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— Franks & Zalev - This Week in Family Law

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Holiday Greetings

Well that's another challenging year in the books. But despite all of the challenges we faced in 2021, we also saw significant progress towards modernizing a justice system when the previous most-recent modernization was the ballpoint pen.

Hopefully, things will return to normal in 2022, and we will not all have to continue learning the Greek-COVID variant alphabet. We look forward to being able to return (safely) to court in person for at least some matters, while continuing to take advantage of the benefits of virtual attendances for others. It may take some time to figure out the right balance between in-person and virtual attendances, but we'll get there soon enough.

We would like to take the opportunity to thank John Bossy, our editor at Westlaw, and Kristy Warren, our associate, for their invaluable help with getting *TWFL* online each week. We would also like to thank those out there that take time to read the *Newsletter* and that have taken time to send us noteworthy cases, comments, and constructive criticism.

And thank you to the hardworking and dedicated judges, court staff and (family) lawyers who have managed to keep the justice system running in these difficult times.

Finally, we want to again express our gratitude to our late-senior partner, Philip Epstein, for the privilege of getting to work and learn from you every day, and for the opportunity to try to meet the impossibly high standards you set in the 14 years you wrote this *Newsletter*. You have left a big, big hole, and we echo what Stephen Grant had to say about you in the May 14, 2021 Globe and Mail:

> *If there is truth in the adage that the arc and success of one's life is measured by the number of people who love you at the end of it, Philip Epstein led an extraordinarily fulfilled life.*

We'll be off for the holidays for the next three weeks, but will be back with the next edition of *TWFL* on January 10th.

Safe and happy holidays to all.

The British Columbia Court of Appeal Gives Claims for Retroactive Spousal Support a *Legge* Up

Legge v. Legge, 2021 CarswellBC 3060 (C.A.) — Fenlon, Butler, Grauer JJ.A.

In *Legge*, the wife appealed from an order dismissing her claim for retroactive spousal support.

The trial judge found that the wife had established an entitlement to spousal support on both compensatory and non-compensatory grounds, but nevertheless dismissed her claim on the basis that it was not in the interests of justice to make a retroactive award. This conclusion was largely driven by the unusually lengthy almost-decade delay between separation and the adjudication of the claim for spousal support.

The parties met in 2001. They began to cohabit in early 2002. They married in Edmonton in 2006 after they relocated to Alberta from B.C. for the husband's work. They had a daughter in 2008, and the wife continued to work part-time and was primarily responsible for their daughter's care.

The parties separated in September 2010, after 8-1/2 years of cohabitation.

The wife started proceedings in Provincial Court in 2010 with respect to custody, child support, and spousal support. The parties ultimately resolved the parenting issues. But no application for interim spousal support was ever made.

When they separated, the husband was earning $64,000, and the wife was earning a very modest income. The parties had accumulated a substantial amount of debt during the marriage.

Shortly after separation, the husband changed jobs and earned more income. He continued to live in the family home and paid all of the associated expenses including the mortgage.

The husband started an action in the British Columbia Supreme Court in 2014, claiming a divorce and orders respecting children and property division. In response, the wife advanced a claim for spousal support, but she did not bring a motion for interim support.

Both parties re-partnered, and the daughter eventually started living primarily with the husband.

In 2014, the wife began working for her parents' trucking company in an administrative role on a part-time basis. She began working full time in 2019. The father paid child support from 2011 to 2015 based on his 2011 income. This amount did not increase even though his income increased over that time. The husband never paid spousal support to the wife, and the wife never paid child support to the husband. The husband never brought a motion for interim child support, and the wife never brought a motion for interim spousal support.

The parties each assumed responsibility for some of the family debt: $43,000 by the wife and $24,500 by the husband. The husband was able to pay off his debt. The wife was not.

The trial judge ordered the wife to pay child support from July 16, 2019 forward, the date on which she received notice of the husband's intention to claim child support. She was ordered to pay arrears of $3,850 and ongoing child support of $350 per month.

With respect to spousal support, the wife argued that she was economically disadvantaged by the breakdown of the marriage and was, therefore, entitled to spousal support both for compensatory and non-compensatory reasons.

While the trial judge accepted that the wife had suffered with health problems and various injuries following separation that temporarily interfered with her ability to be employed, he concluded that absent medical evidence, there was no reason to believe she could not work or attend school full time after 2015 when their daughter went to live with the husband.

Although the trial judge was satisfied that the wife had established both a compensatory and non-compensatory entitlement to spousal support, he concluded that "it would not be in the interests of justice to make a retroactive order for spousal support." The trial judge had concerns as to the wife's lengthy delay in claiming spousal support, especially the resulting CRA complications in doing a recalculation of income taxes from 2011 to 2017.

The wife testified that she did not bring an application for spousal support earlier in the proceedings because of her impecuniosity, the need to rely on Legal Aid, and the initial focus on custody matters. But the trial judge did not accept her explanation:

> [93] When asked about why it took so long for the case to get to trial, the [wife] testified that she had no funds to retain a lawyer and had to rely on Legal Aid, and that she understood custody matters had to be finalized first. However, the parties have been to court on numerous occasions, particularly in Provincial Court, and her application for spousal support was extant throughout the entire period. It would have been a relatively straightforward matter for the [wife] to ask a court for an order for spousal support at any time in the intervening years. I am not satisfied that there has been a reasonable explanation for what amounts to a ten year delay.

Ultimately, the trial judge was of the view that the wife would have been entitled to spousal support had an application been brought earlier, but it would have been unfair were she permitted to advance the claim so late.

With respect to the standard of review, the Court of Appeal noted that support orders are highly discretionary and attract a deferential standard of review — and particularly so where the trial judge had the benefit of hearing the parties directly. To succeed on appeal, the wife had to show that there was an error in principle, a serious misapprehension of the evidence, or that the trial judge erred in law: *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.).

Curiously, the Court of Appeal then proceeded to reweigh the evidence. How quickly we forget.

The Court of Appeal was of the view the trial judge gave insufficient weight to the wife's needs and hardship she experienced, after reaching the conclusion that she was entitled to spousal support. By failing to give sufficient weight to the circumstances on which the wife's entitlement was based, the trial judge made an order that failed to meet the objectives of spousal support. Curiously, to explain why they reached their conclusion, the Court of Appeal referred to *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.) — which dealt with child support, not spousal support — when in *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.), the Supreme Court was clear that claims for retroactive child support and retroactive spousal support are very different:

> [207] While *S. (D.B.)* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. **However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support.** I will mention some of those differences briefly, although certainly not exhaustively.
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> [208] **Spousal support has a different legal foundation than child support.** A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. **These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support.** With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see *S. (D.B.)*, at paras. 36-39, 47-48, 59, 80 and 100-104. **In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight**

> **in relation to claims for spousal support:** see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92. [emphasis added]

But we digress.

The Court of Appeal was concerned that the trial judge was overly-focussed on the 10-year delay. Citing *Kerr*, the Court of Appeal suggested that the commencement of proceedings provided the husband with "clear notice" that support was being claimed. But the delay in *Legge* was *much* longer than in *Kerr*. Here, the wife initially commenced proceedings in the Provincial Court in 2010. Surely, at some point in the following decade, the husband was entitled to assume the wife was not seriously pursuing her claim for spousal support. And why, by the way, is a payor seeking a retroactive decrease not entitled to the same consideration? See *Jonas v. Akwiwu* (2021), 62 R.F.L. (8th) 1 (Ont. C.A.), which is discussed further below, where a delay of 11 months was sufficient to dismiss a claim for a retroactive reduction.

Ultimately, the Court of Appeal relied on the notion from *Kerr* (at para. 212) that, "[a] [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award." A trial judge must consider the needs of the spouse seeking support *both at the time the support should have been paid and at the time of trial:*

> [40] . . . If a spouse has established a "clear entitlement" to spousal support, and that he or she underwent hardship in the past and remains disadvantaged at the time of the hearing to determine spousal support, it would be unusual for a court to make no award for spousal support where financial resources permit, notwithstanding the delay. This is because a denial of spousal support in such circumstances could not meet the statutory objectives. In short, a court should strive to make an award that takes into account the payor's circumstances, but also gives effect to the objectives of spousal support. . . .

In *Legge*, the Court of Appeal found that rather than balancing the interests and responding to the circumstances of the parties with some flexibility, the trial judge approached the award as an "either/or proposition" based on the parties' positions — either awarding the wife all the retroactive support she claimed or nothing. And by failing to consider other possible ways to satisfy the objectives of spousal support, the trial judge effectively gave weight to the husband's circumstances without any consideration of the wife's circumstances: her income had always been a small fraction of his; she had been on welfare for periods of time following the separation; her income remained far below his even though she had been working; and she had yet to be able to pay off $40,000 of the debt that she had assumed at the time of separation.

Without some retroactive award to compensate her for the period of substantial hardship the wife experienced after separation, her ability to establish herself financially and become self-sufficient would be extremely limited.

The Court of Appeal then offered the following analogy between a claim for retroactive child support in *Michel* and the current claim for retroactive spousal support, thereby arguably making the principles of *Michel* fully applicable to the claim for retroactive spousal support:

> [43] Justice Martin's comments in *Michel* about the disadvantages facing women attempting to access justice in family law are relevant to [the wife's] situation:
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> > [96] . . . women will often face financial, occupational, temporal, and emotional disadvantages. Moreover, access to justice in family law is not always possible due to the high costs of litigation. In this larger social context, women who obtain custody are often badly placed to evaluate their co parent's financial situation and to take action against it. Measures that place further barriers on their ability to claim and enforce their rights, like a jurisdictional bar, inhibit their ability to improve their circumstances and those of their children. Yet, as this Court stated in *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 1: "Without an effective and accessible means of enforcing rights, the rule of law is threatened."

Again borrowing from *Michel*, the Court of Appeal found that the wife provided an "understandable explanation" (as opposed to a "reasonable excuse") for her delay in bringing the spousal support application. And, accordingly, the trial judge was wrong to treat her delay as disentitling her to any retroactive award. While delay was a factor to take into account, in the face of the

wife's "understandable explanation," the delay should not have been used to deny any retroactive spousal support, particularly given her continuing economic disadvantage arising from the marriage breakdown.

The Court of Appeal also opined that any argument as to the wife's delay had to be given less weight in light of the husband's delay in not pushing the matter forward. That ain't fair. It was the wife's claim for support. The husband was under no obligation to move it forward for her.

In summary: insufficient weight to the circumstances on which the wife's entitlement to compensatory and non-compensatory support rested; too much weight to the delay factors in the *D.B.S.* analysis; and claims for retroactive spousal support and retroactive child support are far more similar than we might have thought after *Kerr*.

The result? There was "no question" the wife continued to suffer from economic disadvantage arising from the breakdown of the marriage. At the same time, the husband's resources were limited. Therefore, any lump-sum award had to be less than the full amount requested by the wife because of the hardship such an award would place on the husband and because of the delay.

The husband was ordered to pay $27,000 to the wife as retroactive spousal support. This, according to the Court of Appeal was an appropriate balancing of the relevant factors including: the wife's entitlement to spousal support and her continued disadvantaged situation; the parties' limited family property; the delay in adjudicating this matter such that an award for prospective support was unrealistic; the fact that after 2015, the wife was in a position to obtain full-time work; and the hardship that the award may occasion to the husband.

Not All "Notice" Is Created Equal

Jonas v. Akwiwu, 2021 ONCA 641 — Strathy C.J.O., Pepall and Pardu JJ.A.

(And a touch more about *Legge*)

In *Jonas*, the Ontario Court of Appeal was dealing with the issue of a payor seeking a retroactive reduction in support — essentially an application of *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.). But as we note below, it appears that the notice required by a payor to reduce support retroactively is actually more onerous that the notice required of a recipient to increase support retroactively.

In March of 2019, the parties entered into a Consent Order that required the father to pay support for two children based on employment income of $122,499, and pension income of $15,000. The father lived and worked in Nunavut.

In October of 2019, the father claimed that he had suffered a mental breakdown that caused him to take sick leave without pay. The father's counsel sent an email to the mother on October 31, 2019, notifying her of the change in circumstance and the request to reduce child support to $100 per month. The father commenced a Motion to Change 11 months later.

While the motion judge agreed that the change in the father's health and employment was a material change in circumstances, he declined to order a reduction retroactive to October 31, 2019. The motion judge determined that the email from father's counsel to the mother did not provide sufficient information for the mother to make a decision. The email contained six lines, none of which set out the reason for the father's sick leave, a diagnosis, or a timeline for when he might return to work.

The motion judge also noted that the father could not explain why he waited 11 months to bring his Motion to Change.

The mother relied on the support from the father, and the father's delay in bringing his Motion to Change only served to prejudice the mother and the two children who were depending on some enforcement of the arrears that had accumulated over the 11 months. While the father put the mother on "notice" of a change, he did not provide her with enough detailed information to mitigate against the prejudice to her and the children.

The Court of Appeal upheld the motion judge's decision. According to the Court of Appeal, the motion judge's regard to the prejudice to the mother and the children caused by the father's failure to bring his Motion to Change on a timely basis was a reasonable consideration.

The result? Candidly, a bit of imbalance or disequilibrium between retroactive claims to increase and decrease child support.

A brief email will not put a support recipient sufficiently on notice of a need to reduce child support. Rather, specifics of the alleged change must be set out, along with sufficient evidence to support the legitimacy of the change. Additionally, payors need to be diligent in commencing a proceeding if the recipient will not agree to reduce the support obligation. The father in this case sent an unexpected email, then let the matter sit for 11 months. In those circumstances, perhaps, it is not difficult to see why the motion judge made the described determination regarding retroactive support.

This sets up a dichotomy as between the notice a recipient must give to claim a retroactive increase as opposed to the notice a payor must give to claim a retroactive decrease. A recipient must merely "broach" the subject of an increase in support to count as effective notice (see *Colucci v. Colucci* (2021), 56 R.F.L. (8th) 1 (S.C.C.) at para. 86 wherein the Supreme Court imported this standard from *D.B.S. v. S.R.G.* (2006), 31 R.F.L. (6th) 1 (S.C.C.)).

But a payor must do more: in order to count as effective notice for a retroactive reduction in child support, a payor must provide "reasonable proof" that is sufficient to allow the recipient to "independently assess the situation in a meaningful way and respond appropriately" (*Colucci* at para. 88).

All notice is not created equal. Payors that wish to claim a retroactive reduction in child support must give a higher quality of notice. Fair? Probably not. But it appears to be the law.

And because in *Legge*, which is discussed above, the British Columbia Court of Appeal suggested that the principles of retroactive *child* support from *Michel v. Graydon* (2020), 45 R.F.L. (8th) 1 (S.C.C.), apply to a claim for retroactive *spousal* support, it is certainly now arguable that the same notice dichotomy applies to claims for retroactive changes to spousal support.

However, given the comments of the Supreme Court of Canada in *Kerr v. Baranow* (2011), 93 R.F.L. (6th) 1 (S.C.C.) that "different legal principles and objectives . . . underpin spousal as compared with child support" (para. 207) and that "spousal support has a different legal foundation than child support" (para. 208), perhaps this ought not be the case. In contrast to child support, there is no presumptive entitlement to spousal support and, unlike child support, a spouse (or former spouse) is not under any legal obligation to guard the legal interests of the other. Therefore, "concerns about notice, delay and misconduct should generally carry more weight in relation to claims for spousal support" (para. 208).

So Is It "Self-Represented" or "Unrepresented"?

Grand River Conservation Authority v. Ramdas, 2021 CarswellOnt 16703 (C.A.) — Lauwers, Harvison Young, and Sossin JJ.A.

Unrepresented litigants pose a special problem for counsel and courts alike.

The explosion of unrepresented litigants in family law cases has presented significant challenges for family law judges and lawyers. To that end, while *Grand River Conservation Authority* is a civil case, it is nevertheless an important case for family lawyers to be aware of because Justice Lauwers, who wrote the decision for the Court, continued the discussion he started last year in *Girao v. Cunningham*, 2020 CarswellOnt 5363 (C.A.) about the obligations that judges and lawyers owe to unrepresented litigants.

[For further discussion about *Girao*, see "A Brief Case About Briefs" in the August 10, 2020 edition of *TWFL*.]

In *Grand River Conservation Authority*, Justice Lauwers discussed three important considerations to ensure that unrepresented litigants receive a fair hearing.

First, in cases where one party is represented by counsel but the other is not, there may be a natural tendency for judges "to rely on counsel for a clear and accurate understanding of where things stand in the litigation." However, to avoid any appearance of bias, "judges must also permit self-represented parties to explain how they understand the status quo."

Second, in some cases, and despite a judge's best efforts, an unrepresented litigant may still have trouble understanding the difference between "evidence" and "submissions." Submissions by an unrepresented party are not evidence: *Ripulone v. Smith*, 2018 CarswellAlta 840 (C.A.), and a court must be careful to distinguish between evidence and the unsworn submissions of unrepresented parties: *Ceci v. Ceci*, 2009 CarswellOnt 961 (Div. Ct.); *Davidson v. Davidson*, 2010 CarswellOnt 1636 (Div. Ct.); *Sadowski v. Lik*, 2010 CarswellAlta 2146 (C.A.); *Hinds v. Hinds*, 2011 CarswellBC 2915 (C.A.).

In those situations, judges may want to consider whether to "swear in the party and allow submissions to be made from the witness box, and to permit cross-examination on the evidentiary parts[.]" This will allow "the judge to make findings on the evidence where appropriate", while also allowing the other party to test and challenge the evidence through cross-examination. Forgive us for saying so, but — "ugh." Justice Lauwers clearly did not have family law — and the number of unrepresented litigants — in mind when writing his decision.

However, judges must also still ensure that the process is fair to the *represented* party. While there may be situations where it will be necessary to allow an unrepresented litigant to supplement the evidentiary record during submissions, the court should also bear in mind that:

- Parties should generally not be allowed to case-split: *R. v. Krause*, 1986 CarswellBC 761 (S.C.C.) at paras. 15-16 and *Johnson v. North American Palladium Ltd.*, 2018 CarswellOnt 12487 (S.C.J.) at paras. 12-19;

- Although courts have the discretion to reopen a hearing to allow a party to adduce further evidence, that discretion should be exercised "sparingly and with the greatest of care", and after "balancing the public interest in the finality of litigation and the realities of the specific case . . . ": *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 CarswellOnt 3357 (S.C.C.) at para. 61; and *J.F.L. v. H.A.J.L.*, 2021 CarswellBC 2377 (S.C.) at paras. 172-173;

- Judges cannot bend over backwards to "assist" unrepresented litigants, and generally speaking, unrepresented litigants are not entitled to special treatment: *Ridout v. Ridout* (2006), 27 R.F.L. (6th) 237 (Man. C.A.) (*sub nom J.W.C.R. v. C.R.*); *Malton v. Attia*, 2016 CarswellAlta 766 (C.A.); and

- Unrepresented litigants are not exempt from the rules of evidence or the rules of procedure: *Murphy v. Szulinszky*, 2016 CarswellYukon 140 (C.A.), and an unrepresented litigant must make reasonable efforts to present their own case: *A.D. c. A.D.* (2018), 18 R.F.L. (8th) 1 (N.B. C.A.). Fairness requires that the *Rules* be applied consistently: *Dawson v. Dawson* (2012), 22 R.F.L. (7th) 261 (B.C. C.A.).

Third, judges can, in appropriate circumstances engage in "active adjudication" to obtain relevant evidence from an unrepresented litigant who might not fully understand what is relevant and what is not. The idea of active adjudication is not a new concept in family law, particularly in cases involving children. As the Ontario Court of Appeal noted more than 40 years ago in *Gordon v. Gordon* (1980), 23 R.F.L. (2d) 266 (Ont. C.A.):

> [11] . . . A custody case, where the best interest of the child is the only issue, is not the same as ordinary litigation and requires, in our view, that the person conducting the hearing take a more active role than he ordinarily would take in the conduct of a trial. Generally, he should do what he reasonably can to see to it that his decision will be based upon the most relevant and helpful information available. . . .

[See also our comment about *Richardson v. Richardson* (2019), 35 R.F.L. (8th) 265 (Ont. C.A.), aff'd 2021 CarswellOnt 14328 (S.C.C.) in the April 13, 2020 edition of *TWFL*.]

That being said, Justice Lauwers also made it clear that judges "must not cross the line between assisting self-represented litigants in the presentation of their evidence and becoming their advocate."

With respect to counsel's obligations to unrepresented litigants, Justice Lauwers noted that "[a]s officers of the court, lawyers have a duty to assist both self-represented litigants and the court in order to ensure that justice is not only done but is seen to be done." To that end, when dealing with an unrepresented litigant, counsel should carefully consider the principles that are set out in the American College of Trial Lawyers' *Canadian Code of Conduct for Trial Lawyers Involved in Civil Actions Involving Unrepresented Litigants*, Irvine: American College of Trial Lawyers, 2009, including that lawyers should:

1. "Not attempt to derive a benefit for clients from the fact that the opposing litigant is self-represented[.]"

2. "Be aware of their duty to the court in considering reasonable requests for adjournments or waivers of procedural formalities when there is no real prejudice to their client's rights or interests[.]"

3. "Advise the court of all material communications and agreements reached with the self-represented litigant[.]"

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