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— Franks & Zalev - This Week in Family Law

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Contents

Intentional Unemployment in Saskatchewan [not=] Intentional Unemployment in Alberta

N.M. v. T.M. (2021), 55 R.F.L. (8th) 180 (Sask. Q.B.) — Richmond J.

The parties were unable to agree on N.M.'s income for child support purposes. N.M. also sought a reduction in his table support obligation for undue hardship based on the number of children he was financially responsible for, his access-related travel costs, and extra costs he was incurring as a result of his infant son's medical issues.

N.M. was employed with a company in Regina, where he earned $90,676 in 2018 and $77,667 in 2019. In the summer of 2019, N.M. relocated to Avonlea, Saskatchewan with his new partner. Despite the move, he maintained his previous employment until August 2020, when he quit his job to work as a tow truck driver closer to Avonlea. This position offered less pay, but also the possibility of commission and the guarantee of a shorter commute. At the same time, N.M. and his second spouse had a baby, B.M. Unfortunately, B.M. was born with some medical issues which required both special care and regular trips to Regina to see specialists. In mid-November 2020, N.M. lost his job, and had been on unemployment insurance since then.

N.M. suggested that his plan was to remain at home with B.M. on account of his medical condition, so his second spouse could advance her career, and so as to avoid the cost of daycare. He hoped he might be able to secure some part-time employment.

T.M. argued that N.M. should be imputed with income based on his voluntary underemployment or unemployment. But N.M. was quick to point out the actual wording of s. 19(1)(a) of the *Child Support Guidelines*:

> 19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
>
> > (a) the spouse is intentionally under-employed or unemployed, **other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority** or by the reasonable educational or health needs of the spouse. [emphasis added]

N.M. relied on *D. (D.R.) v. M. (J.)* (2004), 6 R.F.L. (6th) 240 (Alta. C.A.) for the proposition that T.M. had to show that he had the specific intent to avoid his child support obligations. But *D. (D.R.)* did not assist the father. While it was certainly a correct statement of the law *in Alberta* at the time based on *Hunt v. Smolis-Hunt* (2001), 20 R.F.L. (5th) 409 (Alta. C.A.) [and query whether it will *remain* a correct statement of the law in Alberta for long — see *Peters v. Atchooay*, 2021 CarswellAlta 1574 (C.A.) where the Court of Appeal allowed a motion to reconsider the rule in *Hunt*], the test to impute income based on

intentional under/unemployment in the rest of Canada, including Saskatchewan, did not require the claimant to show a specific intent to avoid support.

Rather, in Saskatchewan and the rest of Canada, the question of under/unemployment is one of reasonableness: *Pontius v. Murray*, 2011 CarswellSask 679 (C.A.) at para 9:

> . . . The term "under-employed" concerns situations where a parent, for whatever reason, chooses to earn less than they are capable of earning. "Intentionally" does not necessarily mean that the parent in question is attempting to avoid paying child support or does not care for the child. A subjective intent to evade or reduce a child support obligation is therefore not necessary. See: *Beisel v. Henderson*, 2004 SKQB 280, [2006] 2 W.W.R. 502 (Sask. Q.B.).

Here, N.M. had quit a good paying job in Regina because he was tired of the commute after having made the decision to move to Avonlea in the first place. On the evidence, the decision to quit the Regina job was not reasonable at the time.

The situation was complicated, however, by the birth of B.M who had medical issues. However, no medical evidence respecting the needs of B.M. had been filed. Problem.

Furthermore, it appeared that N.M.'s plan to remain home with B.M. so as to promote his second spouse's career was a recent development. According to Justice Richmond, applying the reasonableness test, although promoting his second spouse's career may very well have assisted his new family, it did so at a huge cost to his other children, and N.M. could not just ignore his "first" family. [The "first family first" principle is alive and well: *Fisher v. Fisher* (2008), 47 R.F.L. (6th) 235 (Ont. C.A.); *Cotton v. Cotton*, 2015 CarswellOnt 7486 (S.C.J.); *Dean v. Dean* (2016), 81 R.F.L. (7th) 292 (Ont. Div. Ct.); *Bernier v. Bernier*, 2018 CarswellOnt 12187 (S.C.J.); *V. (B.) v. V. (P.)* (2012), 19 R.F.L. (7th) 292 (Ont. C.A.).]

Although being underemployed to care for the needs of a child under the age of minority is contemplated by the legislation, it was not reasonable for N.M. to not work. N.M. had an obligation to cover more than his "individual financial responsibilities" — he had an obligation towards his other children. He could not prefer his new family over his original one.

Given N.M.'s work history, an income of $75,500 was imputed to him.

N.M. then argued that given the number of children he had, the cost of exercising access from Avonlea, and the cost of getting B.M. to specialist appointments, this was a situation of undue hardship under s. 10 of the *Guidelines*.

However, an income of $75,500 likely negated any undue hardship claim. In *Lonsdale v. Evans* (2020), 37 R.F.L. (8th) 251 (Sask. C.A.), the Saskatchewan Court of Appeal succinctly summarized the law regarding undue hardship:

> [70] The threshold for establishing undue hardship is not easily met: see, for example, *Pelletier v. Kakakaway*, 2002 SKCA 94 (Sask. C.A.) at paras 10-11 and 26, (2002), 223 Sask R 305 (Sask. C.A.); and *Locke v. Goulding*, 2012 NLCA 8 (N.L. C.A.) at paras 36-40, (2013), 29 R.F.L. (7th) 115 (N.L. C.A.). The basic tables set out in the *Guidelines* establish a presumptive rule regarding the amount of child support payable by a person with a given income. While undue hardship is a circumstance that justifies a departure from the presumptive rule, establishing mere hardship is not enough to reduce or excuse a payor parent's obligation; the hardship must be "undue", that is, "exceptional", "excessive" or "disproportionate" in all of the circumstances: *Hanmore v. Hanmore*, 2000 ABCA 57 (Alta. C.A.) at para 14, (2002), 4 R.F.L. (5th) 348 (Alta. C.A.); *Van Gool v. Van Gool* (1998), 1998 CanLII 5650 (BC CA), 166 D.L.R. (4th) 528 (B.C. C.A.); *Reid v. Faubert*, 2019 NSCA 42 (N.S. C.A.) at paras 45-48, (2019), 434 D.L.R. (4th) 287 (N.S. C.A.).
>
> . . . . .
>
> [72] As set out above, I have concluded that the trial judge erred in a key component of the analysis, namely the determination of Mr. Evans' income. The jurisprudence makes clear that the determination of a claim of undue hardship is a heavily fact-driven exercise. In this case, Mr. Evans would bear the **onus of establishing that, on an income of $84,014, his financial obligations cannot reasonably be managed and, if he succeeds in doing that, he must also establish that his household standard of living is lower** than Ms. Lonsdale's. The evidentiary record, in my view, does not permit this

> Court to fairly make that determination, as it may require additional factual findings in light of the passage of time since the trial and my conclusion with respect to Mr. Evans' income. . . . [emphasis added]

Therefore, N.M. had to show that, on an income of $75,500, he could not reasonably meet his financial obligations. That, N.M. could not do. He did not even get out of the gate. N.M. showed household expenses of $5,242 per month (which included his partner's car payment). No undue hardship for N.M.

After 33 Days of Trial, I Wouldn't Let You Deduct Legal Fees from Income Either!

McBennett v. Danis (2021), 57 R.F.L. (8th) 1 (Ont. S.C.J.) — Chappel J.

This case is a prime example of litigation excess that should have been bridled.

The parties married in 2010 and separated in either March 2017 (according to the wife) or March 2018 (according to the husband). They had one child together.

Neither party was wealthy, and they were able to resolve the property issues on consent. However, they were not able to resolve the support or parenting issues. After several years of high conflict litigation, they ended up having a ***33 day*** trial that took over a year to complete.

As usual, Justice Chappel took the time to thoroughly review the legal principles that applied in this case, including a thorough analysis of parenting orders and contact orders under the new provisions of the *Divorce Act* (paras. 74-98), child support under ss. 3, 7, and 9 of the *Guidelines* (paras. 280-290), imputation of income for support purposes (paras. 300-307), and spousal support (paras. 337-366).

The decision also summarizes and explains the principles that apply when assessing credibility (paras. 39-41) and determining whether and when parties actually separated (paras. 49-54).

Each section of the decision is a mini treatise (if you want to help your clients understand how courts analyse and decide parenting and support cases, you should seriously consider sending them these parts of the reasons). Her Honour's analysis of the new provisions of the *Divorce Act* that require consideration of an expansive definition of "family violence" when dealing with parenting issues (see ss. 2, 16(3)(j) and 16(4)) is also definitely worth a careful read, particularly her conclusions at paragraphs 119-120 that:

> • " . . . a pattern of repeated infidelity coupled with lying, coercion, emotional manipulation and harassment around the infidelities" can, in some cases, qualify as "family violence" for the purposes of the *Divorce Act*; and
>
> • The husband's numerous infidelities combined with his "pattern of coercive and controlling behaviour that was psychologically abusive, and his communications with [the wife] after she uncovered the infidelities" did, in fact, qualify as "family violence" in the context of this case.

But for now, the part of Justice Chappel's decision that we want to focus on is her discussion of how to analyse whether and when family law legal fees should be deducted from a person's income for support purposes as a "carrying charge."

Under the *Income Tax Act*, a support recipient can deduct the legal fees s/he incurred to recover, establish, or increase support payments as "carrying charges". The support payor, however, cannot do the same. Whether this is a good policy decision, and whether this creates an uneven playing field or not is open to debate. There are obviously good reasons to try to make it more affordable for support claimants to be able to pursue and obtain proper child and spousal support.

In any event, pursuant to s. 8 of Schedule III of the *Guidelines*, when calculating income for support purposes, the court is required to "[d]educt the spouse's carrying charges and interest expenses that are paid by the spouse and that would be deductible under the *Income Tax Act*."

In this case, the wife's line 150 income (now line 15000) in 2019 was approximately $97,000. However, she claimed that her income for support purposes should be reduced by the approximately $20,000 she spent on legal fees that year to pursue her claim for support against the husband.

Justice Chappel started her analysis by noting that the case law about how to deal with a deduction for legal fees has been somewhat inconsistent:

> [298] . . . The caselaw is inconsistent on how these types of legal fees should be dealt with pursuant to section 8 of Schedule III. Finlayson J. reviewed this caselaw in great detail in *S.B. v. V.H.*, 2019 CarswellOnt 17012 (O.C.J.). In some cases, the courts have held that such legal fees are not carrying charges envisaged by Schedule III of the Guidelines (see *Gillespie v. Gillespie*, 2017 NBQB 149 (Q.B.), aff'd on other grounds 2018 NBCA 22 (C.A.); *L.(G.J.) v. L.(M.J.)*, 2017 CarswellBC 1134 (S.C.)). However, in *B.M. v. P.M.*, 2019 SKQB 36 (Q.B.), the court held that such legal fees are carrying charges contemplated by section 8 of Schedule III and are properly deducted from the support claimant's income on that basis. In that case, however, the court added the amount back into the party's income, because it ordered a shared parenting arrangement and a set-off amount of child support. The trial judge concluded that in these circumstances, both parties were support payors as a result of the judgment, and since no deduction is allowed for fees incurred to contest a support claim, allowing the amount to be deducted by one party only from their *Guidelines* income would be inappropriate. In *S.B.*, the court concluded that legal fees to pursue support are not carrying charges within the meaning of section 8, Schedule III, since such fees were not part of the line on the Income Tax return where carrying charges were reported when section 8 was initially enacted, and the deduction of such fees could result in unfairness in the Family Law context where the fees paid by the party defending the support claim would not be deductible.

After identifying the problem, Justice Chappel explained, and we agree, that the correct way to deal with the issue is to:

> 1. Deduct all "carrying charges" that are shown on the recipient's income tax return, including legal fees, as required by s. 8 of Schedule III of the *Guidelines*. (As the *Income Tax Act* specifically allows for the deduction of legal fees as "carrying charges," and as s. 8 of Schedule III of the *Guidelines* specifically requires the Court to deduct a spouse's "carrying charges" that would be deductible under the *Income Tax Act*, this result seems inevitable.)
>
> 2. Determine whether all or part of the carrying charges should be added back to the recipient's income for support purposes pursuant to s. 19(1)(g) of the *Guidelines* which provides that "[t]he court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following: . . . (g) the spouse unreasonably deducts expenses from income[.]" [See also s. 19(2) of the *Guidelines*, which provides that, "[f]or the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the *Income Tax Act*."]

When exercising its discretion under s. 19(1) of the *Guidelines*, Justice Chappel determined that the court's decision should be "made on the basis that the deduction from *Guidelines* income permitted by s. 8 of Schedule III results in injustice on the particular facts of the case." (see para. 308)

In this case, Justice Chappel determined that it would not be appropriate to allow the wife to deduct her legal fees from her income for support purposes for two reasons.

First, based on the *SSAG*s, the wife would have been entitled to between $137 a month and $1,378 a month of spousal support if she was allowed to deduct her legal fees, but $nil at the low and mid-ranges of the *SSAG*s and only $17 a month at the high range if she was not allowed to deduct them. As Justice Chappel explained in her decision:

> [377] In reflecting upon these results, it is apparent that the legal fees deduction is the only item that tips the scale in favour of spousal support being payable on the facts of this case according to the *SSAG*. **To award spousal support to [the wife] based on the fact that she incurred legal fees to pursue such support when it would otherwise not in my view be granted is circular and yields and unjust result.** [emphasis added]

Second, in 2019, the husband had incurred significant legal fees to obtain a proper severance package from his former employer. Although he was able to deduct these legal fees for income tax purposes, unlike legal fees incurred to pursue support, which are deductible from a party's income for support purposes, fees incurred "to collect appropriate severance wages are not included in [the] list of employment expenses in s. 1 of Schedule III that can be deducted from *Guidelines* income."

Therefore, Justice Chappel was satisfied that "[t]he difference in approach and treatment with respect to the parties' respective legal fees does not in my view make logical sense on the facts of this case and reinforces my conclusion that the deduction of [the wife's] expenses in these circumstances yields a very distorted and unjust result."

As a result, the wife was not allowed to deduct the legal fees she incurred in 2019 to pursue her support claims against the husband from her income for support purposes.

We also want to comment on the length of the trial in this case. Family law cases should *never* take 30 days to try. Not only are long family law trials unaffordable for the vast majority of Canadians, but they also hoard already scarce resources from other cases that would benefit from timely judicial intervention.

In a recent article in the Lawyers Daily, Brenda Hollingsworth wrote about how Florida's civil jury system has managed to get to the point that it is now expected that a regular civil jury trial will take no more than a week, and that if it does not finish by then, there is a strong chance that the trial judge will declare a mistrial. (Florida Man completes personal injury jury trial in five days by Brenda Hollingsworth, online: https://www.thelawyersdaily.ca/articles/29209/florida-man-completes-personal-injury-jury-trial-in-five-days-brenda-hollingsworth.)

If a regular personal injury civil jury case can be tried in five days or less, there is no reason we should not be able to do the same in family law cases in Canada. We simply cannot keep giving family law litigants unlimited amounts of court time. Before a trial is scheduled, the parties must be given strict time limits, and they need to be held to them. If lawyers and parties know that they have a limited amount of time to present a case, that is what will happen. There is no absolute right to a trial on all issues or in all cases; there must be a reason to expend the personal and societal resources: *Merko v. Merko* (2008), 59 R.F.L. (6th) 439 (Ont. C.J.); *Rannelli v. Kamara*, 2011 CarswellOnt 14161 (C.J.).

You Can't Get Blood from a Stone or Retroactive Support from a Dead Dude

Blacklock v. Tkacz, 2021 CarswellOnt 13012 (C.A.) — Juriansz, Lauwers and Sossin JJ.A.

The appellant ("Blacklock") brought a motion against the respondent estate of her deceased husband (the "Estate") for retroactive child support. The deceased had died on March 14, 2019, and the motion to change was filed on October 4, 2019.

The motion judge dismissed the motion, finding that under s. 17 of the *Divorce Act*, an applicant cannot claim or vary a support order against an estate if the original order is silent on whether that order binds the estate.

Blacklock appealed.

Blacklock and the deceased payor were married in 1969 and separated in 1973. They were divorced in 1978, and the Divorce Order required the deceased to pay $20 of child support per week for each of the two children. The Order did *not* provide that the child support obligation would be binding on the deceased's estate.

The children completed their post secondary education in 1997 and 1998, at which point each child no longer qualified as a child of the marriage.

Blacklock claimed $275,000 in retroactive child support from the Estate. The motion judge, under Rule 16(12)(a) of the Ontario *Family Law Rules* (which allows the Court to decide a question of law), and relying on *Katz v. Katz* (2014), 50 R.F.L. (7th) 1 (Ont. C.A.), decided that, under s. 17 of the *Divorce Act*, an application cannot be brought to claim or vary a support order against an estate when the original Order was silent on whether that Order binds the estate.

On appeal, Blacklock argued that *Katz* was distinguishable because, here, the application to vary related strictly to the payor's lifetime on a retroactive basis.

The appeal was dismissed, with the Court of Appeal confirming that its statement in *Katz* that "a support or maintenance obligation under divorce legislation ends when the payor dies unless there is a specific agreement to the contrary" was applicable in this case.

This is an important point that bears repeating — and remembering. Unlike some provincial legislation — s. 34(4) of the Ontario *Family Law Act*, for example — support orders under the *Divorce Act* do *not* automatically bind a support payor's estate. And as there was no order binding the Estate, there was no order to vary to bind the Estate now.

The Court of Appeal did, however, throw Blacklock two potential lifelines — although we don't know that they will float.

First, the Court of Appeal noted that, "[Blacklock] did not make a claim for alleged arrears of support that arose during the life of the payor, as she might still." That is, the Court suggested that Blacklock might be able to start a new Application against the Estate claiming arrears of child support that may have accrued during the life of the payor. That is an interesting suggestion in the context of children that stopped being "children of the marriage" nearly 25 years ago.

While in *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.), the Supreme Court unquestionably expanded the scope for claiming retroactive child support for children that are no longer children of the marriage, and while the idea of "unreasonable delay" is now to be viewed through a different lens, delay still matters. As the Supreme Court stated in *Michel*:

> [111] This factor [the reasons for the delay] requires the court to consider why a claimant waited to bring an application. While timely applications are the norm and are to be encouraged, there are many reasons why even a person in need may delay making an application. In light of what the jurisprudence discloses, **the focus should be on whether the reason provided is understandable**. I do not think we should be looking for a "reasonable *excuse*" for the recipient parent's delay (*D.B.S.*, at paras. 100-3 (emphasis added)). That language, unfortunately, works to implicitly attribute blame onto parents who delay applications for child support. [*emphasis* in original] [**emphasis** added]

While we do not know all of the facts, a delay of more than 25 years is hard to understand, let alone explain.

Then, the Court of Appeal noted, "[n]or does anything in these reasons prevent [Blacklock] from seeking relief under the *Family Law Act*, if available." Respectfully, we are not sure that is right; first on account of the delay, and second on account of the doctrine of paramountcy. Here, the parties were divorced, and there was already a Divorce Order dealing with child support.

The moral of the story? If you have a client, and that client is receiving — or entitled to receive — support pursuant to a Divorce Order — make sure the Order expressly states that it binds the estate. Well, either that or get your deductible ready.

And, just to be clear . . . this interpretation of s. 17 of the *Divorce Act* isn't just an Ontario thing: *McLeod v. McLeod* (2013), 38 R.F.L. (7th) 295 (B.C. C.A.); *Lippolt v. Lippolt Estate* (2015), 56 R.F.L. (7th) 105 (Alta. Q.B.); *Ducharme v. Ducharme* (1981), 21 R.F.L. (2d) 309 (Man. Q.B.).