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

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Contents

Date-of Marriage Deductions for Prior Existing Obligations

Lefebre v. Lefebre (2020), 38 R.F.L. (8th) 421 (Ont. S.C.J.) - Fryer J.

This high-conflict financial case involved a second marriage for the husband ("John") and a third marriage for the wife ("Barbie"). The 11-day trial dealt with spousal support as well as a host of seemingly trivial property issues that were hotly contested, including household contents, ownership of a $10,000 - $15,000 sailboat, ownership of two horses with a combined value of $7,500 and credit card loyalty points. The reason this case is important, however, is that it also dealt with the interesting question of whether John's outstanding financial obligations to his first wife, Doris, when he and Barbie married should be date-of-marriage debts/deductions when calculating his equalization obligations to Barbie.

John separated from Doris in 2000, and he married Barbie in ***2004***.

When John and Barbie married, he was still involved in family law litigation with Doris over the financial issues arising out of the breakdown of their marriage.

In 2007, John and Doris attended mediation with an experienced family law mediator, and they signed a Separation Agreement that required John to pay Doris $200,000 in cash, and to rollover $300,000 in RRSPs. The Agreement stated that the $200,000 was being paid:

> in full and final satisfaction of all of [Doris'] claims in relation to spousal support, both retroactively and on a going forward basis, as well as her claims for retroactive child support and arrears of child support,

and that the $300,000 RRSP rollover was being paid,

> in full and final satisfaction of [Doris'] claims to an equalization of the parties' net family properties pursuant to Part I of the *Family Law Act*.

At John and Barbie's trial, Barbie took the position that John had a $500,000 debt on the date of marriage based on what he eventually ended up paying Doris in order to resolve their family law dispute. From a practical standpoint, had Barbie succeeded on this issue, the equalization payment that John owed her would have increased by approximately $250,000 (or, to be more precise, $250,000 less 50 percent of the notional taxes associated with the $300,000 in RRSPs that John eventually rolled over to Doris).

Justice Fryer was tasked with dealing with this interesting issue.

The starting point was the Ontario Court of Appeal's decision in *Greenglass v. Greenglass* (2010), 99 R.F.L. (6th) 271 (Ont. C.A.), where it held that "contingent liabilities are to be taken into account as long as they are reasonably foreseeable", and that "[i]n determining the present value of a contingent liability, courts have looked at what was reasonably foreseeable on the valuation date[.]"

Based on *Greenglass*, it would certainly stand to reason that if John had an ongoing child or spousal support obligation to Doris when he married Barbie, the capitalized value of that obligation could/should be calculated and deducted from the value of his assets on the date of marriage. However, the case law that has previously dealt with this issue has actually determined that an ongoing support obligation on the date of marriage should ***not*** be included in the equalization calculations. For example, in *Fox v. Fox* (2006), 26 R.F.L. (6th) 64 (Ont. S.C.J.), Justice Karakatsanis (as she then was) refused to include the husband's ongoing *child support* obligations as a date-of-marriage debt:

> While I accept that [the husband] had an ongoing obligation to pay child support at the time of marriage, I do not accept that it should be calculated as a liability with the effect of reducing his assets on marriage. It was no doubt an expense that [the husband] was obligated to pay; however, there are many other ongoing expenses that a spouse may be obligated to pay, such as rent or future income tax that are not deducted as liabilities against existing assets at the date of marriage.

See also *Kilmer Estate v. Kilmer*, 1999 CarswellOnt 4823 (S.C.J.) and *McGoey v. McGoey*, 2003 CarswellOnt 3994 (Ont. S.C.J.).

Justice Fryer noted important policy reasons for not including the capitalized value of a periodic support obligation as a spouse's debt on the date of marriage:

> [102] In *Kilmer Estate*, which was decided 20 years ago, Heeney J. expressed concern about the far-reaching implications of finding that a periodic child support obligation could be construed as a liability under s. 4 of the FLA. The passage of time has only heightened these concerns.
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> [103] **If a periodic support obligation was construed as a liability, it would require evidence - likely from an actuary or a similar expert - as to the present value of the obligation on the relevant date**: see *Virc v. Blair*, 2016 ONSC 49 (Ont. S.C.J.) aff'd at 2017 ONCA 394 (Ont. C.A.). **The court would be required to consider the reasonably foreseeable contingencies** applicable to the obligation which could necessarily include answers to the following questions:
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> - What are the future income prospects of both parties?
> - Has either party re-partnered or anticipate re-partnering?
> - Does either party have any health issues?
> - How long is the child expected to be a dependent?
> - Is a change in the child's residence foreseeable?
> - What are a child's prospects for post-secondary education?
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> The list goes on.
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> [104] Even with the assistance of the *Child Support Guidelines* and the *Spousal Support Advisory Guidelines*, **the variety of factors that could impact the calculation would require the judge to make numerous discretionary assessments and translate those assessments into numerical discounts. These variables can only inject ambiguity and uncertainty into the division of net family property calculation.**
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> [105] Issues with respect to equalization and support can already take an immense amount of time and resources for the parties before the court. **If the analysis was opened up with respect to the support entitlement or obligation in relation to a previous spouse and/or child, it is not hard to imagine the commensurate increase in the length and breadth**

> **of litigation.** Furthermore, these arguments could open the door to fresh litigation with the ex-spouse who may be called upon to give evidence.
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> [106] **As the family court is faced with increasing numbers of self-represented litigants, many of whom are in their second relationship, the prospect for these parties, most of whom will not be able to afford expert evidence, and for judges required to undertake this kind of analysis, is daunting.** [emphasis added]

Based on *Fox* and the other such cases, Justice Fryer concluded that the $200,000 in cash that John paid Doris in 2007 to settle her spousal support and retroactive child support claims should not be included as one of John's debts when he married Barbie in 2004. While Justice Fryer accepted that John would have been able to deduct this debt if it had actually existed when he married Doris in 2004 (or had it been at least *quantifiable*), the fact that John ended up paying Doris a lump sum to settle the support issues three years after he married Barbie was insufficient to overcome the significant evidence that it was not reasonably foreseeable *in 2004* that John's support obligations to Doris would be resolved by way of a lump-sum payment:

> [64] **The fact that the lump sum payment later made to Doris might have been made in satisfaction of obligations related to John's first marriage does not in of itself re-characterize it as a liability that existed on the date of his marriage** to Barbie: see *Cosentino v. Cosentino*, 2015 ONSC 271, 55 R.F.L. (7th) 117 at para. 38.
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> [67] **There was no evidence that a lump sum payment was in the minds of John or Doris on the date of John's marriage to Barbie or even upon entering the mediation three years later**. This issue was not identified by John and Doris from the list of possible issues in the mediator's retainer agreement. The possibility of a lump sum appears to have been raised for the first time by the mediator himself. [emphasis added]

On the facts of this case, Justice Fryer was correct finding that the as-yet-to-be-determined (as of the time of John's marriage to Barbie) future spousal support obligation could not properly form a date-of-marriage deduction. At the time of marriage, the deduction was simply too speculative. Furthermore, the amount of the date-of-marriage deduction would be subject to change depending on how it was characterized in the Agreement between John and Doris (see below). For example, what if the numbers used for the components had been different only to make a better tax deal?

That said, we do want to be clear that there is nothing inherent in the nature of support that would disqualify known payments as proper date-of-marriage deductions. For example, to change the facts slightly:

- Were it *known* on the date of marriage that John would have to pay Doris $100,000 in two years as a final tranche of lump sum spousal support, there would be no basis to deny the deduction.

- Were it *known* on the date of marriage that John had a *fixed* remaining spousal support obligation of $2,500 a month for a further 60 months, the present value of the after-tax cost of that support to John should be a date-of-marriage deduction.

However, the further one gets from fixed and quantifiable spousal support, the more speculative the potential deduction becomes. What if, at the time of his marriage to Barbie, John had a remaining fixed quantum obligation of $2,500 a month for a further 60 months, at which time there would be a spousal support review? We would suggest, as in the second bullet above, that the present value of the after-tax cost of that support *to the date of the review* should be deductible. But anything possibly payable after the review becomes very speculative. The same goes for an open-ended support obligation subject to variation. It is all a matter of degree. With the proper evidence, the court can *estimate*; and it can *guesstimate*. But it cannot *speculate*.

Courts deal with "impossible to calculate" damages all the time in the context of personal injury cases. And courts will regularly have to conduct a "trial within a trial" in negligence actions to determine the most likely outcome of underlying lawsuits. However, courts must distinguish between damages that are hard to calculate and that may require some degree of guess-work, and damages that are unproven on account of the failure to adduce available evidence: *Martin v. Goldfarb*, 2003 CarswellOnt

4553 (Ont. C.A.); *Jarbeau v. McLean*, 2017 CarswellOnt 1656 (C.A.); and *Fellowes, McNeil v. Kansa General International Insurance Co.*, 1998 CarswellOnt 5681 (Gen. Div.).

The question of the $300,000 RRSP rollover, however, is more complicated because John and Doris' Agreement specifically stated that the RRSPs were being transferred to Doris in full and final satisfaction of her claim for an equalization payment. Since the obligation to pay a non-variable equalization payment arises on separation, based on the wording of the Agreement it certainly appeared that John had a debt in the form of an account payable (the equalization payment to Barbie of at least $300,000 less notional taxes when he married Doris in 2004). That said, as detailed below, we note again that the $300,000 figure may be elusive and not *necessarily* reflective of equalization.

John's evidence was that, notwithstanding the express wording of the Agreement, the $300,000 RRSP rollover had actually been meant to settle Doris' support claims, and his evidence was corroborated by both Doris and the lawyer who acted for him on the settlement. Doris' evidence was that she and John, "had fully settled the issue of the equalization of property in 2002, and that the only reason the agreement made reference to further equalization was so that the parties could take advantage of the tax-free rollover of the RRSP." John's lawyer on the settlement also testified that the *primary* issues at the mediation had been parenting, child support and spousal support, but the property issues were not dealt with as they had already been settled.

Based on this evidence and the cases discussed above, Justice Fryer determined that the fact that the 2007 Agreement required John to roll $300,000 in RRSPs to Doris as an equalization payment was insufficient to establish that he actually still owed Doris an equalization payment when he married Barbie in 2004. Although it may not have been appropriate for John and Doris to refer to a lump-sum spousal support payment as a property payment to avoid having to pay tax on the RRSPs now, that did not change the fact that John did not actually owe Doris any money on account of property when he married Barbie.

We agree with Justice Fryer that there are good policy reasons for not requiring a spouse to include the value of an indeterminate periodic support obligation as a debt on the date of marriage. We also agree that her decision was correct based on the cases that have already dealt with this issue. So until an appellate court says otherwise, it appears that in Ontario, a periodic support obligation ***cannot*** be included as a debt when calculating an equalization payment under the *Family Law Act*.

That being said, we do have some doubts as to whether it is actually correct at law that a periodic support obligation on the date of marriage can/should simply be totally ignored. An ongoing support obligation is a reasonably foreseeable liability. And it is arguably unfair to the other party (Barbie in this case) to not have John take some sort of date-of-marriage deduction for the value of his obligation to Doris. While it may be difficult to determine the present value of a future support obligation, as the Ontario Court of Appeal noted in *Greenglass*, "the fact that the assessment of the amount of future costs is difficult does not mean that no future costs are foreseeable." And, as Mr. Epstein and (now) Justice Madsen had to say in their discussion of *Fox* in the April 4, 2006 edition of *TWFL*,

> When we calculate the value of, say, an RRSP at date of marriage, we routinely reduce it by the notional tax, just as we do for the RRSP at valuation date. Why couldn't the present value of future child support, actuarially determined, be deducted as a liability at date of marriage?

So while Justice Fryer is unquestionably right on the law as it presently stands, it may be that this issue deserves another look. Given the frequency of re-partnering, this is an issue that is going to arise over and over again.

The *Child Support Guidelines* and Children with Disabilities - Time for an Amendment

C.M. v. G.M. (2020), 38 R.F.L. (8th) 303 (N.B. C.A.) - Green, Baird, French JJ.A.

In *C.M. v. G.M.*, the New Brunswick Court of Appeal confirmed that, as in most other provinces, child support in New Brunswick for a disabled adult child of a marriage is to be determined based on "the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child" pursuant to s. 3(2)(b) of the *Child Support Guidelines* (the "*Guidelines*").

The Courts of Appeal for Saskatchewan, Manitoba and Ontario have reached the same conclusion: *Senos v. Karcz* (2014), 45 R.F.L. (7th) 97 (Ont. C.A.), *Rémillard v. Rémillard* (2014), 52 R.F.L. (7th) 299 (Man. C.A.), and *Wetsch v. Kuski* (2017), 1 R.F.L. (8th) 290 (Sask. C.A.).

The parties had a 21-year-old son. He was over the age of majority, but had significant special needs and required full-time care from the mother and a number of other caregivers. The father was not involved with the son and had not even seen him since 2014. Given the son's special needs, there was no dispute that he remained a "child of the marriage" under the *Divorce Act*, as he was clearly "unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life[.]"

The Application judge, Justice Bélanger-Richard, found that the father was intentionally underemployed and imputed him with an income of $39,000 a year, which would have resulted in Table child support of $317 a month. However, because the son was over the age of majority and receiving more than $9,000 a year in disability benefits, Justice Bélanger-Richard also had to determine what impact, if any, the disability benefits should have on the father's support obligations, and whether he should have to contribute to the son's various special and extraordinary expenses.

In *Senos*, *supra*, which has been discussed previously a number of times in *TWFL*, the Ontario Court of Appeal found that the approach to child support that is set out in s. 3(2)(a) of the *Child Support Guidelines* is inappropriate when dealing with child support for a disabled adult child of the marriage who is receiving government benefits:

> [64] [**The Ontario Disability Support Program] reflects society's commitment to sharing financial responsibility for adults with disabilities. It makes little sense to calculate child support on the basis that this responsibility falls only on the parents.** In my view, the assumption of some responsibility by the state and [the child of the marriage's] receipt of income support for his board and lodging make the Table approach inappropriate. **These circumstances change the equation and call for a bespoke calculation based on [the child of the marriage's] unique condition, means, needs and other circumstances, including his receipt of ODSP, and the ability of his parents to contribute to his support.**
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> [67] The Table amount is predicated on the parents alone sharing responsibility for the financial support of their child. **In the case of adult children with disabilities, the ODSPA commits society to sharing some responsibility for support. In my view, this makes the s. 3(2)(a) approach inappropriate, and s. 3(2)(b) should be applied to achieve an equitable balancing of responsibility between Antoni, his parents and society.** [emphasis added]

Relying on *Senos*, Justice Bélanger-Richard concluded that the usual "Guideline approach" to child support under s. 3(2)(a) of the *Guidelines* was inappropriate in this case because of the disability benefits that the son was receiving, and turned to the discretionary approach set out in s. 3(2)(b). It is worth emphasizing that it is the *Guideline* "**approach**", not the *Guideline* **amount**, that must be found to be inappropriate: *N. (W.P.) v. N. (B.J.)* (2005), 10 R.F.L. (6th) 440 (B.C. C.A.); *Lu v. Sun* (2005), 17 R.F.L. (6th) 57 (N.S. C.A.); *Geran v. Geran* (2011), 97 R.F.L. (6th) 68 (Sask. C.A.); *Hunchak v. Anton* (2016), 77 R.F.L. (7th) 77 (Sask. C.A.); *McClement v. McClement* (2017), 4 R.F.L. (8th) 267 (B.C. C.A.); *Rebenchuk v. Rebenchuk* (2007), 35 R.F.L. (6th) 239 (Man. C.A.).

Given the mother's limited means and the son's significant expenses, Justice Bélanger-Richard determined that the father should be required to pay full Table child support of $317 a month, as well as his proportionate share of the afterschool care and summer camp at the YMCA, and the costs of a home support worker. However, she declined to order the father to make a further contribution towards the costs of a wheelchair accessible van for the son, as she had already taken those additional costs into account in determining that he should have to pay full Table support.

The mother appealed, and sought a "reversal" of Justice Bélanger-Richard's decision because the Province was going to claw back the child support payments from her social assistance benefits on a dollar-for-dollar basis.

In dismissing the mother's appeal, the Court of Appeal found that the mother had known about the "claw back" before the hearing, and that "the judge's decision to proceed in the fashion she did is consistent with jurisprudence on this subject and is an exercise of discretion which generally attracts deference by this Court."

We have no issue with Justice Bélanger-Richard's discretionary decision, or the Court of Appeal's decision to uphold it. However, given the increasing number of cases we are seeing about child support for disabled adult children, we wonder if the time has come to seriously consider amending the *Guidelines* to include a specific provision to address this issue to ensure uniformity in approach and predictability in result (one of the objectives of the *Guidelines*).

It should not be difficult for the various levels of government that provide benefits to people with disabilities to also decide how those benefits should interact with the applicable child support regime. Parents with disabled adult children should be able to have the same type of certainty and predictability that most other separated parents already have, and the outcome of these difficult cases should not always have to turn on exercises of discretion and arguments about budgets.

We also find it difficult to understand how it is equitable to deduct the child support that the mother was able to obtain from the father from the already limited social assistance that the she was receiving on a dollar-for-dollar basis. Several provinces have already stopped this type of practice (e.g. B.C. in 2015, Ontario in 2017, and Nova Scotia in 2018), and hopefully the provinces that have not yet done so will do so soon to avoid what appears to be an otherwise punitive result.

In the meantime, if you have a case involving the interplay between child support and social assistance, make sure that you understand the impact that each regime has on the other, and to consider whether your client has any options to legally avoid a potential claw back. And it is also important to remember that, at least for the time being, not every province treats such payments equally. So when it comes to precedent, reader beware.

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