

FAMLNWS 2020-19
Family Law Newsletters
May 18, 2020

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

Aaron Franks and Michael Zalev

© Thomson Reuters Canada Limited or its Licensors (excluding individual court documents). All rights reserved.

Contents

- COVID-19 Update
- How Do You Solve a Problem Like *Rothgiesser*? (With apologies to the Sound of Music) - Part Two of Two
- There but for the Grace of God Go I: How Do We Spell "Relief"?

COVID-19 Update

"So while COVID-19 initially thrust parents and judges into 'uncharted territory' with dozens of decisions being reported weekly, we're quickly reaching the stage where there really should be no mystery about the balancing act courts are going to engage in."

Justice Pazaratz in *Wallegham v. Spigelski*, 2020 CarswellOnt 5710 (S.C.J.)

—

There have now been enough reported decisions on COVID-19 and parenting that the outcomes of these issues have become fairly predictable. However, our courts are still grappling with other COVID-19 related family law issues, and this week we are going to comment on three of them: (a) Justice Horsman's decision about support in *Small v. Small*, 2020 CarswellBC 1159 (S.C.); (b) Justice Kurz's decision about exclusive possession in *Alsawah v. Afift*, 2020 CarswellOnt 6295 (S.C.J.); and (c) Justice Wingham's decision about remote hearings in child protection cases in *British Columbia (Child, Family and Community Service) v. M.N.*, 2020 CarswellBC 940 (Prov. Ct.).

—

(a) *Small v. Small*, 2020 CarswellBC 1159 (S.C.) - Horsman J.

Last week, we discussed *Jayawickrema v. Jayawickrema*, 2020 CarswellOnt 6052 (S.C.J.), where a trial about property issues was completed before the start of the COVID-19 pandemic, but the decision was not released until after it was already well-underway. As a result, Justice Jarvis gave the parties an opportunity to make further submissions about the impact, if any, that COVID-19 should have on the property issues.

In *Small*, Justice Horsman was faced with a similar situation (i.e. the trial had finished before the pandemic started, but the decision was not released until after it began), but her Honour had to consider the impact of COVID-19 on support instead of property.

The trial about the financial issues in *Small* started in October 2019, and finished in January 2020. Justice Horsman reserved her decision, and released comprehensive reasons on May 7, 2020.

The husband and the wife were married for 12 years and had two children together. At the time of the trial, the husband was working as the Director of Sales and Business Development for a technology company, and earning a salary of \$80,000 a year. He was

also eligible for annual bonuses. The wife was a self-employed Bikram yoga and Pilates instructor, and had gross revenues of approximately \$40,000 a year.

Based on the evidence, Justice Horsman determined that between October 2019 and January 2020, the wife's income for support purposes was \$35,000 a year, and the husband's was \$100,000 a year. However, as she was concerned that the COVID-19 pandemic might have impacted the parties' incomes, she gave them both leave to return the matter to court to deal with "any COVID-19-related impacts on their incomes that are of more than a temporary nature":

[209] Before turning to consideration of the income to be imputed to the respondent, I must comment on the impact of the COVID-19 pandemic on the issue of prospective support. **This trial concluded at the end of January 2020. Since that date, there have been public health directives that have greatly restricted business operations in British Columbia**, including the mandatory closures of fitness centres and yoga studios. There is no present indication of when such restrictions might be lifted.

[210] **These events do not form part of the trial record, and I have no evidence before me as to the impact, if any, of the COVID-19-related restrictions on either parties' income.** However, I am being asked to determine income in a manner that will influence the parties' future financial positions. **I do not think it appropriate to simply ignore post-trial events, of which I can take judicial notice, that suggest there might already have been a material change in circumstances for one or both parties since the trial concluded.**

[211] I will therefore determine each party's income as of the time of trial. However, **I will also give leave to either party to apply to have their income re-determined based on post-trial events.** Hopefully this judgment will provide sufficient resolution of the issues in dispute between the parties that they can consensually resolve any remaining controversies. However, **in the interests of justice and fairness, in my view both parties should have the opportunity to return to court to ensure that any prospective support orders reflect any COVID-19-related impacts on their incomes that are of more than a temporary nature.** [emphasis added]

This was a very sensible way of dealing with the impact of COVID-19. It gave the parties at least some degree of certainty and finality, while also making it relatively easy for them to file further submissions if COVID-19 had adversely affected their respective incomes while the decision was under reserve.

We expect that we will see more decisions allowing parties to make further submissions about the economic impact of COVID-19 as more decisions in cases that were under reserve when the pandemic started are released over the next several months. It is far better to have the Court most recently familiar with the case deal with such issues than possibly force the parties into an almost immediate variation application.

(b) *Alsawah v. Afifi*, 2020 CarswellOnt 6295 (S.C.J.) - Kurz J.

In *Alsawah v. Afifi*, Justice Kurz dealt with the father's claim for exclusive possession of the parties' matrimonial home.

The parties were married for 14 years and had three children together. They separated in October 2018, when the father was arrested and charged with assault against the mother. After the father was charged, the mother and the children remained in the matrimonial home, while the father rented a one-bedroom basement apartment.

By late-February, 2020, all three children had moved in with the father. The father claimed that he could not afford to rent a larger home, and brought a motion for exclusive possession of the matrimonial home and to oust the mother from the property.

After reviewing the evidence and the statutory factors, Justice Kurz granted the father's motion. Even though the father had already been out of the matrimonial home for a-year-and-a-half as a result of the outstanding criminal charges and his bail conditions, Justice Kurz found that it would be in the children's best interests to give the father exclusive possession and require the mother to vacate the home:

[83] **I recognize the presence of factors regarding exclusive possession that cut both ways in this motion.** The mother refers to the father's violence and his outstanding charges. She has far less income than the husband. The father is seeking a remedy that would oust her from the home to which she has a presumptive right of possession. Unless she wishes to consider switching homes with him, she has no immediate alternate place to stay. There are significant credibility issues here. All of those factors must give a motion judge pause.

[84] **Yet in deciding this motion, I must hark back to the paramount concern of the children's best interests. It is clearly in their best interests to trade their cramped quarters for their former spacious home.** The best interests factor acquires far greater weight when considering effects on the children of the COVID-19 pandemic "social distancing" rules and H's suicide attempt. A return to their home will give them added stability and security.

[85] In a similar vein, **I cannot ignore the fact that four people are living in a basement apartment while only the mother lives in the home.** If most of the father's housing expenses are going to that home, shouldn't the greatest number of family members, and particularly the children, utilize it? Further, the father's basement apartment is available for the mother to use, at least in the short term, if she wishes. [emphasis added]

We will have more to say about this case in the future because, in addition to the COVID-19 related issues, it contains a comprehensive discussion (at paragraph 108) of what Justice Kurz referred to as the "rhetorical excess in family litigation", as well as some very useful suggestions for "lowering the rhetorical temperature" in future family law cases.

—
(c) *British Columbia (Child, Family and Community Service) v. M.N.*, 2020 CarswellBC 940 (Prov. Ct.) - Wingham J.

The Director of Child, Family and Community Service (the "Director") removed the 11-year-old child in this case from his mother's care in January 2020.

When the COVID-19 pandemic started, the Director unilaterally suspended the mother's in-person access "based on a universal policy applying to all children in care." As a result, the mother brought an urgent application to have the protection hearing proceed immediately. The Director accepted that the matter was urgent, but asked that the trial be scheduled in three or four months so that it would have time to prepare.

Justice Wingham was not prepared to put the case off for another three months, and ordered that the ***trial would proceed by telephone*** as quickly as possible:

[25] I am satisfied that the protection hearing, by its nature, is urgent. At this time **it is uncertain as to when the Court will be able to accommodate a hearing in the traditional sense, involving personal appearances by counsel, parties and witnesses.**

[26] **I direct that the protection hearing be set to proceed on an expedited basis.** I am seizing myself with the hearing. **It will be conducted by telephone** and it will be clerked out of the [omitted for publication] registry. **There will be a pre-trial conference within a week of this decision and more if required to address trial preparedness and any other issues which counsel may have as to the conduct of the trial.**

[27] While there may be concerns as to whether a hearing of this nature can be properly conducted by telephone, I am mindful of the words of Mr. Justice McFarlane in the *Director v. B.S.* case that if the circumstances justify it an adjournment may be granted from time to time in order to achieve a fair and proper hearing. [emphasis added]

We are curious to see how a trial that is conducted over the phone will actually work. A remote child protection trial will undoubtedly require significant pre-trial work and planning, and will involve a steep learning curve for all involved. However, we commend Justice Wingham for having the courage to take the necessary steps to ensure that a decision can be made about

what should happen to the 11-year-old child at the centre of this case as expeditiously as possible, instead of being put on hold until it can be heard in person.

On a related note, last week, the joint e-Hearings Task Force of The Advocates' Society, the Ontario Bar Association, the Federation of Ontario Law Associations, and the Ontario Trial Lawyers Association released a comprehensive report as to "Best Practices for Remote Hearings" that provides guidance about preparing for and conducting a remote hearing. The report is a "must read" when dealing with a remote hearing, and can be accessed from the following website:

https://www.advocates.ca/Upload/Files/PDF/Advocacy/BestPracticesPublications/BestPracticesRemoteHearings/Best_Practices_for_Remote_Hearings_13_May_2020_FINAL_may13.pdf

How Do You Solve a Problem Like *Rothgiesser*? (With apologies to the Sound of Music) - Part Two of Two

Anderson v. Bubb, 2020 CarswellOnt 3569 (S.C.J.) - Gray J.

In *Anderson*, the wife brought a motion for summary judgment and sought a final order for spousal support. The agent for the husband had just been retained, and requested an adjournment. For reasons that are explained below, the request for an adjournment was rejected, and summary judgment was granted - a somewhat rare combination.

The parties started cohabiting in 2005, and were married in May 2009. They separated on or about November 1, 2017.

Since 2005, the husband had earned approximately \$92,250 USD, and the wife had earned approximately \$50,000 a year.

In 2009, the parties moved to Alabama because the husband was offered a job there. The wife did not work in Alabama, except for one year when she worked a minimum wage job.

When the parties separated in 2017, the husband stayed in Alabama and the wife returned to Ontario. The wife did not work after she returned to Ontario, and in July 2019, she was diagnosed with Concurrent Disorder - depression and anxiety. She was also an alcoholic and was receiving therapy.

In November 2019, the wife's lawyer wrote to the husband to request spousal support. The husband immediately responded by cutting off the small amount of financial support that he had been voluntarily providing to the wife, and starting a divorce proceeding in Alabama.

The wife filed a response to the proceeding in Alabama in December 2019, that included the following paragraph:

I am currently seeking spousal support/alimony. I am currently unable to work due to medical reasons. I have no income. I am asking spousal support as I gave up my job, bonuses and contributions to my retirement fund as I was no longer working in Canada. [The husband's] assets were to take care of both of us. I have had to claim hardship this year in order to access some of my retirement savings to make ends meet.

The court in Alabama apparently misplaced the wife's response, and treated the matter as an undefended proceeding. A final divorce judgment was granted on February 6, 2020. However, upon discovering that the wife had, in fact, filed a response, the court set aside the divorce judgment, and scheduled the trial for March 17, 2020.

In the meantime, on November 8, 2019, the wife commenced an Application in Ontario for a divorce and spousal support. It was served on the husband on January 17, 2020.

When the wife learned that the trial would be taking place in Alabama on March 17, 2020, the wife brought a motion for summary judgment in Ontario on March 4, 2020. She requested that her claim for a divorce in Ontario be severed from the corollary relief, and that the husband pay her \$2,163 a month in prospective spousal support and \$62,727 in retroactive support.

Keeping *Rothgiesser* in mind, it should now be clear why Justice Gray refused the husband's request for an adjournment - had the adjournment been granted, the wife would have almost certainly lost the ability to pursue her claim for spousal support in Ontario when the Alabama case was heard just a few weeks later. As Justice Gray noted in his decision:

[22] It is quite evident that the proceeding commenced by the [husband] in Alabama was commenced with the clear intention to deprive the [wife] of any opportunity to make a realistic claim for spousal support.

.

[26] Perhaps most significantly, if this motion is not heard, and the divorce proceeding is heard in Alabama, it is a virtual certainty that this court will lose jurisdiction to grant spousal support.

Although the husband was served with the wife's application on January 17, 2020, he did nothing to respond to it. Justice Gray was also satisfied that although the time for the husband to respond to the motion was short, he had been given enough time to prepare responding materials.

There was no doubt that the wife had been ordinarily resident in Ontario since November 1, 2017. Thus, pursuant to s. 3(1) of the *Divorce Act*, the Court had jurisdiction to hear the divorce proceeding, and the Court had jurisdiction to hear the claim for corollary relief pursuant to s. 4(1)(a).

However, as we all now know, if a foreign court grants a valid divorce, a Canadian court loses jurisdiction to grant corollary relief. In addition to *Rothgiesser*, *Okmyansky v. Okmyansky* (2007), 38 R.F.L. (6th) 291 (Ont. C.A.) provides further clear and unequivocal authority that a Canadian court does not have jurisdiction to hear and determine a corollary relief proceeding under the *Divorce Act* following a valid foreign divorce. At paragraph 38 of *Okmyansky*, Justice Simmons held that without a divorce granted in Canada, a request for spousal support could not properly be viewed as "corollary relief" under the *Divorce Act*.

It is also clear that once a foreign divorce has been granted, a court in Ontario does not have jurisdiction to grant spousal support under the *Family Law Act*: *Cheng v. Liu* (2017), 94 R.F.L. (7th) 23 (Ont. C.A.) at para. 34 and *Okmyansky* at para. 42.

Justice Gray did not find that the wife had a strong claim for compensatory support. The parties were mature and self-sufficient when they got married, and it was not clear that she had done very much, if anything, to advance the husband's career. However, relying on *Bracklow v. Bracklow* (1999), 44 R.F.L. (4th) 1 (S.C.C.) and *Van Rythoven v. Van Rythoven*, 2009 CarswellOnt 5187 (S.C.J.); aff'd (2010), 99 R.F.L. (6th) 152 (Ont. Div. Ct.), Justice Gray found that the wife had a strong non-compensatory claim, given her various ailments, and proceeded to order spousal support on the mid-range of the Spousal Support Advisory Guidelines.

Spousal support claims are rarely determined by way of summary judgment, and the vast majority of spousal support cases will almost invariably raise genuine issues requiring a trial about quantum and duration. In this case, however, given that the husband had not responded to the wife's Application and was clearly trying to prevent her from being able to pursue her claim for spousal support in Ontario, in our view, summary judgment was an appropriate way to deal with this particular case.

The question we still have, however, is what would have happened had the husband filed responding materials that raised a genuine issue requiring a trial (as such materials most often would)? Would Justice Gray have had to dismiss the motion in its entirety, thereby effectively precluding the wife from ever being able to pursue her claim for spousal support in Ontario? Or if the facts clearly showed entitlement, could the Court grant partial summary judgment on the issue of entitlement and order support of \$1 a month subject to subsequent variation (or more likely a *de novo* review), effectively adjourning the issues of quantum and duration to the trial or the review? All interesting possible solutions. We will have to wait and see.

There but for the Grace of God Go I: How Do We Spell "Relief"?

R-E-P-O-R-T-I-N-G L-E-T-T-E-R

Fitzpatrick v. Hefferman (2019), 35 R.F.L. (8th) 81 (N.L. C.A.) - Green, Welsh, and O'Brien JJ.A.

This family law based solicitors negligence case provides an important reminder to lawyers to tell their clients whether and when a retainer has ended, what the client must still do to complete the matter, and whether there are any important deadlines of which the client must be aware.

The wife's first lawyer prepared a draft separation agreement that provided, among other things, that the wife would receive part of the husband's pension. However, the draft separation agreement was never signed.

The wife subsequently retained the appellant lawyers (the "lawyers") through the Legal Aid Commission to help her try to finalize the matter. She gave them a copy of the unsigned draft separation agreement, and told them that she was "only interested in pension division as all other things are settled[.]"

In 2003, the lawyers helped the wife resolve child support issues, and obtained the husband's consent to allow the wife to move to B.C. with the children. The wife moved to B.C. in August 2003, and had no further contact with the lawyers after that for many years. However, there was no evidence that the lawyers ever discussed ending their retainer with the wife, or told her what still needed to be done to deal with the pension and/or whether there were any deadlines of which she had to be aware.

In 2013, the wife learned that the husband had retired and was receiving his pension. She contacted the Legal Aid Commission to find out about her entitlements to the husband's pension, but was told that "the division of her husband's pension had not been dealt with by the [lawyers], and that she ought to seek independent legal advice[.]" The wife subsequently learned that the husband's pension could no longer be divided because they had been divorced on February 24, 2002, and the limitation period to divide the pension had expired two years after the divorce was granted (i.e. almost 10 years earlier in February 2004).

On January 20, 2014, the wife sued the lawyers for negligence.

The lawyers responded by claiming that her action against them was statute barred. In Newfoundland, s. 5(b) of the *Limitations Act*, S.N.L. 1995, c L-16.1 establishes a two-year limitation period for negligence claims, and s. 13(1) provides that the limitation period starts to run once the claim has been "discovered." However, s. 13(3) provides for an "ultimate" limitation period - even if a negligence claim has not been discovered, it cannot be brought "after the expiration of 10 years from the later of the date of (a) the act or omission on which that action is based; or (b) the last of a series of acts or omissions or the termination of a course of conduct where that action is based upon a series of acts or omissions or a continuing course of conduct."

Other provinces have similar provisions in their statutes of limitations. For example, in Ontario, s. 15(2) of the *Limitations Act*, 2002, S.O. 2002, c. 24, Sched. B. provides that "[n]o proceeding shall be commenced in respect of any claim after the 15th anniversary of the day on which the act or omission on which the claim is based took place." Notably, in these instances, the limitation period is detached from the notion of discoverability, and linked only to the act or omission in issue.

The wife took the position that her January 20, 2014 claim against the lawyers was timely because she did not discover it until 2013 when she learned that her former husband had started receiving his pension. The lawyers, in contrast, argued that the limitation period had expired 10 years after their last contact with the wife in August 2003, and as a result her 2014 claim against them was statute barred.

The trial judge agreed with the wife, and found that her January 20, 2014 claim was not statute barred by either the two-year limitation period or the 10-year ultimate limitation period because:

- The two-year limitation period established by s. 5(1) of the *Limitations Act* did not start to run until 2013 when the wife learned that her former husband was receiving his pension. Accordingly, the two-year limitation period did not expire until 2015, which was about a year after the wife commenced her Action against the lawyers.
- The 10-year limitation period established by s. 13(3) of the *Limitations Act* did not start to run until the time for the wife to apply to divide her former husband's pension had expired (i.e. two years after the February 2002 divorce was granted).

Accordingly, the 10-year limitation period did not expire until February 2014, which was just over a month *after* the wife had commenced her Action against the lawyers.

The lawyers appealed, and argued that the trial judge had erred in finding that the 10-year ultimate limitation only started to run in February 2004, and that the 10-year limitation period had actually started to run in August 2003, when the wife moved to B.C., as that was when their retainer with her had ended.

The Court of Appeal disagreed. Although the lawyers did not have any contact with the wife after August 2003, *their retainer with her had continued* because they had not taken the necessary (or any) steps to tell the wife specifically that their solicitor-client relationship had come to an end:

[32] **A lawyer who purports to terminate the solicitor-client relationship before the mandate resulting from the retainer is completed must therefore do so in clear and unambiguous terms** because termination in this fashion effectively limits the scope of the original retainer without consent of the client. **Absent a clear termination by the lawyer, the relationship will be presumed to continue during which time the lawyer will remain under a duty to complete the work.**

.....

[34] Thus, absent an express termination of the retainer by the client or the dissolution of the relationship by mutual agreement, **the onus will be on the lawyer to make it clear to the client that the solicitor-client relationship is at an end. This is especially so where, at the time of termination, the mandate for which the lawyer was originally retained has not been completed.** [emphasis added]

Although a lawyer is not liable for what happens after the retainer is terminated " the lawyer must clearly communicate the end of the retainer: *Baines v. Linett & Timmis Barristers & Solicitors*, 2014 CarswellOnt 4769 (S.C.J.); *Shearform Construction Ltd. v. Cook Duke Cox Tod & Kenny*, 2008 CarswellAlta 856 (C.A.); and *Nicolardi v. Daley*, 2005 CarswellOnt 3364 (S.C.J.).

The Court of Appeal also concluded that even if the solicitor-client relationship had ended when the wife moved to B.C. in 2003, the wife's claims would still not be statute-barred because the lawyers had not actually told the wife that they had not completed the work that she had instructed them to do - and this obligation survived the end of the retainer:

[36] . . . **There was a separate duty on the part of the lawyers, on termination of the engagement, to notify the client of uncompleted work and of the legal consequences if it remained uncompleted so that the client could take other steps to protect herself.** Although the issue does not arise in the current case, we would observe that **any such notification by the lawyer should be given in a reasonable and timely manner** so as to give the client a reasonable time in which to take action to protect herself before the limitation period expires. **That duty, which is different from the duty to carry out the professional mandate, which only survives so long as the solicitor-client relationship continues to exist, survives the termination of the relationship and continues until it is discharged.** That duty falls within the scope of [the wife's] statement of claim which alleges a failure on the part of the appellant lawyers to "perform [their] professional duties towards the plaintiff" (paragraph 14). The continuation of that duty, so long as it is not discharged, up to the time of the expiration of the limitation period in this case, means that the ten-year ultimate limitation period imposed by section 14(3)(a) of the *Act*, which runs from the last act or omission, in this case a continuing omission, was not expired. [emphasis added]

So remember, tell your clients *in writing* when your retainer has ended, and whether any work still needs to be done and/or there are any deadlines that the client need be aware of. That way, you will have maximized your chances of being able to rely on a limitation period later if a claim is ever brought.