Spousal Support Entitlement – A Review of Recent Alberta Decisions

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It is hardly an understatement to say that the law of support, both child and spousal, has changed dramatically in the past few decades. This change reflects changes in society in respect of a host of matters including: changes in the opportunities of both genders in education and the work place, changes in the notion of marriage and family and the obligations towards the family and expectations flowing from the breakdown of a relationship. The law is not static. As society changes, so too does statute law and the interpretation of the law – sometimes quite directly and at other times, it lags considerably. It is beyond the scope of this paper, however, to address anything beyond entitlement to spousal support.

The old *Divorce Act* provided the Court with seemingly unfettered discretion to award or not award interim spousal support on the basis of what it found *"fit and just"* having regard to the means and needs of the parties, and final support having regard as well to the "condition, means, needs and circumstances" of the parties and the children. Support could be varied or rescinded having regard to either the conduct of the parties or any change in their condition, means or need. Spousal support tended to be based solely upon the financial needs of the wife and children and the ability of the husband to pay *after* meeting his own expenses. The requirement to establish a causal connection between the need and the fact of marriage was almost a given. Generally speaking, where entitlement was found to exist, the quantum was low for both spousal and child support when compared with awards under the current *Divorce Act*.

The language of the current *Divorce Act* (the "Act") and amendments thereto provides a structure and guidance for the exercise of the Court's discretion (and to counsel negotiating settlement). One is to look at the parties' condition, means and needs with reference to the stated factors and objectives pursuant to section 15.2 of the Act. Those same objectives and factors are to be examined both in relation to entitlement and, if found to exist, the quantum and duration of spousal support.

Following the proclamation of the Act, we are all painfully aware that we didn't "get it right" initially. The focus of the enquiry, decisions and settlements was upon need and self sufficiency – whether or not is was practicable having regard to the needs, means and condition of the parties. Following the Supreme Court of Canada's decisions in *Moge* and *Bracklow*, it was clear that **each** factor and objective had to be considered, with no objective being paramount. The weight to be given in respect of each factor, however, would differ dependant upon the particular circumstances of the marriage and the parties. Arguably, we still did not "get it right" – the focus shifted from self sufficiency to an examination of the disadvantages of the marriage and compensation for the disadvantaged spouse – often with seemingly cursory regard to any advantages, the extent of matrimonial property divided between the spouses, reasonable needs having regard to the standard of living enjoyed during marriage and so forth. Furthermore, our Court of Appeal's interpretation of the provisions of section 19.1(a) of the *Child Support Guidelines* in ***Hunt v Smolis-Hunt*** requiring a "bad faith" intention to defeat or reduce a child support award in order to impute income for child support purposes was extended by some justices to require the same "bad faith" in order to impute income to a potential recipient of spousal support.

In 2006, Rhoda Dobler and Krista Ostwald wrote a paper for the Banff Refresher, *Spousal Support: The Clash of Entitlement and Self Sufficiency*, summarizing the previous year's reported case law in Alberta to see if there were any emerging trends in relation to findings of entitlement as a consequence of the publication of the then draft *Spousal Support Advisory Guidelines* (*"SSAG")*. Their conclusion, at page 19-46 was that spousal support continues to be complex issue and that the *SSAG*, while a helpful tool as a cross reference to quantum, has not assisted with the threshold entitlement issue, nor has it been beneficial in assisting with questions regarding duration of support.

Subsequently, Nick Bala and Mary Jo Maur in their paper entitled *Support Entitlement* presented in 2008 at the National Family Law Program, expressed the view that the *SSAG* had significantly changed the law of spousal support in relation to quantum and duration, and may have a subtle effect upon the question of entitlement. Case law from across the country was reviewed and analyzed, and one of the conclusions drawn was that characterization of the claim as either "needs" based or "compensatory" appeared to be extremely important.

At a recent hearing, opposing counsel suggested that compensatory support is almost a given where there are children, that in Alberta once entitlement was found to exist, the *SSAG* automatically "kicks in" and the Courts will generally not deviate from the quantum and duration ranges. Was *Shields v Shields* therefore a surprise? Following is a review of the Alberta case law over the past 2 years dealing with entitlement, which case law seems to suggest the contrary.

The conclusions drawn from the review suggest, that with a few exceptions:

A. The determination of entitlement is as complex as it has ever been. This is neither surprising nor disappointing as there are a myriad of possible circumstances and there is no "standard" type of marriage, whether or not there are children;

B. The characterization of a claim as compensatory or non compensatory remains important but is not, in and of itself, an answer to the enquiry. Often the conceptual underpinnings overlap or are not clear cut;

C. The decisions seem to reflect an increasingly careful and thorough analysis and weighting of all of the circumstances, factors and objectives under the Act. This includes consideration of advantages, not just disadvantages of the marriage and its breakdown to both spouses, and a consideration of the matrimonial property distribution (as stated in *Moge*, compensation need not necessarily be complete and made by one party, nor is it necessarily achieved solely through the award of spousal support, it may be a combination of support and property);

D. Age and length of marriage remain important considerations in determining entitlement;

E. The decision to have children has financial and other consequences for both parties but does not necessarily result in an entitlement to support on a compensatory basis and, if entitlement is found to exist, indefinite support. It depends upon the unique facts of the marriage.

F. In considering both entitlement and quantum, parties must take personal responsibility for their career choices;