help the court get it right.

Huber: Intervention When Part of the Analysis Is Skipped

Huber offers the other half of the lesson.

The parties in *Huber* were in a marriage-like relationship for 26 years (14 of which they were married), separated in 2014, and had adult children. The husband was an anesthesiologist, and the wife was a nurse. In 2017, they entered into a consent order granting a divorce and requiring the husband to pay monthly spousal support of $12,587, based on *Guidelines* income of $454,000 for him and $51,211 for her. The order made support reviewable on the husband's retirement, on a 10% or greater reduction in gross revenue of the husband's professional corporation, or a material change under s. 17 of the *Divorce Act*. (Yes — we know that the words "review" and "material change" do not play nicely together.)

In 2022, the husband left his full-time Richmond, British Columbia, anesthesiology position, moved to Penticton, and shifted to part-time on-call, *locum*, and emergency work. The wife continued working as a critical care nurse and picked up extra shifts. By the time of the hearing, he was 71 and she was 67.

In October 2024, the husband applied to terminate support, retroactively reduce it for the previous three years, or reduce it going forward. The chambers judge found that the review clause had been triggered by a drop of more than 10% in the gross revenue of the husband's professional corporation. But the judge refused the retroactive reduction, declined to terminate support, imputed income of $475,000 to the husband, attributed income of $142,844 to the wife, and ordered low-range SSAG monthly support. The reasons describe that amount as $10,380 in the procedural history and $10,830 in the disposition; either way, the route to the number was the same. The judge treated the husband's reduced work as a voluntary choice rather than a reasonable late-career reduction.

In effect, the judge treated the *ability* to continue working as sufficient to keep support going at prior levels. The Court of Appeal said it was not.

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We start at the beginning — with entitlement. On that issue, the chambers judge was on solid ground. The wife still had strong compensatory and non-compensatory claims after a 26-year relationship. The husband conceded that the marriage was long and that the parties had prioritized his career over hers. The Court of Appeal accepted that the chambers judge had considered the statutory factors and objectives under s. 15.2 of the *Divorce Act* in finding that the wife remained entitled to support.

That part of the decision is not terribly surprising. Age and reduced work do not just erase a long marriage, a career sacrifice, or a continuing economic disadvantage. This was not a termination case simply because the husband wanted it to be one.

There was also a factual error — and not a small one. The chambers judge found that the husband had approximately $1,000,000 more in assets than the wife. On appeal, it was common ground that the actual difference was closer to $250,000. What's $750,000 between friends? While that mistake could easily have impacted the tenor of the case — that is, it may have been *palpable*; the error was not *overriding* because the asset disparity was not the only, or even primary, basis for continuing support.

Entitlement survived. But that did not answer the next question: if support continued, what income should be used?

The income question is where *Huber* becomes interesting and useful.

The husband's income declined significantly after he reduced his practice. Rather than using his actual 2024 earnings, the chambers judge imputed income based on his historical earning capacity. The Court of Appeal accepted that the chambers judge had effectively found intentional underemployment — just not using those magic words.

That is where the analysis broke down. The Court of Appeal did not simply prefer a different number. It held that the judge failed to do the required legal work before imputing income: the judge did not consider whether it was *reasonable* for the husband to reduce his hours before treating him as intentionally underemployed. The reasonableness inquiry required attention to capacity to earn in light of age, education, health, work history, and work availability.

This was not appellate tinkering with support math. It was an error in principle. Before imputing income, the court had to ask whether the reduction in work was reasonable (or unreasonable). It did not. That failure justified appellate intervention.

In a sentence that should now appear in every retirement or semi-retirement support factum, the Court of Appeal put it this way: "Where a payor spouse has had a long and productive career and is over 70 years old, the fact that they are capable of working full time does not mean that it is unreasonable to work less." That is the whole point. Capacity is not the end of the analysis; reasonableness is.

The evidence the chambers judge failed to grapple with was not trivial. The husband had moved to Penticton at age 68 in anticipation of pending retirement. He said that, due to his age, he was not offered some work because it was frowned upon for critical care physicians to take on certain types of work at the end of their careers. He said his ability to work long hours was waning. He also said he had fewer opportunities to obtain northern *locum* work and that the heavy on-call commitment was increasingly difficult for him. There was also a letter from the doctor responsible for scheduling anesthesiologists at Penticton Hospital saying she did not anticipate providing him any shifts after October 2024.

That evidence mattered because it undercut the conclusion that the husband remained eligible to work "at his discretion indefinitely." Again, the practical point is simple: *eligibility* to work is not the same as an actual *ability* to obtain and sustain the work. And certainly not in a hospital system where someone else schedules shifts, where call obligations matter, and where age and stamina are real variables. This was not a 53-year-old executive announcing an early retirement to avoid support. This was a 71-year-old physician who had actually left full-time work and was piecing together part-time, locum, and emergency work.

The Court of Appeal, therefore, characterized the error as a failure to consider relevant evidence before deciding whether the reduction in hours was reasonable. That was an error in law. The court then held that, in the husband's particular circumstances, it was reasonable for him to reduce his hours and income. As a result, there was no basis to impute income.

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Support continued, but historical income did not. The husband won the imputation issue, but not termination — a distinction with a difference.

Rather than send the matter back, the Court of Appeal did the calculations itself. Sending the parties back for another support trial would only have added cost to a dispute the Court of Appeal could resolve on the record before it. The parties agreed the Court of Appeal could vary support, and the court agreed to do so to permit finality and limit further costs for the parties.

Rather than remitting the matter, the Court of Appeal calculated the husband's *Guidelines* income itself. Using the husband's 2024 professional corporation earnings and projecting his income based on the work he actually performed, the court arrived at an annual income of $310,000.

Using an income of $310,000 for the husband, the court calculated the applicable SSAG ranges and selected the low end, consistent with both the parties' original consent order and the chambers judge's approach. The appeal was allowed in part, reducing monthly support from $10,830 to $5,224 effective January 1, 2025. The court did not set a termination date. It varied ongoing monthly support, left the overpayment issue for the parties to resolve if they could, and invited written submissions if they could not.

Same Lesson, Different Angles

Read together, *Starra* and *Huber* are rowing in the same direction, making the same procedural point. In *Starra*, the motion judge did the retirement analysis, weighed the support objectives, considered the retirement-income evidence, and explained why support would step down and end. Deference carried the day. In *Huber*, the chambers judge skipped the reasonableness question before imputing employment-era income. That was an error in principle. For an appeal, the stronger argument is not "the judge should have picked a different number." It is "the judge picked a number before considering whether that number was available at all."

Dealing With Retirement and Work-Reduction Cases

So what to do with these cases on the next retirement motion? A few practical points . . .

The principles emerging from *Starra* and *Huber* provide a useful framework for preparing and arguing retirement and work-reduction motions. For practitioners looking for a practical roadmap, however, *St-Jean v. Fridgen* (2017), 3 R.F.L. (8th) 92 (Ont. S.C.J.), remains one of the most helpful guides available. Paragraph 37, in particular, sets out a non-exhaustive list of factors to consider and gives counsel a practical map for the evidence to adduce and the arguments to make: ages, length of marriage, roles during the marriage, current finances, re-partnering, medical evidence, the nature and history of support, what the order or agreement says about retirement, the reasons for retirement, ongoing economic consequences, the SSAG range, and whatever else the facts demand.

First, keep the questions separate. Entitlement is one question. Material change/reasonableness of the retirement or work reduction is another. Income is a third. Duration may be a fourth. *Starra* shows that a recipient can have a strong compensatory claim and still face an end date when retirement is properly analyzed. *Huber* shows that a recipient can remain entitled to support even though the payor's pre-retirement income is no longer the right number. If you represent the recipient, do not assume that proving continued entitlement gets you employment-era income. It does not. If you represent the payor, do not assume that proving reduced income gets you termination. It does not.

Second, payor counsel must build an actual retirement or semi-retirement record. The evidence should explain when the reduction started, why it happened, what work was done before, what work is being done now, what work is available, what work is not available, and why the client can no longer reasonably do the old thing at the old pace. If there are health issues, say what they are. If there are scheduling limits, get the scheduling evidence. If the payor is winding down a practice or career, explain the steps. If other potential work is disappearing, prove it. If the payor is still working, explain the pattern and do the arithmetic.

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The point is illustrated by both cases. In *Starra*, the payor's move toward retirement was concrete enough to be assessed against expert retirement-income evidence. In *Huber*, the payor's stated plan to retire at some undefined future point was still speculative, but his actual reduction in hours had to be tested for reasonableness. That is the difference. An *anticipated* retirement can matter when it is real enough to analyze (see *Schulstad v. Schulstad* (2017), 91 R.F.L. (7th) 84 (Ont. C.A.)); a vague statement that "I plan to retire someday" is not a plan.

Third, for recipients, the argument that "the payor used to earn more" is a start, but not the end. The party seeking imputation bears the burden of establishing an evidentiary basis for higher income. In cases involving medical professionals, that may mean evidence about available opportunities, hospital privileges, call requirements, market demand, practice patterns, and whether the payor is actually turning down work. Cross-examination should be built around the same questions: What work was offered? What work was refused? What work is still available? What is the evidence, not the assumption, that the old income remains reasonably attainable?

Fourth, think hard about whether the case can actually be *finished*. Where a payor is already at, or approaching, retirement age, counsel should at least *consider* whether the dispute can be resolved once-and-for-all rather than through successive variation proceedings. That does not mean every case should end with a lump-sum buyout or a fixed payment schedule. Sometimes support genuinely has to remain reviewable because too much is uncertain. But in many cases, reasonable assumptions can be made about retirement timing, expected retirement income, and the parties' future circumstances. Those assumptions may allow the parties to negotiate a final resolution through a lump-sum payment, fixed periodic payments for a defined period, a declining payment schedule, or some combination of periodic payments and a lump sum.

Of course, any negotiated final resolution requires the parties to make reasonable assumptions about the future. No one knows exactly when a payor will fully retire, what retirement income will ultimately look like, how investments will perform, or what future health issues may arise. But retirement litigation already requires those judgments. Courts routinely make findings about future income, retirement timing, employability, support duration, and the parties' likely financial circumstances. If reasonable assumptions are sufficient to permit a court to decide the dispute, they may also be sufficient to permit the parties to settle it.

Huber illustrates why this matters. The Court of Appeal resolved the immediate dispute by holding that income should not have been imputed. But the husband was still working. Support continued. No termination date was set. If and when he ultimately retires, the parties may find themselves back in the same courthouse, older, poorer, and with an even more refined appreciation for photocopying costs and technology charges.

The economics also matter. Retirement disputes have a way of multiplying: fresh disclosure, (over-and-over again) updated income calculations, expert evidence, motions to change, overpayment arguments, and the familiar professional sport of arguing about whether this year is *really* different from last year and whether next year will *really* be different from this year. By the time the parties litigate a reduction, then a further reduction, then actual retirement, and finally termination, the cost of proving the answer may exceed the amount left to fight about. Many of these litigants are already in their late sixties or seventies. Their retirement years should not be spent financing successive motions if a reasonable final resolution can be achieved today.

There is also an adverse incentives point: Ongoing unresolved support can distort behaviour. A payor who still enjoys working may nevertheless have an increased incentive to retire sooner if continuing to work simply means continuing to share a significant portion of the additional earnings. Conversely, waiting until actual retirement before attempting to resolve support may not always produce the most practical or economically efficient outcome for either party. Retirement is often a transition rather than a single event. Good settlement planning can sometimes turn that transition into a final resolution instead of another return trip to court.

Finally, be careful with the "language of voluntariness." Many retirements are voluntary in at least some sense. So are most career changes, relocations, reductions in call, or refusals to keep working forever. The question is not whether the support payor chose the change. The question is whether the choice was reasonable in all the circumstances.

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Starra and *Huber* offer practical reminders that retirement cases are won or lost on the questions the court asks — or should ask. If the judge asks the right questions and explains the answer, *Starra* tells us deference will usually do the rest. If the judge skips the reasonableness inquiry and jumps to historical income, *Huber* tells us appellate intervention is available. Capacity is only the beginning of the inquiry. Before employment-era income can be used, the court must ask whether it is reasonable to expect this spouse, in these circumstances, to keep earning it. At some point, even high-earning professionals get older and slow down. The law will recognize this — but it must first ask the right question.

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