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Review of Spousal Support/Variation of Spousal Support - A Refresher

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REVIEW OF SPOUSAL SUPPORT/VARIATION OF SPOUSAL SUPPORT - A REFRESHER

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INTRODUCTION

The genesis of this paper was a very quietly stated wish of a certain Justice of the Court of Queen's Bench who said, "I sure wish someone would write a paper on the difference between a review of spousal support and a variation of spousal support. People are getting it wrong."

At the time, my reaction was one of disbelief. How could there be confusion as to the difference between a review and a variation application? As I began the research, I realized that this is an area of family law that I rarely practice. I have never conducted a review of spousal support and have only been involved in a few variation applications.

As I read the case law and worked my way through the *Divorce Act*, my disbelief was replaced by the realization that there is a great deal of confusion about review and variation, what the tests are for each, in what situation one may be more appropriate than another, and what evidence is necessary to be successful in either application.

What follows is an attempt to separate and clarify the concepts of review and variation along with a review of the case law in each area from the past ten years.

REVIEW

S. 15.2(3) of the *Divorce Act* states:

The Court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks just and fit.

S. 15.2(4) of the *Divorce Act* states:

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 the cohabitation; and,
- (c) Any order, agreement or arrangement relating to support of either spouse.

S. 15.2(6) of the *Divorce Act* states:

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

These three sections of the *Divorce Act* form the legislative authority, and provide the test for a review of spousal support.

A review of spousal support is an interim order because it anticipates further examination at a later date, or upon the occurrence of a specific circumstance. A review of spousal support is a *de novo* review of entitlement to spousal support in addition to the quantum and duration of spousal support.

A material change in circumstance is not required in a review of spousal support. One need only establish that the triggering event for a review has occurred. Once that is established, the review is a fresh look at all three elements of spousal support based on the circumstances that exist at the time of the review.

In *Morck v Morck* 2013 BCCA 186, the Court stated that an application to review an earlier order of spousal support is a hearing *de novo*; however, in order to review entitlement, it is helpful to know on what basis spousal support was granted in the initial order. A Court must look to the facts when the initial order was granted and the facts at the date of review in order to apply the factors and objectives to determine if entitlement continues to exist.

In the case of a review, the facts that existed when the initial order was granted provide insight into the basis on which entitlement was found if that is not clear from the initial order or agreement.

Providing the background for the finding of initial entitlement to spousal support in a review should not be confused with setting out the facts in the past and the facts in the present for the purpose of establishing a material change in circumstance which is done in a variation.

The purpose of establishing on what basis the initial spousal support was awarded is to determine whether the same basis for entitlement exists at the review, whether the entitlement has shifted from compensatory to non-compensatory, or whether there is no further entitlement.