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— Franks & Zalev - This Week in Family Law

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Contents

An Invitation to Mischief for the Financially and Morally Bankrupt

Rusinek & Associates Inc. v. Arachchilage (2021), 51 R.F.L. (8th) 253 (Ont. C.A.) - Strathy C.J.O., Rouleau and Coroza JJ.A.

It is settled that a trustee in bankruptcy has authority to ***continue*** a claim for an equalization payment that was started prior to bankruptcy: *Schreyer v. Schreyer* (2011), 1 R.F.L. (7th) 1 (S.C.C.) at paras. 20-21; and *Thibodeau v. Thibodeau* (2011), 5 R.F.L. (7th) 16 (Ont. C.A.) at para. 11.

In *Rusinek*, the Ontario Court of Appeal was called upon to answer a slightly different question: can a trustee ***commence*** a claim for an equalization payment on behalf of a bankrupt spouse?

When we discussed the application judge's initial decision in this case in the April 27, 2020 edition of *TWFL* 2020-16, we had some questions about whether her decision that a trustee ***cannot*** commence a claim for an equalization payment was correct, and whether it would withstand appellate review. But as we discuss below, while the Ontario Court of Appeal did not agree with most of the application judge's reasoning, it nevertheless determined that, ultimately, she had reached the right conclusion. That is, a trustee cannot ***commence*** a claim for an equalization payment - yet another land mine for family lawyers to navigate.

The husband and wife in *Rusinek* were married for 12 years. When they separated, their most significant asset was their matrimonial home, which was owned solely by the wife.

Less than a year after the parties separated, and before a claim for an equalization payment had been started, the husband made an assignment in bankruptcy, and disclosed more than $280,000 in unsecured debts to his trustee. As a result of the husband's bankruptcy, all of his assets, including his potential claim for an equalization payment against the wife, vested in his trustee. [See s. 71 of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the "*BIA*")]

In an attempt to recover as much money as possible for the husband's creditors, his trustee tried to start a claim for an equalization payment against the wife. The application judge, however, concluded that the trustee could ***not*** commence the claim for an equalization payment. She reasoned that a claim for an equalization payment is "inchoate until exercised", and that until then, "the right is not assignable and remains only an amorphous possibility." As noted above, we did not agree with that reasoning because if the right is not assignable, then it would remain with the bankrupt and would not be released upon discharge - as it is. We also saw the opportunity for colluding spouses to work mischief against innocent third-party creditors. But what do we know?

The husband's trustee appealed the application judge's decision to the Ontario Court of Appeal.

In thorough reasons, the Court of Appeal agreed with the husband's trustee that the application judge had erred in finding that an equalization payment is an inchoate right until a claim has been commenced, and confirmed that a claim for an equalization payment not started prior to bankruptcy is, in fact, property that vests in a trustee for the purposes of the *BIA*. (This answered our first issue above.)

But that was not the end of the matter. Pursuant to s. 7(2) of the *Family Law Act*, R.S.O. 1990, c. C.43 (the "*FLA*"), a claim for an equalization payment is "personal as between the spouses." Thus, argued the wife, even if the husband's claim for an equalization payment had ***vested*** in his trustee, the trustee still had no authority to actually ***commence*** the claim on his behalf - only the husband could do that.

In accepting the wife's argument, the Court of Appeal stated as follows:

> [48] The issue for this court to determine is, therefore, whether the qualification the Ontario legislature has imposed on the right granted in s. 7 of the *FLA* limits the trustee in bankruptcy's ability to initiate the equalization claim during the estate-administration stage of bankruptcy. **In my view, this is precisely the effect of the words "personal as between the spouses" in s. 7(2) of the *FLA*. A spouse makes the decision to initiate a claim for equalization, as it is something that is personal to the spouses, and that decision cannot be made by a trustee in bankruptcy or any other assignee**. [emphasis added]

The Court of Appeal also noted that its interpretation of s. 7(2) of the *FLA* was supported by prior cases that have confirmed that while an estate trustee can ***continue*** a claim for an equalization payment that had already been started before one of the spouses died because that is expressly permitted by s. 7(2)(a), it cannot ***commence*** such a claim on its own: *Rondberg Estate v. Rondberg Estate* (1989), 22 R.F.L. (3d) 27 (Ont. C.A.).

The Court of Appeal also discussed some of the underlying policy considerations for s. 7(2) of the *FLA*, including reducing conflict between separated spouses and encouraging them to settle their own affairs without litigation:

> [50] . . . **There can be no doubt that the decision to advance an equalization claim is deeply personal**. The [wife] argues that, in the present case, if an equalization claim is made by the trustee in bankruptcy, it may result in the [wife] and her children having to leave the matrimonial home, as it would likely have to be sold to fund the equalization claim.
>
> [51] **Such a decision may create further conflict between the spouses by involving them in litigation and causing them to incur legal fees they may well not be able to afford. Conflict between spouses often has an impact on the children of the marriage**. There is, of course, no obligation under the *FLA* for a spouse to make an equalization claim, and parties are encouraged to settle their affairs without resorting to the courts. As stated in the Preamble of the *FLA*, "it is desirable to encourage and strengthen the role of the family" and "it is necessary to provide in law for the orderly and equitable settlement of the affairs of the spouses". This interpretation of "personal as between the spouses" is consistent with these overall purposes of the *FLA*.
>
> [52] **If a spouse has already taken the step of commencing an application for the equalization of net family properties, the concerns outlined in the paragraph above are substantially reduced, as the parties are already in a situation of conflict**. In such a case, the trustee in bankruptcy steps into the shoes of the bankrupt spouse and continues the claim that has already commenced. [emphasis added]

We accept that interpretation of s. 7(2) of the *FLA* is correct based on the wording of the section, and the Court's prior decisions that have concluded that s. 7(2) does not allow an estate trustee to commence a claim for an equalization payment. Very respectfully, however, we are surprised that the Court of Appeal did not at least discuss some of the potential problems with this interpretation. For example, as we discussed when we wrote about the initial decision in this case, not allowing a trustee to commence a claim for an equalization payment could be used by spouses to, "game the system to the prejudice of all other creditors by putting all assets in the name of one spouse (say the wife) and all debt in the name of the husband. Upon 'separation',

the husband would simply not advance an equalization claim against the wife, make an assignment in bankruptcy, avoid all his other creditors - and then reconcile with the wife." After all, reconciliation is a policy objective of family law statues.

The soon-to-be-bankrupt spouse could also try to use the threat of starting a claim for an equalization payment (so that the trustee could then pursue it) to try to pressure the other spouse into making other concessions (e.g. "if you claim spousal support, I'll cooperate with my trustee to claim an equalization payment . . . but if you agree to waive support now, I will not start a claim before I make an assignment").

The time has come to seriously consider whether s. 7(2) of the *FLA* needs to be amended. Despite the Court of Appeal's comments that the decision to commence an equalization claim is "deeply personal", in our view there is really no good reason to allow an estate trustee or bankruptcy trustee to ***continue*** a claim that was started a day before the spouse died or made an assignment, but to impose an absolute bar against commencing a claim as soon as that same exact same spouse dies or makes an assignment. The bar against allowing an estate trustee to commence a claim for an equalization payment is also particularly problematic, as it actually encourages spouses to commence litigation in order to ensure that their estate will be able to continue the claim if the claimant dies before the spouses have been able to reach an agreement.

Hey PEI - Welcome to the SSAG Party

C.E.D. v. C.J.D. (2021), 52 R.F.L. (8th) 257 (P.E.I. C.A.) - Jenkins C.J., Murphy and Mitchell JJ.A.

The parties separated in August 2013, after a 13-year marriage with two children. During the marriage, the parties agreed that the mother would be a stay-at-home parent, at least until the children went to school. She then worked at various low-paying jobs, and she had some health difficulties. By the time of trial, she had not worked for a number of years and had been collecting CPP disability benefits.

After separation, the parties lived separate and apart in the matrimonial home with the children until October 2013, when the mother went to Ontario to help care for her sick mother. The children remained with the father who paid all of the expenses. The mother returned in April 2014. She moved back into the matrimonial home until the end of August 2014, when she moved out of the matrimonial home with the two children.

The mother filed an application in June 2015, claiming custody, child support, and spousal support. In November 2015, the parties consented to an interim order that the father pay "without prejudice" child support of $450 a month. While the mother originally claimed child and spousal support retroactive to June 23, 2015, at trial she amended her pleadings to claim child and spousal support retroactive to September 1, 2014.

The father agreed that he owed child support retroactive to June 1, 2015, which meant that only the nine months from September 1, 2014 to June 1, 2015, were in issue.

The trial judge equalized the parties' net family property and ordered child support for one child retroactive to June 2015 (as the Court found the older child was no longer a child of the marriage as of June 1, 2015), but declined to order spousal support.

The mother appealed.

Helpfully, the Supreme Court of Canada recently restated the standard of review in *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.): child support and spousal support awards are highly discretionary and the trial judge's findings of fact may not be disturbed absent an error on an extricable question of law, a palpable and overriding error, or a fundamental mischaracterization or misapprehension of the evidence. [See also *Morrissey v. Morrissey* (2015), 69 R.F.L. (7th) 277 (P.E.I. C.A.) at para. 8]

While child support was not a significant issue in the appeal, the Court of Appeal noted that the trial judge had "correctly" relied on *S. (D.B.) v. G. (S.R.)* (2006), 31 R.F.L. (6th) 1 (S.C.C.) ("*D.B.S.*") as the "leading case" on retroactive child support under the *Divorce Act*. While this may *technically* be true, and although it was decided under the B.C. *Family Law Act*, *Michel* offers a critical update as to the general theory of child support and an important review and "reset" of the *D.B.S.* factors. So, for example, in this case the PEI Court of Appeal referred to retroactive child support orders as being "not rare but not always

appropriate", and that retroactive awards can impair the delicate balance between certainty and flexibility in family law - those notions have become somewhat antiquated with the release of the reasons in *Michel* in September 2020. Respectfully, it is no longer appropriate to focus on the *D.B.S.* factors without considering them through the lens of *Michel*.

So, in this case, the Court of Appeal accepted the trial judge's findings that:

- there was little to no evidence to indicate why the mother did not seek support earlier than June 23, 2015;
- the father's conduct was "blameless", as he had been paying child support pursuant to the interim consent order;
- there was no evidence of any adverse impact on the children; and
- a retroactive award would create hardship for the father as he had been paying all the bills, and providing for the mother and children until they left the matrimonial home.

Each one of these accepted findings, we say with respect, should have been considered alongside the *dicta* of *Michel*, where the notions of "reasonable excuse for delay", "blameless conduct", and "hardship" were very significantly reconsidered.

In any case, based on the *D.B.S.* factors, the trial judge's decision with respect to retroactive child support was given extreme deference, and the child support appeal was dismissed.

With respect to spousal support, relying on s. 15.2 of the *Divorce Act*, *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.), and *Bracklow v. Bracklow*, 1999 CarswellBC 532 (S.C.C.), the trial judge found a compensatory basis for spousal support.

Having found entitlement, the trial judge had then considered the father's ability to pay. He found the father's annual income for 2019 and 2020 to be $50,000. From that he deducted income tax and child support to reduce the father's net income to $34,328.

Reviewing the father's sworn Financial Statement that showed monthly income of $4,000 and expenses of $4,330 (a net deficit of $330 per month), the trial judge concluded that the father did not have the financial ability to pay spousal support. Here, the Court of Appeal had some concern.

While the trial judge found that the father's annual income was in the range of $50,000, the trial judge failed to consider that the family debt was to be paid out of the proceeds from the sale of the matrimonial home. Therefore, when that was done, the father would be relieved of $400 a month in debt payments.

The father had also shown an expense of $300 a month for charitable donations. Noted the Court of Appeal, "[t]his is all well and good but, as they say, charity begins at home. That money should be earmarked for family purposes." Therefore, the father actually had a monthly surplus of $536.

While considering the budgets of the parties, the trial judge did not avail of the *Spousal Support Advisory Guidelines* (the "*SSAG*"). According to the Court of Appeal, the trial judge was not *obliged* to refer to the *SSAG* as they "are simply guidelines and not legislation." This statement would seem to depart from how other provincial Superior Courts and Courts of Appeal regard the *SSAG*. Many other provincial Courts of Appeal consider it legal error to not at least *consider* the *SSAG* as a presumptive starting point or a "cross check": *Redpath v. Redpath* (2006), 33 R.F.L. (6th) 91 (B.C. C.A.); *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.); *M. (J.A.) v. M. (D.L.)*, 2008 CarswellNB 24 (C.A.); *Kynoch v. Kynoch*, 2013 CarswellMan 441 (C.A.); *Gray v. Gray* (2014), 50 R.F.L. (7th) 257 (Ont. C.A.); *Frank v. Linn* (2014), 48 R.F.L. (7th) 34 (Sask. C.A.); *Wild v. Wild* (2019), 24 R.F.L. (8th) 26 (Alta. C.A.); *Slongo v. Slongo* (2017), 89 R.F.L. (7th) 27 (Ont. C.A.); *Aquila v. Aquila* (2016), 76 R.F.L. (7th) 1 (Man. C.A.); *Walker v. Walker* (2019), 31 R.F.L. (8th) 310 (Sask. C.A.); *Thompson v. Thompson*, 2019 CarswellAlta 26 (C.A.).

The Court of Appeal did, however, accept that the *SSAG* are "very helpful" in determining amount and duration of spousal support. And, while reference to the *SSAG* is not *mandatory*, it *should be* a first stop for judges when considering spousal support amount and duration. At the very least, they should be used as a rough or general guide, because if a court's conclusion diverges too far from the *SSAG*, a second look might be warranted. [1]

The Court of Appeal explicitly set out that, as they did not want the parties to view a support order as lasting "forever," they preferred to set the duration subject to the ability of the parties to review the order. So much for *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.).

With respect to duration, the Court of Appeal noted that this was a 13-year marriage, such that duration should be in the range of 6-1/2 to 13 years. Noted the Court of Appeal, "[d]uration marks the end of entitlement."

According to the Court of Appeal, "[t]he mother's compensatory claim and the fact that she has some health issues militate towards the higher end of duration. On the other hand, her child rearing responsibilities are at an end or almost at an end." Therefore, in the circumstances, the Court of Appeal set the duration at 11 years.

The father argued that he had already been supporting the mother by way of payments on the joint family debt, and that the court should recognize that he had already been paying the equivalent of spousal support for several years.

There was some merit to this argument. The father had made all the mortgage payments and had paid the taxes and insurance on the jointly-owned home from the date of separation to the date the home was sold - a period of four years. In that period, the mortgage had been paid down by about $27,000, half of which would accrue to the mother's benefit.

Therefore, held the Court of Appeal, while the father was not making direct support payments for that period, the payments he made benefited the mother to an extent that was roughly the equivalent of spousal support. As a result, the Court found that the father had already paid the equivalent of four years of spousal support from August 2013 to August 2017. He had, then, seven years remaining, commencing January 2018.

This is a very odd finding - that the payments the father was making were "roughly the equivalent of spousal support" - when the Court had not yet considered the appropriate *amount* of spousal support.

While we cannot say that what the Court of Appeal did here was technically "wrong," it is highly unusual that the Court here considered duration before amount. The *SSAG* certainly suggest that, while duration and amount are to be considered together, the first consideration should be amount, and any restructuring considerations would generally require that the amount of support be considered before duration. It seems odd that the first question would be, "for how long is support payable?" and not "how much support is payable?"

The *SSAG* formulas for amount and duration are interrelated. They are a package deal. Using only one part of the formula without the other would undermine the integrity and coherence of the *SSAG*: *Wharry v. Wharry* (2016), 89 R.F.L. (7th) 61 (Ont. C.A.); *Domirti v. Domirti*, 2010 CarswellBC 2864 (C.A.); *Fisher v. Fisher*, 2008 CarswellOnt 43 (C.A.).

The *SSAG* uses income sharing as opposed to budgets as a method for determining the amount of spousal support. While budgets can be useful in fine-tuning the *SSAG* amounts or where a given fact scenario may fall within the ranges, budgets are inherently subjective.

The Court of Appeal also added $2,400 to the mother's income for her CPP child benefit. The nature of the CPP child benefit is not entirely clear from the case. But if it was a disability benefit, it should not have been included in the mother's income: *Schmidt v. Christie*, 2021 CarswellAlta 378 (Q.B.); *Lawrence v. Lawrence* (2006), 24 R.F.L. (6th) 112 (B.C. S.C.) at para. 84.

After calculating the parties' incomes for support purposes, the Court of Appeal determined the range of spousal support amounts to be from $163 a month (low), $312 a month (mid), to $466 a month (high).

The youngest child would turn 18 in 2020, upon which the mother would lose many government benefits. At that point the monthly spousal support ranges increased materially to $634 (low), $763 (mid), and $894 (high).

Understanding that it is not appropriate to simply "default" to the mid-range of the *SSAG*, the Court of Appeal noted that the compensatory nature of the claim tended to put it towards the higher end, but the fact that the mother's child-rearing

responsibilities were then close to an end would tend to put it towards the lower end. Here, after consideration, the Court determined mid-range to be appropriate.

Therefore, the Court determined that the father should pay spousal support of $312 a month for 2018; $277 a month for 2019; and a total of $5,268 for 2020 (being $277 a month for eight months and $763 a month for four months). Then, starting in January 2021, the father was to pay spousal support in the amount of $763 a month until the end of 2024, subject to review on the issues of amount and duration.

This Public Service Announcement from the "Save Your Deductible Society"

Hayward v. Hayward, 2021 CarswellOnt 3783 (C.A.) - Lauwers, Trotter and Zarnett JJ.A.

Family lawyers regularly deal with limitation periods. Sometimes the limitation periods are with respect to property claims. Sometimes they are with respect to related causes of action such as assault, oppression, defamation, or negligence. And sometimes they arise in more oblique ways.

In *Hayward*, the Ontario Court of Appeal reminds us that, as affirmative defences, limitation periods *must* be specifically plead and argued. They cannot be just assumed or be "in the air."

Hayward was an estates case. It concerned the Estate of Jeanne Hayward ("Jeanne"), her former husband, Alexander, and their five children, one of whom was Leslie.

Alexander appealed from the trial judge's decision regarding his claims to repayment of a loan he made to Jeanne and to ownership of a tractor.

The trial judge found that Alexander had made a down payment of $1,000 and owned the tractor. However, the trial judge also found that Leslie had paid the remaining $12,560, being the bulk of the purchase price. There was no evidence that Alexander ever repaid Leslie. Therefore, the trial judge found that Alexander owed Leslie $12,560.

On appeal, Alexander argued that a claim for repayment of the loan from Leslie was statute-barred by the general two-year limitation period pursuant to the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B. The Court of Appeal dismissed this ground of appeal because it had not been before the trial judge:

> [7] The appellant argues that the trial judge erred in failing to find that repayment of the loan was time-barred under the *Limitations Act, 2002*, S.O. 2002, c. 24. This proceeding was started as an application and did not have full pleadings, but it was open to counsel to raise the application of the *Limitations Act* as a defence to Leslie's claim. The trial judge cannot be criticized for failing to respond to a defence that was not raised by counsel. This ground of appeal is dismissed.

That is, the expiry of a limitation period is an affirmative defence. It cannot be raised as a defence at trial if it is not pleaded.

In family law, this arises most often when one of the parties claims a debt owing to another party, usually a family member. Quite apart from the usual arguments as to whether an advance was a gift or a loan, if the loan is old, a claim that the amount is not actually owing on account of a limitation period must be specifically pleaded. But limitation periods can come into play in other areas of family law as well, wherein a limitations defence, again, must be specifically pleaded. Well, either that or have your deductible ready.

Footnotes

1 As noted by the Manitoba Court of Appeal in *Aquila v. Aquila* (2016), 76 R.F.L. (7th) 1 (Man. C.A.), "[t]he canary in the coal mine for an appellate court that signals possible unreasonableness with a spousal support award is, in the absence of an obvious reason to explain an anomalous result, whether the global value of spousal support, considering the amount and duration together, is drastically less or more than what is suggested by the SSAG."

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