TAB 23

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End of the Line:
Spousal Support for Older Clients
A Non-Exhaustive Discussion Paper

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End of the Line:*

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A Non-Exhaustive Discussion Paper

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I. Introduction

There are several characteristics present in spousal support cases involving older clients that are less common in cases involving younger clients. These include:

1. Absence of child support claims;
2. Incomes of the payors are decreasing as a result of retirement or illness;
3. Limited ability on the part of the recipient to increase contribution to self-sufficiency;
4. Parties who have ended shorter second or even third marriages – and in such cases, there may be existing spousal support obligations relative to previous marriages or relationships; and
5. The parties who are on first marriages are often in relationships of long duration.

The purpose of this paper is to consider broadly how spousal support claims and the application of the *Spousal Support Advisory Guidelines* ("SSAGs") might differ in cases with older parties. For the purposes of this paper, "older clients" are loosely defined as those approaching or over the age of 60, as well as those who have retired or are on the cusp of retirement.

II. First Instance Applications

A. Entitlement

Non-married spouses can apply for support pursuant to the *Family Law Act* provided they can establish standing, namely, that they have cohabitated continuously for at least three years, or have a child together and are in relationship of some permanence.[1] Standing is a preliminary step prior to addressing entitlement. Married spouses can also apply for support under the *Family Law Act.* Married and formerly married spouses can apply for spousal support pursuant to the *Divorce Act.*[2]

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[1] *Family Law Act*, R.S.O. 1990, S. 29, c. F.3, s. 29; 1999, c. 6, s. 25 (2); 2005, c. 5, s. 27 (4-6); 2009, c. 11, s. 30; 2016, c. 23, s. 47 (1).

[2] *Divorce Act*, RSC 1985, S. 15.2, c 3 (2nd Supp), 1997, c. 1, s. 2.

Factors (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

(a) the length of time the spouses cohabited;
(b) the functions performed by each spouse during cohabitation; and
(c) any order, agreement or arrangement relating to support of either spouse.

Objectives of spousal support order (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

(a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
(b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
(c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

The test for standing under the *Family Law* Act can be surprising to some clients. Occasionally parties (usually the male payor) think that if they maintain separate physical residences, that they will not be found to be cohabitating. In *Campbell v. Szoke*, 2003 CanLII 2291 (ON SC), appeal dismissed, the court confirmed that "Continuous *daily* cohabitation" is not required. *Stephen v. Stawecki*, 2006 CanLII 20225 (ON CA) adds to this, noting that a party maintaining a separate residence is but one factor to consider. This is particularly important for older couples to understand, as they are more likely to have the means to maintain multiple residences and may, to some extent, still continue to have some separate components to their lives. For instance, in *Campbell,* supra, the septuagenarian parties were snowbirds, who maintained separate homes when in Ontario.

Once standing is established, the applicant spouse next needs to establish entitlement based on the purposes for support as set out in the relevant legislation, under one of the established grounds (contractual, compensatory, or need) as set out in *Moge v. Moge* [1992] SCR 813 and *Bracklow v. Bracklow* [1999] 1 SCR 20.

The test for establishing entitlement does not change by virtue of the parties' ages, although issues of health, ability to work, and ability to become self-supporting are more likely to be in play.

Entitlement cannot be assumed simply because parties are in or approaching retirement years, or because the Rule of 65 would apply. Entitlement remains an active issue, particularly in short marriages.

In cases where the parties' respective incomes are modest, there appears to be some blurring of the entitlement test with the question of quantum, for instance, where it is established that the applicant has need, but no amount is payable due to lack of ability to pay.

Property before Support/ Longer term marriages with equalization

Financial resources available to the parties may eliminate or reduce the amount of spousal support payable. For instance, an equalization payment may alleviate need, generate ability to pay, reduce ability to pay, or even cause additional income to be attributable to one of the parties.

Support arising out of long-term marriages frequently has compensatory components. However, final orders or agreements should first determine the parties' respective property positions before turning to the question of support. As Ellie J. puts it, in *Donnelly v. Descoteaux*, 2011 ONSC 5796 at paragraph 64:

> "It is usually wise to deal with equalization first, because an equalization payment may eliminate or reduce the amount of support that otherwise might be awarded."

Consider the following:

> A husband and wife are each 64 years of age and have been married for 30 years. Neither had premarital assets. The wife was a stay-at-home parent to three children, who have been financially independent for several years. The husband retired one month after separation. He has cash of

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(d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

> $1,000,000.00. The parties have no other assets of value. The wife will receive $500,000.00 as an equalization payment. The wife can apply for a division of CPP credits.

This is straightforward. The wife may have grounds for compensatory support, but the quantum is 0. There is entitlement, but the quantum is zero.

However, in a case similar to the above, but without any compensatory features, neither party will be able to establish any *entitlement* to support. See *Chao v. Chao,* 2016 ONSC 7911, where the judge found that the result of the equalization was to leave no grounds for entitlement for support:

> Given that the parties' incomes during the marriage were almost exclusively derived from their investments, the only means available to equalize their standards of living following separation is to equalize their net family property. Once the property is equalized, there is no entitlement to either party to ongoing spousal support from the other, whether by periodic payments or in a lump sum (paragraph 110).

If one party's premarital assets were disproportionate, the same rational may not apply. In addition, there is nothing about a large property award that inherently precludes a support award from being made.

Short term marriages with minimal equalization

In short-term marriages with older parties, these are often second or even third relationships. The ground for entitlement is likely to be need rather than compensation. The parties' ages, health, and ability to work must be considered carefully. In these relationships, the equalization payment, if any, is often minimal.

No Entitlement, But Quantum would have Been (Near to) 0

In *Merko v. Merko*, 2008 ONCJ 530, the parties married in Ukraine and the husband sponsored the wife in coming to Canada. The marriage lasted twelve months. The wife was 54. The wife sought to impute an income of $35,000.00 to the husband and was unsuccessful. Ultimately, the quantum would have been close to nil even if there had been a finding of entitlement.

No Finding of Entitlement – Question of quantum therefore not considered

McKee v. Priestlay, 2007 BCSC 852 – The applicant was 58 years of age and the respondent was 60. The parties were married for three years. The judge simply applies the factors set out in the *Divorce Act*, and finds no entitlement. It should be noted that the respondent's income was well below the "floor" and the applicant made nearly the same amount as him. Also note that the case is from British Columbia, which has a different property regime than Ontario.

Even in some short-term relationships, the equalization payment may eliminate entitlement to support. In *Henderson v. Casson*, 2014 ONSC 720, Ms. Henderson was 57 at date of trial and Mr. Casson was 58. The parties had separated after 6.5 years of marriage (the Rule of 65 would not have been in operation had entitlement been found). Ms. Casson's position was that if no equalization were made, she was entitled to $5,000.00 per month, but conceded that if a (non-nominal) equalization payment was made, the interest generated would be sufficient to support her. An equalization payment was ordered, and as such, Ms.

Cason was found to be self-supporting and there was no need for support. As such the question of quantum did not arise.

Entitlement but no Quantum

MacLaren v. MacLaren, 2004 CanLII 24050 – Ms. MacLaren was 55 by the time of the interim motion for spousal support before Aitken J. The MacLarens' marriage lasted four years. While there appeared to be a significant basis for compensatory support, as well as need for support, the husband's situation had taken turn for the worse and he was depleting capital to support himself and would have had to further do so to pay support to the wife. As such, Justice Aitken declined to award interim support, indicating support would still be a live issue for trial.

If entitlement is established, even a modest income difference can generate a reasonably large support obligation. Given this, from the recipient's perspective, it is preferable to have a finding of entitlement but no quantum, as this better leaves the door open for future support applications, as was the case in *MacLaren.*

B. SSAG-Related Issues of Quantum and Duration

Income determination - treatment of pensions as income versus property

Following retirement, pensions remain property that are subject to valuation and equalization pursuant to the *Family Law Act*. As set out above, the proper procedure is to proceed to determine the equalization payable prior to moving to the questions of entitlement, then quantum and duration of support.[3]

Treating a pension as property following retirement has several advantages. The division may eliminate the need to address the quantum of support, if entitlement (for instance, entitlement based on need in a short-term marriage) is no longer present. Issues of security for support do not arise. The recipient retains the opportunity to "double dip" if appropriate.

However, on a practical level, parties who are negotiating a settlement may wish to consider whether treating the pension as income may produce a better result for both parties. Factors to consider:

1. Depending on the pension, the operative legislation may not permit pension division by rollover if the date of separation occurred after a pension was already in pay. Therefore, the payor may have difficulty satisfying an equalization payment or may have to resort to an "if and when" division of a pension in pay.

2. In cases where a party is on the brink of retirement at date of separation, division may not be as favourable to the recipient as receiving support on account of the pension, particularly if the recipient would be considering the option of purchasing an annuity.

[3] Note that that the goal of interim spousal support is to preserve the status quo (RUG) and should be based on "income-sharing" – see *Drouillard v. Drouillard*, 2012 ONSC 4495, citing *Cassidy v. McNeil*, ONCA 218. Interim support does not mean that there will be a finding of entitlement on a final basis.

3. This approach does necessitate the need for security for support.

Rule of 65

The Rule of 65 is an exception to the regular duration principles in calculating spousal support within the without child support formula. Under section 7.5 of the SSAGs, spousal support duration for the without child support formula ranges from half the duration of the cohabitation to the full duration of the relationship. If the recipient's age at separation (not application or trial) and the total length of the relationship totals 65, the SSAGs prescribe an indefinite duration, meaning that support should continue onwards pending variation or termination.

The SSAGs state that the Rule of 65 does not apply to relationships that are less than five years in length. Because the SSAGs also prescribe an indefinite duration for relationships of 20 years or more, the impact of the Rule of 65 is limited to relationships of at least 5 but less than 20 years in length where the recipient is older than 45 years of age at date of separation.

The SSAGs state that the rule is intended to recognize that age limits a recipient's ability to meet one of the goals spousal support as set out in the *Divorce Act*, namely, to promote economic self-sufficiency insofar as it is possible. The Rule does not preclude the need for a finding of entitlement.

The *Revised User Guide*[4] cites two Court of Appeal cases, each up which uphold the Rule of 65. In *Djekic v. Zai*, 2015 ONCA 25, the Ontario Court of Appeal found it was an error of law for the judges to order time limited support when the Rule of 65 applied unless reasons for deviating from the SSAGs were provided (as per *Fisher v. Fisher*, 2008 ONCA 11). In other words, deviating from the SSAGs *including* the Rule of 65, requires an explanation from the Court. In *Linn v. Frank*, 2014 SKCA 87, indefinite support in a 14 year marriage was held not to be an error. Amongst their reasons, the Court of Appeal cited the Rule of 65, which the trial judge had considered.

Djekic has only been cited to a limited extent regarding the Rule of 65. As one example, in *Ward v. Jones*, 2015 ONSC 2752, the judge lauded the recipient for not seeking indefinite support although pointing out she would "likely be entitled to it," referencing *Djekic v. Zai*.

Also see *Cassidy v. McNeil*, 2010 ONCA 218, wherein the trial judge awarded time limited support although the Rule of 65 applied, without providing reasons[5] for deviating from the SSAG-prescribed duration. The Court of Appeal reiterated that this was an error of law.

Exception for Illness/Disability

The SSAG formulas were developed to deal with the 'typical' case. Few family law cases are entirely typical. This is recognized by the authors of the SSAGs and Chapter 12 sets out a number of exceptional cases when the strict application of the SSAG formulas will not be appropriate.

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[4] Rogerson, Carol and Rollie Thompson, Spousal Support Advisory Guideline: The Revised User's Guide, April 2016, page 94.
[5] The award, also being higher than the high range of the SSAGs, led the Court of Appeal to speculate that the trial judge may have been restructuring, but that it was nevertheless not appropriate to do so without explaining why this was being done.

One such exception is the case of a recipient who is in ill health or suffers from a disability. The RUG addresses this exception at page 62.

Cases involved retirement or older parties and disability include: Hickey v. Princ, 2015 ONSC 5596, where the husband retired at age 51 and the wife was disabled and Tscherner v. Farrell, 2014 ONSC 976, where the wife was in her late fifties and with significant health issues, and the husband was retirement planning.

III. Motions to Change

Many spousal support cases involving older clients will involve motions to change existing support orders or agreements.

A. Applicability of the SSAGs

When the SSAGs were first introduced, there was confusion as to whether they should be used in variation applications. The Court of Appeal answered this question clearly and in the affirmative in the decision of *Gray v. Gray*, 2014 ONCA 659:

> 43 This court commented in *Fisher v. Fisher*, 2008 ONCA 11, at para. 96, that the SSAG only apply to initial support applications, and not to variation proceedings. *Fisher* was not a variation proceeding that entailed consideration of s. 15.3 of the *Divorce Act*. At the time of *Fisher* the final publication of the SSAG had not been released. The July 2008 SSAG publication contemplates that the guidelines have a role to play on variation. The SSAG expressly comment that it should be possible for either spouse to apply to cross over from the "with child support" formula to the "without child support" formula, to affect the amount of spousal support ordered.
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> 44 The approach taken by Cohen J. in *Abernethy v. Peacock*, 2012 ONCJ 145, is appropriate in the current case. As in *Abernethy*, Ms. Gray is entitled to support on a need and compensatory basis. The 1998 support order was deliberately lower than it ought to have been in recognition of her receipt of child support, as permitted by s.15.3 of the *Divorce Act*. In such circumstances, the SSAG offer a valuable tool in assessing a reasonable amount of spousal support, and should be routinely consulted.
>
> 45 In some cases, there are complicating factors that must be considered before a court applies the SSAG wholesale. Complicating factors that courts ought to consider include variations based on the post-separation income increase of the payor, or situations with second families. In such cases, the court must conduct an analysis of the facts of the specific case to assess whether the SSAG ranges are appropriate.

B. Material Change – Yes or No?

Any discussion of variation or change of support must start with consideration of the relevant statutes. Both the *Divorce Act*, footnote supra, and the *Family Law Act*, footnote supra, require applicants to meet a threshold test before considering whether an existing spousal support order should be varied.

Section 17(4.1) of the *Divorce Act* provides that before a court makes an order to vary spousal support, it must first be satisfied that a "change in the conditions, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order."

A similar provision is found in s. 37(2) of the *Family Law Act* which states, "if the court is satisfied that there has been a material change in the dependant's or respondent's circumstances," then the court may vary the existing support provisions.

Professors Rogerson and Thompson in the *Spousal Support Advisory Guidelines*: A Revised User's Guide (footnote supra) at page 76:

> *"L.M.P.* is now the leading case on the threshold test for variation. The test is not whether the change was or was not "foreseeable" by the parties at the time of the previous order. The language of "foreseeability" is mistakenly transposed by lawyers and judges from the case law dealing with spousal support agreements — first *Pelech* and now *Miglin*. Some prefer to restate the "material change" test as a change that was not "foreseen" in the initial order, but even this often leads to confusion. The better approach is to focus on what was "contemplated" or "taken into account" in the initial order."

Retirement

Retirement is probably the most common trigger for an application to vary spousal support by an older client. The question in this scenario should be whether retirement of the payor was contemplated or taken into account in the initial order or agreement, and whether it is appropriate to vary spousal support as a result of the retirement of the payor in the circumstances of the particular case.

A good example of the current approach can be found in *Walts v. Walts*, 2016 ONSC 4777. In this case, the parties separated in 2007 after 28 years of marriage. They signed a separation agreement in 2007 which provided for the wife to receive the maximum transferable amount from the husband's pension. These funds were placed in a LIRA. The Separation Agreement also provided for the husband to pay spousal support in an amount that was half way between the mid and high end of the SSAG range.

The husband brought a motion to change in 2013 seeking to terminate his support obligation on the basis of his retirement. At that time, the husband was 55 years of age. The motion was dismissed. Minnema J. found that the husband's retirement was voluntary and premature. Of particular concern to Justice Minnema was the fact that the wife was 53 years of age and could not access the funds in her LIRA until she reached age 55.

The husband tried again in 2015 when he was 57 years of age and the wife was 55 years of age, arguing that spousal support should terminate because the wife could now access her LIRA funds. The husband also relied on medical evidence that was not before Minnema J. to argue his retirement was not voluntary. The wife defended the motion, arguing that nothing had really changed since 2013 and as a result, the husband's motion was still premature. Justice Mackinnon agreed.

In doing so, Mackinnon J. first addressed the question of material change by adopting the approach described by Professors Rogerson and Thompson in the *Spousal Support Advisory Guidelines: A Revised User's Guide* as quoted above.

Mackinnon J. says at paragraph 12 of her decision:

> "This approach is, in my view, to be preferred to one which asks whether the support payor's retirement was foreseeable or foreseen at the time the original order was made. Most Canadian employees do retire; retirement is not an unexpected event. It is more useful to inquire whether the event that has since occurred, for example, income reduction due to retirement, was taken into account in the order that was made. This inquiry lends itself more naturally to an analysis of issues that arise from the timing of and reasons given in support of retirement in relation to whether the income reduction does or does not constitute a material change in circumstances."

In her analysis, at paragraph 19, Mackinnon J. cites the *Bullock v. Bullock*, 2004 CanLII 16949 decision with approval as

> "authority for the proposition that the court should consider the payor's choice of retirement date in relation to what is reasonable for both payor and recipient having regard to their aggregate retirement resources and the ability of these resources to provide reasonable standards of living for both parties."

She also considers the *Cossette v. Cossette*, 2015 ONCA 2678 decision of the Court of Appeal as authority for the proposition that (at para 21):

> "It is not the law that voluntary retirement can never constitute a material change in circumstances, but that contractual eligibility to retire is not sufficient on its own to establish a material change in circumstances."

In *Francis v. Logan*, 2008 BCSC 1028, the Court made clear the doctrinal reasons that retirement cannot always be a material change: "To allow a variation in this case, in these circumstances, would be to sanction a means of defeating spousal support orders which would ignore the compensation aspect of the analysis in *Bracklow v. Bracklow*, [1999] S.C.J. No. 14 (S.C.C.)." (para 39).

In *Francis v. Logan*, the parties separated after 31 years of marriage. The payor brought a variation application in 2008, five years after separation. The recipient was 57. The payor retired at 63 years of age, and his income dropped to $27,400.00 from $100,000.00. The Court found that "the decision to take early retirement was not, in this case, dictated by medical needs, or economic exigencies but rather personal preferences and choices" (para 34). Parrett J. did, however, order a review when the husband turned 65, which was the age that he would have been permitted to retire with unreduced benefits under his plan.

Early Retirement – Key Points to Remember

Medical evidence is critical. The burden to prove a material change rests on the party seeking the change. Particularly where a party is seeking to establish the reasonableness of early retirement, evidence on this front is critical.

Bare representations regarding health are not enough. For example, see *Greco v. Greco*, 2017 BCSC 172. Counsel for the payor argued that Mr. Greco "left Fort McMurray because the lifestyle did not suit him, that he was working long hours in a difficult work place, and that his health was suffering accordingly". The judge noted, "Mr. Greco adduced no medical evidence relevant to his ability to work and no evidence of any steps taken in search of employment following his relocation" and dismissed the application to vary support.

Be careful what your physician says. In *Moul v. Moul*, 2016 ONSC 4758, the payor, who retired as an consultant and was spending his time at his wife's winery, adduced evidence from two physicians. One doctor wrote a letter supporting the payor retiring (from consulting) and stating that the winery work was better for the payor. However, Justice Labrosse noted that the doctor's evidence did not state that the payor could not work. This ultimately informed Justice Labrosse's conclusion that the payor could work part-time; material changes were found, but an income was imputed to him and support continued, albeit at a lower rate.

Make sure the medical evidence is current. Justice Mackinnon, in *Walts*, supra, notes that the physician's evidence was not sufficiently contemporary to the date from which the payor requested the support reduction. Similar to Justice Labrosse in *Moul*, she points out the shortcomings of the evidence, which did not "include a recommendation that he should retire from his employment for medical reasons or that he should not obtain any alternate employment." In the absence of such evidence, the payor's application was dismissed.

Subsequent Illness or Disability

It is not unusual for an elderly client to require increased support as a result of illness or disability. In addition to the inability to continue to work or be gainfully employed, the increased need may take the form of increased health costs or need for additional care.

There is little doubt that unexpected illness or disability of one spouse will support an application to vary spousal support.

Of note is the *Elaschuk v. Elaschuk* (1997) OJ 1869, 31 R.F.L (4^{th}) 119 decision. The parties separated in 1970 after a 6 year marriage. The husband paid spousal support for 26 year pursuant to the divorce judgment. The wife was diagnosed with Multiple Sclerosis in 1983 and the husband consented to an order increasing the amount of spousal support. At this time the wife was still working full time. When the wife became totally disabled by Multiple Sclerosis in 1991, she successfully applied for a further increase in spousal support.

At paragraph 5 of the short endorsement, the Divisional Court said:

> "(the husband's) primary argument is that the fact of marriage does not alone entitle one of the spouses to a pension for life. The recent decision of the Supreme Court of Canada in *Bracklow v. Bracklow* (1999),44 R.F.L (4th) 1 (S.C.C) however indicates that it may; see esp at paras 46 to 48."[6]

[6] Paragraphs 46 to 48 from the *Bracklow* decision are as follows:

"Following *Moge*'s broad view of causation in compensatory support and the concomitant acceptance of the availability of non-compensatory support, courts have shown increasing willingness to order support for ill and disabled spouses. Sometimes they have done this as a "transition" to self-sufficiency: *Parish v. Parish* (1993), 46 R.F.L. (3d) 117 (Ont. Gen. Div.). But more often, they have frankly stated that the obligation flows from the marriage relationship itself. Collecting cases, Rogerson explains in "Spousal Support After *Moge*", supra, at p. 378 (footnotes omitted):

> The [more dominant] approach, ... particularly in cases of earning capacity permanently limited by age, illness or disability, and the one generally supported by the developing Court of Appeal jurisprudence, has been to award continuing support without regard to the source of the post-divorce need. On this approach, which I earlier referred to as the "basic social obligation" approach, causal connection arguments have been rejected not only in determining entitlement to support, but also in assessing the extent of the obligation. The message coming from the cases adopting this approach appears to be that one takes one's spouse as one finds him or her, subject to all his or her weaknesses and limitations with respect to income-earning capacity; and a spouse with higher earning capacity has a basic obligation to make continuing provision for a spouse who is unable to become self-sufficient at the end of the marriage. One is simply not allowed to abandon a spouse to destitution at the end of a marriage if one has financial resources which might assist in relieving the other spouse's financial circumstances.

47 Rogerson concludes that "the non-compensatory principle ... has come to play ... a large role in the subsequent case law, providing in many cases a very generous basis for support" (p. 384): see, e.g., *Ashworth v. Ashworth* (1995), 15 R.F.L. (4th) 379 (Ont. Gen. Div.) (Non-compensatory permanent support ordered for disabled spouse who, on the judge's findings of fact, *benefited* from the marriage, as opposed to needing any compensation). "The current approach is typically justified by reference, first, to *Moge*'s rejection of the applicability of the causal connection test, and second, to the fact that the spouse who is ill suffers disadvantage from the *breakdown* of the marriage and the loss of financial support from the other spouse" (Rogerson, "Spousal Support After *Moge*", supra, at pp. 378-79 (emphasis in original)).

48 To permit the award of support to a spouse disabled by illness is but to acknowledge the goal of equitably dealing with the economic consequences of marital breakdown that this Court in *Moge*, supra, recognized as lying at the heart of the *Divorce Act*. It also may well accord, in my belief, with society's sense of what is just. The Report of the Scottish Law Commission, *Family Law: Report on Aliment and Financial Provision* (1981), at pp. 111-12, a thoughtful analysis of the rationale and policy considerations of spousal support and illness, states:

> Financial provision on divorce is not ... simply a matter of abstract principle. It is essential that any system should be acceptable to public opinion and it is clear from the comments we have received that many people would find it hard to accept a system which cut off, say, an elderly or disabled spouse with no more than a three-year allowance after divorce, no matter how wealthy the other party might be.

Divorce ends the marriage. Yet in some circumstances the law may require that a healthy party continue to support a disabled party, absent contractual or compensatory entitlement. Justice and considerations of fairness may demand no less."

Remarriage or Repartnering

When dealing with older clients, it is not unusual for one or the other of the parties to remarry or re-partner. In some circumstances, this change may be found to justify the variation or even termination of support provisions.

The effect of remarriage or repartnering of the recipient will be more significant in needs based support cases than in compensatory support cases.

Remarriage or Repartnering of the Recipient

In *Lalonde v. Lalonde*, 2014 ONSC 4925, the husband applied to terminate his support obligations. He had been paying support for a period of approximately 10 years. His former wife sought an order to increase spousal support in accordance with the SSAGs.

The parties were married in 1979 and separated in 2004 after 25 years of marriage. There were three children of the marriage. At the date of separation, only one child remained dependent. The final order that was the subject of the variation proceedings provided for the husband to pay of child support for the remaining dependent child and spousal support.

In 2009, the wife began to cohabit with another man. At the same time, the only remaining dependent child of the marriage moved out of the wife's home. In 2010, the husband retired at the age of 54 and commenced a new job that was less physically demanding.

The court found that the wife had achieved the standard of living to which she is entitled, that is, one that is equal to that she would have enjoyed had the marriage continued and any financial hardship that the wife suffered as a result of the marriage or its breakdown no longer existed (paras 101 and 102). On the basis of this analysis, spousal support was terminated.

Remarriage or Repartnering of the Payor

The remarriage or repartnering of payor is not generally found to be a material change in circumstance warranting a change of support. *Keller v. Keller* (1996 CarswellMan 449) is a unique case. The husband inherited substantial amount as result of second wife's death and first wife successfully applied to increase her spousal support. However, the case is now 20 years old and has not been cited any reported Ontario cases.

Considering the payor's new partner as a factor in assessing ability to pay has been endorsed in other provinces. The RUG, at page 94, cites *Bell v. Bell*, 2013 BCSC 271, wherein the court, while properly refusing to include the new partner's income in the calculations, considered the new partner's contribution to the household costs in arriving at an above-high-range spousal support order. See also *Flieger v. Adams*, 2012 NBCA 39 ,as well as *Grant v Grant,* 2012 NBCA 101.

Termination of Child Support Obligations

In the case of *Gray v. Gray*, 2014 ONCA 659, the husband brought a motion to eliminate his obligation to pay spousal support. In the same proceeding, the wife sought to increase the amount of spousal support being paid on the basis that child support had ended.

The parties were married in 1980 and separated in 1994. There were 4 children of the marriage. In the original divorce judgment, the husband was ordered to pay spousal support in the amount of $800 per month. The judgment specifically stated that the quantum of support was less than required but was ordered in accordance with s. 15.3(2) of the *Divorce Act*.

The husband was also obliged to pay child support for the four children of the marriage in the amount of $2301 per month. At the time of the motion to vary, it was agreed by both parties the child support should be terminated. At trial, the trial judge declined to make any change to the spousal support order.

The Court of Appeal set aside the decision of the trial judge and replaced it with an order that the husband continue to pay increased spousal support for an indefinite period of time.

The court determined that the appropriate quantum of spousal support was the low end of the SSAG range. In reaching this decision the court took into account the husband's increased income, the husband's responsibilities to his second family, the wife's ill health and the fact that for years the quantum of spousal support was lower than it otherwise would have been as a result of giving priority to child support as contemplated by s. 15.3 of the Divorce Act.

C. SSAG-Related Issues of Quantum and Duration

Income determination

The factors affecting income determination in variation proceedings will be similar to the factors taken into account in initial applications. Some additional considerations, which are more likely to arise on a variation, include the general rule against double dipping and the obligation to encroach on capital.

Double Dipping

The concept of double dipping or double recovery was described in the Supreme Court of Canada decision of *Boston v. Boston*, 2001 SCC 43 as follows:

> 34 The term "double recovery" is used to describe the situation where a pension, once equalized as property, is also treated as income from which the pension-holding spouse (here the husband) must make spousal support payments. Expressed another way, upon marriage dissolution the payee spouse (here the wife) receives assets and an equalization payment that take into account the capital value of the husband's future pension income. If she later shares in the pension income as spousal support when the pension is in pay after the husband has retired, the wife can be said to be recovering twice from the pension: first at the time of the equalization of assets and again as support from the pension income.

> 35 Double recovery appears inherently unfair in cases where, to a large extent, the division or equalization of assets has addressed the compensation required. In equalizing the spouses' net family properties, the husband or wife as the case may be must include the future right to the pension income as "property" on his or her side of the ledger. This means that the pension-holder must, on separation or divorce, transfer real assets of equal value to the pension to the other spouse in order to retain the pension under the property accounting.
>
> 36 The pension-holder cannot divide the actual pension as it cannot be accessed until retirement. The pension entitlement cannot be sold or transferred. The apparent unfairness arises when the other spouse receives support payments from the pension income after the pension-holder retires. Professor James G. McLeod stated in his annotation to *Shadbolt v. Shadbolt* (1997), 32 R.F.L. (4th) 253 (Ont. Gen. Div.), at p. 253: "Put another way, [the pension-holding] spouse receives nothing in return for the real assets transferred to his or her partner in order to retain his or her pension under the property accounting".
>
> 37 The double recovery issue here arises if the wife is permitted to seek further support from her former husband where the ability to pay support is determined by including the same pension, the value of which was previously used to determine the value of the husband's net family property, and to calculate the equalization payment owing to the wife. It is this issue which remains unsettled.

The court went on to conclude:

> 64 To avoid double recovery, the court should, where practicable, focus on that portion of the payor's income and assets that have not been part of the equalization or division of matrimonial assets when the payee spouse's continuing need for support is shown (see *Hutchison*, *supra*, at para. 9). In this appeal, that would include the portion of the pension that was earned following the date of separation and not included in the equalization of net family property.
>
> 65 Despite these general rules, double recovery cannot always be avoided. In certain circumstances, a pension which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized assets in an income-producing way and, despite this, an economic hardship from the marriage or its breakdown persists. Double recovery may also be permitted in spousal support orders/agreements based mainly on need as opposed to compensation, which is not the case in this appeal.

So, double dipping is to be avoided where practicable, but this may not always be the case.

Encroachment on capital

The obligation of each party to encroach on their respective capital assets was also addressed in the *Boston* decision.

> [54] I agree with Czutrin J.'s reasons in *Shadbolt* and Professor McLeod's comments in annotation to

> that case. When a pension is dealt with by the lump-sum method, the pension-holding spouse (here the husband) must transfer real assets to the payee spouse (here the wife) in order to equalize matrimonial property. The wife can use these real assets immediately. Under a compensatory spousal support order or agreement, the wife has an obligation to use these assets in an income-producing way. She need not dedicate the equalization assets to investment immediately on receiving them; however, she must use them to generate income when the pension-holding spouse retires. The ideal would be if the payee spouse generated sufficient income or savings from her capital assets to equal the payor spouse's pension income. In any event, the payee spouse must use the assets received on equalization to create a "pension" to provide for her future support.

Mackinnon J. in *Walts v. Walts* at para 23:

> "I conclude that if the court finds that reduced ability to pay due to retirement is a material change in circumstances, and the support payor's pension has been accounted for in the asset distribution to the support recipient, the recipient needs to make reasonable use of those assets to generate income when the retirement pension goes into pay".

The payee has the responsibility to use equalized assets in an income producing way. In *Sullivan v. Sullivan*, 2012 NBQR 262, the husband payor's retired at age 66; the wife refused to sell her shares in a company jointly held with the husband and interfered in his efforts to liquidate his shares, which he ultimately did, in part, to allow him to continue to pay support. The wife failed to meet her responsibilities as a recipient of support and ultimately support was terminated despite the relationship being in excess of 30 years.

The responsibility to encroach on capital is unique to older or retired parties. It does not apply in other cases. Where entitlement and ability to pay are present, a spouse should not have to live off capitall prior to the age of retirement. See *Goeldner v. Goeldner*, 2015 ONCA 455.

IV. Considerations for Either Type of Application

A. Imputing Income

Older clients are not immune to having income imputed to them, although the circumstances and considerations are different.

Income could be imputed to the payor or respondent in cases of first instance, for example, if the payor or respondent (or both) have retired prematurely. In cases of first instance, or if a material change has been established, income can also be imputed on account of RRSPs or investments, as one example. As has been noted, the general rule that a recipient is not required to deplete capital to support him or herself does not apply to retired recipients, who are expected to deplete investments and savings to contribute to their own support.

Income imputation is not an all-or-nothing proposition. In *Moul v. Moul,* 2016 ONSC 4758, Labrosse J. imputed an income of $40,000.00 per annum to a 56-year old consultant (accountant) who had retired and was helping at his new wife's winery. While the support was ultimately reduced on account of material

changes (including the payor's PTSD), it was not terminated completely because Labrosse J. found that the payor was unreasonably unemployed:

> *"The Applicant has chosen to go from full time work to non-remunerated work while spending time and energy on the vineyard and the winery. He has not provided any evidence of his inability to work part-time."*

Justice Labrosse also imputed an income to the support recipient in this case based on her underemployment.

B. Use of an Actuary/Consistent Approaches to Boston

When spouses are older, in cases where duration is indefinite, whether an initial application or variation application, counsel should consider whether the use of an actuary might avoid the need for future variation motions.

In *Zwanenburg*, 2017 ONSC 613, the parties' various sources of income at various ages were considered, including a defined benefit pension, use of RRSPs to exhaustion over a lifetime, OAS, CPP, and a foreign pension. Counsel for the moving party (the payor wife) retained an actuary to calculate the parties' respective incomes at various ages. Justice Beaudoin used the data to calculate step-down support for when the support recipient's foreign pension became available, essentially avoiding the need for future variation motions.[7]

C. Lump Sum Support

In *Mannarino v. Mannarino,* 1992 CarswellOnt 308, [1992] O.J. No. 2730, the Ontario Court of Appeal stated:

> "The law is clear that lump sum maintenance should be awarded only in very unusual circumstances, where there is a real risk that periodic payments would not be made. Such awards should not constitute a redistribution of family assets in the guise of support."

As a result of this decision, lump sum awards were uncommon for many years. This changed when the Court of Appeal revisited the issue in *Davis v. Crawford,* 2011 ONCA 294, and specifically stated at paragraph 51:

> "We reject the appellant's submission that *Mannarino* should be treated as restricting a court's ability to award lump sum spousal support to situations "where there is a real risk that periodic

[7]Double dipping issues were in play. The recipient's equalized assets, but not the payor's equalized assets, were used to determine income. This may have been due to a narrow *Boston*, which reads, at para. 64, "To avoid double recovery, the court should, where practicable, focus on that portion of the ***payor's*** *income and assets* that have not been part of the equalization or division of matrimonial assets when the payee spouse's continuing need for support is shown (see *Hutchison*, *supra*, at para. 9)." However, more relevant is para. 54, cited above, regarding the parties' mutual obligations to encroach on capital.

> payments would not be made" or to other limited and "very unusual circumstances." To the extent that *Mannarino* has been interpreted in that way, in our view, that interpretation is incorrect."

The Court of Appeal went then went on to outline thing a court should consider in determining whether an award of lump sum spousal support is appropriate in a particular case. These include:

a) A lump sum award should not be made in the guise of support for the purpose of redistributing assets.
b) The lump sum award can be made to relieve against financial hardship and any lump sum award will have the effect of transferring assets. This is acceptable if the underlying purpose is to relieve against financial hardship.
c) An important consideration is whether the payor has the ability to make a lump sum payment without undermining the payor's future self-sufficiency.
d) A court must weigh the perceived advantages against the disadvantages of making a lump sum award in each case. The advantages include terminating contact between spouses, providing capital for an immediate need, addressing risk of non-payment, and addressing a lack of proper financial disclosure. The disadvantages include the risk of change in means and needs of parties over time and the fact that variation is not available in the future.

In conclusion the Court said at paragraphs 75 and 76:

> Irrespective of whether the proposed support is periodic or lump sum, it is incumbent upon counsel to provide the judge deciding the matter with submissions concerning the basis for awarding and the method of calculating the proposed support, together with a range of possible outcomes. Further, it is highly desirable that a judge making a lump sum award provide a clear explanation of both the basis for exercising the discretion to award lump sum support and the rationale for arriving at a particular figure. Clear presentations by counsel and explanations by trial judges will make such an award more transparent and enhance the appearance of justice. Over time, this approach will undoubtedly foster greater consistency and predictability in the result.
>
> 76 As part of this approach, where an award of lump sum spousal support is made as a substitute for an award of periodic support, it is preferable that, with the benefit of submissions from counsel, the judge consider whether the amount awarded is in keeping with the *Spousal Support Advisory Guidelines* (Ottawa, Department of Justice, 2008) (the "*Guidelines*"). If it is not, some reasons should be provided for why the *Guidelines* do not provide an appropriate result."

Lump sum support may be an appropriate mechanism for resolving the issue of spousal support in several scenarios involving older clients:

1. Short-term relationships not meeting the Rule of 65, where duration and quantum for support can be determined with some certainty.

2. If the parties' incomes over the next several years are fixed and a determinable event will render the quantum of support to be 0, even if entitlement continues.

3. If otherwise appropriate, given the factors set out above in *Davis v. Crawford*, 2011 ONCA 294.

It is interesting to note that, based on tagged spousal support cases on Westlaw with no dependent children[8] and where the relationship lasted less than two years, lump sum support was ordered in 36% of cases (usually on its own, but in a few cases in combination with periodic support). This declines to 23% for relationships of between three and six years.

Lump sum awards are understandably appropriate in many short-relationship cases. However, in light of the more flexible test in *Davis v. Crawford*, a long-term relationship or a prescription of indefinite support does not preclude the possibility of a lump sum award. *Davis v. Crawford* has been cited in at least 56 cases.

Older Clients / Long Term Marriage

In *Bhatnagar v. Bhatnagar*, 2016 ONSC 3054, the parties had been married 37 years. At the time of this variation application, the recipient wife was nearly 67; the payor husband was 69 and had retired. The applicant wife had a negative net worth; the husband's was near a million. The judge found that he achieved this economic position by failing to pay proper support and proper equalization" (para 47).

There was no proper equalization when the parties separated. The husband had significant assets, but notwithstanding this, Hood J. found there to be a "real" risk of non-payment. Although the Wife sought lump sum support in the alternative to periodic support, Hood J. ordered $200,000.00 in lump sum support, despite acknowledging that, "There was limited evidence in support of this amount."

Green v. Green, 2015 ONCA 541 – The parties' marriage lasted 48 years. The recipient was 63 at date of separation; the payor was 67. The trial judge had calculated lump sum spousal support on the basis of 7 years of support but in the high range. Although the Court of Appeal found several issues with how the amount was quantified, ultimately the result ($173,136.00) was found to be reasonable.

Blatherwick v. Blatherwick, 2015 ONSC 2606 – In a 39-year relationship, both periodic support and 6.5 million in lump sum support were awarded. The husband had little credibility and lived outside of Canada.[9]

Considerations for and Issues with Lump Sum Settlements

Counsel should consider the following in advising their clients:

1. Is a retirement date known? Or has retirement already occurred?
2. How stable is each party's income?
3. Is either party particularly sensitive to the stresses of litigation?
4. Can future litigation be avoided?

Benefits

1. Financial certainty for each party;

[8] All Canadian cases (except Quebec). Includes cases with an unspecified number of dependent children, which usually infers no dependent children. It should be noted that Westlaw's tagging practices are not perfect.
[9] This case, while interesting, is not a particularly helpful as we are unlikely to come across many litigants who, like Mr. Blatherwick, admit on the stand to being a liar and a cheat.

2. Elimination of future litigation costs;
3. Elimination of future litigation risks;
4. Both parties become free to earn income without need to consider the legal impact;
5. Freedom to live – no complications regarding future spouse, etc.;
6. Often in retirement, parties' incomes are lower, so tax-efficiency of periodic support may not be present;
7. Minimizes collection issues; and
8. No need to deal with long-term security for support.

Issues with Lump Sum Payments

1. There are no uniform rules for calculation or appropriate discount factors;
2. Calculation in many cases may prove arbitrary;
3. Over or underpayment may occur; and
4. Payor may not have capital for lump sum support even though payor may have good ability to pay periodic support.

D. Security for Support

Carol Cochrane presented a paper to the CCLA Civil Litigation Conference in 2001, entitled "Securing Support Obligations." It is a very good summary of remedies available to a support recipient to secure their support entitlement and is recommended reading.

When dealing with older clients, there may be fewer options available.

Life Insurance

Life insurance is the most common tool used to secure support obligations in the event of the death of the payor.

The Court of Appeal in *Katz v. Katz*, 2014 ONCA 606 addressed the question of whether a court has jurisdiction to order a party to obtain life insurance, and found that such jurisdiction does exist under both the *Family Law Act* and the *Divorce Act.*

In two recent decisions of Justice Shelston, he applied the *Katz* decision, confirming that the court does have jurisdiction under the Divorce Act to order a payor to obtain life insurance.

In *Kirvan v. Kirvan* 2016 ONSC 7712, 2016 CarswellOnt 19337 Justice Shelston said,

> 235 In *Katz v. Katz*, 2014 ONCA 606, 377 D.L.R. (4th) 264 (Ont. C.A.), the Court of Appeal canvassed the issue of life insurance securing support obligations and provided the following principles:
>
> (a) The *Divorce Act* does not have a provision like s. 34(1)(k) of the *Family Law Act*, which permits a court to order a spouse to obtain insurance to secure payment of support following the payor's death;

(b) Despite not having the specific provisions, the Court is given broad discretion to impose terms, conditions, and restrictions in connection with an order for child or spousal support, including the power to order a spouse to obtain insurance to secure the payment, to be binding on the payor's estate; and

(c) The factors to be considered in determining the quantum of the life insurance, once the issue of insurability and cost of the insurance is resolved, are as follows: the amount of life insurance cannot exceed the amount of support payable over the duration of the support order; the amount of insurance to be maintained should decline over time as the amount of spousal support payable will diminish over the duration of the award; the obligation to maintain insurance should end when the support obligation ends; and the court should first order that the support obligation is binding on the payor's estate.

Analysis

236 I have considered the following factors in arriving at my decision regarding life insurance:

(a) Under the *Divorce Act*, I have jurisdiction to order the respondent to obtain and maintain life insurance to secure his payment of a support obligation;

(b) Under the *Divorce Act*, I have jurisdiction to order the support obligation to be binding on the respondent's estate;

(c) I have ordered the respondent to pay to the applicant spousal support in the amount of $1,504 per month;

(d) The respondent's Great-West Life policy of $200,000 costs him $430.62 per month and has no term;

(e) The respondent has a death benefit of two times his salary through his employment, which principal amount is reduced by 10% each year starting in 2013.

237 Taking all the factors into consideration, I order the respondent to designate the applicant as the irrevocable beneficiary of his death benefit through his employment and the Great-West Life policy and to provide proof of said designation by December 23, 2016.

The same analysis was applied in the case of *Zigiris v. Foustanellas* 2016 ONSC 7528.

However, life insurance may not be available to older parties because of health issues or if available, may be prohibitively expensive. In such instances – alternatives will have to be considered.

RRSP/RRIF

Beneficiary designations of RRSPs or RRIFs can be used as security but cannot be made irrevocable. This concern might be addressed by impressing the RRSP proceeds with a trust in favour of the support recipient. This can be done by an irrevocable declaration of trust by the payor.

Subsection 34(c) of the *Family Law Act* permits a court to make an order requiring that property be transferred to or in trust for or vested in the dependent, whether absolutely, for life or for a term of years.

Collateral Mortgage

Subsection 34(k) of the *Family Law Act* provides that the court can make an order, "requiring the securing of payment under the order, by a charge on property or otherwise. Pursuant to this section, security can be ordered in the form of a mortgage against the payor's home or other real estate. The mortgage can be structured such that the principle amount declines over the period that support is payable.

Other Security for Support

In *Sadlier v. Carey*, 2015 ONSC 3537, the court ordered the support payor to post a security bond and surrender his passport to secure his support obligations. The court stated at paragraph 59:

> Section 34(1)(k) allows the court to order security for a spousal support order. There is no doubt that the posting of a bond is security under this section. This subsection does not refer to passports being deposited with the court as security. I conclude that the word "otherwise" captures this form of security and I adopt the reasoning of Justice Sherr in *Jones v. Hugo*, 2012 ONCJ 211 (Ont. C.J.) at paras. 85-91 and *H.F. v. M.H.* 2014 ONCJ 450 (Ont. C.J.) at paras. 61-62.

Conclusion

While general principals of spousal support do not change based on parties' ages, counsel need to turn their minds more carefully to certain issues. Counsel should strongly consider whether an actuary can be retained to narrow the issues; counsel should also consider the possibility of negotiating a lump sum settlement. The cases also highlight the need for properly adduced medical evidence in the event that the payor relies on health as a reason for early retirement and thus grounds for establishing a material change.

General Resources for Spousal Support

1. Spousal Support Advisory Guidelines
2. Revised User Guide
3. Carol Rogerson and Rollie Thompson's various SSAG papers including case updates
4. Westlaw FamilySource "Spousal Support Quantum Service" – available through the CCLA Library
5. Other commentary available through WestLaw Family– available through the CCLA Library (includes Phil Epstein's "This Week in Family Law," The Family Law Quarterly, the Canadian Abridgement Digest, Wilton & Semple Spousal Support Commentary, etc.
6. Law Society of Upper Canada's Access CLE
7. Theories of Spousal Support Entitlement (Rollie Thompson)
8. Did we forget to talk about Entitlement? Entitlement to Spousal Support and the SSAGs (Nick Bala)