

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Susan Enyedy-Goldner, Applicant

AND:

Robert Goldner, Respondent

BEFORE: The Honourable Mr. Justice A. Pazaratz

COUNSEL: Counsel, for the Applicant, Sarah Gulas

Counsel, for the Respondent, Malcolm Graham

HEARD: March 20, 2024

ENDORSEMENT

- 1 The primary issue is the Respondent father's motion requesting ongoing and retroactive spousal support.
- 2 The Applicant mother disputes both entitlement and any ability to pay. She brought a cross motion for child support based upon an income to be imputed to the father.
- 3 The father's motion in relation to the sale of the matrimonial home was partially resolved. The remaining sale-related issue cannot be addressed at this time.
- 4 The background:
 - a. The father is 52.
 - b. The mother is 54.
 - c. The parties have two children, Isabella, age 17, and Marcus, 15. (They are represented by John Grant, through the Office of the Children's Lawyer. Mr. Grant attended at the outset of the motion, but the parties agreed he could be excused from this interim hearing, as his participation was not required in relation to financial issues.)
 - d. The parties started living together in September 1993.
 - e. They married on July 2, 1994.
 - f. The litigation got off to a bad start. The mother commenced an application while the parties were still living together within the jointly owned matrimonial home. She identified the date of separation as February 17, 2022. The father does not appear to dispute this date. The father was

served with the application but did not respond. He later stated that he was mixed up about the deadline for responding.

- g. With no Answer being filed, the mother proceeded on an uncontested basis without giving notice to the father, even though they were still under the same roof. Justice Edwards' February 14, 2023 order granted the mother sole decision-making in relation to the children; exclusive possession of the home and control of any sale; and the father was ordered to pay child support based upon an imputed income of \$50,000.00.
- h. On May 23, 2023 Justice Brown granted the father's motion to set aside portions of the February 14, 2023 order, including his child support obligation. The mother retained sole decision-making authority for the children; exclusive possession of the home and a vehicle; two cats, and the divorce was severed.

5 Both parties filed lengthy affidavit materials on this motion. The father's narrative on the support issues includes the following:

- a. On March 2, 2023 the father moved out of the matrimonial home pursuant to Justice Edwards' order. He had nowhere else to go, so he went to stay at the home of his sister in Binbrook. He has been sleeping on an air mattress at that home for the past year.
- b. During approximately the first 20 years of the almost 30-year relationship, both parties were both steadily employed working outside of the home, although the mother's income came to be higher.
- c. In 2011 the father became a stay-at-home parent. He has not held any employment since that date. The mother went from being the primary breadwinner to the sole breadwinner for more than a decade leading up to separation. Her income during this period increased significantly.
- d. The father says he assumed primary responsibility for the children, in part because of the mother's long hours working and commuting to Toronto. In addition, the parties agreed that the father would assume sole responsibility for their finances (which the father says were in crisis due to the mother's irresponsible spending habits). He says as a result of his diligent financial management, the parties went from the brink of bankruptcy to a stable financial situation.
- e. During the lengthy relationship, the father came to be completely dependent on the mother financially.
- f. On separation the father had no job and no source of income.
- g. The father's annual income since 2011 has consistently been zero. In contrast, the mother's recent income has been:
 - i. 2019 \$103,764.00
 - ii. 2020 \$106,321.00
 - iii. 2021 \$107,642.00

- iv. 2022 \$111,214.00
- v. 2023 \$117,931.09

- h. The father has attempted to find employment since March 2023 when he was unexpectedly removed from the matrimonial home. His sister's residence is in a remote part of Hamilton, with no public transit. He didn't have a vehicle (or funds for transportation), so his mobility was limited by his unreliable ability to borrow his sister's car. He lists a number of employers near the sister's residence which he contacted about employment, but he was either not qualified or there were no openings.
- i. As it happens, at the beginning of March 2024 the father had to move out of his sister's residence, because she herself was separating from her spouse. She loaned the father some money to help him get a car. He's been living in that car since then. He has no funds to obtain accommodation.
- j. The father has experienced extreme financial hardship since being forced out of the matrimonial home a year ago, with no income and no assistance from the mother.
- k. Since then he had to withdraw approximately \$38,000.00 (net) from his government pension, based on hardship grounds. He has exhausted those funds and is unlikely to be able to access additional funds.
- l. Having been out of the workforce for a decade, the father has decided his best option is to retrain. After considering various options, he wants to pursue a two-year real estate agent course at Humber College. But the course costs \$10,000.00, and he needs a residence, a car, and internet while pursuing the course. He can't even retrain without money.
- m. The father denies the allegation that he committed any family violence against the mother. He denies, for example, that he was financially abusive by controlling her pay cheque. He says the mother asked him to control the family finances because she wasn't good with money. He says she always had the option of diverting her pay from a joint account into her own account – and that this is precisely what she did when she decided to separate.
- n. In contrast, the father says the mother was verbally and psychologically abusive; and physically abused him in various ways including kicking, choking, shoving, pushing him against a wall, and spitting at him. He says she caused him great emotional distress by alienating the children against him, and urging him to commit suicide.
- o. He desperately requires financial support and the mother has the ability to provide such support.
- p. He says since separation the mother has either received or will soon be receiving an inheritance of between \$500,000.00 and \$1,000,000.00, so her claims of financial hardship are unfounded.
- q. He won't be able to pay child support until he has an income. He needs spousal support while he attempts to retrain and rebuild his life.

6 The mother's narrative on the support issues includes the following:

- a. While the father claims he was shocked and taken by surprise when he learned that the mother had obtained a court order evicting him from the matrimonial home on March 2, 2023, he knew that the parties had a very unhappy marriage for a long time. He knew that the mother had served him with a Divorce application while he was still in the home. He deliberately ignored that application and failed to participate in the resolution of the parties' issues. Accordingly, while the father claims he has "only had a year" to re-organize his life, in reality he's known for two years that the marriage was over. He should have accomplished much more during the past two years to obtain a job, to become self-supporting, and to support his children.
- b. At all times – and since the date the father moved out – the mother has continued to assume financial responsibility for everything: For the children. For the jointly owned house. For all the joint debts. The father's failure to contribute anything has created extreme financial hardship for the mother.
- c. She denies that he was a "stay at home father". There was never any agreement that the father should stop working. He unilaterally decided to leave his employment in 2011. At that point, the children were still in daycare and they remained in daycare even after the father quit his job. His voluntary departure from the workforce had nothing to do with child-related responsibilities.
- d. There was no agreement that the father would assume responsibility for family finances. The father simply insisted that he would control the mother's income and the household cashflow. His unilateral and controlling behaviour in relation to finances was consistent with his domineering and intimidating approach to their relationship. Throughout the marriage he was aggressive, belittling, insulting, verbally abusive, and intimidating. On many topics the mother didn't agree with the father but she acquiesced to his demands. She denies that she abused him.
- e. The father was never the primary caregiver for the children. In the early years when both parties were steadily employed, the mother assumed primary responsibility for the children. Even after the father decided to stay home, the mother would still assume primary responsibility for the children as soon as she returned home from work.
- f. The father has exaggerated the amount of time the mother was away at work. She acknowledges that between 2015 and 2019 she travelled for work about ten to twelve times per year, for two or three nights at a time, and that during these limited periods the father would have been responsible for the children. But she only commuted to Toronto for one year. Since May 2015 she has generally worked from home two to three days per week. Since February 2020 she has worked from home most of

the time. And she assumed primary responsibility for the children even when she was working from home.

- g. She acknowledges that as of 2011 when the father elected to stop work as a government administrative assistant, she was earning a bit more, but the discrepancy was not great. In 2011 he was earning about \$48,000.00. She was earning about \$60,000.00.
- h. She insists there was no discussion – and certainly no agreement – about the father quitting his job and staying home. He simply advised her after he did it. She didn't approve. She felt they were both university-educated, with good employment records, so he could easily re-enter the workforce if he wanted. But there was nothing she could do to force him to go out and get another job.
- i. She denies that the father became dependant on her. He made his own choices and lacked any motivation to contribute to his own or the family's expenses.
- j. She denies the father's allegation that her financial situation has improved since March 2023 when he moved out. He seems to think she has extra money to pay down their debts, but in reality she has barely been servicing the debts.
- k. She denies that she has received an inheritance. Her father passed away last year. It is unknown how long it will take for his estate to be resolved.
- l. She disputes the father's statement that he has been seriously seeking employment. He is healthy, well-educated and has significant work experience. He could easily find employment.
- m. The parties have now scheduled a 14-day trial to take place in September 2024. The mother proposes that with the father's spousal support claim being so weak and reliant on disputed facts, that she shouldn't have to pay support until his claim has been thoroughly tested. Any interim support order will hamper her ability to support the children and pay household expenses.
- n. The mother feels that rather than *paying* support she should be *receiving* support from the father for the children. She feels he could easily earn \$30,000.00 per year, and that this amount should be imputed to him.

THE LAW

- 7 The father's spousal support claim is to be determined pursuant to the *Divorce Act*.
- 8 Sections 15.2(1) to (3) of the *Divorce Act* set out the court's jurisdiction to make either an interim or final order requiring a spouse to pay such spousal support as the court considers reasonable.

15.2(1) Spousal support order

A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such

lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

15.2(2) Interim order

Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

15.2(3) Terms and conditions

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

- 9 Sections 15.2(4) and (6) of the *Divorce Act* set out the factors that the court must consider in making a spousal support order, including the “condition, means, needs and other circumstances of each spouse.”

15.2(4) Factors

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.

- 10 These statutory objectives must be considered when the court considers entitlement, quantum and duration of spousal support. *El Ouazzani v. Chabini*, 2022 ONSC 5773 (SCJ)

- 11 Section 15.2(5) of the *Divorce Act* sets out that misconduct of a spouse in relation to the marriage is not a relevant consideration. However, there is a distinction between the misconduct itself and any consequences of the misconduct, which may be relevant as impacting the other spouse’s ability to become self-sufficient. *A.E v. A.E.*, 2021 ONSC 8189 (SCJ). The emotional consequences of spousal misconduct, such as depression, may be considered. *Leskun v. Leskun*, 2006 SCC 25 (SCC); *Meffe v. Meffe*, 2023 ONSC 3195 (SCJ). Section 15.2(5) states:

15.2(5) Spousal misconduct

In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

- 12 Section 15.2(6) of the *Divorce Act* lists the general objectives of spousal support.

15.2(6) Objectives of spousal support order

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.

- 13 All of the objectives and factors set out in section 15.2(6) of the *Divorce Act* must be considered. No single objective is paramount. The court has significant discretion to determine the weight to be applied to each objective, based on the individual circumstances of each case. The goal is to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown. *Moge v. Moge*, 1992 CanLII 25 (SCC); *Bracklow v. Bracklow*, [1991] 1 S.C.R. 420 (SCC); *Fisher v. Fisher*, 2008 ONCA 11 (ON CA); *Racco v. Racco*, 2014 ONCA 330 (ON CA). The court must provide an analysis of how any award achieves the objectives of spousal support. *McGuire v. Bator*, 2022 ONCA 431 (ON CA)
- 14 On a motion for interim spousal support the court must conduct a sequential analysis. *Balayo v. Meadows*, 2013 ONSC 5321 (SCJ); *Cipponeri v. Meli* 2020 ONSC 3232 (SCJ).
- 15 Step 1: Does the Applicant have standing as a spouse? If not, that ends the inquiry.
- 16 Step 2: If the Applicant has standing, is there entitlement under a statute? Does the spousal support claim fall under at least one of the three conceptual bases: compensatory; non-compensatory, or contractual support? *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC). *Halliwell v. Halliwell*, 2017 ONCA 349 (ON CA); *Moge v. Moge*, 1992 CanLII 25 (SCC).
- 17 With respect to entitlement:
 - a. A party seeking interim spousal support is required to establish entitlement on a prima facie basis. *Politis v. Politis*, 2015 ONSC 5997 (SCJ). At this stage, entitlement does not have to be established on a balance of probabilities. Once a triable case is established – both in relation to entitlement and quantum -- a detailed analysis of the merits will have to await the trial. *Roebles v. Kuhn* 2009 BCSC 1163 (BC SC); *Damaschin-Zamfirescu v. Damaschin-Zamfirescu*, 2012 ONSC 6689 (SCJ); *Blanchard v. Lefebvre* 2021 ONSC 4550 (SCJ); *Benard V. Benard*, 2022 ONSC 6220 (SCJ).

- b. While Parliament has prescribed the same factors to be considered for both final and interim support orders, different considerations will apply for interim orders than for final orders. *Bagust-Homes v Devine*, 2023 ONSC 2978 (SCJ)
- c. Interim support motions are not meant to take the place of a trial. *McConkey v. McConkey*, 2022 ONSC 4600 (SCJ).
- d. At the interim stage a motions judge cannot engage in a comprehensive review and analysis of the parties' circumstances. Untested and often incomplete affidavit materials are usually inadequate to make meaningful determinations about such important factors as economic advantages or disadvantages resulting from the relationship or its termination. A trial judge is in a much better position to assess the appropriate amount of support as well as any issue of retroactivity. *Roebles v. Kuhn* 2009 BCSC 1163 (BC SC); *Politis v. Politis*, 2015 ONSC 5997 (SCJ); *Driscoll v. Driscoll*, 2009 CanLII 66373 (SCJ); *Damaschin-Zamfirescu v. Damaschin-Zamfirescu*, 2012 ONSC 6689 (SCJ); *Albaum v Albaum*, 2021 ONSC 3106 (SCJ); *Samis v Samis* 2011 ONCJ 273 (OCJ); *Norouzi v. Bokharaei*, 2022 ONSC 615 (SCJ); *Bagust-Homes v Devine*, 2023 ONSC 2978 (SCJ)
- e. The court should not unduly emphasize any of the statutory objectives of spousal support above others, at the interim stage. *Roebles v. Kuhn* 2009 BCSC 1163 (BC SC); *Seifi v. Hanji* 2021 ONSC 3419 (SCJ); *Politis v. Politis*, 2015 ONSC 5997 (SCJ).
- f. At the interim stage the need to achieve self-sufficiency is of less importance. *Reif v. Reif* 2021 ONSC 3976 (SCJ); *Politis v. Politis*, 2015 ONSC 5997 (SCJ). Nonetheless, there is an obligation on a spouse to take reasonable steps to contribute toward their own support and this must be considered. Depending on the circumstances – and particularly at a motion soon after separation – the Applicant's ability to generate income may be limited or even non-existent. But evidence about ability or inability to contribute to their own support should at least be adduced when requesting interim spousal support. *Podgorni v. Podgorni*, 2010 ONSC 1070 (SCJ); *Cipponeri v. Meli* 2020 ONSC 3232 (SCJ)
- g. Interim motions for support can be brought before disclosure is complete and before any questioning has been undertaken. The evidence is necessarily incomplete at this stage. *Vali-Farhad v Haeri*, 2023 ONSC 3032 (SCJ)
- h. Where contested facts need to be resolved, especially those connected with threshold questions such as entitlement, it becomes less advisable for a court to make an interim support order. *Roebles v. Kuhn* 2009 BCSC 1163 (BC SC); *Seifi v. Hanji* 2021 ONSC 3419 (SCJ); *Politis v. Politis*, 2015 ONSC 5997 (SCJ); *Wilkins v. Wilkins*, 2018 ONSC 3036 (SCJ).
- i. At the interim stage the applicant's needs and the respondent's ability to pay assume greater significance. *Kahro v. Kahro*, 2022 ONSC 666 (SCJ);

Mulik v. McFarlane, 2022 ONCJ 67 (OCJ). But if the claimant cannot establish an arguable case for entitlement, the motion for interim support should be dismissed, even if the Applicant has need and the Respondent has ability to pay. *Damaschin-Zamfirescu v. Damaschin-Zamfirescu*, 2012 ONSC 6689 (SCJ); *Blanchard v. Lefebvre* 2021 ONSC 4550 (SCJ); *Liddell-MacInnis v. MacInnis* 2021 ONSC 1787 (SCJ).

- j. The term “needs” includes a consideration of the lifestyle to which the recipient spouse was accustomed to when the marriage ended. The term “means” is given an expansive interpretation so as to include “all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which the person receives gains or benefits”, *Leskun v. Leskun*, 2006 SCC 25 (SCC); *Di Sabatino v. Di Sabatino*, 2022 ONSC 334 (SCJ).
 - k. Even a relatively short relationship may create an entitlement to interim support, based on immediate circumstances.
- 18 Step 3: If both standing and entitlement are established, the court must determine quantum.
- a. Interim support is a short-term remedy – “a holding order” – to provide a reasonable amount of income for a dependant spouse from the time the proceedings are instituted until the full merits of a case can be determined at trial. The objective is to provide sufficient funds to allow the recipient to maintain the same standard of living enjoyed prior to separation, to the extent that the payor has the ability to provide those funds. *Roebles v. Kuhn* 2009 BCSC 1163 (BC SC); *Samis v Samis* 2011 ONCJ 273 (OCJ); *Politis v. Politis*, 2015 ONSC 5997 (SCJ); *Mulik v. McFarlane*, 2022 ONCJ 67 (OCJ). Obviously the court must be mindful of financial reality when family income is now being divided between two households. Parental responsibilities of either the payor or the recipient must also be considered.
 - b. The quantum of interim support should be within the range suggested by the *Spousal Support Advisory Guidelines* (SSAG) unless exceptional circumstances indicate otherwise. *Roebles v. Kuhn* 2009 BCSC 1163 (BC SC); *Politis v. Politis*, 2015 ONSC 5997 (SCJ); *D.R.M. v. R.B.M.*, 2006 BCSC 1921 (BC SC); *Reif v. Reif* 2021 ONSC 3976 (SCJ); *Veneris v. Veneris*, 2015 ONCJ 49 (OCJ); *Blanchard v. Lefebvre* 2021 ONSC 4550 (SCJ); *Slongo v. Slongo*, 2017 ONCA 272 (ON CA); *Vali-Farhad v Haeri*, 2023 ONSC 3032 (SCJ); The SSAG’s have been described as an ideal tool to assist motions judges on interim spousal support motions. *M. (D.R.) v. M. (R.B.)*, 2006 BCSC 1921 (BC SC); *Decker v. Fedorsen*, 2011 CarswellOnt9891 (OCJ); *Zdrill v. Zdrill*, 2011 CarswellOnt 2886 (SCJ); *Liddell-MacInnis v. MacInnis* 2021 ONSC 1787 (SCJ).
 - c. A mere disparity of income that generates an amount under the SSAG’s does not automatically lead to entitlement. *Lee v. Lee*, 2014 BCCA 383

(BC CA); *R.L. v. L.A.B.*, 2013 PESC 24 (PEI SC). But in practice, entitlement to interim support will generally be found in cases where there is a significant income disparity at the time of the initial application. *T.M.R. v. J.K.S.* 2021 ONCJ 182 (OCJ); *Ford v. Waldhart*, 2022 ONSC 6277 (SCJ)

- d. Income can be imputed – *to either party* – at the interim stage.
 - e. A party's accustomed standard of living during a relationship is an appropriate part of the context upon which need should be assessed. *McIntyre v. Winter*, 2020 ONSC 4376 (SCJ); *Blackstock v. Comeau*, 2018 ONSC 193 (SCJ); *Ford v. Waldhart*, 2022 ONSC 6277 (SCJ). A lavish lifestyle when the parties were together may result in a significant interim support order if the payor has sufficient means. *Majumder v. Rahman*, 2018 ONSC 6587 (SCJ); *Di Sabatino v. Di Sabatino*, 2022 ONSC 334 (SCJ).
 - f. Interim spousal support should be based primarily on the concept of income sharing, rather than unduly focusing on budgets which are often tentative and evolving. *Cassidy v. McNeil*; *Petersen v. Petersen* 2022 ONSC 808 (SCJ).
 - g. The court should also consider whether one party is making payments in relation to joint debts. Where the payor makes such payments, this will reduce the payor's means and also the recipient's needs. *Joyce v. Joyce* 2015 ONSC 4311 (SCJ). However, priority to debt payments should not result in significant hardship for a recipient.
 - h. An interim order is only effective until a final order is granted, and is not binding on the trial judge making the final order. *Stojanovski v. Stojanovski*, 2016 ONSC 8090 (SCJ); *Chaltaf v. Dawood* 2019 ONSC 5097 (SCJ). No material change in circumstances is required in order to make a different order at trial. The amount of interim spousal support may *not* be a good guide to the amount of support after a trial. As *Bracklow* stated and as the SSAG show, there is an interaction between *amount* and *duration* in spousal support. As duration comes into play at trial, the amount may go up or down, especially where there is *restructuring* involved. And at trial more information will be available about assets, debts, property division, updates to employment status, new partners, etc.
 - i. Determining quantum of interim spousal support is rough justice at best. *Cipponeri v. Meli* 2020 ONSC 3232 (SCJ); *Van Haren v. Stewart*, 2017 ONSC 4238 (SCJ).
 - j. If an interim award turns out to have been too high or too low, any appropriate adjustment can usually be made up at trial. *Vali-Farhad v. Haeri*, 2023 ONSC 3032 (SCJ)
- 19 In *Gafanha v. Gafanha*, 2022 ONSC 1613 (SCJ) this court addressed some of the issues relating to imputing income for interim orders:

- [32] As Justice Kiteley stated in *Rankin v. Rankin* 2021 ONSC 4537 (SCJ) “on a motion for temporary support the task of imputing income to the support recipient requires an in-depth analysis as to ability to earn more professional income or in investment income. It is contrary to the expectations on a motion for temporary support for the court to undertake that analysis.” See also *Lidell-MacInnis v. MacInnis*, 2021 ONSC 1787 (SCJ).
- [33] Spousal support is extremely complex and the wide range of considerations applicable to both the recipient and the payor can be much better addressed at an early trial.
- [40] Section 19 of the *Guidelines* permits the court to impute income to a party if it finds that the party is earning or is capable of earning more income than they claim. The circumstances listed in s. 19(1) are not exhaustive. They are simply examples of situations in which the imputation of income to a spouse may be appropriate. *Bak v. Dobell*, 2007 ONCA 304 (ON CA); *Korman v. Korman*, 2015 ONCA 578 (ON CA); *Riel v. Holland* (2003), 2003 CanLII 3433 (ON CA); *Hawas v. Ibrahim* 2021 ONSC 3713 (SCJ).
- [41] The principles that apply in determining whether to impute income are the same in both child support and spousal support cases. *Rilli v. Rilli*, 2006 CanLII 34451 (SCJ); *Perino v. Perino*, 2007 CanLII 46919 (SCJ); *Decker v. Fedorsen* 2011 ONCJ 850 (OCJ); *Liddell-MacInnis v. MacInnis* 2021 ONSC 1787 (SCJ); *Sherman v. Donohue* 2021 ONSC 5179 (SCJ); Section 6.1 of the *Spousal Support Advisory Guidelines* provides that the starting point for determining income is the definition of income under the *Child Support Guidelines*.
- [42] The onus is on the party seeking to impute income to establish a *prima facie* case. The person requesting an imputation of income must establish an evidentiary basis upon which this finding can be made. *Homsi v. Zaya* 2009 ONCA 322 (Ont. C.A.); *Tahir v. Khan* 2021 ONCJ 1 (OCJ); *E.D. v. J.S.* 2020 ONSC 1474 (SCJ); *Abumatar v. Hamda* 2021 ONSC 2165 (SCJ). However the onus on the recipient does not relieve the payor from the obligation to provide full and complete disclosure, to ensure that a court has full information.
- [43] A person’s lifestyle can provide the basis for imputing income. *E.D. v. J.S.*; *Aitken v. Aitken* [2003] O.J. No. 2780 (SCJ); *Jonas v. Jonas*, [2002] O.J. No. 2117 (SCJ); *Price v. Reid*, 2013 39CJ 373 (CanLII); *Lynch v. Lewis* 2020 ONCJ 2 (OCJ); *Abumatar v. Hamda* 2021 ONSC 2165 (SCJ). But lifestyle is not *income*. It is *evidence* from which an inference may be drawn that a person has undisclosed income that may be imputed for the purpose of determining child support. *Bak v. Dobell*, 2007 ONCA 304 (Ont. C.A.); *Iacobelli v. Iacobelli* 2020 ONSC 3625 (SCJ); *Atkinson v. Johnson* 2021 ONCJ 15 (OCJ).

[49] Justice Kraft addressed the challenge of imputing income at interim stage in *Lidell-MacInnis v. MacInnis*:

[75] The court may impute income to a party in the context of a motion for temporary spousal or child support, but should exercise caution in doing so having regard for limitations on the court's ability in the context of a motion to obtain a complete and accurate picture of the parties' respective situations. This is particularly so in cases where the parties are still in the process of formulating plans and goals for re-organizing their affairs and lives in independent households. However, the decision as to whether or not income should be imputed ultimately remains in the discretion of the motions judge and depends on the particular facts of each case.

- 20 The court is required to act with caution when asked to impute income on the basis of conflicting affidavits on an interim motion: *Lowe v. Lowe*, 2020 ONSC 5224 (SCJ); *Hohmeier v. Caputo*, 2022 ONSC 4925 (SCJ); *Elmgreen v. Elmgreen*, 2016 ONCA 849 (ON CA); *M.K. v. K.M.*, 2022 ONCJ 424 (OCJ).

ANALYSIS

- 21 The relevant considerations include the following:
- a. This was a long-term married relationship.
 - b. By the mother's own admission, the parties' finances and economic circumstances became enmeshed with one another over a period of about three decades.
 - c. While there may be dispute about how and why it happened, it is not disputed that since 2011 the father has remained out of the workforce, without any income, and entirely financially dependant on the mother. Whether this was by mutual agreement or simply the result of acquiescence by the mother, there are significant economic consequences – advantages, disadvantages, and vulnerabilities -- flowing from how the parties arranged their lives and family structure.
 - d. The extreme focus in the affidavit materials about whether the father was a “stay-at-home dad”, and the debate about which (if either) of them was the primary caregiver for the children is of little assistance at the interim stage. He says *he* did more. She says *she* did more. The evidence says they were *both* present and actively involved in the children's lives during the whole of the period in question. If the parents insist on fighting about

percentages of responsibility for the children, that issue can be better explored at trial (although it may be less determinative than the parents are portraying).

- e. Similarly, the bitter debate about how the father came to assume responsibility for administering the family's finances is also unhelpful. They both agree he assumed complete responsibility, and with some measure of success which was mutually beneficial. He says the mother approved his efforts to avert bankruptcy. She says he took over because he's controlling. Again, the materials suggest this was a functioning (albeit unhappy) family unit in which there was an ongoing delegation of responsibilities, and each party was contributing in their own way.
- f. Both parties make limited allegations of family violence during the 30-year marriage. These allegations are bitterly disputed. In any event, the affidavit materials do not nearly establish a level of misconduct which should impact an interim support analysis.
- g. I accept the father's evidence that when he was suddenly presented with a court order requiring him to vacate the matrimonial home on March 2, 2023, his options were extremely limited. He had no money, no car, no job, and few belongings. I accept that his only immediate option was to live at his sister's residence in a somewhat isolated part of Hamilton, and that limited transportation created an obstacle to getting back on his feet.
- h. I accept that the father has made some efforts to mitigate his situation during the past year of sleeping on an air mattress in his sister's home. I accept his evidence that despite practical limitations related to his location and his lack of resources, he has made some efforts to find employment without success.
- i. I accept that at age 52, with dated employment credentials, there will be challenges associated with formulating and implementing a long-term plan to rebuild his life. His stated interest in pursuing a real estate agent course sounds reasonable, despite the practical hurdles he has identified (no money, no car, no residence, etc.).
- j. I accept that with the father no longer able to bunk at his sister's residence, his need for financial assistance has become particularly dire.
- k. I find that for purposes of an interim order the father has established an entitlement to spousal support, both on (obviously) non-compensatory and also compensatory grounds. The mother's lament that she never *approved* her partner's dependency would likely resonate with many male support payors who advance the same faint submission. It is of little utility to dwell on different choices each party might have made during their relationship. We have to address the financial reality of how things actually turned out. And in this case, during their lengthy cohabitation the parties' lives evolved in a manner which arguably created an advantage for the mother, and most certainly an economic disadvantage and vulnerability for the father.

- l. With the father having zero income or employment activity since 2011, there is no evidentiary basis upon which I can impute income to him on an interim basis. It is simplistic and short-sighted to suggest to a middle-aged, dependant spouse freshly coming out of a 30-year relationship that they should simply get a minimum wage job and go away. In the long run it is in the interest of the *paying spouse* to support and facilitate realistic career goals which might reduce or even eliminate the claimant's dependency.
 - m. The father has no ability to pay child support at this time.
 - n. I find that it is appropriate to make a *prospective* spousal support order, leaving all issues of retroactivity to the already scheduled September 2024 trial. The father commenced his motion in March 2024. Whatever his pent-up need, the mother currently has no ability to make a retroactive payment of any significance. Since the parties have agreed to sell the matrimonial home prior to their trial, there will be ample opportunity to deal with the broad scope of retroactive claims – including any appropriate adjustment of *this* order – at trial.
 - o. Since payments will be commencing in 2024 I agree with the father that support should be based on the mother's 2023 \$117,931.00 income. (I disagree with the mother's counsel that ability to pay should be frozen at the mother's 2022 year-of-separation income of \$111,214.00 because, in her submission, the father has not established an entitlement to share in the mother's post-separation increase in income. While this legal argument may be further advanced at trial, I don't believe the complex law in relation to "sharing post-separation increases" would impose such a limitation in this case.)
 - p. I agree with the father that with entitlement and income levels having been established, the interim order should fall within the presumptive range prescribed by the *Spousal Support Advisory Guidelines*. In this case, the Divorcemate "Custodial Payor" formula suggests a range of \$2,562.00 (low), \$2,989.00 (mid), and \$3,416.00 (high).
 - q. I must consider not only the mother's significant income but also her significant expenses, both in relation to the children and the jointly owned home, but also in relation to joint debts and obligations. However, that requires a balancing act, in which the recipient's need for financial security and dignity must be given appropriate weight.
- 22 As an aside, I would note that the intensity with which this motion was argued likely reflects the parties' mutual frustration with how inefficiently this case has unfolded. I would suggest that both these parties must assume some responsibility for the level of animosity, complexity and delay on this file.
- a. Had the father simply paid attention and started participating after he was served with the application, the necessary transitions could have occurred in a more controlled and efficient manner.

- b. For her part, while the *Family Law Rules* entitled the mother to proceed on an uncontested basis *without notice to the father* – that lack of notice backfired, as it does in so many family court cases.
- c. The mother got what she wanted in her uncontested order. But the father successfully set much of it aside. More needless work for our overburdened court system.
- d. The “not entitled to further notice” provisions of the *Rules* create a systemic problem in which default orders are routinely followed by motions to set aside. Defaulting respondents inevitably come up with a predictable range of excuses. Sometimes orders are set aside. Sometimes they’re not. This odious extra step in the litigation process not only wastes time and money, but inevitably it also creates lingering resentment and mistrust.
- e. Giving notice to defaulting litigants is not an unwarranted act of charity or a strategic error. It is enlightened self-interest, because either it will flush out the defaulting party, or you’ll end up with a more durable uncontested order. *Phelan v Givlin*, 2023 ONSC 3917 (SCJ); *Roberts v. Santilli*, 2019 ONSC 64 (SCJ); *Provenzano v. Provenzano*, 2004 CanLII 5075 (SCJ); *Campeau v. Campeau*, 2005 CanLII 25948.)

23 On consent, temporary order:

- a. The matrimonial home shall be listed for sale with a closing date not sooner than July 5, 2024.
- b. The motions in relation to the particulars of the listing agreement are adjourned without a return date, returnable on five days’ notice. Any such motion should be returnable on a mutually convenient Wednesday at 10 a.m. as a placeholder date, with the trial coordinator to advise the parties of the date and time for the hearing of the motion, based on judicial availability.

24 Not on consent, temporary order:

- a. The Applicant shall pay to the Respondent spousal support in the sum of \$2,800.00 per month, commencing March 1, 2024, based upon the Applicant’s 2023 income of \$117,931.00 and based upon the Respondent having no income. All issues of retroactivity are reserved to the trial judge.
- b. The Applicant’s motion for child support is dismissed.
- c. Support deduction order

25 If the parties are unable to resolve the issue of costs, written submissions (no more than two pages plus offers, bills of costs and case law links) are to be served and filed on the following timelines:

- a. Respondent's materials by April 15, 2024.
- b. Applicant's materials by April 30, 2024.
- c. Any reply by Respondent by May 6, 2024

Date: March 25, 2024

Justice Alex Pazaratz