

FAMLNWS 2021-22  
Family Law Newsletters  
June 7, 2021

— Franks & Zalev - This Week in Family Law

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**Breaking News**

*Colucci v. Colucci*, [2021 SCC 24](#)

On June 4, 2021, the Supreme Court of Canada released its long awaited reasons in *Colucci v. Colucci*, about how to deal with a payor's request for a retroactive reduction in his or her child support obligations. This is very much a companion decision to *Michel v. Graydon* (2020), [45 R.F.L. \(8th\) 1](#) (S.C.C.).

We will delve into the decision in more detail in a few weeks. In the meantime, you need to be aware that Justice Martin, writing for a unanimous Court, has established a clear framework for dealing with claims for both retroactive *increases and decreases* in child support and requests to rescind (forgive) arrears that the payor properly owes based solely on an alleged inability to pay:

[113] To summarize, **where the payor applies under s. 17 of the *Divorce Act* to retroactively decrease child support, the following analysis applies:**

- (1) **The payor must meet the threshold of establishing a past material change in circumstances.** The onus is on the payor to show a material decrease in income that has some degree of continuity, and that is real and not one of choice.
- (2) Once a material change in circumstances is established, **a presumption arises in favour of retroactively decreasing child support to the date the payor gave the recipient effective notice, up to three years before formal notice of the application to vary. In the decrease context, effective notice requires clear communication of the change in circumstances accompanied by the disclosure of any available documentation necessary to substantiate the change** and allow the recipient parent to meaningfully assess the situation.
- (3) **Where no effective notice is given by the payor parent, child support should generally be varied back to the date of formal notice**, or a later date where the payor has delayed making complete disclosure in the course of the proceedings.
- (4) **The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The *D.B.S.* factors (adapted to the decrease context) guide this exercise of discretion.** Those factors are: (i) whether the payor had an understandable reason for the delay in seeking a decrease; (ii) the payor's conduct; (iii) the child's circumstances; and (iv) hardship to the payor if support is not decreased (viewed in context

of hardship to the child and recipient if support is decreased). **The payor's efforts to pay what they can and to communicate and disclose income information on an ongoing basis will often be a key consideration under the factor of payor conduct.**

(5) Finally, **once the court has determined that support should be retroactively decreased to a particular date, the decrease must be quantified.** The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.

[114] It is also helpful to summarize the **principles which now apply to cases in which the recipient applies under s. 17 to retroactively increase child support:**

a) **The recipient must meet the threshold of establishing a past material change in circumstances.** While the onus is on the recipient to show a material increase in income, any failure by the payor to disclose relevant financial information allows the court to impute income, strike pleadings, draw adverse inferences, and award costs. There is no need for the recipient to make multiple court applications for disclosure before a court has these powers.

b) Once a material change in circumstances is established, **a presumption arises in favour of retroactively increasing child support to the date the recipient gave the payor effective notice of the request for an increase, up to three years before formal notice of the application to vary. In the increase context, because of informational asymmetry, effective notice requires only that the recipient broached the subject of an increase with the payor.**

c) **Where no effective notice is given by the recipient parent, child support should generally be increased back to the date of formal notice.**

d) **The court retains discretion to depart from the presumptive date of retroactivity where the result would otherwise be unfair. The D.B.S. factors continue to guide this exercise of discretion, as described in Michel.** If the payor has failed to disclose a material increase in income, that failure qualifies as blameworthy conduct and the date of retroactivity will generally be the date of the increase in income.

e) **Once the court has determined that support should be retroactively increased to a particular date, the increase must be quantified.** The proper amount of support for each year since the date of retroactivity must be calculated in accordance with the *Guidelines*.

.....

[138] Accordingly, in this third category of cases, **the payor must overcome a presumption against rescinding any part of the arrears. The presumption will only be rebutted where the payor parent establishes on a balance of probabilities that - even with a flexible payment plan - they cannot and will not ever be able to pay the arrears** (*Earle*, at para. 26; *Corcios*, at para. 55; *Gray*, at para. 58). **Present inability to pay does not, in itself, foreclose the prospect of future ability to pay, although it may justify a temporary suspension of arrears** (*Haisman*, at para. 26). This presumption ensures rescission is a last resort available only where suspension or other creative payment options are inadequate to address the prejudice to the payor. It also encourages payors to keep up with their support obligations rather than allowing arrears to accumulate in the hopes that the courts will grant relief if the amount becomes sufficiently large. Arrears are a "valid debt that must be paid, similar to any other financial obligation", regardless of whether the quantum is significant (*Bakht et al.*, at p. 550).

.....

[141] While the presumption in favour of enforcing arrears may be rebutted in "unusual circumstances" (*Gray*, at para. 53), **the standard should remain a stringent one. Rescission of arrears based solely on current financial incapacity should not be ordered lightly. It is a last resort in exceptional cases, such as where the payor suffers a**

"catastrophic injury" (*Gray*, at para. 53, citing *Tremblay v. Daley*, 2012 ONCA 780, 23 R.F.L. (7th) 91). I agree with Ms. Colucci that the availability of rescission would otherwise become an "open invitation to intentionally avoid one's legal obligations" (*Haisman* (Q.B.), at para. 18, citing *Schmidt v. Schmidt* (1985), 46 R.F.L. (2d) 71 (Man. Q.B.), at p. 73; R.F., at para. 57). Simply stated, how many payors would pay in full when the amounts come due if they can expect to pay less later? The rule should not allow or encourage debtors to wait out their obligations or subvert statutory enforcement regimes that recognize child support arrears as debts to be taken seriously. [emphasis added]

### **While You're in London, Grab Me Some Fish & Chips Would You?**

*H-N (Children) (Domestic Abuse: Finding of Fact Hearings), Re*, 2021 WL 01176360, [2021] EWCA Civ 448 (Eng. & Wales C.A. (Civil)) - Sir Andrew McFarlane, President of the Family Division, Lady Justice King, and Lord Justice Holroyde

While we mostly focus on Canadian cases, from time-to-time we come across a non-Canadian decision that we think will be of interest to our readers. The Court of Appeal (Civil Division) of England and Wales' recent decision in *H-N (Children) (Domestic Abuse: Finding of Fact Hearings), Re*, is one such case because of its comprehensive discussion of the impact of domestic abuse in family law and given the recent amendments to Canada's *Divorce Act* to deal with family violence.

As of March 1, 2021, s. 16 of the *Divorce Act* expressly requires our courts to consider "family violence" when determining the best interests of a child. Subsection 2(1) broadly defines family violence as:

... any conduct, whether or not the conduct constitutes a criminal offence, by a family member towards another family member, that is violent or threatening or that constitutes a pattern of coercive and controlling behaviour or that causes that other family member to fear for their own safety or for that of another person - and in the case of a child, the direct or indirect exposure to such conduct - and includes

- (a) physical abuse, including forced confinement but excluding the use of reasonable force to protect themselves or another person;
- (b) sexual abuse;
- (c) threats to kill or cause bodily harm to any person;
- (d) harassment, including stalking;
- (e) the failure to provide the necessities of life;
- (f) psychological abuse;
- (g) financial abuse;
- (h) threats to kill or harm an animal or damage property; and
- (i) the killing or harming of an animal or the damaging of property

Subsection 16(3) of the *Divorce Act* now provides that when determining the best interests of a child, the court must consider "any family violence and its impact on, among other things, (i) the ability and willingness of any person who engaged in the family violence to care for and meet the needs of the child, and (ii) the appropriateness of making an order that would require persons in respect of whom the order would apply to cooperate on issues affecting the child[.]" Furthermore, when considering the impact of family violence on the best interests of a child, s. 16(4) of the *Divorce Act* now requires the court to consider:

- (a) the nature, seriousness and frequency of the family violence and when it occurred;
- (b) whether there is a pattern of coercive and controlling behaviour in relation to a family member;

- (c) whether the family violence is directed toward the child or whether the child is directly or indirectly exposed to the family violence;
- (d) the physical, emotional and psychological harm or risk of harm to the child;
- (e) any compromise to the safety of the child or other family member;
- (f) whether the family violence causes the child or other family member to fear for their own safety or for that of another person;
- (g) any steps taken by the person engaging in the family violence to prevent further family violence from occurring and improve their ability to care for and meet the needs of the child; and
- (h) any other relevant factor.

While the family law system in the UK is not identical to ours, the Court of Appeal's analysis of each of the four cases that were under appeal in *H-N (Children) (Domestic Abuse: Finding of Fact Hearings)*, *Re* should provide some help in understanding how the new family violence provisions of the *Divorce Act* may be applied by Canadian courts. The decision also provides an excellent primer on the evolution of the understanding of the impact of domestic violence in family law cases and that domestic abuse is not limited to incidents of actual physical violence against a child or spouse. Rather, patterns of coercive and/controlling behaviour can also cause serious harm to a child:

[31] The circumstances encompassed by the definition of 'domestic abuse' in [*Family Proceedings Rule 2010: Practice Direction 12J- Child Arrangements and Contact Orders: Domestic Abuse and Harm*] fully recognise that **coercive and/or controlling behaviour by one party may cause serious emotional and psychological harm to the other members of the family unit**, whether or not there has been any actual episode of violence or sexual abuse. In short, **a pattern of coercive and/or controlling behaviour can be as abusive as or more abusive than any particular factual incident that might be written down and included in a schedule in court proceedings** (see 'Scott Schedules' at paragraph 42-50). **It follows that the harm to a child in an abusive household is not limited to cases of actual violence to the child or to the parent. A pattern of abusive behaviour is as relevant to the child as to the adult victim.** The child can be harmed in any one or a combination of ways for example where the abusive behaviour:

- i) Is directed against, or witnessed by, the child;
- ii) Causes the victim of the abuse to be so frightened of provoking an outburst or reaction from the perpetrator that she/he is unable to give priority to the needs of her/his child;
- iii) Creates an atmosphere of fear and anxiety in the home which is inimical to the welfare of the child;
- iv) Risks inculcating, particularly in boys, a set of values which involve treating women as being inferior to men.

.....

[52] Professionals would now, rightly, regard as 'old fashioned' the approach of the *DVMPA* 1976 where protective measures were only triggered in the event of 'violence' or 'actual bodily harm'. In like manner, **the approach of regarding coercive or controlling incidents that occurred between the adults when they were together in a close relationship as being 'in the past', and therefore of little or no relevance in terms of establishing a risk of future harm, should, we believe, also be considered to be 'old fashioned' and no longer acceptable.** The fact that there may in the future be no longer any risk of assault, because an injunction has been granted, or that the opportunity for inter-marital or inter-partnership rape may no longer arise, does not mean that a pattern of coercive or controlling behaviour of that nature, adopted by one partner towards another, where this is proved, will not manifest itself in some other, albeit more subtle, manner so as to

cause further harm or otherwise suborn the independence of the victim in the future and impact upon the welfare of the children of the family. [emphasis added]

The Court of Appeal's decision also confirms that delays and backlogs in the family court system are not problems that are unique to Canada. The following statement could just as easily have been written about our own family courts:

[55] As is well known, the Family Justice system is currently overborne with work (a situation which has been exacerbated as a result of the Covid 19 pandemic). The Family Court's ability to hear disputed private law cases in a timely manner, mindful throughout that court delay is likely to prejudice the welfare of the subject child . . . is already significantly compromised by the sheer volume of work in the system. . . .

In its discussion of the ongoing delays and backlogs in the family court, the Court of Appeal also wrote about some of the steps that overburdened family courts in the UK have been taking in efforts to ensure that family law cases can be dealt with as fairly and efficiently as possible, including:

- Encouraging "a very radical reduction in the amount of time that the court affords to each hearing[.]"
- Limiting issues "only to those which it is necessary to determine to dispose of the case, and for oral evidence or oral submissions to be cut down only to that which it is necessary for the court to hear."
- Not allowing parties to "litigate every issue and present extensive oral evidence or oral submissions; an oral hearing will encompass only that which is necessary to determine the application before the court."

Backlogged Canadian courts should seriously consider applying some of these strategies in the Canadian context, both in the short term, to help us try to clear the backlog that has been created by COVID-19, and in the longer term, to try to reduce the enormous financial and other costs that are currently associated with the family court process. Litigants assume that they have an absolute and unfettered right to judicial time. But parties are *not*, in fact, entitled to unlimited access to the courts and judges: *Greco-Wang v. Wang*, 2014 CarswellOnt 12651 (S.C.J.). Furthermore, contrary to popular thought, there is no absolute right to a trial on *all* issues or in *all* cases. The administration of justice is a finite resource, and there must be a reason to expend the personal, judicial and societal resources on a given case: *Merko v. Merko* (2008), 59 R.F.L. (6th) 439 (Ont. C.J.); *Rannelli v. Kamara*, 2011 CarswellOnt 14161 (C.J.).

Ultimately, access to justice issues call for alternative solutions to trials in family law litigation wherever possible and fair: *Hartley v. Del Pero* (2010), 83 R.F.L. (6th) 305 (Alta. C.A.) (such as final decisions on motions, for example); *Panasiuk v. Leclercq* (2015), 64 R.F.L. (7th) 61 (Alta. Q.B.); *Kun v. Kun*, 2015 CarswellSask 416 (Q.B.); and *Pippin v. Pippin* (2014), 51 R.F.L. (7th) 460 (Sask. Q.B.).

### **Can One Be Promoted into Intentional Underemployment?**

*Ladouceur v. Dupuis*, 2020 CarswellOnt 19113 (S.C.J.) - Lacelle J.

Several years ago, there was a case where, shortly after he separated, a highly paid partner at a major law firm was appointed to the bench, upon which appointment his income reduced by about 75 percent. The wife's counsel argued that, in being appointed to the bench, the husband was intentionally under-employed. Ultimately, common sense prevailed, and the allegation of intentional under-employment was wisely dropped.

Section 19(1)(a) of the *Federal Child Support Guidelines*, SOR/97-175, in providing for the attribution of income in cases of intentional under-employment, was not meant to suggest that anyone earning less than they ever have is to be automatically attributed with income. Rather, the imputation of income for intentional under-employment requires a more nuanced analysis, such as that undertaken by Justice Lacelle in *Ladouceur*. The ultimate question must be: "is it reasonable in the circumstances."

In *Ladouceur*, the father applied to vary a consent interim child support Order (with respect to two children in a shared custody regime) made on October 19, 2019, because his income had declined. The Order required him to pay set-off child support of

\$415 a month to the mother (based on the mother's income of \$104,678 for 2018 and the father's 2018 income of \$138,658). The father asked to reduce his child support payments to \$89 starting in January 2020. He also asked that he be repaid the resulting overpayment of child support in the amount of \$6,048.

The mother opposed the motion. The case was on the trial list for April 2021.

The father argued that his income had clearly reduced so as to meet the test in s. 14(1) of the *Guidelines* because the change in his income between 2018 (\$138,658) and 2019 (\$98,679) was one that would result in a different order. The complicating factor was that the decrease in income was because the father had successfully applied for a promotion to a managerial position such that overtime was no longer available to him. He argued that a promotion cannot reasonably be considered to result in "under employment".

The mother argued that it was not reasonable for the father to voluntarily reduce his income, and that he was obliged to provide for his children to the best of his ability.

The father was employed with the Federal Government in the House of Commons. He began his career with the Government in 2006 as a Senior Analyst. By 2015, he had reached the top level of promotions available to him as an analyst.

In an effort to advance his career, the father applied to be a Manager. His evidence was that, during the marriage, the parties had discussed this and that the mother had encouraged and supported that decision, because it would mean not only an increased base salary, but also increased retirement benefits.

In 2018, the father earned a base salary of \$88,420, but as a Senior Analyst, he was allowed to work overtime. With overtime, his income for 2018 was \$138,658. In 2018, he worked nights and weekends, which paid double his usual rate, working on upgrading the network infrastructure in the House of Commons.

In the summer of 2018, the father applied for a promotion to become a "Team Leader" - a management position. He was selected for that position on October 29, 2018. While this new position did not give him the ability to work overtime, his base salary increased by about \$5,000 to \$93,231.

The father suggested it was ridiculous for the mother to suggest that he accepted a promotion (resulting in lower income) because he did not want to pay child support. The father's evidence was that he took the position because it was higher status and opened opportunities for future career growth. There was no evidence to contradict these assertions. He also argued that, at the time he applied for the position, he and the mother had been in a shared parenting regime, and that because their incomes were relatively close, they had agreed that neither would be seeking support from the other.

The father also expected that the drop in his income would be temporary as he continued to advance his career. His 2019 line 150 income in this new position was \$98,679.

The mother denied any discussions with the father about "career advancement" or promotions. She also argued that, for the past several years, the father had been earning over \$100,000 annually (his average income over that period was about \$135,000), and that he only accepted a management position to avoid his child support obligations.

To the extent it matters, Justice Lacelle accepted that the father had applied for the promotion before he had been served with the mother's Application. We suggest the timing of the application for the promotion is irrelevant. While the *optics* of the father applying for the promotion after being served with the mother's Application may be bad - again, the question, in our view, comes down to reasonableness. If it was reasonable to accept the promotion, it would not matter had he applied for the promotion after being served; and if it was unreasonable, the fact that he applied before being served would not make it reasonable. Ultimately, Her Honour agreed with this reasoning:

[45] . . . Ultimately, I agree with [father's] counsel that regardless of the timing of the Application and formal notice of the claim for child support in this case, a parent has an obligation to support his or her children and it would be open to a court to find the person was intentionally under-employed based on conduct (or lack of it) that pre-dated any application.

Her Honour accepted that the father's base salary was expected to continue to increase. In support of that conclusion, it was noted that the father's base salary had increased over \$5,000 annually in the brief time since he took the position.

The first question for Justice Lacelle was whether or not the father could vary an interim child support order, the test for which seems to be far less onerous than the test to vary an interim spousal support order (the test for which was clarified and re-stated in *Berta v. Berta* (2019), 23 R.F.L. (8th) 201 (Ont. S.C.J.); *Roberts v. Roberts*, 2020 CarswellOnt 6301 (S.C.J.); and *Brown v. Brown* (2020), 50 R.F.L. (8th) 401 (Ont. S.C.J.)).

This matter was governed by section 17(4) of the *Divorce Act*:

17 (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.

and section 14 of the *Guidelines*:

14. For the purposes of subsection 17(4) of the [Divorce] Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:

(a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof . . .

Justice Lacelle also referred to the "usual" case law for the proposition that interim orders are not meant to be long-term solutions - they are intended to provide a "reasonably acceptable solution to a difficult problem until trial." Usually, those sentiments are used upon consideration of an *initial* interim Order, not in the consideration of *changing* an interim Order. However, with that note, Her Honour was exactly right; interim orders are not meant to be long-term solutions, and if a change is known, it seems irrational, especially in the case of child support, to wait for trial to effect a retroactive accounting.

There was no doubt that the father's income had changed, and that the change was significant enough that it would significantly reduce the father's support obligation (in fact, to \$89 a month).

The next question, therefore, was whether the father was intentionally under-employed within the meaning of s. 19(1)(a) of the *Guidelines*.

Ultimately, Her Honour was of the view that the father was not "intentionally under-employed" because she was satisfied that his promotion was taken with a view to advancing his career. While the new position had the immediate impact of reducing overtime that was historically available to the father, it had also increased his base salary - at that point to over \$10,000 higher than his base salary as an analyst in 2018.

Ultimately, as we suggested, it all comes down to "reasonableness":

[47] In any case, the [father] has taken a managerial position with the same employer following a work history of acting in the position while the parties were together. It is **reasonable** to expect that this position will present other opportunities for the [father] which may be of benefit to his children and their future support. . . . [emphasis added]

As Justice Pazaratz noted in *Jackson v. Mayerle*, 2016 CarswellOnt 303 (S.C.J.) at para. 715, "[p]arents are required to act responsibly when making financial decisions that may affect the level of child support available. They must not arrange their financial affairs so as to prefer their own interests over those of their children." When a payor makes an employment decision that results in a significant reduction in the amount of child support payable, the decision needs to be justified in a compelling way. The payor needs to show that the decision was reasonable in the circumstances. See also *Riel v. Holland* (2003), 42 R.F.L. (5th) 120 (Ont. C.A.) at paras. 22-23; and *Pey v. Pey* (2016), 79 R.F.L. (7th) 107 (Ont. S.C.J.) at paras. 88-91.

As a result, Her Honour dismissed the suggestion that the father was intentionally under-employed and found that he had satisfied the test to reduce his support. Her Honour could find "no principled basis to deny the [father] the variation he requests."

Aside from general considerations of "reasonableness" adopted here, we also like Justice Eberhard's analysis of intentional under-employment in *McNaughton v. Price*, 2006 CarswellOnt 304 (S.C.J.):

[16] When I consider section 19 of the Child Support Guidelines, in trying to figure out whether an individual is underemployed, **I ask myself this question: Is this person doing what a reasonable person would do if he was in an intact family and he had children to support?** I understand that unemployment happens. I understand that people, especially those with an expensive and specific skill set, cannot always find employment in their field in a short period of time. Many will try private ventures. Ultimately I have to decide whether a reasonable person might have done as the Respondent did, or would a reasonable person have taken other steps to feed his family. [emphasis added]

Stating the test in this fashion puts some "meat" on the bones of "reasonableness." In *Ladouceur*, in taking the promotion, was the father "doing what a reasonable person would do if he was in an intact family and he had children to support"? Probably.

More generally, while payors certainly have an obligation to earn what they are capable of earning to support their children, payors must also be entitled to make decisions about *their* career path as long as those decisions are reasonable in the circumstances. One need not necessarily make career decisions or choose a career path that will maximize income: *Donovan v. Donovan* (2000), 9 R.F.L. (5th) 306 (Man. C.A.); *Léveillé v. Lemieux*, 2002 CarswellOnt 2908 (Ont. S.C.J.); *G. (W.D.) v. G. (D.L.)* (2009), 69 R.F.L. (6th) 221 (Alta. Q.B.). One need only act reasonably in doing so: *Montgomery v. Montgomery* (2000), 3 R.F.L. (5th) 126 (N.S. C.A.).

What was not raised in *Ladouceur* was the question of whether a payor is bound to work overtime post-separation just because overtime was worked pre-separation: *Beier v. Beier* (2011), 62 R.F.L. (7th) 1 (N.S. C.A.). Post-separation, is it fair to expect a payor to work beyond regular employment hours? Maybe. Or maybe not. [See *White v. White* (2015), 62 R.F.L. (7th) 1 (N.S. C.A.); *Penney v. Simmons*, 2016 CarswellNS 874 (S.C.).]

### Supporto? Finito!

*McArthur v. McArthur* (2021), 53 R.F.L. (8th) 361 (B.C. S.C.) - Murray J.

While a handful of cases does not a trend make, we have noticed that in several cases of late courts have terminated (or materially reduced) spousal support on variation applications in appropriate circumstances: *Choquette v. Choquette* (2018), 8 R.F.L. (8th) 414 (Ont. S.C.J.), aff'd (2019), 25 R.F.L. (8th) 150 (Ont. C.A.); *Cvetkovic v. Cvetkovic-Gorovic*, 2021 CarswellOnt 4162 (C.A.); *Rokach v. Rokach* (2019), 32 R.F.L. (8th) 103 (Ont. S.C.J.); *MacEachern v. MacEachern* (2020), 35 R.F.L. (8th) 364 (Ont. S.C.J.); *Bredenkamp v. Bredenkamp* (2020), 41 R.F.L. (8th) 129 (B.C. S.C.).

*McArthur* is an addition to the list.

The McArthurs were married in April 1984 and separated in March 2006 after 22 years of marriage. Mr. McArthur was 68 and Ms. McArthur was soon to be 64.

From January 2008 to the end of March 31, 2017, Mr. McArthur paid \$2,862 a month in spousal support pursuant to the order of Justice Cohen dated December 10, 2007.

In September 2016, Mr. McArthur applied to have his spousal support payments terminated as he wanted to retire. Alternatively, he applied to have his spousal support payments reduced due to a change in his circumstances.

Mr. McArthur was successful, and his spousal support obligation was reduced to \$1,850 a month by Justice Morellato (the "Morellato Order"). In granting the reduction, Justice Morellato found Mr. McArthur's income to be \$45,000 and Ms. McArthur's

income to be \$7,956. Justice Morellato ordered that her decision be reviewed in two years and that there may be grounds to terminate spousal support at that time:

[58] I am also of the view that this award ought to be reviewed in two years. The court is mindful of Ms. McArthur's strong compensatory claim and her ongoing medical issues but also of Mr. McArthur's understandable desire to retire, the challenges he has faced in obtaining contract work, and his emotional health. While current circumstances and the objectives of ss. 17(7) of the *Divorce Act* require the continuation of spousal support, this may change over time and a review in two years will provide the parties, and the court if necessary, with an opportunity to reassess their respective circumstances. [*McArthur v. McArthur*, 2017 BCSC 541]

As Mr. McArthur's attempt at negotiating a further reduction or termination of his support was not successful, he applied to terminate spousal support as of January 1, 2020, and for a repayment of spousal support paid from that time.

Mr. McArthur's job in information technology ended in 2016. That was the reason for his application to reduce or terminate support in 2016. It then took Mr. McArthur 14 months to find a job. In November 2017, he was hired for an 18-month special project with his municipality, but at a rate of pay much lower than he had been paid historically. Mr. McArthur was then unemployed for another seven months before he was hired on a two-year contract with the Regional District. However, his hours were very significantly reduced on account of Covid - he was averaging five hours a week at \$22/hr. That job was to end in October 2021, whereupon he had no other employment prospects. His only other source of income was his pension. To meet his support payments, he had to use his savings. In November 2019, Mr. McArthur suffered a stroke.

Ms. McArthur was a supply teacher. From 2017 to 2019, she earned approximately \$20,000 per year. She had basically stopped teaching during the pandemic as a result of her pre-existing medical conditions. Ms. McArthur also had her share of health issues, including anxiety and depression.

Ms. McArthur had amassed considerable investments and savings. Her investments were worth approximately \$1.15 million, while Mr. McArthur's were worth only about \$700,000.

Ms. McArthur argued that Mr. McArthur should pay spousal support until July 2022, when she would turn 65 and start collecting \$1,780 a month from old age security and various pensions.

Justice Murray started her analysis with section 17 of the *Divorce Act*, and noted that before making a variation order, the court had to be satisfied that there had been a material change - and a change that had some degree of continuity at that. Her Honour then noted that an application to vary is not a *de novo* examination of all aspects of the case and that the proper approach was to accept the order sought to be varied as having been appropriate, with the proper focus to be on the change in circumstances and how that change should affect the support obligations.

This is all well and good, but for one problem: this was not a variation. It was a review. It was improper to resort to s. 17. In her reasons, again, Justice Morellato stated: "... a review in two years will provide the parties, and the court if necessary, with an opportunity to reassess their respective circumstances." There is no need to prove a material change on a review: *McEachern v. McEachern* (2006), 33 R.F.L. (6th) 315 (B.C. C.A.); *Arsenault v. Arsenault* (2002), 33 R.F.L. (5th) 289 (N.B. C.A.); *Jordan v. Jordan* (2011), 8 R.F.L. (7th) 147 (B.C. C.A.); *Leskun v. Leskun* (2006), 34 R.F.L. (6th) 1 (S.C.C.).

The fact that the Morellato Order did not specify precisely what was to be reviewed [see, for example *Westergard v. Buttress* (2012), 14 R.F.L. (7th) 1 (B.C. C.A.); *Dumont-Dizy v. Dizy*, 2015 CarswellSask 207 (Q.B.); and *Jordan v. Jordan* (2011), 8 R.F.L. (7th) 147 (B.C. C.A.)] does not change the fact that this was clearly supposed to be a review. And, at any rate, Justice Morellato in paragraph 58 of her decision likely sufficiently set out the parameters of review.

While Ms. McArthur wanted support to continue until July 2022, with every month Mr. McArthur paid spousal support, he was depleting his savings - his primary means of supporting himself in retirement.

Ultimately, the fact that the case was treated as a variation proceeding did not prejudice Mr. McArthur, as Justice Murray was satisfied there had been a material change in circumstances since the Morellato Order. Mr. McArthur was no longer earning a significant income, his health was declining, he was unable to find employment and was, by that point, essentially retired.

The hard reality for Ms. McArthur was that she was in a better financial position than Mr. McArthur. It would have been unfair, at his age, to force Mr. McArthur to further deplete his savings because Ms. McArthur preferred to not avail of her own significant savings. Furthermore, Ms. McArthur had already received a lump-sum payout of Mr. McArthur's pension when their family assets were divided, which she then invested to produce income for her own retirement. To order Mr. McArthur to continue to pay spousal support by way of his retirement savings would be to allow Ms. McArthur "to reap the benefit of the pension both as an asset and then again as a source of income", a result which should generally be avoided: *Boston v. Boston* (2001), 17 R.F.L. (5th) 4 (S.C.C.) at paras. 63-65.

As a result, Justice Murray terminated spousal support - but she did not order Ms. McArthur to repay the support she had received since January 2020.

While in some cases a step-down order is made so as to have support reduce more slowly over some period of time, here Justice Murray found that the support termination should not be a surprise to Ms. McArthur because Justice Morellato made the possibility of support terminating very clear in 2017.

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