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

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**Note from the Publisher**

Dear readers of *This Week in Family Law*, please note that no new edition will be posted the week of November 23, 2020, but the *Newsletter* will resume publication the following week on Monday, November 30.

**Another Pension Case. Swell.**

*Langeman v. Langeman*, 2020 CarswellOnt 15193 (S.C.J.) - MacPherson J.

When it comes to enforcing support orders against pension assets, not all orders are created equal.

On May 3, 2019, Justice Sutherland made an interim/temporary order that the Respondent pay to the Applicant \$8,000 a month in spousal support. Justice Sutherland also directed the CIBC to satisfy the spousal support obligation by making payments from the Respondent's RRSP. (As an aside, we would like to understand the basis for this order, but it does not appear to be available). That RRSP was eventually exhausted in August of 2020.

As a result, the Applicant brought an urgent motion asking that the Respondent be ordered to "assign" or "transfer" \$59,953 from his LIRA in satisfaction of his remaining spousal support obligation to her.

Another pension case. Swell.

But maybe this is easy? Pursuant to s. 34(1)(c) of the Ontario *Family Law Act*, in dealing with a claim for support, the court can order that property be transferred (to, or in trust for, or vested, in the dependant), whether absolutely, for life or for a term of years. Under the *Family Law Act*, the court has jurisdiction to transfer or vest property in the recipient spouse to meet a support obligation.

Unfortunately, Justice Sutherland's support order was made under s. 15.2 of the *Divorce Act*, not under s. 33 of the *Family Law Act*. And there is no similar provision under the *Divorce Act*. OK; not so easy.

Rule 26 of the Ontario *Family Law Rules* sets out mechanisms to enforce a support order under the *Family Law Act* and the *Divorce Act*. Those mechanisms include seizure and sale, garnishment, and registration under the *Family Responsibility and Support Arrears Enforcement Act*, 1996, S.O. 1996, c. 31.

However, a LIRA is a form of pension and subject to the provisions of the *Pensions Benefits Act*, R.S.O. 1990, c P. 8, which contains statutory restrictions in connection with locked-in accounts and pension plans. And the Respondent's LIRA was not currently "in pay" - he was not currently receiving any money from it. This, as we will see, is important.

Sections 65(1) and (2) of the *Pension Benefits Act* state:

#### **Void transactions**

65 (1) Every transaction that purports to assign, charge, anticipate or give as security money payable under a pension plan is void.

(2) Every transaction that purports to assign, charge, anticipate or give as security money transferred from a pension fund in accordance with the following provisions is void:

0.1 Section 39.1 (variable benefits).

0.2 Subsection 39.1.1 (7) (spouse's right to transfer entitlement).

1. Section 42 (transfer).

2. Section 43 (purchase of pension).

2.1 Section 43.1 (purchase of pension, single employer pension plan).

3. Clause 48 (1) (b) (pre-retirement death benefit).

4. Section 67.3 (transfer of a lump sum for certain family law purposes).

There are, however, some exceptions to the general prohibition against such transfers. Section 65(3) of the *Pension Benefits Act* states:

#### **Exemptions**

(3) Subsections (1) and (2) do not apply to prevent the assignment, by an order under the *Family Law Act*, a family arbitration award or a domestic contract, of an interest in money payable under a pension plan or an interest in money payable as a result of a purchase or transfer under the following provisions:

0.1 Section 39.1 (variable benefits).

0.2 Subsection 39.1.1 (7) (spouse's right to transfer entitlement).

1. Section 42 (transfer).

2. Section 43 (purchase of pension).

2.1 Section 43.1 (purchase of pension, single employer pension plan).

3. Clause 48 (1) (b) (pre-retirement death benefit).

4. Section 67.3 (transfer of a lump sum for certain family law purposes).

And, finally, s. 66 of the *Pension Benefits Act* provides for a general prohibition against execution against pensions that are "in pay":

#### **Exemption from execution, seizure or attachment**

66(1) Money payable under a pension plan is exempt from execution, seizure or attachment.

As noted by Justice MacPherson, Justice Sutherland's Order was not for lump sum support. It was an order for periodic payments. And, here, the Applicant was asking for an order converting the periodic support payments due from September 1, 2020 to September 15, 2021, into a lump sum order.

Justice MacPherson had issues with that request. On the one hand, the Respondent swore that he was no longer employed. On the other hand, he had clearly been "forced" to pay support pursuant to Justice Sutherland's Order (*ergo* the payments from the RRSP), and he had not moved to vary his support obligation. And, in any case, even if Justice MacPherson had been inclined to convert the periodic payments into a lump sum, it would not have assisted the Applicant in obtaining the relief she wanted in any case since the Order had been made under the *Divorce Act*. As the Ontario Court of Appeal noted in *Trick v. Trick* (2006), 31 R.F.L. (6th) 237 (Ont. C.A.):

[44] First, the order in this case, to the extent it otherwise comes within s. 65(3) at all, is not an order made under the [*Family Law Act*]. Rather, it was made under the [*Divorce Act*]. Accordingly, s.65(3) cannot provide relief from the general prohibition against pension assignment.

. . . . .

[47] Fourth, s. 65 (3) exempts only the assignment of pensions. An assignment of a pension is a transfer of rights to the pension. The Act continues to void all other transactions such as those that purport to "charge, anticipate or give as security money payable under a pension plan". Such transactions are akin to enforcement under s. 66 of the PBA and continue to be prohibited. These continued prohibitions reflect the legislature's continuing objective to preserve pensions.

. . . . .

[53] In this case, the respondent is not seeking an assignment of the appellant's pension for equalization purposes or even for the purpose of lump sum support. Rather, she is seeking to execute, seize or garnishee 100 percent of the appellant's pension to enforce the appellant's outstanding obligations. In my view, she is precluded from doing so at law by s.66(4) of the PBA.

Finally, in addition to the restrictions against assigning, charging, anticipating or giving as security, money *payable* (that is, payable in the future) under a pension plan, the *Pension Benefits Act* restricts the amount that can actually be garnished when a pension (or LIRA) is "in pay".

Sections 66(1) to (3) of the *Pension Benefits Act* make it clear that all of the following are exempt from execution, seizure, or attachment:

- (i) money payable under a pension plan;
- (ii) money transferred from a pension fund to a prescribed retirement savings arrangement; and
- (iii) money payable from a prescribed retirement savings arrangement.

As confirmed by the Ontario Court of Appeal in *Trick*:

[30] . . . The legislation distinguishes between the protection given to pension benefits which a member will receive *in the future* and protection for pension moneys *actually being received*, i.e. a pension in pay . . .

[31] However, preserving a member's interest in his or her pension can conflict with other important objectives reflected in family law legislation. From a property perspective, the value of the pension accumulated during marriage is part of the spouses' net family property subject to equalization. From a support perspective, a pension in pay is an income source

relevant to the ongoing needs of the family members. Thus, pension income may be a source of revenue to enforce support and equalization obligations. [emphasis added]

To partially address this conflict, s. 66(4) of the *Pension Benefits Act* states:

### **Order for support**

66(4) Despite subsection (1) ["Money payable under a pension plan is exempt from execution, seizure or attachment."], payments under a pension plan or that result from a purchase or transfer under the following provisions are subject to execution, seizure or attachment in satisfaction of an order for support enforceable in Ontario **to a maximum of one-half** the money payable:

- 0.1 Section 39.1 (variable benefits).
- 0.2 Subsection 39.1.1 (7) (spouse's right to transfer entitlement).
  - 1. Section 42 (transfer).
  - 2. Section 43 (purchase of pension).
    - 2.1 Section 43.1 (purchase of pension, single employer pension plan).
  - 3. Clause 48 (1) (b) (pre-retirement death benefit).
  - 4. Section 67.3 (transfer of a lump sum for certain family law purposes). [emphasis added]

Therefore, when a recipient begins to receive payments under a pension plan or LIRA, the amount subject to execution, seizure or attachment in satisfaction of an order for support enforceable in Ontario is capped at a maximum of 50 percent of the money payable. There is no discretion conveyed to the court to increase or decrease the cap.

There is no similar exception to s. 66(1) that would permit garnishment for a locked LIRA or pension when payments are not actually being made.

As a result, there was no statutory authority to permit the court to make an order transferring any portion of the Respondent's LIRA to the Applicant for the purpose of satisfying the temporary and periodic spousal support order made pursuant to the *Divorce Act*.

As a result, Justice MacPherson dismissed the Applicant's motion. And properly so.

### **Everything Is Beautiful . . . Just Not Variable**

*Coles v. Coles*, [2020 CarswellNS 435](#) (S.C.) - Jollimore J.

This short decision from Justice Jollimore in Nova Scotia offers a good review of the (sometimes forgotten) principles of variation.

The Applicant ("David") wanted to vary his obligation to pay spousal support to his former wife ("Lynn"), prospectively and retroactively to March 1, 2019. He also wanted the court to set a date for the end of his spousal support payments and for the court to vary his obligation to provide life insurance.

The first question considered by Justice Jollimore was whether there had been a material change since the last support order. She correctly set out that David had to prove a change in his or Lynn's condition, means, needs or other circumstances: s. 17(4.1) of the *Divorce Act*. Her Honour also emphasized that any change sufficient to be a "material change" could not be only temporary; it had to have some degree of continuity. This is confirmed by the Supreme Court of Canada in *L.M.P. v. L.S.* (2011), 6 R.F.L.

(7th) 1 (S.C.C.) at para. 35. If the change is temporary, with no degree of continuity, or where it may be short-lived, the court should be reluctant to permanently vary a prior order: *Powell v. Levesque* (2014), 38 R.F.L. (7th) 261 (B.C. C.A.).

Then, Her Honour noted that, to determine whether there has been a material change, she had to consider the parties' circumstances when the original support Order was made: *R. v. R. (J.W.)*, 2001 CarswellBC 2130 (S.C.C.) at para. 25. Their circumstances at the time of the original support order was the "baseline", and any suggested changes must be compared to it.

Then, Justice Jollimore noted that if a circumstance existed at the time the original support Order was made, then that circumstance cannot be a material change. Or, if the circumstances did not exist, but the parties *actually contemplated the circumstances*, those circumstances cannot be a material change. This is the correct way to explain a material change. Justice Jollimore does not fall into the trap of suggesting that any change that was "reasonably foreseeable" is not a material change: *Dedes v. Dedes* (2015), 58 R.F.L. (7th) 261 (B.C. C.A.) at para. 25. As we have noted previously in *TWFL*, "reasonable foreseeability" is not the language of material change, but the language of awarding support in the face of a spousal support release as considered in *Miglin v. Miglin* (2003), 34 R.F.L. (5th) 255 (S.C.C.). It is only what was "foreseen", whether actually or by reasonable implication, that matters when considering a material change. "Reasonable foreseeability" has no place in the analysis. The difference between "foreseen" and "foreseeability" is also discussed in *Hickey v. Princ* (2014), 50 R.F.L. (7th) 138 (Ont. S.C.J.), rev'd (2015), 69 R.F.L. (7th) 312 (Ont. Div. Ct.).

David suggested that there had been two material changes:

- Lynn's income has increased; and
- David's business, Coles Insurance Services Limited, had declined.

Justice Jollimore did not accept that the increase in Lynn's income was a material change - that increase was temporary. While the hours available to her at one job increased significantly, her other job (at a bank) had been eliminated. And while she received severance, it was very time limited. Therefore, there was no material change. This is a good reminder: the simple fact of a change in job or employment does not matter - it is a resulting change in *income* that matters.

Justice Jollimore did, however, accept that the decline in David's income was a material change.

David's income was \$130,000 when the original support Order was made in 2014, and again in 2015. In 2016 and 2017, his annual income from the business was \$120,000, and it fell to \$109,900 in 2018. His T4 for 2019 showed employment earnings of \$91,555. This decrease in income was not contemplated, and the decrease was primarily because David's failing health had forced him to take time away from the business.

Having found a material change, Justice Jollimore's task was to consider what, if any, change was necessary. To decide that issue, s. 17(4.1) of the *Divorce Act* directs the Court to consider each former spouse's condition, means, needs or other circumstances in the context of the change. The Court also had to consider the economic advantages or disadvantages to the former spouses from the marriage or its breakdown; any financial consequences arising from child care beyond child support obligations; relief of economic hardship arising from the marriage's breakdown; and, to the extent possible, promote each former spouse's economic self-sufficiency within a reasonable time: *Divorce Act*, s. 17(7).

Here, the parties had cohabited for 22 years. After separation, Lynn was left with all three children in her home, and the younger children were still living with her.

At the time of the hearing, David was 65. He had remarried in 2015. His spouse worked in a restaurant, but the Court was not provided with details of her income.

An expert was retained to opine on David's income. The expert concluded that "the Guidelines Income available to Mr. Coles as at December 31, 2018 is \$69,000." The expert arrived at that figure by deducting the entire amount of a loan owing by David's company from David's income. In his report, the expert noted that the loans in question were indirectly financing a portion

of David's salary. However, Justice Jollimore then questioned why the full amount of the loan repayment would be deducted exclusively from David's salary. Good question.

Furthermore, while David's income had declined, two staff members saw increases in their salaries in 2018 and 2019. David also had some difficulty identifying any steps he had taken to reduce his expenses in response to the decline in his business.

Ultimately, Justice Jollimore determined that David's income for support purposes was \$98,967 as shown on his 2019 tax return. She did so for two reasons:

1. David's company could borrow further to maintain his income as the income of other staff members had been maintained. According to the expert, no lender had imposed any restrictions on what the company could borrow or any requirements on the amount of net working capital it was required to maintain.
2. David's position was that he was receiving an income of \$76,412 even while the company was not borrowing.

These facts persuaded Her Honour that, while David's income has declined, his circumstances were not quite as dire as he suggested. We are not sure that these considerations are appropriate as they amount to the suggestion that a company should have to borrow money to maintain historic income levels. Forcing a business to borrow money to pay a higher salary to an owner in order to maintain a higher income for support purposes seems to come a bit too close to the idea of killing the golden goose or, as cautioned by the B.C. Court of Appeal in *Kowalewich v. Kowalewich* (2001), 19 R.F.L. (5th) 330 (B.C. C.A.), "placing the largest shovel in the company store."

In the meantime, Lynn was 62. She was single. She worked part-time (as she always had). The two younger children continued to live with her, and her income had not changed materially since separation.

David unilaterally reduced his spousal support payments *before* his variation application was heard and, as a result, Lynn and the children had discussed moving because Lynn could no longer afford her home. This was certainly not the way to curry favour with the Court.

Given the length of the marriage, the roles adopted during marriage and the economic impact of the breakdown of the marriage, Justice Jollimore concluded that spousal support should leave the parties with approximately equal incomes. Therefore, Her Honour ordered continuing spousal support of \$2,600 a month.

Her Honour then considered David's request to reduce his spousal support payments retroactively to March 1, 2019 - some 4-1/2 months before he filed his variation application.

In *Smith v. Helppi*, 2011 CarswellNS 465 (C.A.), the Nova Scotia Court of Appeal adopted the questions asked by the New Brunswick Court of Appeal in similar circumstances in *B. (P.M.) v. B. (M.L.)* (2012), 22 R.F.L. (7th) 15 (N.B. C.A.):

- Was there a material change in circumstances during the period of retroactivity?
- Having regard to all other relevant circumstances during this period, would David have been granted a reduction in his support obligation but for his untimely application?
- Was the change significant and long-lasting? Was it real and not one of choice?

Considering these questions, Justice Jollimore varied David's obligation retroactive to March 1, 2019. Neither David's health nor the changes in the insurance market had been voluntary. The decrease in David's income had begun in 2016 and had continued.

While David wanted the Court to order a date that support would terminate, Justice Jollimore was not prepared to do so. The parties had been married for 22 years. Lynn had always worked only part time so she was available at home during the day to care for the children and so that David could develop his business. The three children had still been dependent when the parties separated in 2010.

Quite simply, there was no evidence to support a future termination date.

The final question was whether, given the reduction in spousal support, David was still obliged to maintain \$600,000 in life insurance until September 2021. The beneficiaries were Lynn (\$300,000) and each of the couple's three children (\$100,000 each).

Where insurance is ordered as security for support, a Court has the jurisdiction to vary insurance provisions pursuant to s. 17(3) of the *Divorce Act*.

However, Justice Jollimore noticed that David's obligation to provide life insurance was *not* ordered as security for support under the *Divorce Act*. Rather, it appeared to be a free-standing obligation. Consequently, the insurance provisions (amount and duration) could not be varied. Her Honour reached this conclusion for three reasons:

1. The obligation was not identified as security for support.
2. According to the original support Order, all the beneficiaries' entitlement to life insurance ended in September 2021. This date had no particular relevance to anything given that:
  - The oldest child, who was not entitled to child support at the time of the divorce, was a beneficiary of the life insurance.
  - The two younger children, who the parties agreed would no longer be entitled to child support one month after they graduated from university, were named as beneficiaries of the life insurance. But their entitlement to child support ended 5 - 6 years *before* the life insurance obligation was set to end.
  - Lynn's life insurance was not based on her receipt of spousal support. If spousal support ended before September 2021, the life insurance would still continue until September 2021. And if her spousal support continued after September 2021, the life insurance would end.
3. The parties negotiated a schedule for decreasing child support and increasing spousal support as each of the two younger children reached independence. Life insurance was not part of that schedule.

As a result, Justice Jollimore determined that she had no jurisdiction to vary the insurance provisions of the previous order as the insurance was not meant to secure support, but rather was a free-standing obligation.

This is an important point for counsel. If insurance is stated to be required until a specified date, it is possible the obligation to maintain insurance may be held to be a free-standing, invariable obligation. See also *Turner v. DiDonato (2009)*, 63 R.F.L. (6th) 251 (Ont. C.A.).