# *TIPS & TRAPS ON NEGOTIATING SPOUSAL SUPPORT: VARIATION, REVIEW AND OTHER QUIRKS*

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When a spousal support order is made for periodic payments, the quantum of the order can remain constant, go up or down, or terminate. Or the duration of the order can be delineated to a certain date or event, or it could be paid indefinitely. A definite term order is often used where the marriage is relatively short, or where the recipient spouse is likely to become self-sufficient in the foreseeable future. Indefinite term orders are usually used in longer-term marriages or where the recipient may never achieve self-sufficiency due to illness, age, incapacity or some other reason which limits the ability to become self-sufficient.

## *VARIATION*

Whether an order is for a quantum that is constant or changing, or the order is for a definite or indefinite term of duration, an application may be brought to vary the order pursuant to s.17(4.1) of the *Divorce Act*:

> "17.1 A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> (a) A support order or any provision thereof on application by either or both former spouses; or
>
> 17(3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
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> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.
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> (7) A variation order varying a spousal support order should
>
> (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

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(b) apportion between the former 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 former spouses arising from the breakdown of the marriage; and

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

In determining whether there has been a change in circumstances, the test was set out by the Supreme Court of Canada in *Willick v. Willick* [1994] S.C.J. No. 94, [1994] 3 S.C.R. 670 (SCC). First, there must be a material change in circumstances, but further:

> "This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation." (at para 21)

Although *Willick* dealt with the variation of a child support order, the same test applies to a variation of spousal support – see *(G.(L.) v. B. (G.)*, [1995] 3 SCR 370 (SCC).

The Courts have summarized a s.17 analysis as follows:

1. The change must not have been reasonably foreseeable or known of at the time the original order was made (*Murphy v. Murphy*, 2000 BCSC 974) (BCSC); and

2. The change must be of such a nature that, had the change been known of, a different order would have resulted (*G. (L.) v. B. (G.)*, [1995] 3 SCR 370 (SCC).

***MIGLIN***

Where spousal support is contained in Minutes of Settlement or a Separation Agreement, and then the terms of the Agreement are formalized by a Consent Order, the right to vary the Order is set out by the Supreme Court of Canada in *Miglin v. Miglin*, [2003] 1 SCR 303 (SCC). The test and analysis is discussed in detail by Professor

Carol Rogerson in her paper entitled *"The Legacy of Miglin: Some Preliminary Thoughts".*

In order to prove the material change in circumstances, it must be shown that the "new circumstances were not reasonably anticipated by the parties". (*Miglin* at para 88). This statement insinuates some form of "foreseeability". Therefore, if, at the time of the original Agreement or Consent Order, the parties foresaw, or ought to have foreseen the new circumstances, the Court cannot find the required change in circumstances – see *G. (L.) v. B. (G.)*, [1995] 3 SCR 370 (SCC), (at para 74):

> "Here, the trial judge found as a fact that at the time of the agreement the respondent knew that the appellant was "seeing" the third party and that it was foreseeable that they would cohabit. In view of this finding, the trial judge correctly concluded that there was no material change in circumstances."

The test for foreseeability is subjective, not objective. See for example *Innes v. Innes* [2005] O.J. No. 1839 (Ont. Div. CT.) (at para 25-27), *Stones v. Stones*, 48 R.F.L. (5th) 223, (2004) BCCA 99 (BCCA).

***TINKERING WITH THE VARIATION TEST***

One of the concerns under s.17 of the *Divorce Act* and the analysis in *Willick* is that a variation requires a material change in circumstances and the circumstance was not foreseeable. Counsel have tried to navigate around this problem by lowering the bar in an Agreement as to what constitutes a material change in circumstances.

In *Gobeil v. Gobeil* 2007 MBCA 4 (Man.C.A.) the Separation Agreement signed by the parties allowed for a variation where there was a "material change in circumstances, whether such change is foreseen or unforeseen". It seemed that the parties were trying to reduce the uncertainty surrounding a variation application by lowering the threshold.

At trial, the Court decided that this was a form of hybrid variation, both a review and a variation application, and therefore applied *Miglin* principles.

The Manitoba Court of Appeal questioned the use of *Miglin* in the circumstances. Without deciding that issue, the Court went on to indicate that the parties' circumstances at the time of the Agreement should be compared to the totality of the parties' circumstances at the time of the variation. The Court was left with a significant degree of discretion on what to do if the change, as defined by the Agreement, has occurred. In this case, the court found there was no change in circumstances, and thus no variation was ordered.

## *REVIEW ORDERS*

In *Trewin v. Jones* (1997) 26 R.F.L. (4th) 418 (Ont.CA), James McLeod provided an annotation and defined Review orders as follows:

> "Under a Review order, either party may return the matter to Court at a fixed time. On the return, a Court will review support entitlement, form, duration and quantum on the facts as they exist on the return date. The issue of support is determined afresh on the facts and the original onus of proof applies. Neither party has to prove a material change in circumstances."

### *USE OF REVIEW ORDERS*

Review clauses are used by payors in substitution for indefinite support. The payor is given some hope that spousal support will come to an end.

On the other hand, recipients use review clauses as a substitution for a final termination date.

The Court receives its authority to grant a Review Order pursuant to s.15.2(3) of the *Divorce Act*, the provision which allows the Court to include terms and conditions in a spousal support Order. A Review Order does not require a change in circumstances – *McEachern v. McEachern* (2006) 33 R.F.L. (6th) 315 (BCCA).

### *LESKUN – A NEW STANDARD?*

In *Leskun v. Leskun* 2006 SCC 25, [2006] 1 S.C.R. 920 (SCC), Gary and Sherry Leskun were married for 20 years and had one child together. Both the husband and wife

worked for much of the marriage at the TD Bank. In 1993, the husband accepted a job with Motorola. In 1998, the wife was about to be terminated from the bank position and the husband advised he had been having an affair with a woman with whom he now wished to marry. The wife was devastated.

***TRIAL***

At trial, Mr. Leskun, then 45 years of age, was expecting to earn about $200,000. Ms. Leskun, then 53 years of age, was fully relying on the husband's support payments.

The wife's circumstances at trial included health issues, her dispute with her former employer had not yet been resolved and she had lost three close family members. In addition, she was living with her adult daughter who was a single parent, and the child's father did not pay any support while the daughter was receiving Social Assistance.

In 2000, the trial court in its reasons said that the husband was to pay the wife $2,250 per month in spousal support "until Sherry Leskun returns to full employment, when both entitlement and quantum will be reviewed" (*Leskun v. Leskun*, [2000] BCJ No. 1085, 2000 BCSC 1912 at para 25b) (BCSC). In a rather strange twist, the Order that was entered did not accurately reflect the Judgment of the Court, and the Order read that the spousal support was to be paid "until further Order of this Honourable Court, and the Plaintiff [husband] shall be at liberty to apply for an Order reviewing both entitlement to and quantum of spousal support (*Leskun v. Leskun*, 2004 BCCA 422, 7 R.F.L. ($6^{th}$) 110 at para.8.) (BCCA).

In April, 2003, the husband ceased making his spousal support payments and brought an application to terminate spousal support. The wife was unrepresented and cross applied for an increase in spousal support.

***VARIATION APPLICATION***

The variation application was heard in 2003. The wife had not returned to full employment. Her other personal circumstances remained much the same as at trial, some three years earlier.

On the other hand, the husband had left Motorola and was starting a new business in Chicago. In essence, the husband argued he was making no money, had no job prospects and he should not have to support his ex-wife any longer.

The Judge at the variation application rejected both applications and held that the wife was still disadvantaged by the marriage. Due to her lack of formal education, her age and health, she still required spousal support.

### *BC Court of Appeal*

The husband appealed to the BC Court of Appeal. The wife remained unemployed and unrepresented when the matter was heard in 2004. The husband took the position that he was unemployed as well.

The Court of Appeal rejected the husband's arguments and the appeal was dismissed. Mr. Leskun appealed to the Supreme Court of Canada.

### *Supreme Court of Canada*

Again, the wife was unrepresented at the Supreme Court of Canada. The husband's appeal was on several grounds, including the question of whether misconduct could be taken into account in assessing entitlement to spousal support. The more important ground, for the purposes of this analysis, is in relation to the review provisions.

Ultimately, the husband's final appeal to the Supreme Court of Canada was dismissed.

### *Review of Spousal Support*

The Supreme Court of Canada provided some direction on the use of review Orders in the context of spousal support.

In *Schmidt v. Schmidt*, 1999 BCCA 701 (BCCA), Madam Justice Prowse discussed the nature of a review hearing (at para 9):

> "...[Review orders] are considered particularly useful in circumstances where there is some doubt as to whether spousal maintenance should be continued and, if so, in what amount. Rather than force the parties to go through a variation proceeding with its strict threshold test of change in circumstances, the court provides that maintenance shall be reviewed. In some cases, the court also states how proceedings will be conducted and the nature of the evidence to be called. Pending review, the order remains in effect."

In *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 (SCC), Justice Binnie for the unanimous Court quoted the above passage from *Schmidt*, and indicated a review provision in a spousal support order was a condition pursuant to s.15.2(3) of the *Divorce Act*. He indicated (at paras 36, 37 & 39):

> "...This will properly occur when the judge does not think it appropriate that at the subsequent hearing one or other of the parties need show that a change in the condition, means, needs or other circumstances of either former spouse has occurred, as required by s.17(4.1) of the *Divorce Act*.
>
> Review orders, where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances: *Choquette v. Choquette* (1995), 39 R.F.L. (4th) 384 (Ont. C.A.). Otherwise, as the *amicus* fairly points out, the applicant may have his or her application dismissed on the basis that the circumstances at the time of the variation application were contemplated at the time of the original Order and, therefore, that there had been no change in circumstances. The test for variation is a strict one: *Willick v. Willick*, [1994] 3 S.C.R. 670 at pp 688-90.
>
> *Willick* and *Choquette* establish that a trial Court should resist making temporary orders (or orders subject to "review") under s.15.2.... Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s.17 on proof of a change of circumstances. If the s.15.2 court considers it essential (as here) to identify an issue for future review, the issue should be tightly delimited in the s.15.2 order. This is because on a "review" nobody bears an onus to show changed circumstances. Failure to tightly circumscribe the issue will inevitably be seen by one or other of the parties as an invitation simply to reargue their case. That is what happened here. The more precise condition stated in the reason of the trial judge was excessively broadened in the formal order. This resulted in a measure of avoidable confusion in the subsequent proceedings."

Under *Leskun*, Review Orders are useful in the following circumstances: where there is a need to establish a new residence; start a program of education; train; upgrade skills; or obtain employment.

In summary:

1. Review Orders should be avoided if possible. Finality is the preferred option.
2. If Review Orders are used, they should be reserved for circumstances where there is real uncertainty incapable of immediate resolution.
3. The circumstances surrounding the future review should be specifically stated in the Review Order.

***FISHER***

In *Fisher v. Fisher* (2008) 47 R.F.L. (6th) 235 (Ont.CA), the parties were in a 19-year marriage, without children. The trial was in 2006. The husband then earned $140,000 while the wife earned $30,000. The trial Judge ordered a step-down order of support over three years, and provided that either party could "seek a review of both entitlement and/or quantum... without the need to establish a material change in circumstances."

On appeal, the Court of Appeal indicated "a review, particularly one relatively proximate to the time of the originating order, causes unnecessary and significant expense for the parties, not only emotionally, but also financially." (at para 63)

"Review orders in effect turn an initial order into a long-term interim order made after trial. Accordingly, they should be the exception, not the norm. They are appropriate when a specified uncertainty about a party's circumstances at the time of trial will become certain within an identifiable time frame. When one is granted, it should include specifics regarding the issue about which there is uncertainty and when and how the trial judge anticipates that uncertainty will be resolved." (at para 70.) In general, the Court should try to issue a final Order, which would always be subject to the variation provisions pursuant s.17.

In *Fisher*, the wife was making reasonable efforts at self-sufficiency. There was no reason to believe that her finances would change at any clearly marked point in time. Thus, there was no need for a review date. The Court of Appeal set spousal support at $3,000 per month, then stepping it down until September, 2011, which was seven years of support. The Order was, of course, subject to any variation.

***OTHER RECENT CASES ON REVIEW***

In *Ratajczak v. Ratajczak*, 2010 ONSC 4286, 2010 CarswellOnt 5627 (Ont. S.C.J.) the Court imposed a Review Order because there was a genuine and material uncertainty at the time of trial. It followed *Fisher*, and provided specific direction regarding the issue which would be reviewed in the future.

In *I.P. v. J.S.P.,* 2005 BCSC 1063 (BCSC), the trial Judge in 2005 ordered spousal support to be paid indefinitely, but provided for a right of review. Specifically, the trial Court indicated:

> "...Ms. I. P. does have an obligation to attempt to become at least partially self-supporting. There will thus be a right of review of this order, without the necessity to show a change of circumstances, by either party, after June 30, 2008. By that time, the parties will have been separated for almost six years, the home will be sold and the net proceeds divided, and Ms. I. P. will have had a further opportunity to seek some form of employment." (at para 71)

At the review hearing in 2010, Justice Shabbits did not feel the Review Order was a *de novo* review, but rather, was limited only to the issue of self-sufficiency. Income was imputed to the wife and quantum was reduced, although the award remained indefinite.

The lesson was that in a Review Order, one must be very specific as to exactly what is being reviewed: is it *de novo*; is it only in relation to self-sufficiency; or is it something in between?

In *J. (E.P.) v. E. (A.P.),* 2010 BCSC 1121, 2010 CarswellBC 2100 (BCSC), the Court made a very specific Review Order indicating that the review was not to be *de novo*, but

focused on self-sufficiency, reasonable parenting responsibilities and any income changes of the payor.

***SETTING A BASE LINE***

Separation Agreements or Court Orders should set a base line as to the facts used to determine spousal support. As a minimum, the income used to generate spousal support should be specified. The more facts outlined, the better it is for a later variation or review application to determine both a material change in circumstances and whether the future change was foreseeable. This issue is important for both the payor and recipient.

***STOP OR CONTINUE SUPPORT? – THAT IS THE QUESTION***

When there is a review provision, there is always a question of whether or not spousal support comes to an end at the review, or if it continues subject to an adjustment by the Court. One line of authorities indicate that spousal support is to continue indefinitely until varied – *McEachern v. McEachern* [2006] BCJ No. 2917 (BCCA), while another line of cases indicate that spousal support should stop and it would be up to the recipient to establish that it should continue – *McIntyre v. McIntyre* [2007] SJ No. 8 (Sask.CA).

It would be much better for counsel to simply say what the expectation is in the review clause.

***TIPS ON A REVIEW BY A PAYOR***

In *Magee v. Faveri* [2007] O.J. No. 4826, 2007 CarswellOnt 7941 (Ont.SCJ), the payor applied to terminate support on the basis that the recipient should be self-sufficient. The payor led the following evidence, which was important for the Court to make a determination:

(a) The recipient's post-secondary education;

(b) The extent to which the recipient had failed to take additional training or education;

(c) The recipient's work history and level of earnings;

(d) The recipient did not advertise her small business;

(e) The recipient was unwilling to work outside a specified geographic area;

(f) The recipient had not applied to work with a major auto worker in her area (work which was completely different than what she had done in the past);

(g) The recipient had failed to look for jobs online;

(h) The recipient did not read local newspapers to seek employment;

(i) The recipient wanted to be available and at home for her children, despite childcare available from the payor, the payor's new partner or the recipient's new partner.

## *CHANGE IN CIRCUMSTANCES - PAYOR*

### *1. Reduction in Payor's Income*

Where the payor loses his job, and that job loss is non-voluntary, then this is a change in circumstances which would allow for a variation of a support order – *Strang v. Strang* (1989) 23 R.F.L. (3rd) 17 (Alta. QB) affirmed (1990) 26 R.F.L. (3rd) 113 (Alta. C.A.), affirmed [1992] 2 SCR 112 (SCC).

Where the reduction of income is a result of a choice made by the payor, the payor cannot rely on his or her deliberate actions as a basis for an application to reduce spousal support – *Hildebrandt v. Hildebrandt* (1991), 34 R.F.L. (3d) 373 (Sask. QB).

### *2. Payor's Post-Separation Income Increase*

After separation, if the payor's income increases, there are two possible extremes in calculating spousal support:

(a) At one end, it could be argued that any post-separation income increase of the payor should not affect spousal support at all. The recipient would receive a sharing of the marital standard of living only.

(b) At the other end, the recipient spouse could share all of the payor's post-separation increase in income. This might be the case in a long-term marriage.

The Courts usually look for some form of causation between the post-separation income increases of the payor, and whether none, some or all of those increases are to be shared as spousal support. Factors include the length of the marriage, the roles of the parties during the marriage, the time elapsed between the date of separation and the payor's income increase, the reason for the income increase etc. See *D.B.C. v. R.M.W.*, [2006] AJ No. 1629 (Alta.QB). See *Sawchuk v. Sawchuk* [2010] AJ No. 18 (Alta QB); *Beninger v. Beninger* [2009] BCJ No. 2197 (BCCA).

A full discussion of the complexity surrounding the issues on the payor's post-separation increase in income and its effect on spousal support can be found in *"Post Separation Increase in Income "Après moi le deluge"* by Philip Epstein, QC and Sherri Pinsler in these materials.

### 3. *Payor's Retirement*

Retirement may be a material change in circumstances, but it depends on several factors. These factors include whether the retirement is reasonable or it is self-induced (in order to avoid spousal support). Some factors to consider include:

(a) Whether the retirement is wholly voluntarily or forced by illness, declining capacity, or uncertain employment prospects;

(b) The age of the parties;

(c) The extent to which the recipient will be adversely affected, and in particular, what his or her expectations in financial planning has been with respect to both parties' retirement;

(d) The extent to which the support is grounded in compensatory or need or both;

(e) The ability of the recipient to absorb the change by adjusting his or her work participation – *Morton v. Morton* [2005] SJ No. 719 (Sask.CA).

It is not the retirement per se that is the material change in circumstances, but rather, it is the change in the payor's income that is important. See *Winseck v. Winseck* 2008 CarswellOnt 1868 (Ont.Div.C.) where the Court stated at para 18:

> "It is his income, not his retirement status, that determines whether a material change has occurred."

The issue of foreseeability of retirement does cause considerable concern in the case law. It could be argued that retirement is always foreseeable and therefore cannot be relied upon as a change in circumstance – *G. (L.) v. B. (G.),* [1995] 3 SCR 370 (SCC).

On the other hand, the issue of foreseeability could be interpreted on a much narrower basis. For example, if the Agreement or Order being varied specifically contemplates retirement, but the date of retirement is not known, then upon retirement and the date then being certain, this fact should be available to the payor to establish a change in circumstances that was not foreseeable. Otherwise, s.17 of the *Divorce Act* would have very limited use as "almost everything is foreseeable".

Where the payor is forced to retire, and this fact was not contemplated at the time of the original order, the retirement is a change in circumstances – *Strang v. Strang* (1990) 26 R.F.L. (3rd) 113 (Alta. C.A.), affirmed [1992] 2 SCR 112 (SCC). Further, if there is voluntary early retirement and it is done in good faith and not to frustrate the spousal support obligations, then the retirement will be a material change in circumstances – *Hoar v. Toner* (2010) NBQB – 167 (NBQB).

Most of the retirement cases focus on the retirement being a reduced ability to pay spousal support. Where, however, the retirement was foreseeable at the time the Agreement was signed, there will be no change in circumstances and support will continue – *Pearson v. Pearson* (2000), 8 R.F.L. (5th) 396 (Sask. QB).

The issue of the payment of spousal support after one retires is canvassed more fully in Marie Gordon, QC's paper entitled *"Back to Boston: Spousal Support After Retirement"*, found in these materials.

### 4. *Payor's Bankruptcy*

Bankruptcy, in and of itself, may not necessarily be a change in circumstances. In *Richards v. Richards* (1986) 48 Sask. R. 131 (Sask.C.A.), the husband was assigned into bankruptcy and applied to cancel arrears and reduce ongoing support. The variation Court dismissed the husband's claim, and on appeal, the Court also dismissed the claim. The Court of Appeal indicated that the husband was young, able-bodied and he continued to operate a business in spite of the bankruptcy.

### 5. *Payor's Re-Marriage or Re-Partnering*

In general, re-marriage or re-partnering of the payor is not a grounds for a reduction in spousal support (except in some exceptional cases). In fact, re-marriage or re-partnering may actually improve the payor's ability to pay as a result of expense sharing with the new spouse or partner – *McLean v. McLean* (1975) 26 R.F.L. 115 (NBQB).

The payor's new spouse's income may be relevant to increase the payor's ability to pay spousal support – *Hachey v. Hachey* (1994) 9 R.F.L. ($4^{th}$) 71 (NBQB). However, in some cases, support can be reduced or terminated based on new family obligations – *Wolfe v. Wolfe* (1995) 15 R.F.L. ($4^{th}$) 86 (BCSC).

### 6. *Second Families*

After the parties separate and spousal support is determined, a significant issue can arise where one or both parties re-partner or re-marry and have subsequent children. The Courts have struggled with this issue in the child support framework; it is equally difficult with spousal support.

The potential policy choices include first family first; second family first; or treat all children equally. Most of the case law supports the first family first philosophy where the payor must support the first spouse and children over any subsequent obligations.

### 7. *Payor's Anticipated Income*

Where the original support order is based upon the payor's anticipated income in the future, and if that income did not materialize, that fact is sufficient to warrant a change in circumstances to justify a variation – *August v. August* (1989) 21 R.F.L. (3rd) 1 (Man.C.A.).

## *CHANGE IN CIRCUMSTANCES – RECIPIENT*

### 1. *Self-Sufficiency*

In *Leskun v. Leskun* 2006 SCC 25, [2006] 1 S.C.R. 920, the Supreme Court of Canada commented that self-sufficiency is one of the objectives of the *Divorce Act*; it is not a duty. It is simply one of several factors to be taken into account (at para 27). The objective of self-sufficiency does create a lot of tension in the spousal support arena. The usual fact scenario is that the payor is alleging the recipient has failed to take adequate or any steps towards self-sufficiency.

The appropriate remedy when grounding a claim in self-sufficiency is to impute income to the recipient – *McEachern v. McEachern* [2006] BCJ No. 2917 (BCCA). Once the income is imputed, spousal support may or may not be terminated, depending on the facts, entitlement and the basis of the spousal support in the first place. Spousal support based on compensatory principles may be grounds for long-term support which may have little effect on the recipient's present or imputed income.

### 2. *Increase in Income*

If the recipient's financial circumstances improve post-separation, this may not be a material change in circumstances if the recipient can demonstrate a need for further financial support. See *Fowler v. Fowler* 2010 ONCA 328 (Ont.C.A.). A

rather large increase in the recipient's annual income will constitute a change in circumstances which will result in a reduction of support payable – *Mullin v. Mullin* 1990 87 Nfld. & PEIR 1 (PEITD), varied 1991 95 Nfld. & PEIR 73 (PEICA).

### 3. *Decrease in Income*

If the recipient has reduced income after separation, this may result in a change in spousal support. Typically, the recipient may lose or reduce employment, or may suffer an illness or disability after the initial order. In general, the Courts look for some nexis between the loss of income and the entitlement to spousal support.

### 4. *Recipient Re-Marriage or Re-Partnering*

Where the cohabitation of the recipient was foreseeable at the time of the original Order, that fact cannot be relied upon for a change in circumstances – *G. (L.) v. B.(G),* [1995] 3 SCR 370 (SCC).

Where the original Order was based on compensatory principles, the new relationship of the recipient is irrelevant – *R. (R.S.) v. R. (S.M.)* (2006) 30 R.F.L. (6th) 339 (BCSC).

If the spousal support Order is needs-based, this fact will be more relevant by re-marriage or re-partnering than a compensatory-based support Order – *Kelly v. Kelly* 2007 BCSC 227 (BCSC). See also *Rosario v. Rosario* (1991), 37 R.F.L. (3d) 24 (Alta.CA).

It might be appropriate to reduce spousal support to a nominal amount, but not terminate it, given the potential that the recipient may have a future need – *Plotz v. Boehmer-Plotz* [2004] O.J. No. 587 (Ont.S.C.J.). See also *Prince v. Prince* (2000) ABQB 371 (Alta.QB). Cases generally reduce, suspend or terminate support. See *Hinds v. Hinds*, [2008] BCJ No. 2540 (BCCA) and *Bockhold v. Bockhold*, [2010] BCJ No. 283 (BCSC).

In *Murphy v. Murphy* (2007) 43 R.F.L. (6th) 48 (BCCA), the lower Court terminated spousal support due to her income and the income of her new partner. The BC Court of Appeal overturned that decision. The recipient's new relationship was a material change, but the lower Court failed to do a proper analysis under s.17 of the *Divorce Act*.

***5. Recipient Disabled***

Where the recipient's health deteriorates since the original Order, spousal support may be continued (albeit reduced) and the term extended (to comply with the SSAGs) – *Jens v. Jens* (2008) 300 DLR (4th) 136 (BCCA).

***6. Recipient No Longer Has Primary Responsibility For Children***

Where the recipient no longer has primary responsibility for the children, this fact alone may not justify a variation – *Walker v. Walker* (1992) 39 R.F.L. (3d) 305 (BCCA). In general, when children cease to be children as defined by the *Divorce Act*, there should be sufficient grounds to constitute a change in circumstances.

***7. Property of Recipient***

Where the recipient receives a substantial amount of property (unrelated to the marriage) which, if properly invested, would allow him or her to become self-sufficient, then this fact would constitute a material change in circumstance – *Weicker v. Weicker* (1986) 4 R.F.L. (3d) 397 (Alta. QB).

***8. Inflation***

In general, where an Order has not been changed for several years, the loss of purchasing power in the original support Order may constitute a change of circumstances resulting in an increase in spousal support – *Cymbalisty v. Cymbalisty*, [2002] M.J. No. 526 (Man.QB), affirmed (2003) 44 R.F.L. (5th) 27 (Man.CA).

## *TIPS FOR PRESENTING SPOUSAL SUPPORT CLAIMS*

1. Read the SSAGs.
2. Always start with entitlement. Structure entitlement around spousal support entitlement category (compensatory, non-compensatory, contractual).
3. Basic facts in every case: (a) parties' ages; (b) length of marriage; (c) level of education; (d) work history; (e) particulars of children; (f) childcare obligation.
4. Always have SSAG software calculations.
5. Because income is so important, bring different SSAG scenarios.
6. Provide monthly budgets. Three budgets are helpful: (a) lifestyle of parties while living together; (b) current budget; (c) reasonable proposed budget.
7. Know thy Judge.

## *WOMEN AS SUPPORT CLAIMANTS*

Studies have been done on the impact of negotiation between men and women trying to establish spousal support. One author has claimed that women seeking spousal support tend to be less loss-averse than men who provide support, are more likely to make concessions, and are far more risk-averse (*Unequal Shadows: Negotiation Theory and Spousal Support Under Canadian Divorce Law*, Craig Martin (1998) 56 U.T. Fac. L. Rev 135).

In particular, the provisions of the *Divorce Act* surrounding spousal support create significant discretion with the Courts, thereby making predicting an outcome extremely uncertain. In addition, there are high transaction costs to litigate spousal support. And (at least until recently) the awards have been relatively low in any spousal support litigation case. All of these factors tend to reduce the value of the BATNA surrounding spousal support for the recipient.

Prospect Theory, developed by Kahneman and Tversky in 1979, posits that if a person were to use rational choice theory, that person would be indifferent between placing a bet that he could lose $5 or gain $5. However, Prospect Theory demonstrates that the

subjective value of losing $5 is higher than the subjective value of the possibility of gaining $5. Most people are risk-averse.

Translating Prospect Theory to spousal support, the support recipient subjectively values the possibility of obtaining support less than the support payor, who subjectively values paying support much higher. The result is that the two forces press against each other and result in a lower predicted spousal support quantum.

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