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

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Contents

- Could the Pendulum Be Swinging on Early Retirement?
- Travel to Non-*Hague* Jurisdictions - A Cost/Benefit Analysis
- Failing to Comply with Disclosure Orders = Pleadings Struck

From the Editors: In these highly unusual times, please all take good care of yourselves, take the advice of community and medical leaders, and do your best to be supportive of those that may need it. **Nothing** is more important than your health.

Stay healthy.

Aaron & Michael

Could the Pendulum Be Swinging on Early Retirement?

Karges v. Karges, 2019 CarswellOnt 17135 (Ont. C.A.) - Rouleau, Huscroft, and Nordheimer JJ.A.

Savage v. Savage, 2019 CarswellOnt 20421 (Ont. C.A.) - Rouleau, Roberts, and Harvison Young JJ.A.

Disclosure: Epstein Cole LLP represented one of the parties at the appeal in *Karges*.

Whether early retirement has been determined to not be a material change; or whether income is imputed to the person taking early retirement; generally, courts have not been overly sympathetic to payors who avail of early retirement: *Hooper v. Hooper* (2002), 30 R.F.L. (5th) 334 (Ont. C.A.); *Bullock v. Bullock* (2004), 48 R.F.L. (5th) 253 (Ont. S.C.J.); *Francis v. Logan* (2008), 57 R.F.L. (6th) 352 (B.C. S.C. [In Chambers]); *Hesketh v. Brooker* (2013), 35 R.F.L. (7th) 321 (Ont. S.C.J.); *Oderkirk v. Oderkirk*, 2014 CarswellNS 147 (N.S. S.C.); *Hickey v. Princ* (2015), 69 R.F.L. (7th) 312 (Ont. Div. Ct.); *Cossette v. Cossette* (2015), 58 R.F.L. (7th) 12 (Ont. Div. Ct.); and *McPherson v. McPherson* (2019), 29 R.F.L. (8th) 341 (B.C. S.C.).

This has especially been so where the payor is not yet 65 (or at least close to it) and/or where the court has determined that the payor is taking early retirement, at least in part, to avoid his/her support obligations.

While this will not be a long comment (as these cases are invariably fact driven), we would like to draw to your attention to the fact that there have now been two recent cases (*Karges* in October 2019 and *Savage* in November 2019) where trial courts have approved of younger payors taking early retirement, that have been upheld on appeal. In *Karges*, the payor/husband, a manager for a storage company, was 59; and the payor/husband in *Savage*, a teacher, was 57. In both cases, the evidence was essentially that the payor had worked for a long time and was "tired". Mr. Savage had been teaching long enough (27 years) that he was actually eligible to retire at age 57 with an unreduced pension, and the trial judge noted the "drain inherent in the teaching profession."

In both cases, on account of the retirement, the ultimate duration of spousal support was less than it ordinarily would have been. In *Karges*, the Court imputed a significantly reduced income of \$60,000 a year to the payor to age 65. In *Savage*, support was terminated. In both cases, the Court found that the payor had not retired to avoid their support obligations.

The facts of both cases are generally similar. Focussing on *Savage*, the parties had been married for 25 years. They had three adult children, and they separated in 2012. In 2015, the parties agreed on indefinite spousal support of \$1,650 a month. The consent Order provided that either party could seek a change in spousal support based on a material change, whether the change was "foreseen or foreseeable, unforeseen or unforeseeable."

Mr. Savage retired from teaching on December 31, 2017, with an unreduced pension. Of critical importance to the trial judge was the fact that the wife had retired herself with a full pension at age 56: sauce for the early-retirement goose is sauce for the early retirement gander. It is hard to argue, as did the wife, that the payor's retirement was "early, voluntary and unreasonable" in the circumstances.

The wife argued that the court below erred in terminating support after five years of payments, a 25-year marriage, three children, three maternity leaves, and her mostly part-time work. She argued that she had not been compensated for the sacrifices she made, and the disadvantages she suffered during the marriage. At first blush, it does sound strange that support would be terminated after five years of support and a marriage of this duration.

However, the finances of the parties told a different story. At the time of the trial, the husband had annual pension income of \$49,538, of which only \$9,572 had not been equalized. But he had no capital assets. On the other hand, the wife had annual pension income of \$29,300.28, of which \$3,864 had not been equalized, and approximately \$500,000 in investments. That is, a reasonable rate of return on the wife's investments would essentially equalize their incomes. The trial judge also considered there to be a "financial benefit" to the wife from the fact that she was cohabiting with a new partner.

The remaining question is: how does this result comport with the principles of compensatory spousal support? This result does seem a bit unsettling if one considers that, on these facts, spousal support was awarded on a compensatory basis. The Court of Appeal dealt with this as follows:

[16] The appellant also argues that in terminating support, the trial judge failed to apply the fact that spousal support had been grounded in the compensatory rationale. She accepted the appellant's evidence that her shorter work week had been for the benefit of the family and that this had given rise to an economic disadvantage on the breakdown of the marriage which led to lower income and pension payments. She also found, however, that this economic disadvantage had been fully compensated for by the respondent through both the equalization of their assets and the spousal support that had been paid by the time of the trial. This finding was open to her on the record, and it is not the role of this court to revisit such determinations absent palpable and overriding error. We note that this is not a case like some of those cited by the appellant where the recipient spouse is disabled or has no income of her own, or where the income disparity is very significant.

Some further explanation would have been of assistance. How is it possible that, on these facts, the wife could have been fully compensated after only receiving five years of support? Presumably, given the length of the marriage and the ages of the parties, neither party came into the marriage with much money, such that they would have left the marriage with approximately the same net worth (we do not know the reason for the asset disparity at the time of trial).

To simplify the question, let's change the facts slightly:

- The parties are married for 25 years.
- They have three children.
- The wife takes 12 years out of the paid workforce to care for the children and eventually returns to part-time employment.
- Upon separation and after equalization, both parties end up with a net worth of approximately \$500,000.

- After paying compensatory support of \$1,666 a month for five years (such that their net disposable incomes are the same), both parties retire at age 56 with unreduced pensions; the husband earns \$50,000 a year in pension income, and the wife earns \$30,000 a year in pension income.

On these facts, is it fair that the wife received only five years of spousal support? The answer could depend on through which end of the telescope one looks.

On one hand, it is arguable that the wife suffered significant economic disadvantages, and the husband enjoyed significant economic advantages, over many years. She gave up employment benefits. She gave up pension credits/entitlements. She maintained the home so as to allow the husband to advance his career and to supplement his pension. She received her share of fruits of the marriage through equalization. But so did he. Where is her compensation for the roles adopted during marriage? Was it met with payments of \$1,666 a month for five years, when the husband will continue to earn \$20,000 more than her? What of the fact that the husband could have continued earning his pre-pension income for a period of time? What of the fact that the husband left the marriage with greater earning potential?

On the other hand, this is how the parties determined to structure their lives together. He had responsibilities. She had responsibilities. When the marriage ended, they left with the same net worth. As she also retired, "need" cannot be a factor, and he is "only" earning \$20,000 a year more than her.

On these simplified facts, the two main factors appear to be the wife's simultaneous early retirement and the \$20,000 income differential. Viewing the matter purely on a compensatory basis (as we are told that spousal support was "grounded" in compensatory principles), why should the husband be able to avail of early retirement after paying only five years of spousal support on these facts?

The slightly different facts of the actual case do not really change anything. The exception is the fact that the wife, with her investment income, would be earning about the same as the husband. It might be odd that the husband pay support to the wife such that she was actually earning more than him. However, again, we do not know why she has a larger capital base than the husband.

It may be that the wife *was* fully compensated for the roles assumed during marriage after equalization and five years of spousal support. There should be no compensatory support where a property settlement fully compensates for any economic (dis)advantage: *Neate v. Neate*, 2009 CarswellAlta 1213 (Alta. Q.B.); *H. (J.L.) v. W. (R.S.)* (2017), 94 R.F.L. (7th) 1 (Alta. C.A.); *Bodine-Shah v. Shah*, 2014 CarswellBC 1354 (B.C. C.A.); and *Halliwell v. Halliwell* (2017), 90 R.F.L. (7th) 253 (Ont. C.A.). However, it would have been useful had the Court of Appeal clearly set out its thinking behind the reason that the wife had been fully compensated as against the facts of the case.

In any case, it is certainly worth noting that the "early retirement pendulum" may have begun to swing.

Travel to Non-Hague Jurisdictions - A Cost/Benefit Analysis

A.A. v. S.K., 2019 CarswellBC 3714 (B.C. S.C.) - Ball J.

This was an application by the mother for an order permitting her to travel with the parties' 4-year-old child, to Karachi, Pakistan for two months, primarily to allow her to attend her brother's wedding. The father opposed the application.

The parties were married in an arranged marriage in the Pakistani Islamic tradition in July 2015.

The parties separated on May 1, 2019.

The father was allegedly physically violent towards the mother in the presence of the child. According to the mother, on separation, the father also "banished" her and child from the family residence, and demanded that they return to her parent's home in Calgary. As the mother had no money, the father allegedly bought them airline tickets and sent them back.

Then, on July 5, 2019, the father obtained a without notice Order requiring the mother to return the child to the father, and prohibiting her from removing the child from Canada. As the mother had no money and no income, and as the father was not paying support of any kind, the mother found an inexpensive flight back to Vancouver. Upon returning to Vancouver, the mother and child moved into a shelter due to concerns about the father's aggressive and violent behaviour. With the assistance of the shelter, the mother contacted the Ministry of Children and Family Development ("MCFD") and the R.C.M.P. to report the incidents of violence. Ultimately, the B.C. Supreme Court issued a Protection Order at a contested hearing that provided:

1. That the father be restrained from directly or indirectly communicating with or contacting the mother or the child, except as approved by MCFD or except in the presence of legal counsel; and
2. That the father be restrained from attending, nearing, entering, or being found within 100 meters of any known residence, school, and place of employment of the mother or the child, except as approved by MCFD or except in the presence of legal counsel.

The father was also charged with assault, but was released on a bail order that included the usual protective conditions, including that the father have no contact or communication directly or indirectly with the mother or the child except in accordance with a family court order made by a judge who had reviewed the bail order; and that the father not go to any workplace, residence, school, or place of worship of the mother or the child.

As a result of the bail order and the Protection Order, the father had no access or parenting time with the child.

The mother wanted to travel with her daughter to Karachi, Pakistan for two months to attend her brother's wedding.

The father opposed the trip on the basis that Karachi was too dangerous. It was clear that if the daughter was not allowed to travel to Pakistan, the mother could not travel to Pakistan because she was the child's sole caregiver given the orders that had been made. That is, if the child could not travel, the mother could not travel.

The father based his objection to the proposed travel on three bases:

1. An apparent outbreak of drug resistant typhoid fever in Pakistan. This information was apparently published on a website by a commercial seller of vaccine products, submitted as an exhibit (the website also included a warning that it did not provide medical advice, diagnosis, treatment, or prescriptions). A further document apparently published by the Government of Canada on October 10, 2019 referred to the same outbreak of drug resistant typhoid. This document described the mechanisms for the spreading of typhoid fever and recommended certain pre-trip vaccinations, eating and drinking safely, washing hands regularly, and using alcohol-based hand sanitizer if soap was not available.
2. Pakistan is not a signatory to the *Hague Convention*.
3. In general, Pakistan is dangerous. The support for this was another document from the Government of Canada referring to areas in Pakistan where travel should be avoided.

It is worth noting that these "supporting" documents appear to be hearsay, and as such documents are likely, and should be, inadmissible. *At the very least*, where a document akin to an Amnesty International or Government Report (such as an Immigration and Refugee Board document) is tendered for the truth of its contents in respect of contested facts, the reliability and trustworthiness of the document takes on added importance and should not simply be appended to an affidavit: *Isakhani v. Al-Saggaf* (2007), 40 R.F.L. (6th) 284 (Ont. C.A.); *Beeching v. Beeching*, 2006 CarswellOnt 7860 (Ont. C.A.); and *Children's Aid Society of Toronto v. C. (J.)* (2013), 41 R.F.L. (7th) 491 (Ont. C.J.). Notably, the Amnesty International Report for the United States makes the U.S. sound like a dangerous place to travel. While many may take serious issue with many aspects of our neighbour to the south, it is hard to argue that Florida, New York, or California are generally "too dangerous" for travel. Such documents are also not appropriate for judicial notice: *R. v. Khawaja*, 2010 CarswellOnt 9672 (Ont. C.A.).

Given the facts of the case, and the absence of any real evidence to indicate that the mother was a flight risk, one would not think there would be any reasonable chance of the father being able to prevent the child (and the mother) from travelling.

Justice Ball, however, relied on *Hamid v. Mahmood*, 2012 CarswellOnt 9070 (Ont. C.J.), a case where the Ontario Court of Justice considered whether three children should be allowed to travel with their mother to Pakistan to visit their ailing maternal grandmother. In *Mahmood*, the mother had sole custody of the children and authority to obtain the children's passports, health cards, and birth certificates without the father's consent. The father had supervised access, and the Court found that the mother was *not* a flight risk. However, the Court, relying on the type of government documents that were relied on in *A.A.* (and that we suggest are not properly admissible), did not allow the children to travel because it was not satisfied that the benefits of the trip "are so great as to outweigh the risk of harm which, although not quantifiable, is nonetheless very real, in my opinion."

As in *Mahmood*, the Court in *A.A.* concluded that the mother was *not* a flight risk. In fact, after being unceremoniously sent to Calgary by the father, the mother returned to British Columbia (with the child) upon being ordered to do so, despite her lack of financial resources.

In any case, the mere fact that a party is looking to travel with children to a non-*Hague* signatory jurisdiction is clearly, without more, not a basis to prevent travel. There must be *at least some evidence* of *at least some possibility* that the children might not be returned: *Johnson v. Johnson*, 1996 CarswellOnt 409 (Ont. Gen. Div.); and *D.G. v. A-G.-D.*, 2019 CarswellOnt 1232 (Ont. C.J.). It is highly unusual that, absent such evidence, a court would prevent travel.

That then led to a discussion about the dangers of travelling to Pakistan.

In *Mahmood*, the father filed documentation about the political and social climate in Pakistan, including a travel advisory report saying that the security situation in Pakistan was fragile and unpredictable (again, in our view these kinds of documents should not be admissible). The father in *A.A.* made similar arguments. However, he was also confronted with evidence that when he learned that his niece was going to be interviewed as part of the MCFD investigation, he sent her to Pakistan, and gave her \$350 a month for her support while she was there. As the father had sent his niece to Pakistan and supported her while she was there, Justice Ball did not accept that his *stated concerns about the child's safety in Pakistan were sincere*.

However, things then took a bit of an odd turn. Although Justice Ball *accepted* that there was no evidence that the mother would not return to Canada, and *rejected* the father's claims about the "dangers" associated with travelling to Pakistan, his Honour then nevertheless accepted the decision in *Mahmood*, and denied the mother's request to travel to Pakistan with the child:

[21] . . . in keeping with judicial comity, I accept the decision in [*Mahmood*] as equally applicable to the facts in this case. Similar dangers to those discussed in [*Mahmood*] exist in Pakistan today. There is no particular explanation from the [mother] that the proposed travel is in the best interests of [the child] apart from being in the company of the respondent, which is no doubt important. The respondent, in this case, is sincere in her attention to the safety of *A.A.A.* If she were permitted to travel of Pakistan, she would not knowingly place the child in danger. However, as noted in *Hamid*:

[29] . . . However, danger - whether it emanates from crime, terrorist attacks or other sources, by its very nature makes victims of similarly like-minded persons, specifically, persons who would not *knowingly* place themselves in threatening situations. It is a truism that no one walks along a street *knowing* that a terrorist bomb is about to explode nearby; no one drives a car *knowing* it is about to be carjacked; no one would go to any location *knowing in advance*, they might be kidnapped, assaulted or terrorised in that location. Yet people - ultimately victims - do these things unwittingly, and these terrible events do occur. [emphasis in original]

[30] I assess the mother's request for permission to take the children to Pakistan as something akin to a cost/benefit analysis. What is the benefit to the children versus the potential cost of that benefit?

Absent any risk of not returning, and absent any *current* evidence of danger, it is hard to understand why a 2012 decision would prevent travel to Pakistan in 2019.

Using the idea of a cost/benefit analysis from *Mahmood*, Justice Ball found there would be "no particular benefit" to the child travelling to Pakistan, "apart from presence with other members of her mother's side of the family, which is beyond doubt a positive factor." His Honour then concluded that:

[22] . . . the potential risk of harm to this child is of greater significance when taken in the balance. The benefits here are not so great as to outweigh the risk of harm, which "although not quantifiable, is nonetheless very real . . ." [citing *Mahmood* at para. 33]

And, thus, travel was not allowed.

Justice Ball then further noted that circumstances which create a risk of harm today may change in the future so as no longer to be a factor in relation to travel (while basing his finding of danger on hearsay from 2012).

We are fully in favour of the "cost/benefit analysis" referenced in both *Mahmood* and *A.A. v. S.K.* We just have some trouble understanding how that balancing was applied in this case. Absent cogent evidence or very good reasons, courts generally should not contradict the decisions of the custodial parent who is charged with determining a child's best interests, and should generally leave the day-to-day decision-making about a child's life up to his or her custodial parent: *Colina v. Chan*, 2011 CarswellBC 1358 (B.C. S.C.); and *Perron v. Perron* (2012), 29 R.F.L. (7th) 164 (Ont. C.A.).

Failing to Comply with Disclosure Orders = Pleadings Struck

Giavon v. Giavon, 2020 CarswellOnt 57 (Ont. S.C.J.) - Ricchetti J.

In Ontario, when it comes to vacillating between striking pleadings for non-disclosure and not striking pleadings, the pendulum seems to swing very, very quickly. Motion courts strike pleadings; appellate courts caution against striking pleadings; motion courts take it easy on striking pleadings for a while; motion courts start striking pleadings again; appellate courts recognize that the "drastic remedy" should be one of last resort that is saved for "exceptional and egregious" cases, but that striking is appropriate when nothing else will do. And the cosmic dance goes on.

We have to believe that motion judges - who are also trial judges - know that striking pleadings make trials more difficult for themselves and their judicial colleagues. And that is why, when motion judges strike pleadings, save and except for orders based in error or on a clear misapprehension of the evidence or substantial unfairness - which can certainly happen on occasion in a busy motions court - appellate courts should be loath to interfere by reinstating them.

From *Purcaru v. Purcaru* (2010), 75 R.F.L. (6th) 33 (Ont. C.A.) and through the following appellate cases: *Chiaramonte v. Chiaramonte* (2013), 36 R.F.L. (7th) 11 (Ont. C.A.); *Kovachis v. Kovachis* (2013), 36 R.F.L. (7th) 1 (Ont. C.A.); *Glasco v. Bilz*, 2015 CarswellOnt 1278 (Ont. C.A.); *Roberts v. Roberts* (2015), 65 R.F.L. (7th) 6 (Ont. C.A.); *Carpenter v. Carpenter*, 2016 CarswellOnt 10377 (Ont. C.A.); *Van v. Palombi*, 2017 CarswellOnt 6598 (Ont. Div. Ct.); *Wouters v. Wouters* (2018), 6 R.F.L. (8th) 305 (Ont. C.A.); *Pey v. Pey*, 2018 CarswellOnt 4394 (Ont. C.A.); *Mullin v. Sherlock* (2018), 19 R.F.L. (8th) 1 (Ont. C.A.); ending with *Holly v. Greco* (2019), 28 R.F.L. (8th) 49 (Ont. C.A.); the dialogue between the lower and appellate courts appear to have reached the following equilibrium:

- Striking pleadings is the "drastic remedy of last resort", to be exercised "sparingly", and saved for "exceptional and egregious cases", when no other remedy will suffice to protect the reputation of the administration of justice.
- Pleadings should not be struck on the first motion to do so or on the first incidence of non-compliance. The guilty party should have *at least* a second chance to comply, and must fully understand the risk of pleadings being struck upon further failure to comply.
- After *at least* a first caution, and more usually a second or third caution, courts may permit the aggrieved party to move to strike pleadings without further notice to the offending party.

- Courts should order costs against the offending party, and a failure to pay those costs, without reasonable excuse, will increase the chances that pleadings will be struck.
- If pleadings are to be struck, the court must consider three things:
 - Precisely what pleadings are to be struck;
 - How, if at all, may the party whose pleadings have been struck still participate in the trial? May they still participate to some limited extent on custody/parenting issues? May they still attend to "test the claims" of the remaining party?
 - How, if at all, can the struck party get his/her pleadings reinstated?

In *Giavon*, Justice Ricchetti followed this general procedure. After referring to *Family Law Rule* 1(8)(a) through (c) (detailing what the court may do upon the failure of a party to obey an order), he noted that the Respondent had been given *several* chances to comply with previous disclosure orders, and had also not complied with any of the previous costs orders. He was clear that,

[68] It is important to ensure that the party in default is clearly given one last chance to comply with the court order(s) and is aware of the consequences, that might be ordered, if the party in default continues to willfully disregard compliance with the courts order(s). That was clearly done in this case. Despite knowing that his pleadings might be struck, the Respondent continued to disregard his financial disclosure ordered by the court . . .

. . .

[72] I recognize that it is best for the administration of justice that both parties present their case fully at trial and the judicial determination be made on the merits. However, where one party willfully obstructs the fair and proper prosecution and determination of the issues in the proceeding, the administration of justice will fall into disrepute if the court permits the defaulting party to benefit from such actions to the prejudice of the opposing party.

That is the sound of pleadings being struck. And, in this case, deservedly so.