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— Franks & Zalev - This Week in Family Law

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Contents

You Should Probably Actually *Read* that Arbitration Agreement

Hristovski v. Hristovski (2020), 43 R.F.L. (8th) 139 (Ont. S.C.J.) - Van Melle J.

Hristovski offers yet another reminder that if parties are going to arbitrate, they must understand and carefully consider their appeal rights *before* they sign the arbitration agreement.

In 2017, the parties agreed to mediate/arbitrate all of the issues arising on the breakdown of their marriage, with a senior family law lawyer in Ontario.

During the arbitration process, the wife brought a motion to compel the husband to produce additional disclosure that her expert allegedly needed to complete his analysis of the husband's income for support purposes.

While the arbitrator granted some of the wife's requests for disclosure, he dismissed others.

The wife appealed the arbitrator's decision, and an issue arose about whether the Court had jurisdiction to hear this appeal from what was very clearly an interlocutory Award.

In the section of the parties' arbitration agreement that dealt with appeals, they agreed that they would both be able to appeal questions of law, fact, and mixed fact and law as of right. However, the agreement was silent as to whether they could appeal interlocutory decisions. And that was a serious problem for the wife because, based on the Ontario Court of Appeal's decision in *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 CarswellOnt 5276 (C.A.) (see the October 21, 2019 edition of *TWFL*), there is no appeal from an interlocutory Award unless the arbitration agreement expressly provides for such an appeal. A procedural or interlocutory ruling is not, by default, an "award" that is subject to appeal. See also *Mull v. Mull*, 2018 CarswellOnt 8264 (S.C.J.) and *Hutchison v. Mullin* (2019), 34 R.F.L. (8th) 230 (Ont. S.C.J.).

As noted by Justice Lemon in *Hutchison* (quoting Justice McGee with approval in *Mull*:

> [11] The court's jurisdiction to intervene in an arbitration process is limited. The modern approach sees arbitrations as autonomous, self-contained, and self-sufficient processes within which parties have agreed to resolve their dispute through the services of an arbitrator, and not by the courts.
>
> [12] In keeping with that modern approach, there are no appeals from interlocutory Orders. Similarly, procedural decisions, such as the interim production of disclosure are immune from review under the *Arbitration Act*.

> [13] There are sound policy reasons for courts not intervening in interlocutory Arbitration Awards: it can undermine the purposes of an arbitration process, making it less useful to disputants, and it could constitute a serious reproach to the ability of our system of arbitration to serve the needs of its users.

As a result, the wife's appeal was dismissed with costs.

The lesson? Before entering into an arbitration agreement, it is critical to consider the default options for appeals, and whether and how you want/need to modify those defaults to suit the needs of your particular case. If you want to be able to appeal interlocutory or procedural awards, you must so specify in the arbitration agreement.

Review Clauses: Be Careful What You Wish for 'Cause You Just Might Get It

Fitzpatrick v. Fitzpatrick (2020), 42 R.F.L. (8th) 195 (B.C. S.C.) - Warren J.

The parties were married in 1988 and had two children together. They separated in 2007.

In 2010, they consented to an order that the husband pay the wife $3,545 a month in spousal support based on the husband's income of $170,000 a year, and the wife having nominal income. Although the order did not include a time limit on the husband's support obligation, it provided that, "[t]he spousal support shall be reviewed in three (3) years." This was important because, as the B.C. Court of Appeal explained in *Jordan v. Jordan* (2011), 8 R.F.L. (7th) 147 (B.C. C.A.), "[a] review hearing does not require a preliminary threshold finding of a change of circumstances", and that once a review is triggered, "the court moves directly into a consideration of the issue(s) to be reviewed and whether the evidence supports a change in the earlier order."

Neither party sought a review in 2013. However, in 2019 the husband applied to terminate his spousal support obligation, and argued that he did not need to establish a material change in circumstances under s. 17 of the *Divorce Act* because the 2010 order provided for a review.

The wife took the position that the review clause in the 2010 order only allowed the husband to seek a review in 2013, and that after that the order could only be varied if either party was able to establish a material change in circumstances.

Relying on the B.C. Court of Appeal's decision in *Toth v. Toth* (2016), 73 R.F.L. (7th) 24 (B.C. C.A.), Justice Warren concluded that "whether [the husband] has a right to a review of spousal support depends on the proper construction of the provision in the 2010 Order that contemplates a review", and that the "review provision must be construed so as to give effect to the objective intent of the parties."

After considering the evidence, Justice Warren found that the review clause had been included in the 2010 order due to the significant uncertainty surrounding the wife's future earning capacity and ability to become self-sufficient. Accordingly, Justice Warren concluded that the purpose of the review clause was to allow *either party* to have the court reassess the statutory spousal support factors and objectives set out in the *Divorce Act* once more information was available about the wife's career prospects:

> [47] Although [the wife] had recently developed an educational plan, it was only a plan. There was no way to know whether she would succeed and, if she did succeed, how long it would take and how close she would get to achieving self-sufficiency. There is no evidence before me that suggests that the parties had some specific event in mind when they selected three years as the trigger. **The three-year period, considered in context, was intended to give [the wife] at least three years to adjust and start moving forward. It was not intended to prescribe a fixed date on which a review had to occur lest the right to a review be lost. A construction of the provision that would only permit a review precisely three years after the 2010 Order was made, would be impractical. It would also undermine the parties' primary intention of permitting a review once there was more certainty about [the wife's] earning capacity because it was possible that not enough would be known about her earning capacity** in three years to make a review at that time useful. [emphasis added]

As a result, Justice Warren determined that the husband did not need to establish a material change in circumstances before the Court could consider his request to terminate support.

Unfortunately for the husband, that was not the end of the matter. The wife had a very strong compensatory claim as she had left the workforce and assumed primary responsibility for the children and the home during the marriage, and had supported and assisted the husband in his career as the CEO of his family's winery. Justice Warren also rejected the husband's claim that his income had recently fallen to only $110,000 a year, and found that his annual income for support purposes was still $170,000.

While the wife had not made adequate efforts to secure remunerative employment after the parties separated, Justice Warren was of the view that, at most, the wife would have been able to earn $50,000 from employment. After adding that to the $25,000 a year that the wife had been earning from her investments, Justice Warren found that the wife's income for support purposes was $75,000 a year.

Based on the parties' incomes as found by Justice Warren ($170,000 a year for the husband and $75,000 a year for the wife), the Spousal Support Advisory Guidelines provided for a range of support of between $2,256 and $3,008 a month for 9.5 to 19 years. Given the length of the marriage (more than 19 years), and after finding that the wife had a very strong compensatory claim, Justice Warren determined that the husband should be paying the wife **$3,000 a month** in support (i.e. at the high end of the range for quantum based on the parties' respective incomes for support purposes). Furthermore, even though the husband had already been paying support for 13 years, and the *SSAG*s provided for a maximum duration of 19 years, Justice Warren declined to order an end date for the husband's support payments, and concluded instead that support should be indefinite and continue until one of the parties could establish a material change.

There are two very important lessons here. First, it is essential to use clear and precise wording when drafting review clauses. The entire issue of whether the husband could rely on the review clause in the 2010 order could have been avoided if it had simply been drafted to say that "[t]he spousal support shall be reviewed in three (3) years ***or at any time after that***."

Second, timing is everything when its comes to triggering a review. Although the husband was ultimately successful in reducing his support payments from $3,545 a month to $3,000 a month (i.e. by $6,540 a year), he has now given up his one and only chance at a review, and is now faced with the prospect of having to pay support indefinitely pending a material change in circumstances. Given that the husband was only 59-years-old and was responsible for running a family business that will presumably continue generating income for him even after he retires, this could end up being one of those unfortunate situations where the husband is never actually able to establish a material change.

Let Common Sense Reign

Sabry v. Loeff (2020), 2020 CarswellOnt 14108 (S.C.J.) - Lemay, J.

In *Sabry v. Loeff*, Justice Lemay offers a common-sense solution to the now-regular interplay between prior support orders and agreements and COVID-19.

The parties were subject to a final Order for child support. In June of 2020, Mr. Sabry brought a Motion to Change the final Order on the basis that his financial circumstances had materially changed as a result COVID-19. Shortly thereafter, Mr. Sabry asked for leave to bring an urgent motion to suspend enforcement of the existing Order pending the outcome of his Motion to Change. That motion was granted in July (but, due to some procedural irregularities, on only a temporary basis), and the return of the full motion was then heard by Justice Lemay.

At the time of the motion, the child was just about to turn 11 years old.

The final Order contained the following terms:

> 2. The Applicant/Father shall pay ongoing child support to the Respondent/Mother for the support of the child in the sum of one thousand seven hundred and fifty-nine dollars and fifty cents ($1,759.50) per month commencing June 1st, 2019 based

on an agreed-upon imputed income of $213,750 and the Table amount for one child under the *Child Support Guidelines*. Support Deduction Order to issue.

3. The Table child support in paragraph 2 above shall be ***fixed and non-variable until the Child has completed high school***. At that time, the parties shall determine, either on consent or by return to court by way of motion to change, what the new child support amount will be going forward. At no time shall either party ever be at liberty to seek child support from the other for an amount other than specified in paragraph 2 above from June 1, 2019 until the Child completes high school. [**emphasis added**]

Through the evidence, Justice Lemay learned that Mr. Sabry, in the original litigation, had not been forthcoming about his income. He further learned that Ms. Loeff's income was not impacted by COVID-19.

Mr. Sabry made the required child support payments for most of a year. However, in March, he reduced the child support he was paying so that it was based on an income of only $24,000 a year (rather than the $213,750 under the Order).

Justice Lemay accepted that Mr. Sabry's business had been severely impacted by COVID-19 and that it was beyond his control. That formed the basis of Mr. Sabry's Motion to Change, and his motion to stay enforcement, as the Family Responsibility Office ("FRO") had advised that they were going to garnish Mr. Sabry's CERB benefits at a rate of 50 percent.

Although the evidence was thin on the point, Justice Lemay accepted that Mr. Sabry did have some assets or savings with which to continue to pay child support.

Justice Lemay determined that Mr. Sabry's motion met the test for urgency: (a) the change in his income appeared to be significant; (b) the Court was not scheduling regular motions until December; and (c) Case Conference dates were even further off.

Mr. Sabry argued that the stay should be granted on the basis that his income had, at least temporarily, been significantly reduced. He further argued that the child would not be prejudiced by granting a stay, as Ms. Loeff continued to earn a significant income.

Ms. Loeff, on the other hand, argued that the Order in question called for child support that was specifically "fixed and non-variable" - and that it was so because of Mr. Sabry's significant failures of disclosure in the original proceeding. Ms. Loeff argued that Mr. Sabray was simply trying to evade his responsibilities again. Finally, she argued that Mr. Sabry had significant assets from which he could pay support even if he wasn't earning income.

The point regarding the "fixed and non-variable" nature of the support was a good one. To address it, Mr. Sabry argued that the Court hearing the ultimate Motion to Change should determine the impact of an Order for "fixed and non-variable" child support.

Justice Lemay started with the observation that it may be difficult for Mr. Sabry to succeed in his Motion to Change given the stated "fixed and non-variable" nature of child support in the Order. However, Justice Lemay determined that the motion before him was neither the time nor place to consider that issue. That said, his Honour did note that:

a) A global pandemic of this nature was arguably not foreseeable when the Order was entered into.

b) The closure of Mr. Sabry's business was as a result of events beyond his control and was mandated by the government.

Respectfully, these considerations appear to put the cart before the horse. The first question is whether the fixed and non-variable nature of child support in the Order was, in fact, an insurmountable hurdle. If an Order can, in fact, provide for "fixed and non-variable" child support, then presumably the sort of material changes noted by Justice Lemay are irrelevant. And while cases certainly suggest that parties cannot, by *agreement*, oust the jurisdiction of the Court to vary support [*Bemrose v. Fetter* (2007), 42 R.F.L. (6th) 13 (Ont. C.A.); *Patton-Casse v. Casse* (2011), 8 R.F.L. (7th) 343 (Ont. S.C.J.), aff'd (2012), 29 R.F.L. (7th) 210 (Ont. C.A.); *L.M.P. v. L.S.* (2011), 6 R.F.L. (7th) 1 (S.C.C.), *Chan-Henry v. Liu*, 2018 CarswellBC 3272 (S.C.); and *Powell v. Powell* (2019), 23 R.F.L. (8th) 367 (B.C. S.C.)], there does appear to be jurisdiction for a Court to order that support not be

variable [*Moon v. Moon* (2011), 3 R.F.L. (7th) 381 (Ont. S.C.J.); *LeBlanc v. Yeo*, 2011 CarswellOnt 4457 (S.C.J.); *Shedden v. Shedden* (2012), 25 R.F.L. (7th) 187 (Ont. S.C.J.); *de Somer v. Martin* (2012), 22 R.F.L. (7th) 287 (Ont. C.A.); *Harris v. Harris* (2000), 10 R.F.L. (5th) 45 (Ont. C.A.); and *Skotnicki v. Cayen*, 2019 CarswellOnt 13233 (S.C.J.)]. However, this may not hold in Manitoba: *Anderson v. Bernhard* (2017), 1 R.F.L. (8th) 452 (Man. Q.B.).

In any case, this will be an interesting question for the judge that ultimately hears the issue. From our point of view, we are generally opposed to any "jurisdictional hurdles" that make it more difficult to settle cases. Sometimes payors, sometimes recipients, and sometimes both - for their own reasons - want to settle support by making it fixed and non-variable for some period of time or permanently. And if making support (whether it be spousal or child support) fixed and non-variable is something that helps get a case settled, it seems ill-advised to not allow people to settle based on such arrangements and to not give them some basis to believe that, except in egregious circumstances, such provisions will be upheld. The one exception to this, perhaps, might be an agreement that purports to make child support fixed and non-variable for a significant amount of time - ironically such as in this very case.

Justice Lemay made quick work of Ms. Loeff's argument that Mr. Sabry had assets he could use to pay support. Justice Lemay found that while the existence of assets was a factor that might justify a continuation of the support payments, it was not as relevant as the other issues raised by Mr. Sabry.

His Honour also did not accept Ms. Loeff's argument that the Motion to Change was just another tactic by Mr. Sabry to avoid paying support. That argument was not supported by the facts that:

a) Mr. Sabry made payments until the end of March, 2020.

b) The closure of Mr. Sabry's business was as a result of events completely beyond his control.

c) Although Mr. Sabray did unilaterally reduce his support amounts, he did not stop paying support entirely. Instead, he paid support based on the CERB he was receiving. Mr. Sabry also moved to vary the amount quickly.

Finally, Justice Lemay found that the non-payment of support for a limited period of time would have no meaningful impact on the child. Ms. Loeff continued to work and earn a good income.

Therefore, Justice Lemay ordered that enforcement of the Order be stayed for a period of six months and that the underlying Motion to Change be heard promptly.

With respect to costs, Justice Lemay was of the view that the costs of the motion should be left to the judge hearing the Motion to Change: Either the motion to stay the order should not have been brought; or it should not have been opposed.

Overall, Justice Lemay provides for a common-sense solution to what is becoming all-too-common a problem.

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