FAMLNWS 2021-29
Family Law Newsletters
August 2, 2021

— Franks & Zalev - This Week in Family Law

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Contents

When Retiring Early Is Not "Early Retirement"

MacDonald-Hills v. Hills (2021), 55 R.F.L. (8th) 46 (Ont. S.C.J.) — Sproat J.

The husband brought a motion to discontinue child support for his three adult children, and to terminate spousal support.

The parties married in October of 1992, and they separated in March of 2007. They had three children, who were 27, 25, and 22 years old, respectively, at the time of the motion.

In 2009, the parties signed Minutes of Settlement that dealt with child support, spousal support, and property division. The husband wanted the matrimonial home to be sold, the proceeds divided, and his pension divided at source, but the wife wanted to stay in the home. Therefore, pursuant to the Minutes, the husband transferred his interest in the matrimonial home to the wife, and the wife paid the husband $25,000 and gave up any claims to his pension. The Minutes, which were incorporated into a final order, also provided that the husband's pension income would not be included in any future calculation of the husband's income.

The husband had been employed for 29 years as a registered nurse with a mental health unit. He worked an emotional and demanding job with patients who were suffering from severe mental illnesses. The stress of this work caused personal health issues for the husband, including hypertension, anxiety, depression and "compassion fatigue". He described himself as "burnt out". The husband's doctor recommended that he retire to try to address and improve his mental and physical health.

While the husband admitted that he could technically do other nursing jobs, his evidence was that he was not prepared to work in other nursing fields as he had devoted himself to the mental health field for 27 years.

In April 2021, the husband notified the wife that he intended to retire (with an unreduced pension) in July 2021, when he would be 56 years old. The wife did not disagree with the husband's evidence (and some written evidence) that, during the marriage, the husband had intended to retire when he was 55 years old.

The husband argued that, upon his retirement, spousal support should terminate. The wife, on the other had, argued that she had been incapable of working since 1996 because of an earlier stroke. She also had rotator cuff and carpel tunnel issues. Her evidence was that she lived with a great deal of daily pain. She also had suffered some memory and word loss from her stroke. The wife's condition was worsening; she certainly was not healthy.

At the suggestion of her employer, the wife resigned from her employment as a Registered Nurse in 1996. Shortly thereafter, she began receiving CPP disability benefits. She had not been able to work since 1996, and she had not made any effort to find

employment or investigated any job opportunities since 1996. She had a net worth of about $415,000, including the equity in her home and her retirement savings plan, and she made monthly payments of about $1,350 for her various debts. Her monthly income from CPP and other government programs was about $1,400 a month.

Given the ages and stages of the children, Justice Sproat found that the husband had been entitled to stop paying child support some years ago. But that still left the question in this rather sad situation of whether the husband could retire and terminate his spousal support.

Justice Sproat accepted that, during the marriage, the parties had discussed the husband's intention to retire at or about age 55. Furthermore, Justice Sproat found that as the husband was entitled to retire at age 55 with an unreduced pension, the wife had always understood it was *possible*, if not *probable*, that he would do so.

Justice Sproat agreed with the following propositions from *Smith v. Smith*, 2013 CarswellOnt 13918 (S.C.J.):

> • a person who meets the pension criteria for an unreduced pension is not taking an "early retirement";
>
> • 65 is no longer the presumptive retirement date — many pension plans use retirement dates based on an 80 factor of years and service;
>
> • the decision to retire when a person is entitled to an unreduced pension is a foreseeable event that should have been expected by the support recipient; and
>
> • the fact that the parties had discussed the payor's intention to retire when s/he qualified for a full pension is a relevant consideration.

Justice Sproat also took issue with what he viewed as an attempt by the wife to resile from the Minutes of Settlement, and quoted the following paragraphs from Justice Mazza's decision in *Liberale v. Spadafora*, 2008 CarswellOnt 3319 (S.C.J.):

> [23] When parties, who are represented by counsel as in the case before me, enter into minutes of settlement to resolve all issues, it is presumed that those minutes are the result of the parties weighing the strengths of their respective cases against the risks which they face if they should decide to litigate the issues. Those minutes of settlement almost invariably are a reflection of the compromise the parties are willing to make.
>
> [24] When parties sign those minutes, it is a representation to the court that the parties have deliberated over the terms and are committed to complying with those terms. It is only when a party was coerced, a victim of a fraud, or a victim of a mistake known to the opposing party that the minutes of settlement will be set aside.

Justice Sproat found that the wife had understood when she signed the Minutes in 2009 that the husband might retire at age 55, and that this could cause her spousal support to end. As a result, his Honour concluded that it was reasonable for the husband to retire.

Furthermore, as the husband had by then been paying spousal support for just over 14 years after the 14 $^{1}/_{2}$-year marriage, Justice Sproat thought it was reasonable not to impute the husband with any employment income. Therefore, spousal support was reduced to $1 a month after a transition period of rather meagre ($375 a month) step-down support for about two years.

We are left to wonder if the result would have been the same were it not for the husband's various health issues. Or, even with those facts, query why the Court did not avail of the "significant need" exception to the "Rule Against Double Dipping" (*Boston v. Boston* (2001), 17 R.F.L. (5th) 4 (S.C.C.)) to allow the wife some continued support from the husband's already-equalized pension.

Perhaps the answer is in the nature of the specific Consent Order in this case — that the husband's pension income would not be included in any future calculation of the husband's income. A support order can be varied, but can the same be said for an Order setting out what is *not* to be included in the payor's income? Maybe not so much. If parties can agree about how

income should be calculated for child support purposes [*Austin v. Austin* (2006), 29 R.F.L. (6th) 1 (C.A.); *Shields v. Shields*, 2006 CarswellAlta 608 (Q.B.); *Charron v. Charron*, 2015 ONSC 5370], surely they can do so for spousal support purposes. The next time you are representing a payor, you might just want to give that some thought. (But if you're representing a recipient, forget we said anything.)

"Phew!" — The Husband

D.L. v. B.W., 2021 CarswellPEI 35 (S.C.) — Clements C.J.S.C.

The parties separated in 2009 after more than 30 years of marriage. Most of their assets, including the family home, were in the wife's name.

Although both parties initially retained lawyers, they made no progress towards resolving the matter. In the meantime, the wife moved out of the family home, while the husband continued living there.

Nothing happened in the case until March 2020, when the wife retained a new lawyer and took the position that the limitation period for the husband's claim for an equalization payment had expired. She also tried to have the family home listed for sale, and to force the husband to vacate the property.

In Prince Edward Island, s. 7(3) of the *Family Law Act* provides that the limitation period for claiming an equalization payment expires on the earliest of six years from the date of separation, or two years from the date of divorce. As the parties separated in 2009 and were not yet divorced, the applicable limitation period expired in 2015.

In most cases, the expiry of a limitation period would be the end of the matter. The case law is clear that "[l]imitation periods are not enacted to be ignored", and that parties are required to act with due diligence to discover the material facts giving rise to their claims: *Soper v. Southcott*, 1998 CarswellOnt 2906 (C.A.) at para. 21.

In some circumstances, the discoverability principle can operate to delay the start of a limitation period until the claimant has discovered, or ought to have discovered through the exercise of reasonable diligence, the material facts giving rise to his or her claim. However, discoverability could not help the husband in this case, because he was well aware of his own separation in 2009, and title to the family home was in the wife's sole name.

While the husband may not have known about the six-year limitation period, ignorance of the legal significance of the material facts is ***not*** a basis for delaying the commencement of the limitation period: *Nicholas v. McCarthy Tétrault*, 2008 CarswellOnt 6320 (S.C.J.) at para. 27, aff'd 2009 CarswellOnt 5701 (C.A.), leave to appeal refused. Accordingly, although the husband claimed he did not know about the existence of the limitation period until the wife's new lawyer told him about it in March 2020, that did not provide a proper basis for extending the limitation period in this case on the basis of the discoverability principle.

Fortunately for the husband, s. 2(3) of the *Family Law Act* allows the court to extend the limitation period for claiming an equalization payment if the claimant can establish that: (a) there are apparent grounds for relief; (b) the delay was incurred in good faith; and (c) the delay did not cause substantial prejudice to the other party.

As the parties were unable to locate any cases from PEI that had considered s. 2(3), the Chief Justice considered a number of leading Ontario cases that have dealt with s. 2(8) of Ontario's *Family Law Act*, which is identical to s. 2(3) of PEI's *Family Law Act*, including *El Feky v. Tohamy* (2010), 90 R.F.L. (6th) 302 (C.A.); *Taylor v. Taylor*, 2019 CarswellOnt 11608 (S.C.J.); *Paulsen v. Paulsen* (2017), 96 R.F.L. (7th) 395 (Ont. S.C.J.); and *Horner v. Horner* (2014), 53 R.F.L. (7th) 471 (Ont. S.C.J.).

Since the wife owned almost all of the parties' assets, it was clear that, but for the limitation period, she would owe the husband an equalization payment. Accordingly, the Court was satisfied, and the wife conceded, that the "apparent grounds for relief" part of the test was met.

Chief Justice Clements was also satisfied that the husband had established that the delay was incurred in good faith and that the wife would not be substantially prejudiced if the limitation period was extended.

While the husband should have been more proactive, the Court was satisfied that he had acted "honestly and with no ulterior motive". As the Ontario Court of Appeal noted in *El Feky v. Tohamy* (relying on Justice Mendes da Costa's decision in *Hart v. Hart* (1990), 27 R.F.L. (3d) 419 (Ont. U.F.C.)):

> [34] . . . I believe, to establish "good faith", it must be shown that the moving party acted honestly and with no ulterior motive. It does not seem to me that the Legislature, anticipating the general newsworthy nature of the family property provisions of the Act, intended that a mere failure to make enquiries should necessarily negate "good faith", provided that the absence of enquiry does not constitute wilful blindness or does not otherwise, in all the circumstances, fall below community expectations. . . .

Furthermore, while the Court was very concerned about the length of time that had passed, the mere passage of time, in and of itself, does not constitute "substantial prejudice" for the purposes of s. 2(3) of the *Family Law Act*. Neither does the mere fact that an equalization payment would have to be paid if the limitation period is extended. In this context, "prejudice" refers to the underlying claim — not to the extension of the limitation period itself: *El Feky*. There must be evidence to show that the party seeking to rely on the limitation period made "irreversible financial decisions" based on the belief that no equalization payment was being sought, and/or important documentation is no longer available because of the passage of time.

As there was no evidence that the wife would suffer any prejudice for the purposes of s. 2(3), and as the other parts of the test had been met, Chief Justice Clements granted the husband's motion to extend the limitation period.

Mean What You Say; and Say What You Mean

A.A. v. R.R. (2021), 55 R.F.L. (8th) 68 (Ont. S.C.J.) — Shore J.

If the court finds that a party meets the test for leave to appeal set out in s. 45 of the *Arbitration Act, 1991*, S.O. 1991, c. 17, does the court retain a residual discretion to not grant leave to appeal?

The parties participated in an arbitration. The award was released on December 24, 2020. The Appellant brought a motion for leave to appeal the award and for an order staying the award, pending appeal.

The main ground of appeal was that the Arbitrator exceeded his jurisdiction when making an award decreasing the Appellant's parenting time. The Appellant argued that the Arbitrator had only two choices: increase the Appellant's time with the child, or leave the current parenting plan.

The main question before Justice Shore was whether or not leave to appeal should be granted.

Paragraph 26 of the parties' Arbitration Agreement was clear that:

> The parties have the right to review any arbitration award in accordance with section 46 of the *Arbitration Act* and the right to appeal any award on a question of law, with leave, as provided by section 45 of the *Arbitration Act*.

Section 45 of the *Arbitration Act* provides:

> 45. (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.

Therefore, the Appellant had a right to appeal a *question of law*, with leave under both the *Arbitration Act* and the Arbitration Agreement. As the main issue on appeal was one of jurisdiction - whether the Arbitrator had jurisdiction to make an award *decreasing* the Appellant's parenting time — the issue was a question of law.

Justice Shore then went on to consider whether the Appellant met the test for leave to appeal. In doing so, she noted that a narrow scope of appellate review in family law matters promotes finality: *Ojo v. Mason* (2013), 31 R.F.L. (7th) 57 (Ont. S.C.J.) at paras. 19-24; *Van de Perre v. Edwards* (2001), 19 R.F.L. (5th) 396 (S.C.C.) at paras. 8-16; and *Veneris v. Koh Veneris*, 2018 CarswellOnt 11297 (S.C.J.). In that vein, in *Petersoo v. Petersoo* (2019), 29 R.F.L. (8th) 309 (C.A.) the Ontario Court of Appeal noted:

> [35] Mediation/arbitration is an important method by which family law litigants resolve their disputes. Indeed, the courts encourage parties to attempt to resolve issues cooperatively and to determine the resolution method most appropriate to their family. The mediation/arbitration process can be more informal, efficient, faster and less adversarial than judicial proceedings. These benefits are important with respect to parenting issues, which require a consideration of the best interests of children. The decision of an arbitrator, particularly in child related matters, is therefore entitled to significant deference by the courts: see *Patton-Casse v. Casse*, 2012 ONCA 709, 298 O.A.C. 111 (Ont. C.A.), at paras. 9, 11.
>
> [36] The essence of arbitration is that the parties decide on the best procedure for their family. Although the family law of Ontario must be applied, the procedures on an arbitration are not meant to mirror those of the court . . .
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> [37] Here the parties decided that an appeal would only be based on a question of law. As this court stated in *Alectra Utilities Commission v. Solar Power Network Inc.*, 2019 ONCA 254 (Ont. C.A.), at para. 20:
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> > The starting point in exercising the court's role under the *Arbitration Act, 1991* is the recognition that **appeals from private arbitration decisions are neither required nor routine**. [**emphasis added**]

In *Gragtmans v. Gragtmans*, 2020 CarswellOnt 12927 (S.C.J.), after reviewing the Court of Appeal's decision in *Petersoo*, Justice Czutrin described the role performed by courts in applications for leave to appeal family law awards as that of a "gatekeeper." [1] This, of course, raises an interesting question: what is this "gatekeeping" role — and is it over-and-above the stated test for leave to appeal? Or is a consideration of the test for leave to appeal to be viewed through the lens of this "gatekeeping" role?

Justice Shore suggested that this gatekeeping role meant that the court has a residual discretion not to grant leave, *even if the court finds that the test set out in section 45 of the Arbitration Act is met*. In her words, "[i]n determining whether to grant leave to appeal an arbitration award, this Court must factor in the gatekeeping role played by the court, emphasized by the requirement to obtain leave of the court in the *Arbitration Act*."

The parties had been involved in litigation since 2015. In 2019, on the eve of trial, the parties reached an agreement that resolved the issues in dispute regarding their then four-year-old child. The agreement was incorporated into a Consent Order. Although the Appellant had wanted equal parenting time, the parties agreed on a residential schedule that had the child living with the Respondent for one extra overnight every two weeks. Paragraph 4 of the Consent Order read:

> The regular residential schedule for A.R. shall be reviewed by April 1, 2020, **with a view to increasing the time** A.R. spends with R.R. **in accordance with her best interests**. If the parties are unable to agree, they shall submit the review to mediation and, if necessary, arbitration with a mutually agreeable professional. [**emphasis added**]

At the arbitration, the Appellant took the position that the child's primary residence should be with him, with much more limited parenting time for the Respondent than the Appellant then had under the Consent Order.

In considering the test in s. 45 of the *Arbitration Act*, the "matter at stake" (s. 45(a)) in the arbitration was the residential schedule of the child. The issue on appeal would be whether the Arbitrator had the jurisdiction to reduce the Appellant's parenting time.

While the Arbitrator had only reduced the time the Appellant spent with the child by one day every two weeks, the test for granting leave to appeal focuses on the importance *to the parties*.

It could not be denied that the issue of overnights was important to the parties. But that was not the end of s. 45(a), which goes on to say that the issue must "justify an appeal."

Did the loss of one night every two weeks — some of which was made up by increased time over the holidays — justify an appeal?

Justice Shore thought not. She could not justify the time and cost (both emotional and financial) of an appeal to the parties for the loss of something less than 18 days over the course of a year in the circumstances of this case.

Justice Shore also thought the fact this was a high conflict case had some bearing on whether the issue, albeit important to the parties, justified an appeal. The Arbitrator was concerned about the ongoing cost of the litigation on the child and the fact that the Appellant and his family continued to be angry, resentful, disapproving and mistrustful of the Respondent, and Justice Shore shared his concerns:

> [26] The parties have a six-year old child who has been caught in the middle of their dispute for her entire life. The cost of this appeal perpetuates the ongoing litigation. It provides no relief to the ongoing litigation, continues to consume limited court resources at a time when court resources are being stretched to the limit, and continues to place the child in the middle of their high conflict dispute, contrary to the best interest of the child. The cost of the appeal is high in these circumstances and I find not justified for a difference of less than 18 days of reduced parental time with the child in a year.

Justice Shore then, quite properly, continued to consider the merits of the appeal. It can be argued that a motion for leave to appeal an arbitration award is not based on the merits of the appeal, but in determining whether an appeal ought to be heard, the merits of the appeal must creep into the analysis. To allow an appeal void of merit to proceed would be a waste of time, even if the issue was important to the parties.

Here, as set out above, the sole issue was one of jurisdiction: did the Arbitrator have jurisdiction to reduce the Appellant's parenting time? The Appellant argued that the Arbitrator decided an issue that was not before him.

It is trite that an Arbitrator's authority comes solely from the Arbitration Agreement (and from the *Arbitration Act*, of course). An arbitrator has no inherent jurisdiction, residual jurisdiction or *parens patriae* jurisdiction. So what of the wording of paragraph 4 of the Consent Order which provided that the regular residential schedule would be reviewed *with a view to increasing* the Appellant's parenting time in accordance with the child's best interests?

Justice Shore deals with it as follows:

> [33] . . . The review clause in the order provides that the schedule shall be reviewed in accordance with the best interests of the child. **The wording "with a view" is not mandatory, but suggestive. The term "with a view to increasing the time" cannot detract from the mandatory obligation both under the contract and the law in Ontario that the review must be decided in accordance with the best interest of the child.** Looking at the language of the Order, nothing restricts the arbitrator from making a decision in the best interest of the child, even if it means reducing the Appellant's parenting time with the child. [**emphasis added**]

The Arbitrator was of a similar opinion:

> The May 29, 2019, order provides for a review of parenting time "with a view to increasing the time [the daughter] spend with [the father] in accordance with her best interest." The order was based entirely on the consent of the parties. The wording was a negotiated compromise of the parties' competing interests, under the pressure of an approaching trial date . . . **The language "with a view to increasing . . . " expresses an intention or maybe a presumption that the father's parenting time with the daughter would increase, but it is qualified by "in accordance with her bests interests."** [**emphasis added**]

There was also nothing in the Arbitration Agreement that restricted the Arbitrator's jurisdiction in this regard. The Arbitration Agreement provided that the issues before the Arbitrator included "parenting time" for the child. There was no qualification in the Arbitration Agreement that the Arbitrator could only *increase* the Appellant's time with the child or leave it as it was prior

to the review. While the Appellant may have *wanted* the schedule to increase, nothing in the Consent Order or the Arbitration Agreement limited the authority of the Arbitrator regarding parenting time.

This likely came as a bit of a surprise to the Appellant. Again, the Consent Order stated that the review was "with a view to increasing" the Appellant's parenting time in accordance with the child's best interests. One could posit that this was not a "wide open" review. Rather, if the Arbitrator did not think that increasing the Appellant's time was "in accordance with the child's best interests" — perhaps his mandate was to simply make no change. Otherwise, what was the point of the "with a view" language? Why not just leave it at "a review of parenting time?" This was a Consent Order, and words are to have meaning. A Court Order is to be interpreted by giving each term a sensible meaning in harmony with the other terms: *Dhillon v. Jaffer*, 2012 CarswellBC 982 (C.A.); *Shih v. Shih* (2017), 91 R.F.L. (7th) 102 (C.A.).

And with that, the motion for leave to appeal was dismissed. The lesson? Be clear. Mean what you say; and say what you mean.

And, finally, of the question as to whether, in exercising a "gatekeeping role" a court retains residual discretion to refuse a motion for leave to appeal that otherwise meets the test? It is not directly answered. However, it appears there is no such residual discretion. Rather, the consideration of the test for leave to appeal is to be viewed through the lens of a "gatekeeping" role. And that's probably the way it should be.

Footnotes

1 Justice Shore in *A.A.* incorrectly attributes the use of the term "gatekeeping role" to the Ontario Court of Appeal in its decision in *Alectra*.