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— Franks & Zalev - This Week in Family Law

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Issue: Saskatchewan and British Columbia — Whether Passage of Time Constitutes Material Change in Circumstances

In the *Spousal Support Advisory Guidelines* (the "*SSAG*"), Professors D.A. Rollie Thompson and Carol Rogerson stress that an order for "indefinite" support does not necessarily mean permanent support, and certainly does not mean that support will continue indefinitely at the level set by the *SSAG* formula. "Indefinite" support means that support is subject to the normal process of variation and review, and through this process the amount of support may be reduced and may even be terminated *if the basis for entitlement disappears*.

A review or variation may involve consideration of whether the support recipient remains entitled to support. As circumstances change, including changes in employment and income, retirement, and remarriage, entitlement may be at issue.

But what about cases where the support payor has arguably satisfied their support obligation, but there is no overt change in circumstances (e.g. retirement, remarriage, etc.), aside from the passage of time? Is the support payor entitled to seek a variation or possibly even a termination of support?

In *Townsend* and *Zandbergen*, the Saskatchewan Court of Appeal and the British Columbia Court of Appeal, respectively, considered the issue of whether the duration and amount of spousal support paid — or the arguable "end of entitlement" — can constitute a material change of circumstances. In both cases, the appellants had been paying spousal support for longer than the length of the relationship, and sought to terminate support.

In both cases, the Court of Appeal concluded that the duration and amount of support paid — the "mere passage of time" — did *not* constitute a material change of circumstances, and dismissed the appeal. These cases raise the question of when, if ever, support payors will be entitled to a reduction or termination or support, where the only change in circumstances is the passage of time. Absent unusual circumstances, it just cannot be that a payor could have to pay support for double or triple the length of the relationship solely because incomes or other life circumstances do not change.

Townsend v. Townsend **(2023), 91 R.F.L. (8th) 271 (Sask. C.A.)**

The parties in *Townsend* separated in 2000, after 15 years of marriage, when the wife was 51-years-old and the husband was 40. The parties did not have any children together, but the wife had two children from a previous marriage, who were independent by the time the parties separated.

The wife had worked only sporadically since the parties married in 1985, and the jobs she did work were low paying and part-time or casual. The wife had a medical condition that did not render her incapable of working, but did limit her employment opportunities.

In 2002, the trial judge ordered the husband to pay the wife indefinite, non-compensatory spousal support of $1,700 per month. The trial judge held that the spousal support was intended to "relieve the economic hardship [the wife] suffered as a result of the breakdown of the marriage and also promote in so far as practicable, her economic self-sufficiency." This was a wholly reasonable result; nothing to see here.

The *SSAG* formula for duration under the "without child support" formula provides for "indefinite" support if the parties were married for at least five years, and the length of marriage plus the age of the support recipient at the time of separation equals or exceeds 65 (commonly referred to as the "Rule of 65"). Again, as a reminder, an order for "indefinite" support does *not* necessarily mean that support is permanent or infinite — only that the duration is not, at that time, specified. Orders for indefinite support are open to variation — and/or termination — as the parties' circumstances change.

The husband initially appealed the trial judge's decision, but later abandoned his appeal.

In 2003 and 2006, the husband brought applications to vary the spousal support order, both of which were dismissed. While we do not know the grounds on which the husband was seeking to vary the support order, these early variation applications, which were brought only one year and four years after the support order, respectively, were likely premature, and may have impacted the court's willingness to vary or terminate support down the road. When advising clients, it is important to remember that an early strategic misstep may have a lasting negative impact.

In 2018, the husband brought an application to terminate support, arguing that there were material changes in circumstance justifying a variation of the spousal support order. By that time, the husband had been paying spousal support for approximately ***16 years*** — meaning the husband had been paying spousal support for longer than the parties' marriage of 15 years. The husband had paid the wife more than $393,000 in gross spousal support over this period of time.

The husband argued that the duration and amount of support paid exceeded the range provided for in the *SSAG* and, therefore, the wife's entitlement to spousal support on a non-compensatory basis had ended because the objectives of the support order had been met.

The Chambers judge determined that there were no changes in circumstances that justified varying the support order, and dismissed the husband's application.

The Chambers judge rejected the husband's argument that the passage of time and the amount of support paid constituted material changes that justified the termination of the support order. He determined that the passage of time was not a relevant consideration because the indefinite support order was based on the trial judge's determination that it was highly unlikely that the wife would ever be able to provide adequately for herself. On these facts, the passage of time combined with the amount of support paid by the husband did not satisfy the non-compensatory purpose of the support order. Is it just us, or is this starting to sound like a permanent support order?

The Chambers judge acknowledged that a significant passage of time giving rise to a question of whether the objectives of spousal support have been satisfied *may* constitute a material change, but that the passage of time on its own is not sufficient to establish a material change:

> [36] I accept that an order for indefinite spousal support order [*sic*] does not mean permanent support. Further a significant passage of time giving rise to a question of whether the objectives of spousal support have been satisfied may constitute

> a material change in circumstances. However, **mere passage of time is not sufficient to establish a material change in circumstances where an application is brought to vary the terms of an indefinite order for spousal support, including where that passage of time extends beyond the suggested duration of spousal support under the *SSAG*.** [emphasis added]

Why is it, we ask rhetorically, that the *SSAG* amount and duration ranges *can* be used to suggest that compensation has *not* yet been achieved, but *cannot* be used to suggest that compensation *has* been achieved?

That being said, we agree that the proper question to be determined is whether the objectives of spousal support have been satisfied as a result of the passage of time. A support payor cannot simply argue that they are entitled to a termination or a reduction of support on account of the passage of time, without explaining how the passage of time impacts the support recipient's entitlement to support, even when relying on the range of the duration of support suggested by the *SSAG*. The *SSAG* are, after all, *advisory*.

The husband appealed the Chambers judge's decision. The husband's main argument on appeal was that the Chambers judge erred when he concluded that the amount and duration of support paid as of the date of the variation application did not constitute a material change in the parties' circumstances.

The Court of Appeal was not persuaded. Justice McCreary, writing for the Court of Appeal, referred to other decisions in which Canadian courts have held that the passage of time alone does not amount to a material change in circumstances for support purposes, including *Gray v. Wiegers* (2008), 47 R.F.L. (6th) 1 (Sask. C.A.); *Rondeau v. Rondeau* (2011), 90 R.F.L. (6th) 328 (N.S. C.A.); *Hess v. Hamilton* (2018), 5 R.F.L. (8th) 287 (Ont. S.C.J.); and *G.S. v. A.S.*, 2022 CarswellNfld 173 (C.A.).

The Court of Appeal referred to the line of cases that has developed in Ontario that suggest that paying support over a significant period can raise a question about whether the objectives of the support order are satisfied so as to constitute a material change warranting variation, including *deJong v. deJong*, 2009 CarswellOnt 1304 (S.C.J.); *Sharpe v. Sharpe*, 2018 CarswellOnt 9521 (S.C.J.); and *Pitt v. Pitt*, 2019 CarswellOnt 1675 (S.C.J.).

After considering these cases, the Court of Appeal held:

> [30] In my opinion, the mere passage of time, in and of itself, cannot establish that the objectives of a spousal support order have been met. Rather, "**[t]he key question must be whether the objectives of the spousal support reflected in the original order have been satisfied, as a result of the passage of time**" . . . In the circumstances of this case, the Chambers judge did not err when he determined that the objectives of the Support Order were not satisfied by the passage of time. . . . [emphasis added]

The Court of Appeal rejected the husband's argument that, given the passage of time, the economic hardship the wife was experiencing was no longer caused by the breakdown of the marriage, but rather by her failure to contribute to her own support and to properly manage her financial affairs. The Court of Appeal held:

> [33] This argument is superficially compelling but, ultimately, cannot succeed. Again, subjective foreseeability guides a consideration of material change. We must ask: what was known at the time of the Support Order and what was foreseeable? The trial judge acknowledged that [the wife] was economically advantaged by the marriage and disadvantaged by its breakdown, but she also acknowledged that the disadvantage caused by the breakdown would not be remedied by [the wife] becoming self-sufficient. It was foreseen that [the wife] would never be able to support herself independently. This was a stated reason for the indefinite period of support, without the inclusion of a review provision. . . .
>
> [34] In conclusion on this point, the trial judge determined that an order for spousal support was necessary to relieve the economic hardship of the marriage breakdown and to promote self-sufficiency as far as doing so was practicable. She also concluded that the Support Order should be indefinite because it was unlikely [the wife] would ever achieve self-sufficiency. Despite the passage of time, there has been no material change to [the wife's] economic hardship or her dependency. Thus, the objectives of the Support Order have not been satisfied.

The Court of Appeal also rejected the husband's argument that the wife's entitlement to support had ended and that this constituted a material change. The court found that a spouse's entitlement to support exists as long as they have a need for maintenance and the other spouse can provide maintenance. In this case, the wife had a continued economic need, and the husband had sufficient income to provide support. (We pause here to note that the Court of Appeal's analysis of the wife's ongoing entitlement to support was almost certainly impacted by her health issues that impacted her ability to attain self-sufficiency — it is an oversimplification of non-compensatory support to say that need for support and the ability to pay support will result in entitlement.)

The Court of Appeal ultimately dismissed the husband's appeal, holding that, while the husband had been paying spousal support for longer than the parties were married, the mere fact of the duration and amount of support paid did not constitute a material change in circumstances.

***Zandbergen v. Craig*, 2024 CarswellBC 2120 (C.A.)**

The parties in *Zandbergen* separated in 2007 when the wife was about 47-years-old, after 14 years of marriage. They had two children together, who were approximately 28 and 26 years old, respectively, as of the hearing in 2023, and were no longer entitled to child support.

During the parties' marriage and since their separation, the husband worked as a realtor. The wife had also worked in real estate at various points during the parties' marriage, but had no meaningful employment outside of the home after their separation.

In 2009, the parties agreed that the husband would pay child support of $5,000 a month and spousal support of $8,000 a month, based on an income of $300,000.

In 2017, Justice Smith of the British Columbia Supreme Court heard cross-applications brought by the parties concerning child and spousal support. Justice Smith varied the husband's child support obligations, at least in part based on the child's attendance at post-secondary school, and ordered that the husband continue to pay spousal support of $8,000 a month based on an income of $430,000 for an "indefinite period" (the "2017 Variation Application").

The court rejected the husband's argument that spousal support should terminate in December 2020 (i.e. a duration of 12.5 years, when the *SSAG* recommended a duration of between seven years two months and 14 years four months) and made the following findings concerning the wife's entitlement to ongoing spousal support:

> [64] The [wife] is now 57 and long out of the work force. I do not find any reasonable prospect of her being able to obtain employment or becoming self-sufficient, nor any basis on which income can be imputed to her. **I am satisfied that the compensatory and non-compensatory grounds for spousal support remain essentially as they were at the time of the June 9, 2009 Order with, if anything, a greater non-compensatory component.**
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> . . . . .
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> [69] **I do not find it likely that the [wife's] financial situation or her ability to become self-sufficient will improve between now and 2020 or any date that can be predicted.** Circumstances may arise that justify a variation application, but the evidence does not support a pre-determined end date for spousal support. [emphasis added]

In December 2021, the husband brought an application to terminate spousal support or, alternatively, to vary support and set a definite date for termination. Similar to the husband's arguments in *Townsend*, the husband in *Zandbergen* argued: (1) that he had paid spousal support for a longer period of time than the length of the parties' relationship and for a longer period of time than the upper limit recommended by the *SSAG*, and (2) that the wife had failed to manage her resources well and she had taken no steps towards self-sufficiency.

In rejecting the husband's arguments, the court relied heavily on Justice Smith's decision on the 2017 Variation Application:

> [69] There does not appear to be a basis for suggesting that the duration of support payments, or [the wife's] failure to achieve self-sufficiency, were not taken into account by Smith J. It seems to me that Smith J. considered the possibility of [the husband] paying spousal support indefinitely and without a pre-determined end date. **In so doing, Smith J. can be taken to have considered that [the husband] might pay support for a duration longer than the length of the parties' relationship. In short, I do not find that [the husband's] payment of spousal support beyond the length of the parties' relationship amounts to a material change in circumstances in the specific circumstances of this case.**
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> [70] In respect of the argument that [the wife], by virtue of her failure to take reasonable efforts to achieve self-sufficiency, has created a material change in circumstances, **I note that Smith J. specifically found it unlikely, given [the wife's] age, her health issues and her years out of the work force, that her prospects for self-sufficiency would improve "between now and 2020 or any date that can be predicted".**
>
> [71] The evidence before me is that [the wife's] financial situation has deteriorated and her chances of becoming self-sufficient have not improved since the parties appeared before Smith J. [emphasis added]

The court's reliance on Justice Smith's reasons in the 2017 Variation Application, which had been heard approximately six years earlier, is concerning. As Professors Thompson and Rogerson stress in the *SSAG*, entitlement is *always* a live issue, and it is certainly conceivable that a party's entitlement to support could change over a period of six years.

Far from reducing or terminating spousal support, the court found that as the husband was no longer obligated to pay child support for the parties' daughter, the husband's spousal support obligation should be calculated using the "without child support" formula. The court ordered the husband to pay spousal support of $10,248 a month, being the high end of the "without child support" formula based on an income of $430,000.

The husband appealed. The central thrust of the husband's position was that, by virtue of paying spousal support for a period of time equal to the duration of the parties' relationship, he had discharged his support obligation. He argued that this constituted a material change in circumstances that justified a termination or, alternatively, a variation of support.

The Court of Appeal cited extensively from the Saskatchewan Court of Appeal's decision in *Townsend*, and concluded that the husbands' arguments in *Townsend* and *Zandbergen* were similarly flawed:

> [39] . . . [the husband's] position that his support obligation must end because he has paid spousal support in excess of the duration contemplated by the *SSAG* ignores the fact that [the wife's] **entitlement to spousal support was established by way of the 2009 Order and was subsequently confirmed in the Smith Order**. As noted above, Smith J. found that [the wife] had no reasonable prospect of obtaining employment or becoming self-sufficient and, accordingly, he ordered spousal support for an indefinite period. In coming to this conclusion, Smith J. expressly rejected [the husband's] request that he set a specific end date for the payment of support. [emphasis added]

The Court of Appeal went on to note that the court's decision on the 2017 Variation Application provided ample support for the conclusion of the lower court that the husband had not established a material change in circumstances, and commented that the husband's application was in large measure an attempt to relitigate matters that had previously been considered and rejected, contrary to the objectives of the material change test.

But this seems to suggest that an historic finding of entitlement is subject to *res judicata*: once entitled, always entitled. But that is most certainly not the case. Continuing entitlement is, and must be, always in issue.

The Court of Appeal adopted the Saskatchewan Court of Appeal's holding in *Townsend* that the essential question to be determined is whether the objectives of the original spousal support order had been satisfied. The court then further noted that it was clear from both the decision on the 2017 Variation Application and the decision of the lower court on the current Variation Application that both courts were of the view that those objectives were not in fact satisfied by the payment of support for the duration set out under the *SSAG*.

The Court of Appeal acknowledged that circumstances may arise that could justify a future variation application, but that those circumstances were not present before the judge and the husband had not established that the lower court erred in dismissing his application to terminate support.

Conclusion

While we recognize that there are circumstances in which the court may extend the duration of support — including in cases where the recipient is unable to achieve self-sufficiency due to an illness or disability — we have to wonder when the payors in *Townsend* and *Zandbergen* will be entitled to a reduction or termination of support, given the courts' findings in those cases that the support recipients will likely never attain self-sufficiency.

The court's decision in *Zandbergen* is especially concerning, when one considers that the parties in that case were married for only approximately 14 years, the wife was approximately 47-years-old when they separated, and she had worked at various points during the parties' marriage. There is no indication in the decision that she suffered from any illness or disability that would have prevented her from working.

While the court acknowledged in *Zandbergen* that circumstances may arise that could justify a variation of support, we do not see how the husband will be entitled to a variation or termination of support prior to his retirement.

In some cases, marriage is truly forever.