ONTARIO BAR ASSOCIATION
A Branch of the Canadian Bar Association

May 2013 Family Law Section

SPOUSAL SUPPORT – A MEDIATOR'S PERSPECTIVE

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There can be little doubt that the introduction and acceptance of the *Spousal Support Advisory Guidelines* has had a dramatic impact on spousal support. It is rare that a reported case does not consider the *SSAG* and it would be rarer still if counsel discussing a spousal support case did not consider the Guidelines.

However, the introduction of the *SSAG* has not eliminated spousal support litigation and, perhaps inadvertently, the Guidelines themselves have added to the litigation by calling for a spousal support review in given circumstances. That is particularly so when utilizing the "with child spousal support formula", which generally calls for a review when the youngest child finishes high school.

Even without the Guidelines, the imposition of a review order by the court or an agreement by the parties that they would review the spousal support is a common tool and very often a "quick fix" to a vexing problem.

One of the objectives of spousal support, be it the Provincial statutory objectives or The *Divorce Act*, promote self sufficiency of the dependent to the extent that the dependent can contribute to her own self sufficiency. The courts have devised various schemes to encourage self sufficiency, including time limited orders and step down orders. However, the most common tool has been the review order in order to replace the usual support order that is subject only to a material change in circumstances.

All of the Provincial statutes and the Federal *Divorce Act* have provisions for a variation of spousal support if there is a material change of circumstances. The judicial gloss placed on the statutory provision by the Supreme Court of Canada in *Willick v. Willick*, 1994 34 C.R. 670 (S.C.C.) creates a significantly higher threshold than the statute seems to suggest. Thus, the threshold in *Willick* that the material change be unforeseen or unforeseeable has made the threshold very difficult to meet for many who thought their circumstances changed sufficiently to warrant a reduction in their support obligation.

For example, retirement sometimes has been considered a material change, but sometimes not, depending on the circumstances and the age of the retiree. A new spouse or even a change in income may or may not meet the threshold test. Thus, lawyers for many years have been drafting Separation Agreements that contain material change clauses that contain language that overcomes the restrictions imposed by *Willick v. Willick* and often specify specific events such as retirement or remarriage that constitute material changes giving a right to the payor to apply for a variation.

In addition to the vexing problem of material change comes the direction from the Supreme Court of Canada in *Messier v. Delage* [1983] 2 S.C.R. 401, that judges should not speculate on what might happen to the payor or the recipient in the future and in cases where there is real doubt, then the courts should leave the issue to the variation provisions of the various support statutes. *Messier v. Delage* was decided long before the Guidelines and long before there was rampant discussion of durational spousal support limits and long before *Willick*.

The introduction of durational limits under the Guidelines often now relieves the courts of speculating what might happen to the recipient in the future, since the court can take that into account by lengthening or shortening the durational limits.

However, the most common tool used by mediators, in particular, and also judges to resolve the vexing problems of the need for a variable clause, speculation about the recipient and payor's future, the problems of *Willick* and the problems of *Messier v. Delage*, were all attempted to be solved by a review clause. A review was a *de novo* look at the spousal support issue without being hampered by what had gone on before. It appeared to make perfect sense in circumstances where the recipient was attempting to achieve self sufficiency but, the court was unclear whether she would be successful in that regard. A perfect example of that would be where the recipient planned to go back to school to complete a teacher's degree, and there was considerable uncertainty as to whether she would find employment upon graduation. The review order was designed to allow the payor some potential relief if, in fact, the recipient was able to achieve a degree of self sufficiency. If one left the situation to a material change clause, there would be an argument that parties recognized, at the time of settlement, that the recipient planned to go back to school and become a teacher and thus, there was no material change of circumstances if she succeeded in that endeavour.

At first instance, a review clause seems to make perfect sense. It allows a fresh look, at an appropriate time, chosen by the parties or the court and is supposed to provide for much greater certainty.

In *Leskun v. Leskun*, 2006 34 R.F.L. (6th) 1 (S.C.C.), Justice Binnie had much to say about review orders and what he did have to say has had a profound effect on future jurisprudence. Justice Binnie, in speaking about review orders, noted as follows:

> "Review orders under s. 15.2 have a useful but very limited role….Common examples are the need to establish a new residence, start a program of education, train or upgrade skills, or obtain employment. In such circumstances, judges may be tempted to attach to s. 15.2 orders a condition pursuant to s. 15.2(3) of the *Divorce Act*, that entitles one or other or both of the parties to return to court for a reconsideration of a specified aspect of the original order. 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*.
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> 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* (1998), 39 R.F.L. (4th) 384 (Ont. C.A.). Otherwise, as the amicus curiae 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.
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> At the date of the trial before Collver J., there were outstanding issues which the trial judge anticipated would be resolved in a relatively short time.
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> *Willick* and *Choquette* establish that a trial court should resist making temporary orders (or orders subject to "review") under s. 15.2. See also: *Keller v. Black*, [2000] O.J. No. 79 (QL) (S.C.J.). 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 reasons of the trial judge was excessively broadened in the formal order. This resulted in a measure of avoidable confusion in the subsequent proceedings."

These comments about review orders were controversial at the time. They emanated from a distinguished jurist of the Supreme Court of Canada, but one that the family law bar recognized had no significant experience in family law. Thus, many, including the writer, dismissed the comments on the basis that they interfered with and discouraged one of the more important tools that mediators and judges had in the tool box to help resolve family law cases. It was not long after *Leskun v. Leskun* that Justice Lang, speaking for a unanimous Court of Appeal in *Fisher v. Fisher*, 2008 ONCA 11 (Ont. C.A.) made it clear that review orders should be restricted to those narrow, few cases where it was required and, in any event, if a review order was made, it should be, as Justice Binnie also noted, seriously circumscribed so that the review hearing did not simply become a revisiting of the original dispute. That is, if there was a review, it should be limited to an enquiry, for example, of whether the wife got the job that she was talking about at trial or some other specific circumstances that needed to be explored.

Notwithstanding *Leskun* and notwithstanding *Fisher,* the courts continue to make review orders and mediators continue to use them as a tool.

After hundreds of mediations, I have concluded that *Leskun* and *Fisher* were rightly decided and that the use of a review order or agreement should be very seriously restricted and circumscribed. There can be no doubt that review orders play a significant role in mediated spousal support cases. I think this is because the *Spousal Support Advisory Guidelines* promote review orders, as does Section 15.3 of the *Divorce Act*, which entitles a review of spousal support when priority has been given earlier for child support. It is often a natural inclination to fix a review date when one anticipates that child support will change.

Review orders are often seen by many mediators as giving actual attention to Section 15.2(6)(d) of the *Divorce Act*, in that many of us think that a review order promotes self sufficient to the support recipient because it is a sword of Damocles hanging over their neck pending the review.

However, the fundamental problem with review orders that was recognized by Justice Binnie and Justice Lang is that they inevitably mean reengagement of the parties in the process and the expense of such reengagement. While parties may want review orders in order to protect them from the problems caused by *Willick*, they do not want the kind of review orders that cause them to have to retain counsel and accountants and revisit the spousal support issue. That is particularly so if the spousal support is going to be long term, because it potentially leads to multiple applications. Thus, while reviews are a popular tool in the mediator's tool box, mediators and judges ought to look for alternative ways to resolve the spousal support conundrum.

One of the ways to resolve this problem is to consider the issue of a lump sum. The Court of Appeal for Ontario revisited the issue of lump sums in *Davis v. Crawford*, 2011, ONCA, 294, where the court expanded the factors that a court should consider when awarding a lump sum. Experienced mediators were well ahead of the Court of Appeal on this and frequently used a lump sum as a means of resolving a spousal support issue and avoiding a review or future variation application.

Lump sums are popular in cases that are being mediated because the payor and the recipient want certainty and finality. The recipient wants the security of knowing she will no longer have to depend on the payor to remit a monthly cheque and the payor no longer wants anyone looking over his shoulder in order to determine his income on an ongoing basis. The recipient wants to get on with her life and not be harassed by variation applications every time the payor has a change in income.

The problems with lump sums are, of course, that they are not tax deductible for the payor. Frequently, there is no contingency discount that will be taken into account. More frequently, the payor will not have the kind of net

worth available to make a lump sum that is needed to resolve the matter. Thus, mediators often look for another way to solve the problem of certainty and finality even when resources may be limited.

One way to achieve this result is to consider a hybrid arrangement which combines periodic spousal support with a lump sum. This solves many of the problems for the parties and gives each party, to some degree, what they want. That is, the recipient gets the benefit of a fixed period of support during which she can organize her life and plan for the future. The payor gets the tax deductibility for the same period for which periodic support is being paid. Everyone has certainty and finality because the periodic sums and the lump sum are not subject to change, absent a catastrophic change in circumstances. If a hybrid arrangement is being made, the payor makes a lump sum either during the period that periodic payments are being made, up front or at the end, and frequently that lump sum payment is a combination of cash and an RRSP roll over. Thus, the recipient sometimes gets more money into her RRSP then she would otherwise be able to shelter, although she will have to pay tax on the monies rolled over at the time the RRSP is turned into a RIFF at the age of 71. Usually the RRSP would have doubled by the time that occurs and thus there are very substantial benefits to the recipient. The payor gets a break because his RRSP is going to be worth considerably less when he is taxed because he almost always will be at a higher tax rate than the recipient. The RRSP often solves the problem of how the payor comes up with a lump sum in order to bridge the gap between what the wife will need in order to maintain her standard of living.

A judge can make a lump sum award. A judge can make a step down award. A judge can make an award that terminates on a given date or a judge can made an award that is subject to a material change of circumstances. However, it is rare and unusual for a judge to make a hybrid award, but there is nothing in the *Divorce Act* or the *Family Law Act* or in case law that will prevent a judge from making such an order. I suspect that such orders have not been made to date because, traditionally, counsel have not sought that kind of resolution. A judge will, however, virtually never order a spousal RRSP roll over in order to satisfy a support claim. If a judge attempted to do so, there would, undoubtedly, be an argument that this was a property transfer in the guise of a support order. Nevertheless, in light of the provisions of Section 15(2) of the *Divorce Act*, I suggest that a judge has the jurisdiction to make such an order.

We are all aware that the first step in unravelling the financial issues between the parties is to determine the equalization payment between the parties. While the statute overwhelmingly supports an equal division and cases such as *Serra v. Serra*, 2009 ONCA 105 (Ont. C.A.) are an aberration, an unequal division of net family property is simply another way of conveying a lump sum to the support recipient. It is rare that a court would mix support with property. One of the advantages of mediation is that it is up to the mediator to craft a creative settlement to help the parties solve the problem. When one is going to mix property with support, the mediator and the parties will have to take into account the income tax consideration of transferring properties between spouses and whether there are advantages in doing a transfer at fair market value as opposed to a roll over and whether the parties can make use of capital gains exemptions in order to facilitate a settlement. All of this is likely beyond a judge's powers when determining support, but well within the role of the mediator in trying to fashion a settlement.

It will still be the minority of clients who choose private dispute resolution as a method of resolving their dispute over the next decade. If the parties choose to remain within the judicial system, then the key to resolution of these disputes prior to trial is for judges to use many of the same techniques that mediators utilise to resolve these kinds of family law disputes. That, of course, makes the judge's role akin to that of the mediator, but that is not significantly different than a role an active judge will play at a case conference.

While judges cannot use some of the techniques that are used by mediators in a judgment or order, they can use some of these techniques to encourage people to reach a settlement using all of the creative kinds of proposal that mediators put together in these kinds of cases.

Finally, a word about the SSAG. It is somewhat unfortunate that "Guidelines" appears in both *Child Support Guidelines* and the *Spousal Support Advisory Guidelines*, because it leads far too many counsel to treat them in

the same formulaic fashion. I venture to say that the vast majority of counsel and judges have not read in detail and studied the final version of the SSAG that was released in July, 2008. Utilizing the Guidelines without an understanding of the principles upon which they are based, leads to faulty reasoning and incorrect calculations. Thus, frequently, mediators are called upon to help counsel and the parties understand how an appropriate application of the SSAG applies to their case. Too often, parties have ignored the chapters on ceilings and floors, how to use the ranges, restructuring and, most importantly, the exceptions under the Guidelines.

A regular re-reading of the final version of the SSAG ought to be mandatory for lawyers, judges and mediators. Utilizing the Guidelines without thoroughly understanding the framework leads to significant misapprehensions and miscalculations.