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Family Law Newsletters
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— Franks & Zalev - This Week in Family Law

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Contents

Death to *Halliwell*

Plese v. Herjavec, 2020 CarswellOnt 18494 (C.A.) - Strathy C.J.O., and Brown and Huscroft JJ.A.

The appellant/payor, Robert Herjavec ("Robert"), appealed from a spousal support order made after a 24-year marriage to the respondent/recipient, Diane Plese ("Diane").

After a month-long trial, Robert was ordered to pay $2,689,558 in equalization, $125,000 a month in spousal support, and $14,233 a month in child support from May to August inclusive, for each year that the parties' youngest daughter was still in university. At the time, the decision garnered a fair bit of interest across Canada for the very significant spousal support award in favour of a claimant that had also amassed very significant capital. *After* buying a house and a cottage for $10.5 million, Diane would be left with $13.5 million which, although a healthy sum, was less than half of Robert's capital base.

Robert argued that the spousal support award should be set aside or substantially reduced.

The parties were married in 1990 and separated in 2014. They had three adult children, and the parties were each 56 years old at the time of trial.

In the early years, Robert was an entrepreneur, and Diane was a full-time optometrist who ran her own office. Diane began to work part time in 1993, upon the birth of their first child. She continued to work on a part-time basis between her subsequent maternity leaves.

Robert's business prospered, and he encouraged Diane to stop working, which she did, taking over household management and child-related duties.

By the time of their separation, they had accumulated substantial assets and enjoyed an exceptional income. They lived in a large home in an exclusive area of Toronto that was sold in 2018 for $17.395 million. The parties also owned a $2.6 million property in Florida, a $5 million cottage in Muskoka, and a ski chalet in Caledon. The children went to exclusive private schools. Through Robert's company, the family had access to a private jet which they used for European vacations with their children - all in all, a very similar lifestyle to most of us.

Diane started proceedings on March 3, 2015. The trial spanned 18 days of evidence over four weeks. There were 13 witnesses, including a number of experts on real estate and business valuation issues, and a forensic accounting expert concerning Robert's income.

There were five main issues at trial: breach of trust allegations against Robert; equalization of net family property; spousal support; child support; and retroactive adjustments to spousal support and child support.

At trial, Justice Mesbur found that:

- Robert had breached his fiduciary duties as the sole trustee of the family trust. However, he had accounted for the amounts that he had taken from the trust, and the beneficiaries had received the amounts to which they were entitled.

- Robert's net family property at the valuation date was $24,155,510, consisting primarily of his interest in his company, The Herjavec Group Inc. ("THG"). Diane's net family property was $18,835,699, consisting primarily of her ownership of the matrimonial home. As a result, Robert was ordered to make an equalization payment to Diane of $2,689,558, significantly less than the $12 million she had sought.

- Robert was required to pay spousal support of $125,000 per month, for an indefinite period.

- Robert was required to pay child support for the youngest daughter, in the amount of $14,233 per month, from May to August inclusive, for each year that she was in university.

- The parties' claims for retroactive adjustments were dismissed.

Robert was awarded $450,000 in costs, as the majority of the time taken up at trial related to equalization issues, specifically the valuation of Robert's interest in THG.

With regard to entitlement to spousal support, the trial judge noted that the "overarching criterion" was a determination of what was "reasonable", having regard to the "conditions, means and other circumstances of the parties." She reminded herself that she was required to consider the factors and objectives of a spousal support order, as set out in s. 15.2 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.).

The trial judge made the following findings of fact in relation to the s. 15.2(4) factors:

- The marriage was a lengthy one of nearly 30 years.

- The parties worked as a "team." Diane's financial contributions from her own work were "critical" to Robert's financial success, particularly in the early years of their marriage. Over the course of the marriage, Robert became the prime income earner and Diane became responsible for raising the children and managing the household.

- When Diane stopped working outside the home, she lost very steady employment and a financial safety net created from her own separate earnings. This was found to be a compensable loss.

- Diane had been unable to contribute to her own support since 2003 and, at age 56, she was unlikely to be able to return to her previous profession. Absent anything else, she was in need of support.

- In December 2015, Robert was ordered to pay interim spousal support of $124,115 per month. At the time of the interim order, Robert represented that his 2015 income would be $1.7 million. In fact, his line 150 income for 2015 was $4.553 million before the mandated adjustments under the *Child Support Guidelines*. With those adjustments, his income was $6.242 million. In contrast, Diane had virtually no income.

In addressing the objectives of spousal support in s.15.2(6) of the *Divorce Act*, the trial judge made the following additional findings:

- She rejected Robert's submission that Diane's capital position, at the end of the marriage, sufficiently compensated her for any economic disadvantages that arose from the marriage. Robert had a capital base of at least $32 million. He also had the capacity to earn an income of more than $5.5 million per year.

• After buying a house and a cottage (for a total of $10.5 million), which Diane testified she intended to do, she would have $13.5 million, less than half of Robert's capital base.

• Robert's and Diane's capital bases did not generate the same level of income. The nature of Robert's assets allowed him to earn 8.5 times that which Diane could earn from her assets. The trial judge determined that such a disparity could "only be corrected through a generous spousal support order."

• The assessment of "economic hardship" in the context of this family required an examination of the luxurious lifestyle they enjoyed prior to their separation. Diane's lifestyle had suffered since the marriage breakdown, and there was no evidence to suggest that Robert had experienced a similar reduction in his lifestyle. Without spousal support, Diane would have suffered economic hardship as a result of the end of the marriage.

This is all to say that at trial, entitlement was not really a significant question. But how much? And for how long?

The case law sets out different approaches to the calculation of spousal support for high-income earners. Here, Robert had an annual income of about $5.9 million and Diane had an annual income of about $679,725.

The trial judge first looked to the *Spousal Support Advisory Guidelines* (the "SSAG"), which suggested a range of monthly spousal support from $153,144 (low), to $178,664 (mid-range), to $187,050 (high). The high-range figure would have provided each of the parties with approximately half of the total Net Disposable Income. She noted that in lengthy marriages, courts will often fashion a spousal support order that results in each party having roughly the same NDI.

The trial judge recognized that the SSAG do not necessarily apply where the payor spouse earns more than $350,000 per year and that, in some cases, the courts conduct a "means and needs" analysis to calculate spousal support, taking the standard of living the parties enjoyed during the marriage into account.

The trial judge considered Diane's needs in relation to the standard of living during the marriage and her evidence that she intended to use some of her capital to buy a house and cottage. The trial judge calculated that Diane's net monthly expenses would be about $58,000 if she were to maintain anything close to the marital standard of living. Therefore, on a non-compensatory basis alone, Diane had entitlement to support.

Robert urged the trial judge to award support based on the "*Halliwell* principle" [*Halliwell v. Halliwell* (2017), 90 R.F.L. (7th) 253 (Ont. C.A.)] - universally known (at least previously) as the Ontario Court of Appeal's gift to high income payors, and proving that gifts are sometimes revocable. [1]

The trial judge was not persuaded by *Halliwell*, and suggested that *Halliwell* required "an individualized fact-specific analysis" which, in turn, called for a consideration of the effect of the equalization payment on spousal support. And she had already dealt with the effect of the equalization payment in evaluating Diane's means and needs. The trial judge also noted that, while the SSAG do not apply automatically to income above $350,000 per year, $350,000 is not a hard "cap"; that is, spousal support can, and often will, increase for income above $350,000.

The trial judge ultimately found that a spousal support award of $125,000 per month would be appropriate in all the circumstances. This figure was lower than any of the SSAG scenarios. It provided Diane with about 39% of NDI (including child support). When child support ended in the near future, Diane would have a net monthly income of about $87,000 and Robert would have a net monthly income of $173,000. This was thought to be a "reasonable balancing of the economic consequences of the end of the marriage, coupled with reasonable compensation for [Diane], over and above simply meeting her monthly needs."

The trial judge rejected Robert's position that spousal support should end after two years. There was nothing on the horizon to suggest that Diane's need for support or compensation would end after two years. The trial judge declined to order a termination date, noting that the SSAG called for "duration unknown" support in these circumstances.

So that's $125,000 a month in spousal support. No termination date. One unhappy Robert. And an appeal.

On appeal, Robert suggested that the trial judge erred:

1. In her assessment of Diane's means and needs.

2. In her determination of spousal support by failing to apply "the *Halliwell* Principle" and the SSAG.

3. In ordering indefinite spousal support by not ordering a termination date or review.

The highly-deferential standard of review in support cases is very clear. An appellate court cannot overturn a support order simply because it would have made a different decision or balanced the factors differently: *Ballanger v. Ballanger*, 2020 CarswellOnt 14284 (C.A.) at para. 23. And an appellate court should not interfere with a support order unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or the award is clearly wrong: *Hickey v. Hickey* (1999), 46 R.F.L. (4th) 1 (S.C.C.) at para. 11. A deferential standard of review is meant to discourage appeals that are meant to only try to persuade the appellate court the result should have been different. It promotes finality.

On appeal, Robert maintained the position with respect to spousal support that he maintained at trial. He argued that the spousal support order should be set aside and that Diane should reimburse the interim amounts that were paid. As we will see, this did not go over well with the Court of Appeal.

With respect to the non-compensatory ("means and needs") analysis, Robert argued that the trial judge erred:

(a) in assessing Diane's means and needs, and specifically in the calculation of her income-earning capital base, in excluding the full value of the house and the cottage she intended to purchase;

(b) in estimating the professional fees that would be incurred in the acquisition of those properties;

(c) in estimating Diane's future maintenance expenses without an up-to-date budget; and

(d) in double counting the child care expenses claimed by Diane, when she was receiving child support.

These arguments make it clear that Robert was focussing exclusively on errors with respect to the non-compensatory support analysis, and specifically on alleged errors in assessing Diane's means and needs. However, spousal support is driven by both compensatory and non-compensatory factors [*Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.) at para. 201], and the Court of Appeal picked up on this, noting that Robert's argument focused only on non-compensatory factors when Diane's strongest entitlement to support was compensatory.

The trial judge was entitled to approach the question of Diane's entitlement with reference to the standard of living the parties enjoyed during their marriage. Indeed, it would have been an error to not do so. "[G]reat disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution[.]" [*Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.) at para. 85]

The trial judge was entitled to determine that, without spousal support, Diane would have suffered economic hardship as a result *of the end* of the marriage. This is a point that is often forgotten in a compensatory support analysis. We are concerned not only with economic advantages and disadvantages as a result of the marriage and the roles assumed *during* the marriage; we are also concerned with disadvantages a spouse may suffer as a result of the *end* of the economic union.

Robert submitted the trial judge erred by deducting from Diane's assumed capital base the entire value of the house and the cottage ($10.5 million) she claimed she *intended* to purchase. Robert suggested that Diane made no mention of such purchases when examined prior to trial.

This argument went nowhere. It was not a palpable and overriding error. The trial judge was entitled to accept Diane's evidence. According to the Court of Appeal, the trial judge was also entitled to conclude that Diane could buy a house and a cottage reasonably commensurate with the standard of living enjoyed during marriage, without having to allocate some of that capital for investment purposes.

While the Court of Appeal was quite correct that the "true driver" of support in this case was compensation, the Court did make a confusing statement when it noted that Robert had not established that the trial judge erred in her determination of Diane's means and needs, "having regard to the compensatory nature of entitlement." It seems to us that a "means and needs" analysis specifically does not, in fact, require regard to the compensatory nature of entitlement. One can have non-compensatory entitlement to spousal support even absent compensatory factors.

Robert also suggested that the trial judge erred in estimating Diane's future maintenance expenses for her anticipated home and cottage without a written, up-to-date budget (or any evidence of a planned specific purchase). In fact, the trial judge acknowledged that she "somewhat arbitrarily" took half of the maintenance costs for the parties' Toronto house and Florida property to *estimate* what Diane was likely to spend on maintenance in the future.

While the Court of Appeal determined this to be "entirely within the fact-finding responsibility of the trial judge," we do have some sympathy for Robert here. Surely Diane had some obligation to put forward evidence of the expenses she was likely to incur in maintaining her future properties. The trial judge had to act "somewhat arbitrarily" because Diane had not put forward the necessary evidence. This seems unfair and, to some extent, let Diane off the hook. Even if the Court of Appeal was suggesting that, generally speaking, budgets are not terribly useful in assessing future needs, surely Diane had some obligation to put forward evidence of the capital and maintenance costs of the kinds of properties she was proposing to buy.

With respect to the alleged error regarding child support, the parties' youngest daughter continued to be a child of the marriage and was, therefore, entitled to support. She lived away from home while she attended university and lived with her mother from May through August. The trial judge ordered Table "summer" child support of $14,233 per month for the four months that the daughter was living with her mother.

The trial judge also determined that it would be inappropriate to make an order for the payment of the daughter's post-secondary education expenses because of the child and spousal support she was receiving. However, as Diane's Financial Statement (on which non-compensatory spousal support was based) included the cost of the daughter's post-secondary education and other childcare expenses, Robert argued that there was an element of double-counting: those amounts were part of both the spousal support order and the child support order.

The Court of Appeal did away with this argument in one sentence, suggesting that "any error made by the trial judge here was immaterial." In our view, the issue was not that the daughter's post-secondary education expenses were double counted, but rather whether the trial judge should have taken into account the amount of spousal support Diane was receiving in deciding whether these expenses were section 7 expenses. We do not think it was necessary for her to do so, as presumably the child support on its own was sufficient to cover the daughter's post-secondary education. However, if the trial judge had found that the child support on its own was sufficient to cover these expenses, then it would have been appropriate for these expenses to be excluded from Diane's Financial Statement, to avoid the double counting issue raised by Robert.

The comments of the Court of Appeal with respect to *Halliwell* are likely the most interesting part of this case.

Robert argued that the trial judge erred in failing to consider *Halliwell* in calculating his income for support purposes. He argued that, where a payor's income exceeds $350,000, *Halliwell* ***requires*** the court to calculate the payor's income based on the average between the $350,000 SSAG "cap" and the payor's actual income.

The Court of Appeal took the opportunity to "reframe" what it had said in *Halliwell*. The decision had been the subject of significant criticism for having espoused a method of income calculation that was not based in law or in the text of the SSAG.

First, found the Court of Appeal, the trial judge was alive to the decision in *Halliwell*. At para. 341 of her reasons, the trial judge noted that the calculation of spousal support for high-income parties must be "an individualized fact-specific analysis" that considers the effect of the equalization payment: *Halliwell*, at para. 107. The trial judge then further explained that she dealt with the effect of the equalization payment when she assessed Diane's means and needs.

The Court then offered these comments on *Halliwell* itself (at para. 57):

> [57] *Halliwell* does not require the court to impute the payor's income at the mid-way point between the *SSAG*s "cap" and the payor's actual income. Rather, *Halliwell*, at para. 116, emphasizes what the *SSAG*s have always stated: "Above the $350,000 ceiling, an additional formula range is created: **appropriate income inputs range anywhere from $350,000 to *the full income amount*. Entitlement is important to determine a location within that range**" . . .
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> [58] [Robert's] submission that the support award "far exceeds the *Halliwell* range" is simply inaccurate. The *Halliwell* range includes, at the upper end, the use of the full amount of the payor's income. The award here is within the appropriate range. [emphasis added]

Notably, these comments echo the comments of the Court of Appeal in *Dancy v. Mason* (2019), 25 R.F.L. (8th) 93 (Ont. C.A.). In *Dancy*, the Court of Appeal suggested that it is not very meaningful to speak of set "ranges" for spousal support in over-$350,000 cases because the ranges are fluid, depending on the income inputs.

Ultimately, found the Court of Appeal, the lesson in *Halliwell* is that the court must fully consider the effects of a property settlement when determining spousal support, beginning with the question of entitlement. Nothing more. And that was clearly done in this case. In her analysis of entitlement, the trial judge considered Diane's capital base resulting from the equalization payment and the potential investment income, but accepted that she could not consider the ability of Diane's capital base to meet her future needs in isolation. Some of Diane's capital was to be used to purchase real property and would not produce income.

Robert also argued that the trial judge erred by failing to account for his debts in comparing their capital positions. However, the Court of Appeal found that this submission "rang hollow" because Robert had not provided an updated valuation of THG. The trial judge explicitly inferred that had it been to Robert's benefit, he would have produced an updated valuation. This is hard to align with the Court of Appeal approving of the trial judge "somewhat arbitrarily" taking half of the maintenance costs for the parties' Toronto house and Florida property to *estimate* what Diane was likely to spend on maintenance in the future - because Diane had not put the necessary evidence before the Court.

The Court of Appeal then continues, "[if], at some future date, there are material changes in [Robert's] financial circumstances, including the valuation of THG, he has his remedies." What remedies are those? An equalization payment cannot be varied. A decrease in the value of Robert's company (or an increase in his debts) cannot (alone) be a material change for the purpose of varying support. And debts that existed on the date of trial cannot later found a material change.

Finally, the Court of Appeal saw nothing wrong with a support order "without durational limit" in the circumstances. They opined, "[t]here is nothing in the trial judge's order or in the underlying reasons to deprive [Robert] of his right to seek a review should a material change occur in either his or [Diane's] circumstances." And here, they were correct.

Appeal dismissed. *Halliwell* dead. Summary long, but done.

More Fun with Bankruptcy

Unterschultz v. Clark (2020), 48 R.F.L. (8th) 24 (Alta. Q.B.) - Germain J.

The husband and wife agreed to resolve their family law dispute through binding arbitration. At the conclusion of the hearing, the arbitrator determined, among other things, that the husband owed the wife an equalization payment of $1,472,749.50.

The award also provided that if the husband "declared bankruptcy or insolvency, the unpaid balance of the equalizing payment herein shall convert to an award of further retroactive spousal support to enable registration and enforcement by [the Maintenance and Enforcement Program]." From a practical standpoint, this meant that if the husband filed for bankruptcy, the wife would be treated as a preferred creditor (i.e. she would rank behind secured creditors but ahead of unsecured creditors), and that any equalization payment owing would survive the husband's eventual discharge from bankruptcy (see ss. 136(1)(d.1) and 178(1)(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3).

The wife applied to register the arbitrator's award with the court as a judgment of the Queen's Bench pursuant to s. 49 of the Alberta *Arbitration Act*, R.S.A. 2000, c. A-43, which provides, among other things, that:

> 49(1) A person who is entitled to enforce an award made in Alberta or elsewhere in Canada may make an application to the court to that effect.
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> . . . . .
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> 49(7) If the award gives a remedy that the court does not have jurisdiction to grant or would not grant in a proceeding based on similar circumstances, the court may
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> (a) grant a different remedy requested by the applicant, or
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> (b) in the case of an award made in Alberta, remit it to the arbitral tribunal with the court's opinion, in which case the arbitral tribunal may award a different remedy.

On the eve of the hearing, the husband made an assignment in bankruptcy. Quelle surprise.

At the hearing, the husband and his main creditor, Black Earth, took the position that the court could not incorporate the part of the arbitrator's award that converted the outstanding equalization payment owing into lump sum support because the court (and the arbitrator) did not have jurisdiction to make such an award/order.

Justice Germain recognized that the arbitrator had made this award to prevent the husband from avoiding his equalization obligation. His Honour also acknowledged that since the arbitrator's support award was based on the assumption that the wife would receive the equalization payment and be able to use it to generate income, "the transfer of some of the unpaid equalization payment as additional lump sum support may seem reasonable or logical."

The problem with the arbitrator's decision, however, was that there is no basis in law for converting an equalization payment into lump sum spousal support in the event of a subsequent bankruptcy:

> [53] However, the **courts generally do not prefer giving one creditor an advantage over another creditor simply by a declaration in the event of a bankruptcy. Nor do the courts prefer giving a creditor an advantage over a debtor who elects to go bankrupt**. It is the type of clause which if found in an agreement would immediately result in relief against forfeiture as a punitive measure when one feels the need to make an assignment in bankruptcy. **It seems to me that the unpaid amount, if any, after payment to [the wife] pursuant to her unpaid vendor's lien, should be an unsecured debt. I would again rely on section 49(7) of the *Arbitration Act* as this proposed conversion is not an order that I would have granted**. . . . [emphasis added]

That being said, Justice Germain was able to alleviate some of the wife's potential problems by finding that she was entitled to a vendor's lien over the assets that the arbitrator had directed her to transfer to the husband. (A vendor's lien is an equitable lien that "arises by operation of law and is founded on the principle that a purchaser will not be able to keep the property without payment": *Hosseini v. Salerno*, 2010 CarswellOnt 938 (S.C.J.) at para. 22.) His Honour also determined that the wife should not be required to transfer assets to the husband's trustee until she received the equalization payment that she was owed:

> [39] I conclude that it **was the intention of the Arbitrator that the normal niceties between counsel would be exercised and exhibited to bring about the transfers of the various assets. This would at the very least imply a vendor's lien on the assets [the wife] was to transfer to [the husband] to satisfy the property division**. While an account receivable is a form of property, it is not equivalent equitably to an actual interest in property while an equalization payment properly secured is.
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> . . . . .
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> [43] **[The wife] holds an unpaid vendor's lien in her interest in the assets until and unless the equalization payment is made** or satisfactory arrangements are made to deal with it.
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> [44] In short, **I reject [the husband's] submission that the matrimonial property identified in the schedule is his property unconditionally. It will become his property (his Trustee's property) when the transactions relating to its transfer from one to the other are complied with, including the satisfaction of an unpaid vendor's lien**. Until that occurs, [the wife] is under no obligation to release, discharge, or transfer her interest in any of the property identified in the Arbitrator's Award as the asset of [the husband].
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> [45] Even if this obvious vendor's lien entitlement and my interpretation of the Arbitrator's Award would not have ended the issue, then pursuant to *Arbitration Act* section 49(7)(a), **I would not grant an unconditional sale order in similar circumstances but instead would have clarified that [the wife's] interest in the property does not transfer in equity until the equalization payment is paid or otherwise resolved by settlement**. It is inappropriate to characterize the equalization payment as an unsecured debt. This was not the intention of the Arbitrator because that is not how matrimonial property divisions work! When the Arbitrator sets the value of that asset, that is final subject to appeal; when he indicated what goes where that too is final, provided the equalization payment is made. **There is no obligation on the part of [the wife] to simply transfer assets in which she is in equity a co-owner, in exchange for an unsecured creditor's arrangement**. [emphasis added]

The wife was very fortunate that Justice Germain was willing to impose a vendor's lien in the circumstances. In other cases, courts have been clear that parties should generally not be able to obtain additional relief after a final decision has already been made, and in a direct attempt to circumvent a bankruptcy.

For example, in *Thibodeau v. Thibodeau*, an arbitrator determined that the husband owed the wife an equalization payment of approximately $265,000, and that the husband was to pay the equalization payment from his share of the proceeds of sale of their matrimonial home. The husband subsequently went bankrupt, and the wife responded by bringing a motion for an order giving her priority over the husband's other creditors with respect to his share of the matrimonial home, and requiring the husband to transfer his RRSPs to her. In overturning the motion judge's decision, the Ontario Court of Appeal indicated that "[a] subsequent bankruptcy should not normally lead to a variation order shoring up the terms of an equalization payment award or order in a way that impacts the rights of such third parties." [(2011), 5 R.F.L. (7th) 16 (Ont. C.A.) at para. 73]

The lesson in all of this is to make sure to ask the arbitrator or trial judge for specific relief that s/he actually has authority to grant that will: (a) maximize the chances of being able to collect on whatever is owed; and (b) protect against a subsequent bankruptcy to the extent possible. For example, had the wife in *Unterschultz* asked the arbitrator to secure the equalization payment against the husband's assets, and to make it clear that she did not have to transfer any assets to him until she had been paid, this entire situation might have been avoided.

Footnotes

1 The "*Halliwell* Principle" was said to support the proposition that the income of a high-income payor would be the average of the payor's actual income for support purposes and the $350,000 SSAG "soft-ceiling."

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