

A Review of the Impact of Illness and Disability on Spousal Support

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INTRODUCTION

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 less¹.

This paper is intended to be a review of non-compensatory spousal support and particularly the impact of illness and disability on spousal support in Alberta. To do so, we look to the statutory framework for spousal support. Spousal support can be obtained in Alberta through the federal *Divorce Act*² for married spouses or through the provincial *Family Law Act*³ for spouses or adult interdependent partners. These two statutes employ similar factors that the court must consider and have the same objectives or goals that are to be achieved from a support order. One factor the court shall take into consideration is the “condition” of each spouse which includes a review of the parties’ health.

The statutes provide the authority for an award of spousal support, but before it is granted, a Court must find entitlement. The leading Supreme Court of Canada cases for entitlement to spousal support remain *Moge v Moge*⁴ and *Bracklow v Bracklow*. These cases recognized the three conceptual grounds for spousal support being compensatory, non-compensatory and contractual. *Bracklow* established the non-compensatory basis and posed the inquiry of “What duty does a healthy spouse owe a sick one when the marriage collapses?” Despite this leading case from 1999, the case law provides little guidance after entitlement is found to answer the next questions being what quantum is appropriate and for what duration⁵. There continues to be much uncertainty.

What is clear is that Canadian law provides for a “much more generous basis for spousal support than other jurisdictions which focus on clean break principle and spousal support to be a minimal, transitional remedy⁶.” Our creation of Spousal Support Advisory Guidelines (SSAG) is also unique. These SSAG were established as informal, advisory guidelines to be used once entitlement was

¹ *Bracklow v Bracklow*, [1999] 1 SCR 420 at para 48, 169 DLR (4th), [*Bracklow*].

² *Divorce Act*, RSC 1985, c 3 (2nd Supp), [*Divorce Act*].

³ *Family Law Act*, SA 2003, c F-4.5, [*Family Law Act*].

⁴ *Moge v Moge*, [1992] 3 SCR 813, [1993] 1 WWR 481, [*Moge*].

⁵ Rollie Thompson, QC, “Ideas of Spousal Support Entitlement” (Paper delivered at the Legal Education Society of Alberta 46th Annual Refresher: Family Law, April 28 - 30, 2013), [unpublished], at p 1.

⁶ Carol Rogerson & Rollie Thompson, “The Canadian Experiment with Spousal Support Guidelines” (2011) 45(2) FLQ 241 at 245.

found, to assist with the determination of quantum and duration in accordance with current practice under the existing legislation to encourage some consistency. Although not legislated, the SSAG are described as a “useful tool” or a “starting place.” The SSAG provide a range of support and a suggested duration under either a “with child” or “without child” formula. The SSAG set out exceptions wherein the suggested ranges and duration may not be appropriate or consistent with the objectives and factors in the legislation, and one such exception is in cases of “illness and disability.” Authors of the SSAG acknowledge that the law is very divergent in illness and disability cases.

After a review of the statutes, the leading Supreme Court decisions and the SSAG, this papers intends to discuss more specific questions including:

- What qualifies as an illness or disability?
- What evidence is required to substantiate an illness or disability?
- Does timing of the diagnosis or impact of an illness or disability have an impact on the application?
- Should the Order for spousal support be temporary with a review date or permanent?
- Should the Order be for periodic or lump sum spousal support?

Notwithstanding the use of the SSAG and the exception, the principle of overriding judicial discretion and the fact specific analysis make it difficult to determine trends that will assist parties to reasonably predict court outcomes. Despite an inability to clarify the area of non-compensatory spousal support in cases of illness or disability what continues to be true is:

[57] [...] Marriage, while it may not prove to be "till death do us part", is a serious commitment not to be undertaken lightly. It involves the potential for lifelong obligation. There are no magical cut-off dates⁷.

I. LEGISLATION – THE *DIVORCE ACT* & THE *FAMILY LAW ACT*

Spousal support is a statutory remedy that may be obtained in Alberta through the *Divorce Act*⁸ for married spouses or through the *Family Law Act*⁹ for adult interdependent partners or married spouses. The right to spousal support is not automatic.

⁷ *Bracklow*, *supra* note 1 at para 49 and 57.

⁸ *Divorce Act*, *supra* note 2.

⁹ *Family Law Act*, *supra* note 3.