Fisher c. Fisher

88 O.R. (3d) 241

Court of Appeal for Ontario,
Doherty, Goudge and Lang JJ.A.
January 10, 2008

Family law -- Support -- Spousal support -- Wife not being economically disadvantaged by 19-year childless marriage but being economically disadvantaged by its breakdown -- Husband's salary increasing dramatically just before separation and wife facing greatly reduced lifestyle instead of sharing in that gain -- Wife being 41 years old at time of separation -- Wife working full time at time of trial and earning annual income of $30,000 -- Wife not being self-sufficient merely because she could meet her basic needs -- Self-sufficiency to be considered in context of marital standard of living -- Husband starting new relationship with woman who chose to stay at home -- Husband's endorsement of that choice could not be relied upon to reduce his support obligation to wife -- Trial judge not erring in refusing to make indefinite spousal support award but erring in quantum and duration of award -- Quantum and duration being increased on appeal -- Total amount of support ordered on appeal falling within Spousal Support Advisory Guidelines' global range while total amount of support ordered by trial judge falling far below Guidelines global range -- Trial judge erring in imposing review order in absence of evidence that wife's circumstances would change at identifiable point in future.

The parties were married in 1985 and separated in 2004, when the wife was 41 and the husband was 42 years old. There were no children of the marriage. The wife was employed full-time approximately half of the time for most of the marriage but worked full time during the last years of the marriage, earning an average annual income of $30,000. The husband's income increased dramatically from $81,800 in 2003 to $120,000 in early 2004, when he accepted a new job. The marriage ended shortly afterwards. The wife was taken by surprise by the separation, and became clinically depressed. She took disability leave for about a year, and then returned to full- time employment. She was earning $30,000 annually at the time of the trial. The husband earned approximately $132,000 in 2005 and $140,000 in 2006. He began a relationship with a new partner, an American physiotherapist with two young children, who elected not to retrain to meet Ontario professional qualifications but instead to stay at home. Her contribution to the family income was the US$700 monthly child support she received from the children's biological father. The trial judge ordered the husband to pay the wife monthly spousal support of $2,600 from March 1 to December 1, 2006; $1,800 for 2007; and $1,050 for 2008, and stipulated that either party could seek a review of entitlement and/or quantum after January 1, 2009 without the need to establish a material change in circumstances. The trial judge declined to make support retroactive, leaving the wife with the $2,000 monthly interim support she was awarded from October 1, 2004 until the end of the trial. The wife appealed.

Held, the appeal should be allowed.

The trial judge made certain errors of fact. He mistakenly found that the wife was employed full time throughout the marriage. He speculated that she would perhaps enter into a new relationship in which her day-to-day expenses might be shared. There was no evidence of any potential new relationship. As these errors contributed to the trial judge's decision, the award had to be set aside.

There was no reason to interfere with the trial judge's determination that an indefinite order was not appropriate given the wife's relative youth and her employment position.

The husband voluntarily assumed significant responsibility for a second family when he knew, or ought to have known, of his pre-existing obligation to his first family. There was no evidence that his obligations to his first family would impoverish his second family. He could not rely on his second wife's preference to remain at home to reduce his support obligation to his first family.

The wife was not economically disadvantaged by the marriage but she was economically disadvantaged by its breakdown. Her standard of living was significantly reduced when she moved to a small townhouse and she lost not only her future dream and the large financial salary increase in which she was led to believe she would share but she also lost the comfortable middle-class lifestyle to which she was accustomed. She was also economically disadvantaged by the reactive depression she suffered after the separation.

Self-sufficiency is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, it relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation and that they can reasonably anticipate after separation. Thus, a determination of self-sufficiency requires consideration of the parties' present and potential incomes, their standard of living during marriage, the efficacy of any suggested steps to increase a party's means, the parties' likely post-separation circumstances, the duration of their cohabitation and other relevant factors. In all the circumstances, the wife should not be considered self-sufficient on the basis of her current $30,000 income.

In the circumstances, the trial judge erred in adding a provision permitting either party to apply for a review after January 1, 2009. Review orders 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 timeframe. When one is granted, it should include specifics regarding the issues about which there is uncertainty and when and how the trial judge anticipates that uncertainty will be resolved. In this case, there was little evidence that the wife's financial circumstances would change at an identifiable point in the future, apart from the potential return of her income to pre-separation levels, which would not have rendered her self-sufficient when considered in the context of her marital standard of living.

The trial judge erred in refusing to make the final support order retroactive to October 2004.

To provide her with a reasonable transition following her 19- year marriage, the wife would need support for seven years, beginning with the year of separation. The award was varied to $3,000 monthly from October 1, 2004 to March 1, 2008, followed by $1,500 monthly from April 1, 2008 to September 1, 2011.

The trial judge failed to consider the Spousal Support Advisory Guidelines. When counsel fully address the Guidelines in argument, and a trial judge decides to award a quantum of support outside the suggested range, appellate review will be assisted by the inclusion of reasons explaining why the Guidelines do not provide an appropriate result. The trial award in this case, including interim support, but assuming termination in December 2008, totaled a lump sum of $94,200, an amount that fell far

below the Guidelines' global range. In comparison, the support as varied on appeal totaled $189,000, an amount which fell within the Guidelines' global range.

APPEAL from the award of spousal support by the order of Justice Grant A. Campbell, [2006] O.J. No. 676, [2006] O.T.C. 166 (S.C.J.).

Cases referred to Adams v. Adams, 2001 CanLII 8527 (ON CA), [2001] O.J. No. 1575, 15 R.F.L. (5th) 1 (C.A.); Andrews v. Andrews (1999), 1999 CanLII 3781 (ON CA), 45 O.R. (3d) 577, [1999] O.J. No. 3578, 50 R.F.L. (4th) 1 (C.A.); B.D. v. S.D., [2006] J.Q. no 1670, 2006 QCCS 1033; Bakker v. Bakker, 1997 CanLII 12385 (ON SC), [1997] O.J. No. 4950, 34 R.F.L. (4th) 55 (Gen. Div.); Bemrose v. Fetter, 2007 ONCA 637 (CanLII), [2007] O.J. No. 3488, 42 R.F.L. (6th) 13 (C.A.); Bildy v. Bildy (1999), 1999 CanLII 9319 (ON CA), 42 O.R. (3d) 737, [1999] O.J. No. 501 (C.A.); Bracklow v. Bracklow, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420, [1999] S.C.J. No. 14, 63 B.C.L.R. (3d) 77, 169 D.L.R. (4th) 577, 236 N.R. 79, [1999] 8 W.W.R. 740, 44 R.F.L. (4th) 1; Bracklow v. Bracklow, 1999 CanLII 5311 (BC SC), [1999] B.C.J. No. 3028, 181 D.L.R. (4th) 522, [2000] 3 W.W.R. 633, 3 R.F.L. (5th) 179 (S.C.); Cavanagh v. Cassidy, 2000 CanLII 22514 (ON SC), [2000] O.J. No. 1658, 7 R.F.L. (5th) 282 (S.C.J.); Choquette v. Choquette, 1998 CanLII 5760 (ON CA), [1998] O.J. No. 3024, 39 R.F.L. (4th) 384 (C.A.); Curtin v. Curtin, [1997] O.J. No. 4653 (Gen. Div.); D.S. v. M.S., [2006] J.Q. no 506, 2006 QCCS 334; Desramaux v. Desramaux, 2002 CanLII 45030 (ON CA), [2002] O.J. No. 3251, 216 D.L.R. (4th) 613, 28 R.F.L. (5th) 25 (C.A.); Doyle v. Doyle, 2001 CanLII 28158 (ON SC), [2001] O.J. No. 4706, 22 R.F.L. (5th) 276 (S.C.J.); Droit de la famille -- 061122, [2006] J.Q. no 17350, 2006 QCCS 7734; Edwards v. Edwards, 1994 CanLII 4054 (NS CA), [1994] N.S.J. No. 361, 118 D.L.R. (4th) 217, 133 N.S.R. (2d) 8, 5 R.F.L. (4th) 321 (C.A.); G.V. v. C.G., [2006] J.Q. no 5231, 2006 QCCA 763; Hickey v. Hickey, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518, [1999] S.C.J. No. 9, 138 Man. R. (2d) 40, 172 D.L.R. (4th) 577, 240 N.R. 312, 202 W.A.C. 40, [1999] 8 W.W.R. 485, 46 R.F.L. (4th) 1; Huisman v. Huisman (1996), 1996 CanLII 761 (ON CA), 30 O.R. (3d) 155, [1996] O.J. No. 2128, 137 D.L.R. (4th) 41, 21 R.F.L. (4th) 341 (C.A.); Jeffries v. Jeffries, 1997 CanLII 12251 (ON SC), [1997] O.J. No. 3124, 32 R.F.L. (4th) 345 (Gen. Div.); Keller v. Black, 2000 CanLII 22626 (ON SC), [2000] O.J. No. 79, 182 D.L.R. (4th) 690 (S.C.J.); Kent v. Frolick, 1996 CanLII 10257 (ON CA), [1996] O.J. No. 3356, 23 R.F.L. (4th) 1 (C.A.); Krauss v. Krauss, [1991] O.J. No. 777, 33 R.F.L. (3d) 233 (C.A.); Kugler v. Kugler, [1994] O.J. No. 2564, 8 R.F.L. (4th) 205 (Prov. Div.); Kurbegovich v. Kurbegovich, 1998 CanLII 14868 (ON SC), [1998] O.J. No. 217, 36 R.F.L. (4th) 220 (Gen. Div.); L. (B) v. S. (J.), 1994 CanLII 9109 (AB QB), [1994] A.J. No. 540, 156 A.R. 266, 7 R.F.L. (4th) 299 (Q.B.); Leskun v. Leskun, 2006 SCC 25 (CanLII), [2006] 1 S.C.R. 920, [2006] S.C.J. No. 25, 268 D.L.R. (4th) 577; Linton v. Linton (1990), 1990 CanLII 2597 (ON CA), 1 O.R. (3d) 1, [1990] O.J. No. 2267, 42 O.A.C. 328, 75 D.L.R. (4th) 637, 41 E.T.R. 85n, 30 R.F.L. (3d) 1 (C.A.); Lust v. Lust, [2007] A.J. No. 654, 2007 ABCA 202; M.G. v. J.C., [2006] J.Q. no 1669, 2006 QCCS 1028; McEachern v. McEachern, [2006] B.C.J. No. 2917, 3 W.W.R. 471, 2006 BCCA 508, 62 B.C.L.R. (4th) 95, 33 R.F.L. (6th) 315; Miglin v. Miglin, 2003 SCC 24 (CanLII), [2003] 1 S.C.R. 303, [2003] S.C.J. No. 21, 66 O.R. (3d) 736n, 224 D.L.R. (4th) 193, 302 N.R. 201, 34 R.F.L. (5th) 255, 2003 SCC 24 (sub nom. M. (L.S.) v. M. (E.S.)); Moge v. Moge, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107, 81 Man. R. (2d) 161, 99 D.L.R. (4th) 456, 145 N.R. 1, [1993] 1 W.W.R. 481, 43 R.F.L. (3d) 345; Parsons v. Parsons, 1995 CanLII 7352 (ON SC), [1995] O.J. No. 3225, 17 R.F.L. (4th) 267 (Gen. Div.); Pettigrew v. Pettigrew, [2006] N.S.J. No. 321, 2006 NSCA 98, 30 R.F.L. (6th) 7; Pope v. Pope (1999), 1999 CanLII 2278 (ON CA), 42 O.R. (3d) 514, [1999] O.J. No. 242, 170 D.L.R. (4th) 89, 43 R.F.L. (4th) 209 (C.A.) (sub nom. MacNeill v. Pope); Redpath v. Redpath, [2006] B.C.J. No. 1550, 2006 BCCA 338, 62 B.C.L.R. (4th) 233, 33 R.F.L. (6th) 91; Ronnie v. Milligan, [2001] P.E.I.J. No. 23, 2001 PESCTD 23, 200 Nfld. & P.E.I.R. 358; S.C. v. J.C., [2006] N.B.J. No. 186, 299 N.B.R. (2d) 334, 778

A.P.R. 334, 2006 NBCA 46, 27 R.F.L. (6th) 19 [Leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 246]; Schmuck v. Reynolds-Schmuck, 1999 CanLII 15000 (ON SC), [1999] O.J. No. 3104, 50 R.F.L. (4th) 429 (S.C.J.); Stein v. Stein, [2006] B.C.J. No. 2020, 2006 BCCA 391; Tedham v. Tedham, [2005] B.C.J. No. 2186, [2006] 3 W.W.R. 212, 2005 BCCA 502, 47 B.C.L.R. (4th) 254, 20 R.F.L. (6th) 217 (C.A.), supp. reasons [2005] B.C.J. No. 2463, 261 D.L.R. (4th) 322, [2006] 3 W.W.R. 234, 2005 BCCA 553, 47 B.C.L.R. (4th) 276; Toth v. Kun, [2006] B.C.J. No. 739, 2006 BCCA 173; Yemchuk v. Yemchuk, [2005] B.C.J. No. 1748, 257 D.L.R. (4th) 476, [2005] 10 W.W.R. 634, 2005 BCCA 406, 44 B.C.L.R. (4th) 77, 16 R.F.L. (6th) 430, supp. reasons [2005] B.C.J. No. 2319, 2005 BCCA 527, 22 R.F.L. (6th) 60. Statutes referred to Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), ss. 15.2 [as am.], 17 [as am.] Authorities referred to Bala, N., "Spousal Support Law Transformed -- Fairer Treatment for Women" (1994) 11 C.F.L.Q. 6 Canada, Department of Justice, Spousal Support Advisory Guidelines: A Draft Proposal (Ottawa: Department of Justice, 2005), ss. 4.4.2, 5.1, 5.1.2.2, 10.8, c. 8 Rogerson, Carol, "Spousal Support After Moge" (1996) 14 C.F.L.Q. 281 Rogerson, Carol, "Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001) 19 C.F.L.Q. 185 Rogerson, Carol and Rollie Thompson, "The Advisory Guidelines 31 Months Later" (2007)

Erin L. Reid, for appellant.

Iain R.R. Sneddon, for respondent.

The judgment of the court was delivered by

[1] LANG J.A.: -- This appeal challenges both the amount and duration of spousal support awarded following an almost 19-year marriage.

[2] The trial judge ordered the respondent, Robert Fisher, to pay the appellant, Anita Fisher, $2,600 spousal support from March 1 to December 1, 2006; $1,800 for the calendar year 2007; and $1,050 for the calendar year 2008. The order makes no award of support for 2009; however, it provides that, after January 1, 2009, either party may "seek a review of both entitlement and/or quantum . . . without the need to establish a material change in circumstances". The trial judge declined to make support retroactive, leaving the appellant with the $2,000 monthly interim support she was awarded for the period from October 1, 2004 until the end of trial. The order also requires the respondent to disclose his income to the appellant on an annual basis. It does not contain a reciprocal provision for the appellant to disclose her income to the respondent.

[3] The appellant challenges the trial judge's factual findings. She also argues that the trial judge erred in his application of the law by time-limiting/reviewing support, by failing to order support payable from the date of the interim order, by failing to apply the Spousal Support Advisory Guidelines: A Draft Proposal (Ottawa: Department of Justice, 2005) (the "Guidelines"), and by reducing the amount of support based on the respondent's obligations to his second family.

[4] For the reasons that follow, I would allow the appeal and set aside those parts of the divorce order dealing with the quantum [See Note 1 below] of spousal support and the review order. In their place, I would order spousal support in the amount of $3,000 monthly beginning October 1, 2004. I would step down spousal support on April 1, 2008 to $1,500 and terminate it on September 1, 2011. This would provide the appellant with seven years of spousal support, subject of course to any variation order made in accordance with s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

Background

[5] The parties married in August 1985, when the appellant was 22 and the respondent 23 years of age, and separated in April 2004, when they were 41 and 42 years of age respectively. There were no children of the marriage.

[6] Initially, the appellant contributed her earnings from clerical entry-level employment to assist with the parties' expenses during the two years necessary for the respondent to complete his Honours Bachelor of Arts. [See Note 2 below] The parties then moved from Waterloo to London so that the respondent could obtain his Bachelor of Education. The appellant sought new employment and continued to contribute to the parties' expenses.

[7] Following graduation, the respondent taught high school for 11 years, earning $65,000 in his final year. In 1999, the respondent accepted employment in London with the Ontario Secondary School Teachers' Federation (O.S.S.T.F.) at an increased salary. Over the three years prior to separation, the respondent earned increasing amounts of income. By 2003, he was earning $81,800. In February 2004, the respondent accepted a position with the O.S.S.T.F. in Toronto at an annual salary of $120,000, plus car allowance and benefits. The parties separated two months later. The respondent earned approximately $132,000 in 2005 and $140,000 in 2006, both amounts including car allowance and benefits.

[8] The respondent began a relationship with his current partner, who then lived in the United States. Although the new partner was a physiotherapist, she left her profession to stay at home with her two pre-school-age children. During this time, she worked part time as a day care aide.

[9] In 2005, the new partner and her children moved to Canada to join the respondent. Until she married the respondent and obtained the necessary immigration status, the new partner was prohibited from employment in Canada. As well, she needed to retrain to meet Ontario physiotherapist qualifications. However, even though both children attended school full time, the new partner elected not to retrain, but instead to stay at home. Her only apparent contribution to the family income is the US$700 monthly child support she receives from the children's biological father, who earns US$70,000 annually. The trial judge also imputed $10,000 of notional annual income to her based on her prior U.S. day care employment.

[10] The respondent's support of his partner's decision to stay at home means that he voluntarily assumes most of the financial responsibility for his new family, which he argues adversely affects his ability to support the appellant.

[11] The appellant had a high school education when the parties married. During the marriage she took university courses, mostly through distance education. After separation, she returned to university and was one and a half credits short of completing her Bachelor of Fine Arts degree at the time of trial.

[12] Although the trial judge found that the appellant worked full time throughout the marriage, the parties agree that her work, until 1999, was often part time, or seasonal, with periods of absence from the work force. It is conceded that, from 1984 to 1999, the appellant was only employed full time approximately half the time. However, she did work full time in the area of advertising sales during the last years of the marriage.

[13] For the most part, the appellant earned an average annual income of $30,000. For about two years before separation, she had a commission job that provided a base salary of $35,000 with a total income of $41,000, including commissions. This was the highest income she ever earned.

[14] The separation came as a shock to the appellant, who had planned to leave her employment to join the respondent in a new home they had purchased to accommodate his Toronto employment. Several months after separation, the appellant became clinically depressed. She took disability leave from October 2004 to September 2005, for which she received $19,500 of gross disability benefits from her insurer. The appellant has since returned to full-time employment. At the time of trial, she earned $30,000 annually.

[15] The parties equalized their assets, including the proceeds of sale of the matrimonial home and the respondent's pension, with the respondent paying the appellant an equalization payment of approximately $102,000. From this, the appellant bought a $191,000 home, which the trial judge found was a "huge 'step down'" in lifestyle that resulted from the respondent's "decision to terminate their marriage". In contrast, the respondent bought a $328,000 home in Ajax for himself and his new family, as a result of which he has significant expenses.

Trial judgment

[16] Both at trial and on appeal, the respondent argued that spousal support should be terminated and the appellant considered self-sufficient at her current $30,000 income. The appellant argued for support at $3,000 monthly, retroactive to October 2004, and ongoing indefinite support of $3,500, reviewable on or after September 1, 2012. While entitlement to support was agreed upon both at trial and on appeal, the trial judge discussed, and counsel argued, the principles regarding entitlement that are also relevant to the issue of quantum.

[17] The parties agree that the experienced trial judge correctly canvassed the legal principles. He recognized the factors and objectives set out in s. 15.2 of the Divorce Act. He reviewed the seminal authorities, including Moge v. Moge, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, [1992] S.C.J. No. 107 regarding compensatory support, and Bracklow v. Bracklow, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420, [1999] S.C.J. No. 14 regarding needs-based support. He considered questions of economic disadvantage, economic hardship, self-sufficiency and the reduction in the appellant's standard of living. He concluded that the appellant "fits entirely within the jurisprudential criteria of having suffered an 'economic disadvantage' by Mr. Fisher's decision to [end] the marriage".

[18] While the trial judge did not come to an explicit conclusion regarding the issue of self-sufficiency, he cited a series of cases providing transitional support following mid- range marriages where the recipient spouse would be able to achieve self-sufficiency. [See Note 3 below] From this and his later analysis, it is apparent that he determined that it was practicable for the appellant to become self-sufficient from her earnings, or to adjust her standard of living, by December 2008 -- subject to the 2009 review also provided by his order.

[19] In the trial judge's view, the respondent's obligations to his second family were a significant issue. In his thorough analysis, the trial judge recognized the need to balance obligations to two families. He referred to Kugler v. Kugler, [1994] O.J. No. 2564, 8 R.F.L. (4th) 205 (Prov. Div.), at para. 49, where Katarynych J. noted that a court cannot "ameliorate the conditions of the first family while devastating

the second family". The trial judge also recognized that a payor cannot avoid a support obligation by assuming new liabilities or by relying on new obligations to a second family. He also noted that a new partner is expected to contribute to the second family's expenses. After setting out these general principles, [See Note 4 below] he observed [at para. 68]:

> [R]egardless what one might think of Mr. Fisher's behavior, choices and the manner and timing in which they occurred, the law allows him to make those choices. With regard to [the children of his new partner], he can be commended for his willingness to take them on as if they were his own.

[20] The trial judge concluded that the respondent's decision to support his second family "is a reality that must be taken into account" when assessing the quantum of support payable to the appellant.

[21] The trial judge also considered cases dealing with time- limited [See Note 5 below] support and implicitly concluded that any economic disadvantage suffered by the appellant as a result of the marriage was not sufficient to warrant indefinite support. The trial judge's analysis again referred to Moge, as well as the decisions of this court in Kent v. Frolick, 1996 CanLII 10257 (ON CA), [1996] O.J. No. 3356, 23 R.F.L. (4th) 1 (C.A.) and Krauss v. Krauss, [1991] O.J. No. 777, 33 R.F.L. (3d) 233 (C.A.), [See Note 6 below] for the principle that time-limited support should only be ordered in "unusual" or "unique circumstances" or in the particular circumstances of the parties. On this issue, the trial judge summarized the principle [at para. 33]:

> [C]ourts appear to continue to make time-limited orders only where, because of a young age, short marriage or other factors, a dependent spouse is capable of achieving self- sufficiency, or where a spouse has sustained very little, if any, economic disadvantage as a result of the breakdown of the marriage.

[22] In the result, he concluded [at para. 69]:

> I am persuaded that based upon the case law -- Moge, the Krause factors, Bracklow and Huisman -- Ms. Fisher's relative youth, her good health, the fact that she has no dependents and has no (significant) debt, and her past and present work record/ethics/opportunities, this case is indeed one that is "unusual." I speculate that over the next few years Ms. Fisher will become entirely self-sufficient and, like Mr. Fisher, perhaps enter into a new relationship
> (or partnership) whereby her day-to-day expenses can at least be shared. (Emphasis added)

Issues

[23] The appellant argues that the trial judge erred in making factual findings that materially affected his decision, including that:

> (a) the appellant was employed full time throughout the marriage;
>
> (b) the appellant would earn enough income to be self- sufficient in the next few years; and
>
> (c) the appellant would find a new partner to share her expenses.

[24] The appellant also argues that the trial judge's award fails to apply properly the objectives of s. 15.2(6) of the Divorce Act to recognize the appellant's economic disadvantages arising from the marriage or its breakdown, to relieve against the hardship she suffered as a result of the breakdown and

to recognize the appellant's limited ability to achieve economic self-sufficiency. In particular, the appellant argues that the trial judge erred by:

> (a) reducing the respondent's obligation to pay support by reason of his obligations to his second family;
>
> (b) refusing to order that increased support begin effective October 1, 2004, the date of the interim support order;
>
> (c) time-limiting the appellant's support, subject to a review order; and
>
> (d) failing to award support based on the Guidelines.

Analysis

Standard of review

[25] Based on the standard of review of a support order set out by L'Heureux-Dubé J. in Hickey v. Hickey, 1999 CanLII 691 (SCC), [1999] 2 S.C.R. 518, [1999] S.C.J. No. 9, at paras. 10-11, I am mindful that the discretionary decision of the trial judge, who in any event is very experienced, is entitled to considerable deference and should not be interfered with absent an error in principle, a significant misapprehension of the evidence or unless the award is clearly wrong.

Findings of fact

(a) Full-time employment

[26] As I have indicated, it was common ground that the appellant did not work full time throughout the marriage. Accordingly, the trial judge erred in finding that she worked full time. Such a finding likely affected his determination of the quantum of the appellant's support.

(b) Sufficient employment income

[27] The appellant testified about her employment income. At its highest, the appellant's testimony included an expression of her "hope" that her income would increase to $35,000 in a couple of years. On this evidence, the trial judge concluded that the appellant "predicts that after about three years her [$30,000] income will increase and her employment position will solidify" (para. 67). The appellant argues that this finding is not supported by the evidence because a "prediction" invokes more certainty than does a "hope".

[28] The trial judge's uncertainty about the appellant's prospects is reflected in another part of his reasons, also challenged by the appellant, when he said: "I speculate that over the next few years Ms. Fisher will become entirely self- sufficient." The appellant argues that the trial judge was not entitled to base his decision on speculation.

[29] In my view, while the choice of the word "speculate" was unfortunate, when considered in the context of the trial judge's reasons as a whole, the trial judge meant no more than that he anticipated the appellant's income might return to the $40,000 level once she was able to build a commission base in her new employment. It was likely precisely because the trial judge recognized this uncertainty that he provided for a subsequent review of the support order. Accordingly, while different terminology

would have been preferable, I am not persuaded that any misstatement by the trial judge on this point materially affected his decision.

[30] However, the uncertainty regarding the appellant's employment income is relevant to both the review order and the trial judge's analysis of the appellant's self-sufficiency, which I will discuss in detail later.

(c) A new partner

[31] In his reasons, the trial judge also "speculate[s]" that the appellant would "perhaps enter into a new relationship (or partnership) whereby her day-to-day expenses can at least be shared" (para. 69). It is conceded that this comment was not supported by the evidence. Indeed, there was no evidence that the appellant even had a relationship with any potential partner. In my opinion, the trial judge's unwarranted comment was an error that contributed to his decision to provide what he described as a "type of time-limited review spousal support order".

Conclusion on findings of fact

[32] The errors regarding the appellant's employment and potential new relationship, particularly when considered in combination with the discussion that follows about the impact of the respondent's second family on his support obligation, and the circumstances in which "termination/review" orders are appropriate, lead to the conclusion that the trial award must be set aside. It is not necessary that the matter be returned for a new trial because there are no factual disputes that would justify the delay and expense that would necessarily be incurred. Accordingly, it falls to this court to assess the appropriate quantum of spousal support.

Application of the law

Factors and objectives

[33] It is helpful to begin by setting out the factors and objectives of ss. 15.2(4) and (6) of the Divorce Act regarding an order of spousal support.

Factors

15.2(4) 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 cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

. . . . .

Objectives of spousal support order

15.2(6) 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 economic self-sufficiency of each spouse within a reasonable period of time.

[34] I will deal with each of the relevant factors and objectives in turn, mindful, as was the trial judge, of the admonition that no one objective predominates; rather, it is important to balance all four objectives in the context of the circumstances of the particular case: See Moge v. Moge, at para. 52; Bracklow v. Bracklow, at para. 35 and Miglin v. Miglin, 2003 SCC 24 (CanLII), [2003] 1 S.C.R. 303, [2003] S.C.J. No. 21, at para. 39. After this, I will balance the considerations that emerge to determine an appropriate quantum of support.

Factors

15.2(4)(a) -- Length of the cohabitation

[35] A determination of the "condition, means, needs and other circumstances of each spouse" includes consideration of the length of the parties' cohabitation. The Guidelines, which I will discuss later, observe that "in parts of the country it is difficult to time-limit support after 15 years of marriage". [See Note 7 below] Indeed, in other cases involving lengthy marriages, many courts have imposed indefinite orders for support. See Andrews v. Andrews (1999), 1999 CanLII 3781 (ON CA), 45 O.R. (3d) 577, [1999] O.J. No. 3578, 50 R.F.L. (4th) 1 (C.A.); Adams v. Adams, 2001 CanLII 8527 (ON CA), [2001] O.J. No. 1575, 15 R.F.L. (5th) 1 (C.A.); Desramaux v. Desramaux, 2002 CanLII 45030 (ON CA), [2002] O.J. No. 3251, 28 R.F.L. (5th) 25 (C.A.). Indefinite support is appropriate after a long-term marriage because the dependent spouse is often of an age that makes it difficult to achieve economic self-sufficiency.

[36] Even though this marriage was lengthy, the trial judge decided that an indefinite order was not appropriate. In making this determination, the trial judge considered the appellant's employment position and relative youth. For reasons that I will expand on later, I see no reason to interfere with the trial judge's determination on this point.

15.2(4)(b) -- Functions performed during cohabitation

[37] The appellant and the respondent remember their functions during the marriage somewhat differently, and the trial judge does not appear to have made a factual finding on this issue. However, even accepting the appellant's testimony that she assumed a somewhat greater proportion of non-economic responsibilities during the marriage, the evidence also indicated that the respondent fully participated in household chores. In any event, the appellant does not argue that any assumption of household responsibilities [See Note 8 below] negatively affected her career goals or advanced those of the respondent.

15.2(4) -- Other circumstances

[38] The court is required, as it did in this case, to consider other factors, including the means and needs of the parties. One important factor in this case is the respondent's responsibility, if any, for his "new" or second family. The appellant does not take issue with the trial judge's review of the law on this point; rather, her concern lies with the application of the law to the facts of this case.

[39] While courts generally recognize a "first-family-first" principle (which provides that a payor's obligations to the first family take priority over any subsequent obligations [See Note 9 below), inevitably new obligations to a second family may decrease a payor's ability to pay support for a first family. [See Note 10 below]

[40] In each case, obligations toward second families must be considered in context. For example, where spouses with a child separate, and one remarries and produces another child, the obligations to the second child will affect support for the first family because the payor has an equal obligation to both children. [See Note 11 below] However, that is not this case.

[41] In this case, the respondent voluntarily assumed significant responsibility for his second family when he knew, or should have known, of his pre-existing obligation to his first family. He assumed this obligation even though the second family is capable of contributing to its own support provided the respondent's new partner completed her qualifications to practise as a physiotherapist in Ontario. In addition, the second family receives child support from the children's biological father. This is not a case where the respondent was obliged to support his new family, at least beyond the temporary legal obligation based on their initial immigration status. In any event, there was no evidence that the respondent's obligations to his first family would impoverish his second family. In these circumstances, the respondent's endorsement of his second wife's preference to remain at home cannot be relied upon to reduce his support obligation to his first family.

[42] I now turn to consider the objectives set out in s. 15.2(6).

Objectives: Section 15.2(6)

15.2(6)(a) -- Economic advantages or disadvantages from the marriage or its breakdown

[43] The concept of economic advantage or disadvantage arising from the marriage is the foundation for the principles of compensatory support familiar from their detailed discussion in Moge.

[44] In this case, the parties formed a relationship of financial interdependence, which began when the respondent partly depended on the appellant's assistance to complete his education. This permitted the respondent to begin his career at a young age, and to advance that career during the marriage and after its breakdown. This was no doubt an economic advantage to the respondent.

[45] With the respondent's support and encouragement, the appellant chose an educational program in fine arts, which accorded with her personal interests. There was no evidence that this choice, or any other choice made during the marriage, deprived the appellant of any other education or retraining that she otherwise would have pursued to improve her income- earning potential. Indeed, the appellant is content with her current career, which is a continuation of the career she followed during the marriage. In those circumstances, the marriage did not put her at a disadvantage regarding her career.

[46] This brings me to the appellant's primary contention on this appeal, namely, that she was economically disadvantaged not by the marriage, but by its breakdown, and in particular by her loss of the parties' standard of living, past and future.

[47] As the trial judge noted, the appellant's standard of living was significantly reduced when she moved to a small townhouse (a disadvantage also suffered by the respondent in view of his similar loss of the matrimonial home and the diminution in capital). Specifically, the trial judge found that the appellant "lost not only her future dream and the large financial salary increase in which she was led to believe she would share, but she also lost the comfortable middle-class lifestyle to which they both had been accustomed" (para. 60). In addition, the appellant was economically disadvantaged by the reactive depression she suffered after the separation. The resulting interruption to her employment reduced her income, at least in the short term.

[48] It follows that the economic disadvantages from the marriage breakdown were more pronounced for the appellant, particularly regarding the reduction in her standard of living.

15.2(6)(c) -- Economic hardship

[49] It is also necessary to consider whether the appellant suffered economic hardship from the marriage breakdown. The trial judge thoroughly canvassed the case law that discusses the distinction between economic hardship and economic disadvantage. There appears to be ongoing uncertainty about whether "hardship" refers to an inability to meet basic needs or whether it should be more liberally interpreted to refer to an inability to meet the recipient's needs considered in their context. [See Note 12 below]

[50] In this case, if defined literally, as did the trial judge, the appellant did not suffer "hardship" because, even on her $30,000 income, the appellant could provide for her basic needs. However, if defined liberally, she did suffer the economic hardship of a reduction in her standard of living.

[51] While it may be preferable to consider hardship in the relative context of the particular parties, I need not determine that issue on this record. Instead, I will discuss any economic hardship arising from the appellant's reduced standard of living under the objective of self-sufficiency because it is under that rubric that the issue is raised in the appellant's argument.

15.2(6)(d) -- Self-sufficiency

[52] Section 15.2(6)(d) of the Divorce Act promotes the objective of economic self-sufficiency only if it is "practicable" to do so and where the objective can be realized "within a reasonable period of time".

[53] Self-sufficiency, with its connotation of economic independence, is a relative concept. It is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation. See Linton v. Linton (1990), 1990 CanLII 2597 (ON CA), 1 O.R. (3d) 1, [1990] O.J. No. 2267 (C.A.), at pp. 27-28 O.R. Thus, a determination of self-sufficiency requires consideration of the parties' present and potential incomes, their standard of living during marriage, the efficacy of any suggested steps to increase a party's means, the parties' likely

post-separation circumstances (including the impact of equalization [See Note 13 below] of their property), the duration of their cohabitation and any other relevant factors.

[54] Self-sufficiency is often more attainable in short-term marriages, particularly ones without children, where the lower- income spouse has not become entrenched in a particular lifestyle, or compromised career aspirations. In such circumstances, the lower-income spouse is expected either to have the tools to become financially independent or to adjust his or her standard of living.

[55] In contrast, in most long-term marriages, particularly in traditional long-term ones, the parties' merger of economic lifestyles creates a joint standard of living that the lower- income spouse cannot hope to replicate, but upon which he or she has become dependent. In such circumstances, the spousal support analysis typically will not give priority to self- sufficiency because it is an objective that simply cannot be attained. See Linton at p. 27 O.R.

[56] The relevance of standard of living as a measure of dependency in long-term marriages is best encapsulated by L'Heureux-Dubé J. in the following passage from Moge (p. 870 S.C.R.):

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see Mullin v. Mullin (1991), supra, and Linton v. Linton, supra). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", supra, at pp. 174-75).

[57] In this case, I have already noted that the appellant's claim is largely a needs-based one arising from the financial dependence that developed mainly in the latter years of the marriage when the respondent's income began to increase significantly. By the time of separation, the parties' anticipated sharing an average joint income of about $125,325. [See Note 14 below]

[58] Yet the respondent submits that the appellant should be considered self-sufficient on the basis of her current $30,000 income. I reject this submission. It is not only obvious that the appellant would need more than her $30,000 income to maintain her pre-separation standard of living, she would still require support even if that income increased to $41,000. Accordingly, the goal of self-sufficiency based on her income- earning capacity is not practicable in a reasonable time. However, that does not end the matter.

[59] The question remains whether it is reasonable to expect the appellant to gradually adjust her standard of living to one commensurate with her own income. The answer depends on a balancing of all the objectives and factors, which I will address under quantum of support.

Summary of objectives

[60] In summary, the appellant suffered no established economic disadvantage arising from the marriage either by the assumption of child care responsibilities or in any other way that compromised her career or educational aspirations. Any minimal disadvantage cannot be compared to that of a long-

term traditional spouse who made career sacrifices to the significant advantage of the other spouse. While the appellant's economic assistance at the beginning of the parties' marriage provided an advantage to the respondent, the primary basis for the appellant's support claim is framed as an inability to attain self-sufficiency in light of the marital standard of living.

[61] Before turning to quantum of support, it is necessary to first address whether a review order was appropriate in this case and whether the support order should have applied from the date of the interim order.

Review order

[62] On the language of the order in this case, the appellant would receive her last support payment on December 1, 2008. After January 1, 2009, she would be permitted to apply for a review.

[63] A review allows an application for support without the need to prove the material change in circumstances required in a s. 17 variation application. Unless the review is restricted to a specific issue, it is generally equivalent to an initial application for support and necessitates a complete rehearing of every issue from entitlement to quantum. Thus, 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.

[64] In this case, the appellant was awarded $10,000 in partial indemnity trial costs for her initial application. Undoubtedly, her actual costs were higher. Requiring the appellant to undertake a second trial three years after the first is likely to generate similar costs. For the appellant alone, this expense may likely exceed the after-tax value of the support that the trial judge ordered for her benefit for the entire year preceding the new application ($1,050 monthly). The concern respecting costs extends equally to the respondent. It is hard to justify such an expense unless it is strongly indicated on the unusual facts of a particular case. This is why review orders are generally discouraged and why such an order was inappropriate in this case.

[65] As Binnie J. observes in Leskun v. Leskun, 2006 SCC 25 (CanLII), [2006] 1 S.C.R. 920, [2006] S.C.J. No. 25, at paras. 36 & 37, "[r]eview orders under s. 15.2 have a useful but very limited role" and are applicable only when there is "genuine and material uncertainty at the time of the original trial". At para. 39, he emphasizes that trial courts should resist making temporary or review orders in preference for permanent spousal support orders, which would be subject to the s. 17 provision for variation in the event of a material change in circumstances. Where a trial court considers it "essential" to impose a review order, Leskun advocates a tight delimitation of the facts that will be subject to review, so that the proceeding does not become a re-argument of the case.

[66] In reaching this conclusion, Binnie J. referred to this court's decision in Choquette v. Choquette, 1998 CanLII 5760 (ON CA), [1998] O.J. No. 3024, 39 R.F.L. (4th) 384 (C.A.), in which the husband appealed from an indefinite support award arguing that the trial judge erred in failing to include a review order. In rejecting this submission, this court noted that concerns about the wife's anticipated ability to achieve self-sufficiency could be addressed through a variation application.

[67] In Andrews v. Andrews, supra, a husband sought the inclusion of a review order in an indefinite support award. In refusing that relief, Laskin J.A., writing for the court, noted that a failure to make reasonable efforts to contribute to one's own support may amount to a material change in

circumstances. In respect of review orders more generally, he indicated: "I do not think that the court should routinely make review orders" (para. 37). [See Note 15 below] He added that this was particularly so on appeal, when the trial judge had not seen fit to do so.

[68] In "Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001) 19 C.F.L.Q. 185 at 218, Professor Rogerson refers to Choquette and Andrews and concludes, "to justify a review order, there must be either a concern about a spouse's failure to make reasonable efforts toward self-sufficiency or a clear expectation of a change at an identifiable point in the future."

[69] Most recently, Bemrose v. Fetter, 2007 ONCA 637 (CanLII), [2007] O.J. No. 3488, 42 R.F.L. (6th) 13 (C.A.) considered an appeal of an initial support order. Because this court upheld the initial order, it concluded that it should not "pick and choose" amongst its provisions and maintained the review order. However, Gillese J.A., writing for the court, noted that [at para. 84], "the financial situations of the parties and the endless litigation since trial make the notion of a review highly unattractive."

[70] 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 timeframe. 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.

[71] In any other case, a trial judge should issue a final order based on a preponderance of the evidence called by the parties. In the family law context, a final order will always be subject to variation, which will suffice to protect against future events. A variation is available not only when there is an unexpected change in circumstances, but also when an anticipated set of specified circumstances fails to materialize. This is particularly the case where an initial order specifies a trial judge's anticipation that the recipient spouse will or should be able to earn a given income within a particular timeframe. This flexibility is to be contrasted with a review order, which invariably places the burden on the applicant, albeit in the context of an initial application.

[72] Moreover, a trial judge concerned about the burden of proof may structure the support order either to place the burden on the payor or on the recipient as may be appropriate. This may be achieved by terminating support, so that the recipient spouse bears the burden of establishing a material change justifying ongoing support, or by ordering indefinite support, so that the payor spouse bears the burden of establishing a material change justifying the termination of support.

[73] In this case, the trial evidence indicated that the appellant was making reasonable efforts at self-sufficiency. There was little evidence that her financial circumstances would change at an identifiable point in the future, apart from the potential return of her income to pre-separation levels, which would not have rendered her self-sufficient when considered in the context of her marital standard of living. Thus, there was no basis for the review date provided in the trial judgment. As well, the order did not comply with the Leskun requirement for a tight delimitation of the facts subject to review.

[74] Accordingly, I conclude that the imposition of the review order constituted an error in principle on the facts of this case.

Commencement date for support

[75] The appellant obtained an interim support order of $2,000 monthly commencing in October 2004, which is when she began her disability leave. The award continued through the January 2006 trial. At trial, the appellant requested that the final support order be retroactive to October 2004.

[76] In my view, the trial judge erred in refusing that relief. I say this for three reasons. First, as was established at trial, the appellant was in need of support and the respondent had the ability to pay. While the trial judge referred to the $12,000 debt the appellant incurred in this period, he saw this as offset by the $19,500 of disability insurance. However, in my view, retroactive support to replace an interim support order should not be restricted to situations where the recipient spouse has incurred a crippling amount of debt. Rather, retroactive support should be available when the recipient establishes at trial that he or she was entitled to a greater amount of interim support, the respondent had the ability to pay, and the imposition of retroactive support would not create undue hardship for the payor.

[77] Second, the interim motion judge limited the amount of interim support partly because she was sceptical about the appellant's reasons for leaving her employment. However, the trial evidence established that the appellant did not wilfully leave her employment, but rather, that she was disabled by depression. [See Note 16 below] Even if the appellant could have resumed her employment earlier with the help of the medication that she refused at the time, she still would have needed support to offset the diminution in her lifestyle resulting from the loss of the parties' combined incomes.

[78] Finally, the interim support award was based on the premise that the appellant earned $48,000, or would have earned that amount had she not taken disability leave from her employment. However, the trial judge ultimately determined that the appellant never earned, or had the ability to earn, $48,000 at that time.

[79] In these circumstances, the appellant was entitled to an appropriate level of spousal support from the October 2004 date of commencement of interim support.

[80] This decision to award a final order of support commencing from the date of the interim award also accords with the structure of the Guidelines, which explicitly apply to interim orders. [See Note 17 below] This is important because, as I will discuss, if the Guidelines are applied to final orders, but not retroactively to interim orders, or the period between separation and the commencement of support is otherwise not accounted for, the Guidelines' recommendations for duration of support will be distorted.

[81] In addition, a refusal to order support payable from the date of interim support will provide one party with an incentive to delay a final hearing and the other party with an incentive to insist on its expedition. Either incentive may result in increased procedural costs. Thus, achievement of the Guidelines' objectives of discouraging litigation manoeuvring between the parties, while promoting an equitable result for the parties, mandates an earlier commencement date for final support where feasible.

[82] Accordingly, I would allow the appeal on this issue and order increased support commencing October 1, 2004. I turn now to the questions of amount and duration of support.

Quantum -- Amount and duration

[83] This assessment must be completed in the context of the legal principles carefully reviewed by the trial judge, including the factors relevant to whether support should be indefinite or limited-term.

[84] The factors and objectives require a balancing of the parties' circumstances, including the duration of the parties' cohabitation, their ages, their incomes and prospective incomes, the effects of equalization, the stages of their careers, contributions to the marital standard of living, participation in household responsibilities, the absence of child-care obligations, the respondent's increased cost of living arising from his new employment, the parties' reasonable expectations, the respondent's rapid pre- and post-separation increases in income, the appellant's limited claim for compensatory support and her greater need for transitional support.

[85] In reaching his decision to limit the duration of support, the trial judge referred to several authorities [See Note 18 below] and specifically referenced [at para. 69] the appellant's "relative youth, her good health, the fact that she has no dependents and has no (significant) debt, and her past and present work record/ethics/opportunities". As I have said, I agree with the trial judge that indefinite support was not indicated on the facts of this case.

[86] In this case, the appellant's dependency on the marital standard of living was not entrenched in the manner it would have been in a traditional marriage where the parties enjoyed a gradually increasing standard of living. The respondent's substantial income increases started in approximately 2002. This provided the parties with a better standard of living during the last years of their marriage than they enjoyed in the many preceding years, a standard of living that would have increased further commensurate with the respondent's 2004 income.

[87] In this circumstance, Professor Rogerson's observation in "Spousal Support Post-Bracklow: The Pendulum Swings Again?" is apt [at p. 259]:

> Such discrete [limited-term] obligations may also arise in longer relationships where both parties have worked throughout the relationship and the lower-income spouse is understood to have only a limited claim to non-compensatory, transitional support to cushion the drop in standard of living occasioned by the marriage breakdown.

[88] To provide the appellant with a reasonable transition following her 19-year marriage, it is my view that the appellant will need support for seven years, beginning with the year of separation. In my view, a seven-year order complies with the spousal support objective of recognizing the appellant's economic disadvantage arising from the marriage and its breakdown, while also encouraging the appellant to complete her transition to self-sufficiency, whether by reason of earning a higher income or, more likely, by adapting her lifestyle to her then income.

[89] To achieve an equitable result regarding the amount of support, I have averaged the parties' incomes for the last years. In the respondent's case, I use his increasing income in the three years prior to separation, as well as his substantially increased income in the year of separation, [See Note 19 below] even though it was largely received post-separation. This results in an average salary for the respondent of $89,825, which allows for the parties' expectation that they would have shared those increases but for the separation.

[90] For the appellant, as with the respondent, I use her income earned in the three years prior to separation and in the year of separation which produces an average income of $35,500. [See Note 20 below]

[91] On the basis of these averages, in my view, the appropriate amount of transitional and compensatory support for the appellant is reflected by an award of $3,000 monthly for a three and a half year period from October 1, 2004 to March 1, 2008, followed by a further three and a half years at $1,500 monthly from April 1, 2008 until September 1, 2011. I would then terminate support. Such an award cushions the appellant's drop in standard of living caused by the marriage breakdown.

[92] While I have assessed the amount and duration of spousal support based on the circumstances involved, it is helpful to consider the reasonableness of this award by reference to the Guidelines. As noted, the trial judge's omission of any reference to the Guidelines in the trial reasons is the final issue raised in this appeal.

Spousal Support Advisory Guidelines

[93] Since it is clear that the Guidelines were put to the trial court, [See Note 21 below] the appellant argues that the trial judge erred in failing to take them into account in determining the quantum of support. In fairness to the trial judge, at the time of trial, the Guidelines were released only one year earlier and were not yet the subject of widespread commentary.

[94] The Guidelines were drafted under the aegis of the federal Department of Justice by the highly-regarded family law professors, Carol Rogerson and Rollie Thompson. The objective of the Guidelines is to bring certainty and predictability to spousal support awards under the Divorce Act. For this purpose, they employ an income-sharing model of support, that if proven viable, will reduce the need to rely on the labour-intensive, and thus expensive, budget-based evidence employed in a typical case. In this way, in a manner quite different from the Child Support Guidelines ("CSGs"), the Guidelines aspire to reduce the expense of litigation of spousal support by promoting resolution for the average case.

[95] In the seminal case of Yemchuk v. Yemchuk, 2005 BCCA 406 (CanLII), [2005] B.C.J. No. 1748, 16 R.F.L. (6th) 430 (C.A.), at para. 64, Prowse J.A. aptly characterized the Guidelines as a "useful tool". [See Note 22 below] She recognized that, unlike the CSGs, the Guidelines are neither legislated nor binding; they are only advisory. The parties, their lawyers and the courts are not required to employ them. As well, the Guidelines continue to evolve; they are a "work in progress" subject to revision. Those revisions, as with the Guidelines themselves, will follow after broad consultation by the authors with a wide range of interested constituents.

[96] Importantly, the Guidelines do not apply in many cases. They specifically do not apply at all in certain enumerated circumstances, including where spouses earn above $350,000 [See Note 23 below] or below $20,000. Furthermore, they only apply to initial orders for support and not to variation orders. They are thus prospective in application. They do not apply in cases where a prior agreement provides for support and, obviously, in cases where the requisite entitlement has not been established. They will not help in atypical cases. [See Note 24 below] As well, there will be regional variations, as well as rural and urban variations, that may be seen to merit divergent results based on variations in cost of living or otherwise. Importantly, in all cases, the reasonableness of an award produced by the Guidelines must be

balanced in light of the circumstances of the individual case, including the particular financial history of the parties during the marriage and their likely future circumstances.

[97] Accordingly, the Guidelines cannot be used as a software tool or a formula that calculates a specific amount of support for a set period of time. They must be considered in context and applied in their entirety, including the specific consideration of any applicable variables and, where necessary, restructuring.

[98] Importantly, the Guidelines do not impose a radically new approach. Instead, they suggest a range of both amount and duration of support that reflects the current law. Because they purport to represent a distillation of current case law, they are comparable to counsel's submissions about an appropriate range of support based on applicable jurisprudence. However, if the Guidelines suggest a range that conflicts with applicable authorities, the authorities will prevail.

[99] Counsel on this appeal advise that in London, where this support order was made, the Guidelines are widely used by the bar as a starting point for the purpose of assessing an appropriate level of spousal support, or for checking the validity of a proposed settlement. This is consistent with the finding of Professors Rogerson and Thompson set out in "The Advisory Guidelines 31 Months Later", which provides an extensive review of how the Guidelines have been applied in courts across Canada.

[100] Other appellate courts [See Note 25 below] have accepted the Guidelines as a "cross-check" or "starting point" for spousal support that "will help in the long run to bring consistency and predictability to spousal support awards", encourage settlement and allow parties to "anticipate their support responsibilities at the time of separation". [See Note 26 below]

[101] However, Québec courts have not been as accepting of the application of the Guidelines, mainly on the basis that an "individual analysis" is required in assessing spousal support, as opposed to the adoption of a "mathematical formula". [See Note 27 below] This concern is satisfied by the structure of these reasons, which first address the quantum of support in the traditional manner, and then assess the reasonableness of that support against the range drawn from the Guidelines. Nonetheless, I am optimistic that, with experience, the Guidelines will become accepted as a reliable tool for resolution of many cases, subject always to the important caveat that due consideration be given to the parties' individual circumstances.

[102] In addition, when considered in their entirety and subject to their limitations, the Guidelines also assist in informing an appellate standard of review. In Redpath v. Redpath, supra, at para. 42, Newbury J.A. commented:

> Now that [the Guidelines] are available to provide what is effectively a "range" within which the awards in most cases of this kind should fall, it may be that if a particular award is substantially lower or higher than the range and there are no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention.

[103] In my view, when counsel fully address the Guidelines in argument, and a trial judge decides to award a quantum of support outside the suggested range, appellate review will be assisted by the inclusion of reasons explaining why the Guidelines do not provide an appropriate result. This is no different than a trial court distinguishing a significant authority relied upon by a party.

[104] I turn to the application of the Guidelines. The "Without Child Support Formula" purports to incorporate both compensatory and non-compensatory support objectives by focusing on a combination of the difference in the parties' gross incomes and the length of their cohabitation. This approach is consistent with a party's needs serving as a proxy for dependency. The formula is set out in s. 5.1 of the Guidelines:

> Amount ranges from 1.5 to 2 percent of the difference between the spouses' gross incomes (the gross income difference) for each year of marriage, (or, more precisely, years of cohabitation), up to a maximum of 50 percent. The range remains fixed for marriages 25 years or longer, at 37.5 to 50 percent of income difference.
>
> Duration ranges from .5 to 1 year for each year of marriage. However support will be indefinite if the marriage is 20 years or longer in duration or, if the marriage has lasted five years or longer, when years of marriage and age of the support recipient (at separation) added together total 65 or more (the rule of 65).

[105] According to Professors Rogerson and Thompson, trial judges and lawyers often overlook or ignore the integral component of duration of marriage. [See Note 28 below] The Guidelines use duration to categorize cohabitation: a short-term cohabitation is one of less than five years; a medium-term cohabitation is from five to 19 years and a long-term cohabitation is 20 years or longer.

[106] However, under the Guidelines, a medium-term marriage becomes a long-term one (giving rise to indefinite support) if the parties' years of marriage, [See Note 29 below] plus the age of the support recipient at the date of separation, equals or exceeds 65. [See Note 30 below] This refinement recognizes that an economically-dependent older spouse may have trouble thereafter attaining self-sufficiency.

[107] While the "rule of 65" does not apply in this case, the general principle that it adopts in classifying marriage based on a spouse's age at separation is still relevant. This is because age is a strong indicator of an individual's ability to become self-sufficient.

[108] In circumstances such as these, where the marriage falls just outside of the Guidelines' classification of a "long-term" marriage, a court may still decide that an indefinite support order is appropriate. Similarly, a court may decide that limited-term support is appropriate even though the period of cohabitation is 20 years or more. This is because, as the Guidelines note, while courts should consider the age of the parties and the duration of the marriage, they must also consider all other relevant circumstances.

[109] In recognition of the symbiotic relationship between amount and duration, the Guidelines emphasize [at p. 39]:

> Amount and duration are interrelated parts of the formula
> --they are a package deal. Using one part of the formula without the other would undermine its integrity and coherence. As discussed below, the advisory guidelines provide for restructuring, which allows duration to be extended by lowering the monthly amount of support. (Emphasis added)

[110] In this case of a medium-term 19-year marriage, the Guidelines provide a range of support. At the low end of the range, the appellant would receive 28.5 per cent of the parties' income differential of $54,325, or $1,290 monthly ($15,483 annually). At the high end of the Guidelines' range, the appellant would receive 38 per cent of the differential, or $1,720 monthly ($20,644 annually). In accordance with the formula for duration, support would be payable for a period ranging from 9.5 to 19 years.

[111] The award I consider appropriate in this case, at least initially, both exceeds this range for amount and falls below the range for duration. Thus, I turn to the provisions for restructuring, which essentially involve converting the specific ranges of support to a lump sum amount (without consideration for present values). In this case, this conversion results in a broad support range from a low of $147,088, to a high of $392,236.

[112] This global range can be compared to the trial award as a "litmus test of reasonableness". The trial award, including interim support, but assuming termination in December 2008, totals a lump sum of $94,200, [See Note 31 below] an amount that falls far below the Guidelines, although I recognize that this does not account for what may have been the final result after a review hearing.

[113] In comparison, the support award that I propose in these reasons would total $189,000. [See Note 32 below] This figure falls within the Guidelines' global range, albeit toward the low end of that range.

Result

[114] In the result, I would allow the appeal, set aside paras. 2 and 3 of the divorce order and substitute an order for spousal support of $3,000 monthly commencing October 1, 2004 and continuing to March 1, 2008. Thereafter I would award support of $1,500 monthly from April 1, 2008 terminating after a final payment on September 1, 2011. I would also vary para. 5 of the order to make reciprocal the obligation to disclose annual incomes to the other spouse as long as support is payable.

[115] This termination order is designed to provide the appellant with support to enable her to become financially independent, or adjust to a lower standard of living within seven years. It also assumes that the respondent will maintain his income in a manner consistent with his current employment. The order is, of course, subject to variation by reason of a material change in circumstances.

[116] I would award costs of the appeal to the appellant in the amount of $9,000, inclusive of disbursements and Goods and Services Tax.

Appeal allowed.

Notes ----------

Note 1: The word "quantum", in these reasons, encompasses both amount and duration of support.

Note 2: The parties received additional financial assistance from Mr. Fisher's parents during this time.

Note 3: Bakker v. Bakker, 1997 CanLII 12385 (ON SC), [1997] O.J. No. 4950, 34 R.F.L. (4th) 55 (Gen. Div.), which limited support to five years after a 12-year marriage for a 35-year-old highly employable wife; Jeffries v. Jeffries, 1997 CanLII 12251 (ON SC), [1997] O.J. No. 3124, 32 R.F.L. (4th) 345 (Gen. Div.), which limited support to three years for a 30-year-old wife whose eight years out of the workforce could be offset by specific retraining and who could look forward "to many productive years of working"; and Bildy v. Bildy (1999), 1999 CanLII 9319 (ON CA), 42 O.R. (3d) 737, [1999] O.J. No. 501 (C.A.), in which this

court varied a five-year spousal support order to nine years following a 13-year marriage with children, during which the wife was out of the workforce for eight years - although the order in that case also provided for reconsideration of entitlement at the end of the nine-year period.

Note 4: The trial judge cited the following cases in support of this principle at para. 46: Edwards v. Edwards, 1994 CanLII 4054 (NS CA), [1994] N.S.J. No. 361, 5 R.F.L. (4th) 321 (C.A.); Ronnie v. Milligan, [2001] P.E.I.J. No. 23, 200 Nfld. & P.E.I.R. 358 (T.D.); Curtin v. Curtin, [1997] O.J. No. 4653 (Gen. Div.); Parsons v. Parsons, 1995 CanLII 7352 (ON SC), [1995] O.J. No. 3225, 17 R.F.L. (4th) 267 (Gen. Div.); L. (B.) v. S. (J.), 1994 CanLII 9109 (AB QB), [1994] A.J. No. 540, 156 A.R. 266 (Q.B.).

Note 5: Huisman v. Huisman (1996), 1996 CanLII 761 (ON CA), 30 O.R. (3d) 155, [1996] O.J. No. 2128 (C.A.); Kurbegovich v. Kurbegovich, 1998 CanLII 14868 (ON SC), [1998] O.J. No. 217, 36 R.F.L. (4th) 220 (Gen. Div.); Bracklow v. Bracklow, 1999 CanLII 5311 (BC SC), [1999] B.C.J. No. 3028, 3 R.F.L. (5th) 179 (S.C.).

Note 6: See also Pope v. Pope (1999), 1999 CanLII 2278 (ON CA), 42 O.R. (3d) 514, [1999] O.J. No. 242 (C.A.).

Note 7: Guidelines, s. 5.1.2.2.

Note 8: This is quite separate from the issue of the appellant's assistance to the respondent regarding the completion of his education, to which I give consideration when addressing economic advantages and disadvantages from the marriage.

Note 9: Guidelines, s. 10.8.

Note 10: See N. Bala, "Spousal Support Law Transformed -- Fairer Treatment for Women" (1994) 11 C.F.L.Q. 6 at 52.

Note 11: Another example of an exception to the principle occurs where the payment of first-family support would drive the second family onto social assistance or otherwise into poverty. See Guidelines, s. 10.8.

Note 12: Carol Rogerson, "Spousal Support After Moge" (1996) 14 C.F.L.Q. 281 at 309-10.

Note 13: The equalization of the parties' net family property in this case did not increase the appellant's ability to be self-sufficient. To the extent it decreased the ability of the respondent to pay support, that decrease was inextricably intertwined with his choice to assume complete responsibility for the expenses of his second family.

Note 14: This is a calculation based upon the appellant's earnings in the four years preceding separation (because those years are most representative of her income) and upon the respondent's earnings over four years, including his increased earnings in the year following separation (because this provides some recognition that the sudden increase in his income was proximate to the marriage breakdown).

Note 15: For application of this principle in a trial decision, see Keller v. Black, 2000 CanLII 22626 (ON SC), [2000] O.J. No. 79, 182 D.L.R. (4th) 690 (S.C.J.).

Note 16: The appellant's disability insurer ultimately accepted the evidence that the appellant was disabled.

Note 17: See Guidelines, chapter 8.

Note 18: Moge v. Moge, supra ; Kent v. Frolick, supra; Krauss v. Krauss, supra; Doyle v. Doyle, 2001 CanLII 28158 (ON SC), [2001] O.J. No. 4706, 22 R.F.L. (5th) 276 (S.C.J.); Cavanaugh v. Cassidy, 2000 CanLII 22514 (ON SC), [2000] O.J. No. 1658, 7 R.F.L. (5th) 282 (S.C.J.); Huisman v. Huisman (1996), 1996 CanLII 761 (ON CA), 30 O.R. (3d) 155, [1996] O.J. No. 2128 (C.A.); Kurbegovich v. Kurbegovich, supra; and Schmuck v. Reynolds-Schmuck, 1999 CanLII 15000 (ON SC), [1999] O.J. No. 3104, 50 R.F.L. (4th) 429 (S.C.J.), in which Himel J. provides an excellent review. These authorities illustrate the swing of the pendulum from Pelech's clean-break approach, where limited-term orders were the norm, to the post-Moge and Bracklow trend towards indefinite support.

Note 19: The incomes averaged are $75,500 in 2001, $77,000 in 2002, $81,800 in 2003 and $125,000 in 2004.

Note 20: The incomes averaged are $30,000 in 2001, $41,000 in 2002, $41,000 in 2003 and $30,000 in 2004, without taking into account the appellant's anomalous situation while she was on disability leave.

Note 21: The exhibit book contains Guidelines calculations.

Note 22: For further appellate commentary on the Guidelines see: S.C. v. J.C., 2006 NBCA 46 (CanLII), [2006] N.B.J. No. 186, 27 R.F.L. (6th) 19 (C.A.), at para. 5, leave to appeal to S.C.C. refused [2006] S.C.C.A. No. 246 (October 19, 2006); McEachern v. McEachern, 2006 BCCA 508 (CanLII), [2006] B.C.J. No. 2917, 33 R.F.L. (6th) 315 (C.A.); Stein v. Stein, [2006] B.C.J. No. 2020, 2006 BCCA 391; Toth v. Kun, [2006] B.C.J. No. 739, 2006 BCCA 173; Redpath v. Redpath, 2006 BCCA 338 (CanLII), [2006] B.C.J. No. 1550, 33 R.F.L. (6th) 91 (C.A.); Tedham v. Tedham, 2005 BCCA 502 (CanLII), [2005] B.C.J. No. 2186, 20 R.F.L. (6th) 217 (C.A.); Lust v. Lust, [2007] A.J. No. 654, 2007 ABCA 202; Pettigrew v. Pettigrew, 2006 NSCA 98 (CanLII), [2006] N.S.J. No. 321, 30 R.F.L. (6th) 7 (C.A.); G.V. v. C.G., [2006] J.Q. no 5231, 2006 QCCA 763.

Note 23: See "The Advisory Guidelines 31 Months Later" at chapter 5 for commentary on the appropriateness of the amount of the Guidelines' income ceiling.

Note 24: The Guidelines address a number of examples where their application would not be appropriate. See Guidelines, s. 4.4.2.

Note 25: They have also been frequently been referenced by the trial courts. See "The Advisory Guidelines 31 Months Later at 9". The authors identify that the Guidelines have been cited in approximately 81 cases in Ontario since their release in January 2005.

Note 26: See S.C. v. J.C., supra, at para. 5.

Note 27: See G.V. c. C.G., supra, where the court refuses to clarify "principles" in applying the Guidelines because they are purely "advisory". The court also emphasizes that, while it is tempting to resort to a recipe for a mathematical formula instead of going to the difficult analysis in the Divorce Act, this approach should not be adopted since, as stated in Moge, there is no "magic recipe" or a grid for determining spousal support. This point was applied by the trial court in Droit de la famille -- 061122, [2006] J.Q. no 17350, 2006 QCCS 7734. Quebec trial courts have also been critical of adopting the Guideline formula for the determination for support: in B.D. v. S.D., [2006] J.Q. no 1670, 2006 QCCS 1033; M.G. c. J.C., [2006] J.Q. no 1669, 2006 QCCS 1028; and D.S. c. M.S., [2006] J.Q. no 506, 2006 QCCS 334.

Note 28: The "Advisory Guidelines 31 Months Later" at 11.

Note 29: While I use the term "marriage" for convenience, I use this term synonymously as it is in this case with the term "cohabitation" used in the Guidelines.

Note 30: The Guidelines refer to this principle as "the rule of 65".

Note 31: Calculated at interim support of $2,000 per month from October 1, 2004 to and including February 1, 2006 (17 months in total), totalling $34,000; support of $2,600 per month from March 1, 2006 to December 1, 2006 (10 months), totalling $26,000; support of $1,800 per month from January 1, 2007 to December 1, 2007 (12 months) totalling $21,600; and support of $1,050 per month from January 1, 2008 to December 1, 2008 (12 months) totalling $12,600.

Note 32: Calculated at support of $3,000 per month from October 1, 2004 to and including March 1, 2008 (42 months) totalling $126,000; and support of $1,500 per month from April 1, 2008 to and including September 1, 2011 (42 months) totalling $63,000.