

*Its pendulum swung to and fro with a dull, heavy, monotonous clang; and when the minute-hand made the circuit of the face, and the hour was to be stricken, there came from the brazen lungs of the clock a sound which was clear and loud and deep and exceedingly musical, but of so peculiar a note and emphasis that, at each lapse of an hour, the musicians of the orchestra were constrained to pause, momentarily, in their performance, to harken to the sound; and thus the waltzers perforce ceased their evolutions; and there was a brief disconcert of the whole gay company; and, while the chimes of the clock yet rang, it was observed that the giddiest grew pale, and the more aged and sedate passed their hands over their brows as if in confused reverie or meditation.*

*The Raven, Edgar Allen Poe*

### **Twenty-Five Years of Support: Swinging Pendulum or Just Confused Reverie?**

**Linsey Sherman & Martha McCarthy<sup>1</sup>**

This month, the *Family Law Act (FLA)* turns twenty-five years old.<sup>2</sup> Like most twenty-five year olds, the *FLA* has weathered good times and bad, undergone intense personal growth, and at times struggled to refine its own ideological views. As the *FLA* reaches adulthood, it is an appropriate time to take a look back at where the law started in 1986 and where it is today. After all, if Justin Bieber can pen memoirs at the age of sixteen, then a review of the life of the *FLA* is certainly in order.

The support provisions in the *FLA* have birthed a lively and controversial body of judge-made law. Indeed, any lawyer who does not diligently read *This Week in Family Law* may find herself vociferously arguing that a clean-break approach to spousal support is not even an option after a ten year marriage with minor children. But, these times they are a-changing. If support was ever so clear cut, it doesn't seem to be anymore.

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<sup>1</sup> Martha McCarthy & Company. Special thanks to Joanna Radbord for her brilliant comments and edits.

<sup>2</sup> *Family Law Act*, R.S.O. 1990, c. F. 3.

Although the statutory language in the *Divorce Act* and the *FLA* with respect to spousal support has not changed in twenty-five years,<sup>3</sup> there has been so much inconsistency in the jurisprudence on the question of entitlement to, quantum, and appropriate duration of spousal support awards that it has been described as a “pendulum swing”.<sup>4</sup> It is easy to see why. A flash-card look at the leading spousal support cases from the Supreme Court of Canada

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<sup>3</sup> The spousal support provisions in the *Divorce Act*, R.S.C. 1985, c.3 (2<sup>nd</sup> Supp), and the *FLA* are almost identical. As a result, case law decided under either provision is relevant: *Linton v. Linton* (1990), 1 O.R. (3d) 1 (C.A.).

Section 15.2 of the *Divorce Act* provides as follows:

15.2 (1) 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

...

(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

...

(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

Similarly, the *FLA* provides as follows (ss. 30 & 33):

30. Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so.

33.(8) An order for the support of a spouse should,

- (a) recognize the spouse’s contribution to the relationship and the economic consequences of the relationship for the spouse;
- (b) share the economic burden of child support equitably;
- (c) make fair provision to assist the spouse to become able to contribute to his or her own support; and
- (d) relieve financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home).

<sup>4</sup> See *infra* note 11.

between 1983 and 1999 highlights a bench that is not afraid to change its mind: from *Messier v. Delage*<sup>5</sup> (fit and just reward) to the *Pelech* trilogy<sup>6</sup> (clean break and finality) to *Moge v. Moge*<sup>7</sup> (focus on the compensatory principle and long-term or indefinite support) and *Bracklow v. Bracklow*<sup>8</sup> (focus on need and non-compensatory principles of support).

In Ontario, we now have the decision of the Ontario Court of Appeal in *Fisher v. Fisher*,<sup>9</sup> which officially endorses the application of the *Spousal Support Advisory Guidelines*, generally rejects the use of review orders in spousal support awards unless there is significant uncertainty, and revives the imposition of time-limited orders even in long-term marriages.

Is there a pendulum? If so, does the metaphor apply more broadly to include jurisprudence pertaining to other elements of support?

In a nutshell: yes, and yes.

In this paper, we review the origins of the pendulum theory and consider a cross-section of spousal support cases that have been decided in the wake of *Fisher*. We also take a look at how the courts' views have swung back and forth (and sometimes back again) on the questions of who is a spouse, who is a child, and who is a parent for the purposes of support under the *FLA*. And although we come to the conclusion that the pendulum metaphor applies to the jurisprudence broadly, we suggest that spousal support awards are most affected by what appears to be a lack of consensus – over time and at any given time – on the basic ideological underpinnings of spousal support in this country. In this sense, child support jurisprudence has benefited from the clear mandate that courts must act in the best interests of the child. Nonetheless, traditionally-held views about gender, sexual orientation, and family status continue to restrict the development of a consistent, progressive, and equality-promoting body of support jurisprudence in Ontario.

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<sup>5</sup> [1983] 2 S.C.R. 401 (*Messier*).

<sup>6</sup> *Pelech v. Pelech*, [1987] 1 S.C.R. 801; *Richardson v. Richardson*, [1987] 1 S.C.R. 857; and *Caron v. Caron*, [1987] 1 S.C.R. 892 (*Pelech* trilogy).

<sup>7</sup> [1992] 3 S.C.R. 813 (*Moge*).

<sup>8</sup> [1999] 1 S.C.R. 420 (*Bracklow*).

<sup>9</sup> 2008 ONCA 11 (*Fisher*).

## I. The Pendulum and Its Origins

The pendulum metaphor was introduced by Chief Justice McLachlin in the majority opinion in *Bracklow v. Bracklow*:

Turning to the jurisprudence, Mr. Bracklow cites L'Heureux-Dubé J.'s statement in *Moge*, supra, that "marriage per se does not automatically entitle a spouse to support" (p. 864). That is true. To hold otherwise would swing the pendulum too far back and completely ignore the independent, clean-break model of marriage. But, in certain circumstances, marriage may give rise to an obligation. It is not the bare fact of marriage, so much as the relationship that is established and the expectations that may reasonably flow from it that give rise to the obligation of support under the statutes.<sup>10</sup>

In her commentary following the Supreme Court of Canada's decision in *Bracklow*,<sup>11</sup> Professor Carol Rogerson examined the metaphor as it applied both to the Supreme Court's previous case law on the issue, as well as to the lower court cases flowing from the *Bracklow* decision. She explained the metaphor as describing "[t]he pattern that has emerged in spousal support...where the Supreme Court of Canada releases, with seeming regularity, a major decision every five to seven years – one that changes the conceptual framework and sends everyone (family lawyers, judges and academics) scrambling to understand its implications for the basic framework of spousal support."<sup>12</sup>

The pendulum's story begins with the Supreme Court of Canada's 1983 decision in *Messier*. In that case, the parties had been married for twelve years and had two children. The wife was awarded custody, child and spousal support upon divorce. At the time, she did not work outside the home although she was enrolled in a course of study. Three years later, one of the parties' children decided to live with the husband. Shortly after, the husband sought to vary the support provisions of the divorce order, claiming that the wife had completed her studies, had obtained part-time employment, no longer had small children in her care and was otherwise able to re-organize her life. In light of the change of circumstances, the trial judge reduced the amount of spousal support payable and set a termination date. The Quebec Court of Appeal reversed the termination. At issue before the Supreme Court was whether time-limited support was appropriate.

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<sup>10</sup> *Supra* note 8 at para. 44.

<sup>11</sup> Carol Rogerson, "Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001), 19 C.F.L.Q. 185.

<sup>12</sup> *Ibid* at 187.

The Supreme Court directed that a support award should be fit and just, and that a court must base its decision “on the actual factors submitted for its consideration”.<sup>13</sup> A termination date was inappropriate in this case where the husband had the means to pay, the wife had never worked outside the home and had, after diligently re-training, only been able to find part-time employment. In dissent, Lamer, McIntyre and Wilson JJ. would have held that the wife’s unemployment was a social problem, the responsibility for which should fall on the government, not the former husband.

*Messier* rejected the “hypothesizing as to the unknown and then unforeseeable future”,<sup>14</sup> and was generally understood to provide a broad basis for long-term support. However, the Court changed its tune four years later in a series of cases known as the *Pelech* trilogy. Of interest, the majority opinion in *Pelech* was written by Wilson J., who had previously been in dissent in *Messier*.

In the *Pelech* trilogy, the Court considered the threshold test for varying a previously-negotiated spousal support agreement. In *Pelech v. Pelech* specifically, the parties had entered into a separation agreement which provided the wife a lump sum in satisfaction of all spousal support claims. After the agreement was signed, the husband made the required payments and subsequently was able to increase his net worth substantially. For her part, the wife’s health deteriorated to the extent that she was unable to work and was forced to deplete her capital and apply for social assistance. She thus sought an order to vary the agreement and for spousal support.<sup>15</sup>

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<sup>13</sup> *Supra* note 5 at para. 78.

<sup>14</sup> *Ibid.*

<sup>15</sup> In *Richardson v. Richardson*, *supra* note 6, the parties were married for thirteen years and had one child. The child continued to live with the wife after the separation. In Minutes of Settlement, the parties agreed that spousal support would be payable for one year. At the time, the wife was unemployed and receiving social assistance. When support ended and she was still unemployed, the wife commenced divorce proceedings in which she sought spousal support and increased child support. The trial judge did not vary child support but awarded spousal support and indexed the award to keep up with inflation and the financial circumstances of the wife. The Court of Appeal struck the award of spousal support and the indexing clause but increased child support. The wife appealed to the Supreme Court of Canada.

In *Caron v. Caron*, *supra* note 6, the parties were married for fourteen years and had two children. They signed a separation agreement which provided, *inter alia*, that the husband would pay the wife \$600 per month in spousal support, until such time as she remarried or cohabited with another person as man and wife for a continuous period in excess of 90 days. The wife did and the husband discontinued his support. The wife’s new relationship broke down and she was forced to go on social assistance. She sought to vary the terms of the agreement. The trial and appeal courts dismissed the wife’s application because she had not shown a special change in circumstances.

Harkening back to the dissent in *Messier*, the Court in *Pelech* focussed on the elements of freedom of choice with respect to marriage and divorce. Wilson J. stated:

Absent some causal connection between the changed circumstances and the marriage, it seems to me that parties who have declared their relationship at an end should be taken at their word. They made the decision to marry and they made the decision to terminate their marriage. Their decisions should be respected. They should thereafter be free to make new lives for themselves without an ongoing contingent liability for future misfortunes which may befall the other...Accordingly, where an applicant seeking maintenance or an increase in the existing level of maintenance establishes that he or she has suffered a radical change in circumstances flowing from an economic pattern of dependency engendered by the marriage, the court may exercise its relieving power. Otherwise, the obligation to support the former spouse should be, as in the case of any other citizen, the communal responsibility of the state.<sup>16</sup>

Courts generally considered the trilogy to support the clean break approach to divorce, thus narrowing the scope for support and promoting the use of lump sums and time-limited orders.

Five years later in *Moge*, the Supreme Court re-centred the discussion of spousal support around the principle of compensation. In doing so, L'Heureux-Dube J. rejected the suggestion that the *Pelech* trilogy applied to any situation other than where the parties had freely entered into a separation agreement dealing with support and one party sought a variation.

In *Moge*, the parties were married for twenty-three years and had three children. The husband was a welder; the wife was responsible for the home and raising the children, and also worked six hours per night as an office cleaner to supplement the husband's income. When the parties divorced, the wife was awarded \$150 per month in child and spousal support. Having a grade seven education, the wife worked as a cleaner at a hotel until 1987 when she was laid off. At that time, spousal support was increased to \$200 per month. She worked part-time as a cleaner until 1989, at which time the husband successfully petitioned for spousal support to be terminated. The Court of Appeal reversed the trial judge's order on termination, and the Supreme Court of Canada held that a continuing support order was appropriate.

For the majority, L'Heureux-Dubé J. dismissed the argument that spousal support awards should be based on self-sufficiency as the primary objective. Rather, she reminded us that self-sufficiency – in so far as it is practicable – is one of four objectives listed in the *Divorce*

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<sup>16</sup> *Pelech*, *supra* note 6 at para. 85.

*Act*, none of which take precedence over any others. When read together, these four objectives require that spousal support awards address “an equitable sharing of the economic consequences of marriage or marriage breakdown.”<sup>17</sup>

To fairly assess entitlement to and quantum of support, a court must inquire into the roles adopted by the parties during the marriage and conduct an assessment of the economic advantages and disadvantages resulting to each party as a consequence of these roles. The principle of compensatory support will be engaged, and is particularly acute, where one party has forgone employment opportunities in order to take on the bulk of household duties and child-rearing responsibilities. Importantly, *L’Heureux-Dubé J.* emphasized that this form of economic disadvantage often continues for a woman post-separation because “economic choice is reduced, unlike that of her ex-husband, due to the necessity of remaining within proximity of schools, not working late, remaining at home when the child is ill, etc. The other spouse encounters none of these impediments and is generally free to live virtually wherever he wants and work whenever he wants.”<sup>18</sup>

However, *Moge* also held that the compensatory principle may be engaged where both spouses work full-time, but where the couple’s shared lifestyle decisions advantage one spouse’s career and disadvantage the other. The lack of children in a marriage does not, therefore, preclude compensatory support.<sup>19</sup> In this sense, *L’Heureux-Dubé J.* labelled the traditional/modern marriage dichotomy as “unhelpful”:

It is important to note that families need not fall strictly within a particular marriage model in order for one spouse to suffer disadvantages. For example, even in childless marriages, couples may also decide that one spouse will remain at home. Any economic disadvantage to that spouse flowing from that shared decision in the interest of the family should be regarded as compensable. Conversely, the parties may decide or circumstances may require that both spouses work full-time. This in and of itself may not necessarily preclude compensation if, in the interest of the family or due to childcare responsibilities, one spouse declines a promotion, refuses a transfer, leaves a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities and thereby incurs economic loss...<sup>20</sup>

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<sup>17</sup> *Supra* note 7 at para. 78.

<sup>18</sup> *Ibid.* at para. 73.

<sup>19</sup> *Ibid.* at paras. 80-84.

<sup>20</sup> *Ibid.* at para. 83.

L'Heureux-Dubé J. clearly stated that the compensatory analysis could equally reward a husband who had been economically disadvantaged or had contributed to an economic advantage conferred upon the wife.<sup>21</sup> Nonetheless, the judgment in *Moge* is noticeably focussed on highlighting the role that divorce and single-motherhood play in the feminization of poverty. For example:

That Parliament could not have meant to institutionalize the ethos of deemed self-sufficiency is also apparent from an examination of the social context in which support orders are made. In Canada, the feminization of poverty is an entrenched social phenomenon. Between 1971 and 1986 the percentage of poor women found among all women in this country more than doubled. During the same period the percentage of poor among all men climbed by 24 per cent. The results were such that by 1986, 16 per cent of all women in this country were considered poor: M. Gunderson, L. Muszynski and J. Keck, *Women and Labour Market Poverty* (1990), at p. 8. ...

It would be perverse in the extreme to assume that Parliament's intention in enacting the Act was to financially penalize women in this country....<sup>22</sup>

The cynical among us have said that the decision in *Moge* provided a little something for everyone. As Professor Rogerson has pointed out, it “dealt with the basic principles of spousal support at a fairly high level of generality” and “left many issues to be resolved through an on-going process of adjudication in lower courts.”<sup>23</sup> Two issues remained particularly troublesome: (a) how to quantify a compensatory support claim; and (b) how to address need-based claims where the compensatory principle was not engaged.

*Bracklow* dealt with the second issue. In that case, the parties cohabited for seven and a half years and were married for three years. The wife had some health problems during the marriage. Both parties were employed throughout most of the cohabitation period, although the wife had had some periods of unemployment. A year before the parties' separation, the wife was admitted to the hospital for psychiatric problems and was unable to work again. She suffered from bipolar mood disorder, obsessive compulsive disorder and fibromyalgia, which was aggravated by the stress of the marriage breakup. Following separation, the wife's only means of support were subsidized housing and disability benefits. Although she obtained an interim order for spousal support, her application for permanent support was dismissed at the trial and appeal levels. The Supreme Court recognized Mrs. Bracklow's

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<sup>21</sup> *Ibid.* at para. 48.

<sup>22</sup> *Ibid.* at paras. 56 and 64.

<sup>23</sup> *Supra* note 11 at 190.

entitlement to support but, somewhat surprisingly, sent the case back to the trial judge for a determination of quantum and duration.

*Bracklow* formally recognized three bases upon which a spousal support award could be grounded: compensatory, non-compensatory, and contractual.

On the central issue of entitlement, McLachlin J. classified marriages into two broad categories: (a) the basic social obligation model, “founded on the historical notion that marriage is a potentially permanent obligation (although it revises the archaic concept of the wife's loss of identity with the voluntary secession of autonomy of two, co-equal actors as the basis for the ongoing duty)”<sup>24</sup>; and (b) the independent model, which “sees each party to a marriage as an autonomous actor who retains his or her economic independence throughout marriage.”<sup>25</sup>

A particular form of support attached to each category of marriage: “[t]he independent, clean-break model of marriage provides the theoretical basis for compensatory spousal support. The basic social obligation model equally undergirds what may be called “non-compensatory” support. Both models of marriage and their corresponding theories of spousal support permit individual variation by contract, and hence provide a third basis for a legal entitlement to support.”<sup>26</sup>

Thus, explained McLachlin J., a compensatory support award should reflect the role played by each party in the marriage, and specifically the career sacrifices made by one spouse to his or her detriment, or to the advantage of the other spouse. Non-compensatory support, however, should be awarded where one spouse has a proven need, even if a compensatory claim cannot be made out. In these cases, the quantum and/or duration of support may be more directly linked to the length of cohabitation, the nature of the spouse’s need, and his/her ability to become self-sufficient. Of course, “[t]he problem with applying either model exclusively and stringently is that marriages may fit neither model (or both models). Many modern marriages are a complex mix of interdependence and independence... It is not a question of either one model or the other. It is rather a matter of applying the relevant

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<sup>24</sup> *Supra* note 8 at para. 23.

<sup>25</sup> *Ibid.* at para. 24.

<sup>26</sup> *Ibid.* at para. 25.

factors and striking the balance that best achieves justice in the particular case before the court.”<sup>27</sup>

Did *Bracklow* represent a swing of the pendulum? Certainly, few lawyers in the post-*Bracklow* world will fight very long or hard over the issue of entitlement, so long as the parties have standing and there is a difference in incomes. However, over-categorization can also be tricky as it leads us away from individual realities into so-called objective models. Some commentators have suggested that *Bracklow*'s real effect was to muddy the waters and create even greater uncertainty in the jurisprudence.<sup>28</sup>

As Professor Rogerson has argued, *Bracklow* may well have broadened the bases for support and was, in that sense, progressive. However, she has also noted that the decision's "gender-neutral, conservative language" may represent a "shift towards a traditional, status-based view of family relationships and the social obligations of support to which they give rise".<sup>29</sup> Whatever one thinks of the decision, *Bracklow* is a far cry from the gender-based view of support articulated by L'Heureux-Dubé J. in *Moge*.

It was 2001 when Professor Rogerson suggested that the shift in *Bracklow* toward need and away from compensation might have the effect of limiting support awards over the long run.<sup>30</sup> Her comment now seems clairvoyant – although the term "shift" may be too soft – in the wake of the Ontario Court of Appeal decision in *Fisher*.

## **II. *Fisher v. Fisher: The Pendulum Swings Again?***

In *Fisher*, the parties had been married for nineteen years. They separated in 2004, when the husband was 42 years old and the wife was 41 years old. They did not have any children.

The parties were in their early twenties when they married. The wife worked in an entry-level clerical job and contributed her earnings in the first two years of the marriage, during which time the husband completed his Bachelor of Arts degree. The parties then moved from

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<sup>27</sup> *Ibid.* at paras. 27 and 32.

<sup>28</sup> See: E. Llana Nakonechny, "Spousal Support Decisions at the Supreme Court of Canada: New Model or Moving Target?" (2003) 15 Can. J. Women & L. 102; D.A. Rollie Thompson, "Rules And Rulelessness in Family Law: Recent Developments, Judicial and Legislative" (2000-2001) 18 C.F.L.Q. 25; Miriam Grassby, "Two Income Couples: Presumption of Need for the Lower Income Spouse" (2003-2004) 20 Can. J. Fam. L. 321.

<sup>29</sup> *Supra* note 11 at 207.

<sup>30</sup> *Ibid.* at 280.

Waterloo to London so that the husband could obtain his Bachelor of Education. The wife got a new job in London and continued to contribute to the parties' expenses.

The husband taught high school for eleven years, and earned about \$65,000 in his last year. He then took an institutional job with the Ontario Secondary School Teachers Federation, where he started at approximately \$80,000 per year, which increased to \$120,000 in 2004 just prior to the parties' separation. The wife had earned a base annual salary of \$30,000 per year throughout the marriage, and was a few credits short of obtaining her Bachelor of Fine Arts. She worked full-time in the last few years of the marriage, earning \$41,000 in the final year, but had otherwise worked part-time from 1984 to 1999.

The wife was prepared to quit her job and move to Toronto for her husband's employment, but the parties separated shortly before the move. As a result of associated stress and depression, the wife took disability leave for one year. However, at the time of trial she had returned to full-time employment.

The trial judge made a step-down support order requiring the husband to pay \$2,600 per month from March 1, 2006 to December 1, 2006, \$1,800 per month for 2007, and \$1,050 per month for 2008. He made no further order for 2009, but provided that either party could seek a review after January 1, 2009. Including the interim support the wife had received since October 1, 2004, she was awarded four years of support for a nineteen year marriage.

Lang J.A., writing for the Court of Appeal (Doherty and Goudge JJ.A. concurring), set aside the trial award, and instead ordered support payable at \$3,000 per month from October 1, 2004 to March 1, 2008, and at \$1,500 per month from April 1, 2008 to September 1, 2011. Support was terminated after seven years without the possibility of review.

*Fisher* is now the leading decision on support in Ontario, and has been cited over one hundred times since its release in 2008. Its impact can be boiled down to the following:

*(a) The Spousal Support Advisory Guidelines are endorsed in Ontario*

Family lawyers throughout the country are by now so familiar with the *Spousal Support Advisory Guidelines* (SSAGs) that we dream about them at night – for better or for worse. The SSAGs were drafted by Professors Carol Rogerson and Rollie Thompson, at the request of the federal Department of Justice, and released in draft form in 2005. They were developed to bring more certainty and predictability into the determination of the amount and duration

of spousal support awards and/or agreements. They do not deal with entitlement, but rather suggest a range for support using a formula based on the parties' respective incomes, the length of cohabitation, and whether there are children. The recommended duration is, generally, anywhere from half the length of cohabitation to the full term of cohabitation. In a medium to long-term marriage with children, or where the recipient's age and years of cohabitation equal sixty-five or over, the recommended duration is usually indefinite.

The SSAGs were first endorsed at the appellate level by the British Columbia Court of Appeal in *Yemchuk v. Yemchuk*,<sup>31</sup> where Prowse J.A. referred to them as a "useful tool".<sup>32</sup> They were subsequently endorsed in 2006 by the New Brunswick Court of Appeal in *S.C. v. J.C.*<sup>33</sup> In 2008, the Ontario Court of Appeal followed suit.

Much of Lang J.A.'s endorsement of the SSAGs seems to hinge on her view that "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."<sup>34</sup> Further, judicial discretion is still preserved, particularly in difficult cases requiring a sensitive approach to the facts. Indeed, the SSAGs acknowledge that many such cases are exceptions, such as where there are compelling financial circumstances in the interim period, debt payment, prior support obligations, illness and disability, and the compensatory exception in short marriages without children.

Lang J.A. made it clear that the SSAGs are not binding, and no one could accuse her of going overboard in her endorsement of their application. Nonetheless, the decision in *Fisher* solidified the importance of the SSAGs in Ontario jurisprudence, and now requires any judge who chooses not to apply them to explain the basis for doing so in written reasons.

And so it has come to pass that the "advisory" guidelines which were not introduced as law have become as determinative as if they had been. Some claimants may benefit from this – after all, certainty should reduce litigation and allow people a framework in which they can negotiate fair results without the expense of going to court. For others, particularly those without children and those living in urban centres, the Guidelines are not such a benefit. For

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<sup>31</sup> *Yemchuk v. Yemchuk*, (2005), 16 R.F.L. (6th) 430 (B.C.C.A.)

<sup>32</sup> *Ibid.* at para. 64.

<sup>33</sup> *S.C. v. J.C.*, (2006), 27 R.F.L. (6th) 19 at para. 5 (N.B.C.A.) leave to appeal to S.C.C. refused, [2006] S.C.C.A. No. 246 (October 19, 2006)

<sup>34</sup> *Supra* note 9 at para. 98.

those in short and childless marriages, they also promote termination in a way that does not accord with how we used to think about support.

Our own view is that while certainty and predictability play an important role, any move away from individualized justice is dangerous and jeopardizes the very best feature of our family law system. Now, data is entered into a program and the computer spits out support amounts, lump sums and termination dates. It seems like nobody even talks about exceptions to the SSAGs or budgets or individual circumstances. Suddenly, it's all about the math. Spouses are being asked to negotiate from the lump sum amounts and courts are adopting the ranges of duration as if they are biblical. Where is the individual in all of this? How does the computer know what anyone's life will be like in 8 years? How do we reconcile current practices with the leading Supreme Court of Canada cases on spousal support? It is difficult. But, whatever we think of them, the SSAGs have clearly become the cornerstone of any support discussion. Perhaps, then, we should all read them again, with better attention to the details, exceptions and the caselaw, and less focus on the basic output.

*(b) Review orders should be used sparingly*

In *Fisher*, Lang J.A. held that the trial judge erred in principle in ordering a *de novo* review of support on or after January 1, 2009. In fact, *Fisher* all but outlaws review orders except where there exists “a specified uncertainty about a party’s circumstances at the time of trial [which] will become certain within an identifiable timeframe.”<sup>35</sup> In all other cases, a trial judge should make a final order of support, time-limited or not, which is always subject to variation on the basis of a material change in circumstances.

Indeed, Lang J.A. seems to suggest that a trial judge might achieve the same purpose of a review order by making a final support order that strategically incorporates the burden of proof. That is, “[t]his 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.”<sup>36</sup>

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<sup>35</sup> *Ibid.* at para. 70. Lang J.A. refers to the Supreme Court of Canada’s decision in *Leskun v. Leskun*, [2006] S.C.R. 920 at paras. 36 and 37, where Binnie J. stated that “[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”.

<sup>36</sup> *Fisher*, *ibid.* at para. 72.

(c) *Imposition of a time-limited order in a long marriage*

Although Lang J.A. recognized that the parties' marriage was lengthy, she agreed with the trial judge that an indefinite order was not appropriate given the young age and promising employment position of the wife. The wife did not claim that she had suffered any particular economic disadvantage from the marriage itself, and Lang J.A. held that her support claim was "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."<sup>37</sup>

Ultimately, Lang J.A. awarded support for seven years on the basis that "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."<sup>38</sup>

Seven years of support after a nineteen year marriage, in which the wife saw the husband through two university degrees and relocated with him on account of his employment opportunities? Although the wife did not argue that she was entitled to compensatory support, perhaps this argument was deserving of more discussion. We know that compensatory support is possible in a childless marriage; *Fisher*, however, sets a high threshold that smacks of the impossible.<sup>39</sup>

We are not convinced that Lang J.A. intended to launch a pendulum swing back to the *Pelech* days of self-sufficiency and clean breaks. Although the duration of the award seems short, it must be recalled that the support awarded for the first four years exceeded the high end of the SSAG range. To be fair, when one considers the restructuring provisions of the SSAG, Lang J.A.'s award falls within the lump sum range, albeit on the low side.<sup>40</sup>

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<sup>37</sup> *Ibid.* at para. 57.

<sup>38</sup> *Ibid.* at para 88.

<sup>39</sup> See the pre-*Fisher* case of *Huszarik v. Fairfield* (2004), 9 R.F.L. (6th) 130 (S.C.J.), where the wife was awarded indefinite support following a 17 year childless marriage, where the wife maintained the home, planned the parties' social lives, entertained for the husband's professional colleagues, and very occasionally cared for his daughter from a previous relationship.

<sup>40</sup> Note that the lump sum ranges referred to by Lang J.A. do not take into account present values or tax consequences. This would be a necessary exercise where an actual lump sum was being negotiated and/or awarded. In *Fisher*, Lang J.A. used the gross ranges as a tool to compare her award to that suggested by the SSAGs.

Unfortunately, the decision does not really explain why seven years was an appropriate limit on Mrs. Fisher’s support – an omission which, in our view, has had dramatic consequences in the subsequent jurisprudence. A review of the post-*Fisher* case law in Ontario suggests that some judges are applying *Fisher* for the proposition that clean break and self-sufficiency once again reign supreme as the predominant objectives of spousal support law.

We cannot help but feel discouraged by this swing of the pendulum away from *Moge* and back toward a *Pelech*-era reasoning. We can think of no substantial change in the lived reality of separated women since *Moge* that would justify this shift. Women continue to suffer economic losses as a result of cohabitation and marriage breakdown in disproportionate numbers to men. Overwhelmingly, women are the primary caregivers for their children pre- and post-separation, and as a result experience financial hardship in a way that the non-residential parent, free to devote substantial time and energy to income-earning activities, simply does not experience. The concept of the “modern family”, which presupposes that women participate equally with their spouses in the professional and domestic spheres, is a mythical construct unfamiliar to most wives and mothers and perpetuates the false notion that women are not deserving of ongoing or long-term support.

Frankly, the emerging trend in post-*Fisher* jurisprudence invites the continuing feminization of poverty, recognized by L’Heureux-Dubé J. in *Moge*, and disrespects the *Charter* values that require the advancement of women's equality. Sadly, it suggests to family law equality-seekers that any progress is temporary, to be reversed at any time with the next pendulum swing, and will never be achieved in any meaningful way.

### **III. Post-*Fisher* Case Law: The Good, the Bad and the Ugly**

There is no question that *Fisher* has changed the landscape of spousal support orders in Ontario. A review of the case law suggests that the traditional marriage/stay-at-home parent compensatory case is no longer immune from a time-limited order in medium-term marriages, and indefinite support is more likely to be awarded in cases of disability and illness.

Judges faced with non-compensatory claims in childless marriages have taken *Fisher* as a go-ahead to make time-limited orders, often of short duration. This may be what *Fisher* stands for; however, lawyers may want to remind judges that although the duration of the *Fisher*

award was less than half the length of the marriage, it was in an amount that exceeded the SSAG range for four out of the seven years.

There is also a noticeable chill on review orders, although they are occasionally still made in cases that likely would not meet the threshold test in *Fisher* of a “specified uncertainty” that “will become certain within an identifiable timeframe”.<sup>41</sup>

Perhaps most concerning is an identifiable trend toward time-limited support in cases where the parties have children, often still living at home.<sup>42</sup> The difficulty seems to arise in the case of a medium-term marriage, with children, in which the wife was employed in some capacity but also responsible for all, or almost all, of the child-care responsibilities. Even though L’Heureux-Dube J. told us nearly twenty years ago in *Moge* that the distinction between traditional and modern marriages is no longer useful,<sup>43</sup> the court seems unable to accept this reality. A brief search of the support jurisprudence in the aftermath of *Moge* reveals that the term “traditional marriage” has been used in over 250 cases.

***(a) (Mostly) compensatory indefinite support***

In *Cassidy v. McNeil*,<sup>44</sup> the parties were married for twenty-three years and had three children. At trial, the judge had ordered support in the amount of \$1,200 per month for five years. On appeal, the Court of Appeal held that the parties had merged their lives together over a twenty-three year period, and that the wife had had a somewhat compromised career path due to her child care responsibilities when the children were young. The Court reversed the time limit and made support indefinite but, recognizing that the husband was now the custodial parent and that the wife earned a relatively high income, they decreased the amount payable to \$950 per month.

In *Leonard v. Leonard*,<sup>45</sup> the parties were married for twenty-five years and had two children, both of whom were adults. The trial judge found the parties to have had a traditional marriage, and that although the wife had made best efforts to become self-sufficient, she had not succeeded. Further, her health was in decline and she was unlikely to attain self-

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<sup>41</sup> *Supra* note 35.

<sup>42</sup> This trend was identified in a paper by Carol Rogerson and Rollie Thompson, “Fisher and After: The Spousal Support Advisory Guidelines in Ontario” (May 28, 2008) at 13, online: [http://www.law.utoronto.ca/documents/rogerson/spousal\\_ontarioupdate0805.pdf](http://www.law.utoronto.ca/documents/rogerson/spousal_ontarioupdate0805.pdf).

<sup>43</sup> *Supra* note 7 at para. 42.

<sup>44</sup> 2010 ONCA 218.

<sup>45</sup> 2008 CarswellOnt 5708 (S.C.J.).

sufficiency in the future. Support was increased from \$400 per month to \$1,000 per month, indefinitely.

In *Couldridge v. Couldridge*,<sup>46</sup> the parties were married for 21 years and had two children. The wife was 46 years old at the time of separation, and had stayed home to raise the children. She continued to have child care responsibilities for the parties' youngest child, who was 16 at the time of trial. The trial judge ordered indefinite support within the SSAG range.

*Knowles v. Alchiotis*<sup>47</sup> was decided under the *Family Law Act*. In this case, the parties cohabited for twelve years and had two children. At the time of separation, one of the children was an adult, and the other child was twelve years old. The mother was 51 years old and the father was 49 years old. The mother had been a stay at home parent and had worked at a few minimum wage jobs. Following separation, she had been diagnosed with breast cancer and suffered from depression. At the time of trial, however, she had recovered and was searching for employment. The trial judge found that the mother's commitment to child care was essential to the father's success as a stuntman and stunt coach in the movie industry. Although the father only worked approximately 50 days per year, his working periods often began on very short notice, required long hours on set, and occasionally distant travel. In the result, the mother was awarded indefinite support according to the mid-range SSAG.

*Chaloux v. Bailliu*<sup>48</sup> was also decided under the *Family Law Act*. The parties cohabited for nineteen years, and had three children in a shared custody arrangement. At the beginning of the relationship, both parties were employed. The father continued to work and support the parties when the mother decided to enrol in medical school. The parties' children were born while the mother was in medical school and completing her residency program. The trial judge found that, during this period, the father took paternity leave and reduced his working hours so that he could be at home with the children while the mother pursued her studies. It was also found that the father had taken on extra work at various points to supplement the family income so that the mother could spend time with the children during the hours she had free from school (rather than seeking paid employment on top of her studies). Although both parents contributed to the family and household, the trial judge found that the father had taken on more of the household and childcare responsibilities throughout the relationship.

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<sup>46</sup> 2010 ONSC 4659.

<sup>47</sup> 2010 ONSC 3665.

<sup>48</sup> 2010 ONSC 1397.

The trial judge rejected the mother's argument that the father was already self-sufficient because he maintained full-time employment at a reasonable salary (approximately \$48,000 per year). Rather, throughout the parties' relationship, the father had put his career on hold and not pursued promotions or advancement in order to take on the bulk of childcare responsibilities. Indeed, the father's willingness to do this had directly contributed to the mother's ability to pursue medical school and a specialty in geriatrics. As a result of the roles adopted during the marriage, the father's income was likely to remain the same, while the mother's was likely to increase. The trial judge ordered indefinite support payable by the mother according to the mid-range SSAG, having regard to the parties' shared custody agreement.

Trial judges, clearly struggling with what to do in disability cases, seem to be erring on the side of indefinite support where the marriage is at least of medium duration. In *Ricciardelli v. Ricciardelli*,<sup>49</sup> the parties had been married for sixteen years and had two children. The wife returned to work as a part-time teacher after the birth of the first child, but struggled with serious mental health issues after the birth of the second child. She attempted suicide on two occasions, was hospitalized and generally unable to return to work. During her hospitalization and following the subsequent separation the children resided with the husband, who earned a substantial income. The trial judge ordered indefinite support in an amount just outside the low SSAG range. Ongoing support was necessary and justified because the wife had stayed home for a period following the birth of the parties' first child, and had serious mental health issues that arose during the marriage. Although framed as a compensatory case, one has to wonder if this is not more appropriately characterized as a case of ongoing need.

In *Steele v. Steele*,<sup>50</sup> the husband sought to vary the parties' separation agreement, which provided for indefinite support to the wife. The parties had been married for twelve years and had four children. The wife had stayed at home to raise the children during the marriage, and suffered from Crohn's disease. Although the trial judge found that there was a material change in circumstances because one of the children had moved to the father's house, he nonetheless ordered support to continue indefinitely on the basis of the wife's role during the marriage and her ongoing health issues.

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<sup>49</sup> 2010 ONSC 2961.

<sup>50</sup> 2009 CarswellOnt 2788 (S.C.J.).

In *Rhynold v. Rhynold*,<sup>51</sup> the trial judge adjusted the amount payable under Minutes of Settlement to reflect the husband's decreased income, but refused to terminate support altogether. The parties had been married for eleven years and had no children. The wife suffered from an ongoing mental health disability and had throughout the marriage. Although the support payable for the 2008 year exceeded the SSAG range, the trial judge refused to reduce it retroactively on the basis that the SSAGs do not always apply where one party suffers from disability or illness. Taking into account the husband's retirement and declining income, the trial judge reduced support to an amount consistent with the high end of the SSAG range but continued it on an indefinite basis.

*McFadden v. Sprague*<sup>52</sup> and *Smith v. Smith*<sup>53</sup> are both cases that involved ongoing need due to disability. *McFadden* involved a twenty year marriage and two children. The parties had agreed to shared custody of the children, but could not agree on support. The wife earned approximately \$187,000 per year, while the husband suffered from emotional and physical issues and had virtually no income or ability to maintain employment. Ongoing support within the SSAG range was ordered due to the husband's disability, his compelling need, and the increased costs to him of shared custody.

*Smith* involved a much shorter marriage and no children. The parties had been married for ten years, and separated when the wife was 50 years old and the husband was 41 years old. The wife had been unemployed at the date of marriage, and had worked part-time throughout the length of the marriage. She suffered from health problems that began during the marriage, and was in dire financial trouble post-separation. The trial judge ordered support in an amount that far exceeded the high SSAG range and for an indefinite duration, on the basis of the wife's ongoing health problems, her intense need, age and the parties' "lengthy marriage".<sup>54</sup>

***(b) Time-limited non-compensatory support***

Several cases apply *Fisher* for the proposition that time-limited support orders are appropriate in clear non-compensatory support cases where the parties do not have any children. While we agree that this is likely what the Court of Appeal had in mind when it decided *Fisher*, we

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<sup>51</sup> 2009 CarswellOnt 6260 (S.C.J.).

<sup>52</sup> 2008 CarswellOnt 3383 (S.C.J.); additional reasons in 2009 CarswellOnt 294 (S.C.J.).

<sup>53</sup> 2008 CarswellOnt 1921(S.C.J.).

<sup>54</sup> *Ibid.* at para. 24.

note that many of the cases that purport to implement it have not considered the age of the parties, an important and defining fact in *Fisher*, or the effect of restructured support.

In *Klimm v. Klimm*,<sup>55</sup> the parties were married for eighteen years and had no children. Both parties worked throughout the relationship, although the husband earned significantly more than the wife (\$114,000 and \$51,000 respectively). The wife was found to have undertaken the bulk of the household duties, notwithstanding her employment, while the husband was able to focus exclusively on pursuing his career. In total, the court awarded eleven years of support on a step-down basis (seven of which had already been paid in the years following separation), commencing with \$1,800 per month for two years and reducing to \$900 per month in the final two years.

In *Malesh v. Malesh*,<sup>56</sup> the parties had been married for eighteen years and did not have children. Twice during the marriage, they had moved to ensure the husband's job security, and the wife took menial jobs in each new location. The wife worked full-time prior to separation, and her income had increased steadily to approximately \$76,000 per year. The husband earned approximately \$122,000. Given the roles of the parties during the marriage and that the wife had not yet attained self-sufficiency, the trial judge ordered time-limited support for nine years at the mid-range SSAG amount.

The parties had been married for twenty-three years in *Smith v. Smith*,<sup>57</sup> and had no children. Although both parties worked throughout the relationship, the wife had relocated on several occasions to follow the husband, who was the higher earner. At the time of separation, the husband was 45 years old and earning \$63,000, and the wife was 48 years old and earning \$40,000. Notwithstanding the wife's evidence that she had been prevented from progressing in her career due to the relocations, the trial judge held that the parties' relationship was only moderately interdependent because they had both worked throughout. In fact, the judge further found that the wife's career had been advantaged by following the husband. As a result, he ordered support at the low end of the SSAG range, time limited for eight years.

*Hayes v. Hanrieder*<sup>58</sup> was decided under the *FLA* and might shock the senses, depending on one's perspective. The parties cohabited for fifteen years; the husband was 53 years old at the time of separation and earned \$49,000, and the wife was 49 years old and earned \$15,000.

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<sup>55</sup> 2010 ONSC 1479.

<sup>56</sup> 2008 CarswellOnt 3258 (S.C.J.).

<sup>57</sup> 2010 ONSC 398.

<sup>58</sup> (2008), 66 R.F.L. (6th) 112 (S.C.J.).

The trial judge found that the parties had assumed an equal partnership throughout the duration of their relationship, each maintaining a separate bank account and contributing to the household expenses on a 50/50 basis. As such, there was no real basis for a compensatory support claim. Rather, transitional support was appropriate to assist the wife in overcoming some of the more serious financial consequences of the end of the relationship. In the result, the husband was ordered to pay support on a stepped down basis (to reflect his impending retirement) for a thirty-one month period.

*Refcio v. Refcio*<sup>59</sup> is an interesting case dealing with a childless short-term marriage. Here, the parties were married for two years and cohabited for one, for a total cohabitation period of three years. During the relationship, the husband encouraged the wife to stop working and to continue with her studies. The wife suffered a breakdown post-separation and was hospitalized; sometime later she gave birth to twins, of whom the husband was not the father. At trial, the judge ordered the husband to pay the wife \$1,500 per month for a period of five years, and continuing until the wife found employment. On appeal, the Divisional Court reversed the continuing duration of the order, and instead ordered time limited support for five years. The continuing nature of the support order was not appropriate given the short marriage and the parties' young ages.

In *Rendell v. Normore*,<sup>60</sup> where the parties cohabited for four years, had similar incomes, and there was no suggestion of disability or illness, the court ordered support for a period of one year under the *Family Law Act*. There was no financial dependency created by the relationship.

### ***(c) Fisher-gone-bad cases***

The following cases seem to suggest a trend toward time-limited support in medium to long-term marriages where the parties have adult children or, more astonishingly, still have dependent children. Even if one reads *Fisher* as supporting the time-limited support cases reviewed above, surely it does not extend this far.

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<sup>59</sup> (2009), 74 R.F.L. (6th) 295 (Ont. Div. Ct.).

<sup>60</sup> 2008 CarswellOnt 4942 (S.C.J.).

In *Rioux v. Rioux*,<sup>61</sup> the parties had been married for twenty-one years and had one child entering university at the time of separation. The trial judge found that, during the marriage, the wife had managed the home, raised the parties' child and worked part-time, all while the husband focussed on his own employment. He ordered lump sum support in the amount of \$100,000. On appeal, the court held that a lump sum was inappropriate. Recognizing that she was entitled to a non-compensatory transitional award despite her relative youth (she was 49 at the time of the appeal), the Court of Appeal awarded support for a further five years for a total award of eight years. Interestingly, Gillese J.A. also ordered that support would be reviewable by either party after the five years. Given that there was little real uncertainty, this ruling seems to conflict with Lang J.A.'s strong language in *Fisher*.

*Pagnotta v. Malozewski*<sup>62</sup> is an appeal decision from the Divisional Court. The parties had been married for twenty years and had two teenage children, both of whom lived with the wife. The wife had worked part-time during the marriage and, although she was seeking full-time work as a teacher, she did not expect her income to be more than a quarter of the husband's income. The Divisional Court reversed the motion judge's order for time-limited support for one year and extended it to two years, subject to further order on motion or at trial. Frankly, this result would have been surprising at trial, not to mention on an interim motion. We do not know whether the parties settled or if a trial is still pending.

In *Balasz v. Balasz*,<sup>63</sup> the parties were married for eighteen years and had three children, all of whom were adults at the time of separation. The wife had raised the children and worked part-time throughout the parties' marriage in a restaurant and as a hairstylist, but was unemployed and receiving employment insurance at the time of trial. For his part, the husband earned approximately \$75,000 per year. Each party had re-partnered by the time of trial. Focussing on the wife's need and the principle of self-sufficiency, the trial judge ordered a stepped-down support order for a total of nine years.

In *Weber v. Weber*,<sup>64</sup> the parties were married for twenty years and had five children. At the time of separation, the wife was 44 years old. She had had primary responsibility for the care of the children, and the judge recognized that the compensatory principle was engaged in this case. At the time of separation, the husband earned approximately \$98,000 per year; the wife

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<sup>61</sup> 2009 ONCA 569.

<sup>62</sup> (2008), 54 R.F.L. (6th) 173 (Ont. Div. Ct.), reversing in part, 2007 CarswellOnt 9117 (S.C.J.).

<sup>63</sup> (2009), 75 R.F.L. (6th) 315 (S.C.J.).

<sup>64</sup> 2008 CarswellOnt 9365 (S.C.J.).

did not work, but was enrolled in a course to be certified as an educational assistant. The husband was ordered to pay support of \$600 per month for a period of three years, to allow the wife time to complete her training. A review of the arrangement could be requested by either party after the three years, when the youngest child would be thirteen years old.

*Scott v. Scott*<sup>65</sup> surely cannot be correct. In this case, the parties were married for twenty years and had four children. Although the wife worked full time during the marriage, she also had primary responsibility for the children. The wife had earned approximately \$27,000 to \$31,000 per year during the marriage, and was 45 years old at the time of separation. Five years after separation, she took a severance package from her employer and engaged in retraining. Although the husband had earned \$125,000 per year prior to separation, he argued that his income was declining due to the economic downturn.

The trial judge found that the parties' marriage had been traditional, but with an element of interdependence. The wife's claim was compensatory to a degree, given that she had put her own education and career on hold early in the relationship in order to help the husband immigrate to Canada, and she had had primary responsibility for the care and upbringing of the parties' four children. Stepped down support was ordered for a total of nine years, terminating when the youngest was thirteen years old.

In *Ratajczak v. Ratajczak*,<sup>66</sup> the parties were married for fourteen years and had three children. From the date of separation in 2006 until 2008, the husband provided financial support for the family, but discontinued the payments thereafter. The husband earned approximately \$70,000 per year and the wife earned \$10,000 per year, although she was enrolled in a nursing program and set to write her final exams in January 2011. The parties had agreed to a shared custody arrangement for the children. At trial, the judge recognized that the wife had been economically disadvantaged by her role in the relationship as a stay-at-home mother, while the husband had pursued his career. Nonetheless, the trial judge ordered retroactive and ongoing support in the low range of the SSAG, to be reviewed in June 2011, for a total of about six years of support. If the wife obtained a nursing job prior to June 2011, she was ordered to disclose the information to the husband and either party could bring a variation application.

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<sup>65</sup> 2008 CarswellOnt 1246 (S.C.J.).

<sup>66</sup> 2010 ONSC 4286.

In *Korkola v. Korkola*,<sup>67</sup> the parties were married for eleven years and had two children, aged ten and seven years old. The wife was 32 years old at the date of separation, and the husband was 36 years old. The wife stayed home to raise the parties' children, although she had worked as a dental assistant in the early years of the marriage, and later as a part-time bookkeeper for the husband's medical practice. The parties had agreed on a shared custody arrangement, and the wife had enrolled in a nursing program. Recognizing the roles of the parties during the marriage and the significant difference in income (the husband was an orthopaedic surgeon earning approximately \$540,000 per year), the trial judge ordered a lump sum of \$12,000 in compensatory support, and periodic support sufficient to equalize the parties' net disposable income each year. At the time of trial, interim support had been paid for a period of three years; the trial judge ordered support payable for a further five years, with a salary of \$50,000 imputed to the wife in the final year. While the trial judge emphasized that the parties needed to establish a clean break "at some point", we note that, like *Scott*, support in this case will end when the parties' youngest child is still twelve years old.

*Ali v. Williams*<sup>68</sup> involved a fifteen year marriage and two children, ages fourteen and twelve. During the marriage, the wife had stayed home to raise the children. Following separation, she had obtained her teaching certificate and was working as a part-time teacher. The husband earned approximately \$100,000 per year. Although recognizing that the wife was dependent on the husband due to the roles assumed by the parties during the marriage, support was time-limited to a total of five years.

Finally on this trend, in *Grinyer v. Grinyer*,<sup>69</sup> the parties had been married for twenty-two years and had two children aged 26 and 19. Although the younger child had been living with the husband since 2007, he had previously lived with the wife. Further, the wife had stayed home to raise the children during the marriage and worked only part-time throughout this period. She was awarded time-limited support for seven years.

*Benson v. Benson*<sup>70</sup> is an interesting case involving an equalized pension. In this case, the parties cohabited for twenty-five years and had two adult children. The wife had been the primary caregiver of the children and had little work experience. Both parties were in their

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<sup>67</sup> 2009 CarswellOnt 395 (S.C.J.).

<sup>68</sup> 2008 CarswellOnt 1757 (S.C.J.).

<sup>69</sup> (2008), 49 R.F.L. (6th) 219 (Ont. S.C.J.).

<sup>70</sup> 2008 CarswellOnt 745 (S.C.J.).

late fifties, and the husband was nearing retirement. At trial, the judge limited support to five years in the low range of the SSAGs, coincided to terminate with the husband's retirement. This was fair, according to the judge, because the husband's pension had already been equalized between the parties. If the husband were to earn any additional income, the wife should bear the burden on a variation application.

We think that the cases reviewed in this section highlight a questionable trend that takes *Fisher* too far. As Professors Rogerson and Thompson argue:

It is a critical first step in the support analysis to determine whether the rationale for spousal support is non-compensatory or compensatory, or a mix of the two. Only where the support is non-compensatory or at least primarily non-compensatory should the issue of time limits arise at the time of the initial order or agreement, as in *Fisher*. Otherwise, the initial order or agreement should usually be indefinite, with any time limits only to be fixed at a later review or variation hearing, depending upon the actual or imputed progress of the recipient towards self-sufficiency.<sup>71</sup>

In fact we would bet that, if faced with the above statement, the Court of Appeal in *Fisher* would likely agree. However, given the uncertainty in the spousal support jurisprudence, who really wants to take their chances on appeal?

A brief word about reviews. It is difficult to know how many judges chose to order indefinite support in cases that might otherwise have called for a review, pre-*Fisher*. However, it appears that those most dramatically affected by the trend against review orders are:

- support recipients (usually women);
- in medium to long-term marriages;
- who have stayed at home to raise the children and perhaps worked in a part-time capacity;
- and who continue to have teenaged or pre-teen children from the marriage in their care at the time of separation.

In most of the cases surveyed here, the support recipient was in her forties and diligently looking for well-paid employment at the time the support order was made. For many women, however, this proves difficult. Courts should adopt a more sensitive approach to the often bleak situation in which many women find themselves. While most judges are wont to

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<sup>71</sup> *Supra* note 42 at 14.

classify anyone under the age of fifty as young, youth is in the eye of the beholder. Whereas people in their forties with an established employment history and a full resume are considered to be in their prime, forty-something women who have just gone back to school are not. This was the lesson of *Moge* which, sadly, seems to have been forgotten. It is in these cases that review orders could and should play a role.

#### **IV. Pendulum Transferred? Other Areas of Support**

In this section, we review how the court's approach has swung back and forth on the questions of who is a spouse, who is a child, and who is a parent for the purposes of support under the *FLA*.

(a) *Who is a spouse?*

Section 29 of the *FLA* defines a spouse, for the purposes of support, as follows:

“spouse” means a spouse as defined in subsection 1 (1), and in addition includes either of two persons who are not married to each other and have cohabited,

(a) continuously for a period of not less than three years, or

(b) in a relationship of some permanence, if they are the natural or adoptive parents of a child.

And in s. 1(1) of the *FLA*, spouse is defined as:

“spouse” means either of two persons who,

(a) are married to each other, or

(b) have together entered into a marriage that is voidable or void, in good faith on the part of a person relying on this clause to assert any right.

The Supreme Court's 1999 decision in *M. v. H.*<sup>72</sup> is the most important decision affecting the definition of spouse in s. 29 of the *FLA* over the last twenty-five years. In that case, the Supreme Court held that the definition of spouse in s. 29 violated s. 15 of the *Charter*, because it was under-inclusive and discriminated against same-sex couples on the basis of sexual orientation. The Court severed s. 29 of the *FLA* and suspended its invalidity for six

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<sup>72</sup> [1999] 2 S.C.R. 3.

months to allow the legislature time to respond. The new definition of spouse came into effect on November 20, 1999. Although *M. and H.* had settled their case prior to the hearing at the Supreme Court, this decision expanded the scope of the provision to include all same-sex couples who otherwise met the cohabitation criterion.

If we are celebrating the 25<sup>th</sup> birthday of the *FLA* (and we are), then we should also note that *M. v. H.* demonstrated the wide influence that the definition of spouse had and has on other areas of the law. After *M. v. H.*, 56 Ontario statutes<sup>73</sup> and 68 federal provisions<sup>74</sup> had to be amended to include same-sex couples as spouses. Similar numbers of statutes were amended in other provinces. And of course, those incremental changes eventually led to the conclusion that gays and lesbians should be free to marry.<sup>75</sup> As Justice Abella said in a speech to the Federation of Law Societies National Family Law Conference in 1994, “[f]amily law is and should be a leader in the legal system because it matters so much to so many.” There can be no doubt that the equality that gays and lesbians have achieved in this country has its roots in family law.

While *M. v. H.* wound its way up to the S.C.C., the Ontario courts were also being asked to expand the concept of spouse in other ways. In *McEachern v. Fry Estate*,<sup>76</sup> the applicant sought a support award under s. 58 of the *Succession Law Reform Act (SLRA)* from the estate of the deceased on the basis that she had been his spouse. The applicant and the deceased had been romantic companions for over fifteen years, following the deaths of their respective spouses. Although they maintained separate residences, they spent the majority of their free time together at each of their homes and took their holidays together. Considering *Molodowich v. Penttinen*,<sup>77</sup> the leading decision on the meaning of the term cohabitation, the

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<sup>73</sup> *Amendments Because of the Supreme Court of Canada Decision in M. v. H. Act*, 1999, R.S.O. 1999, c. 6.

<sup>74</sup> *Modernization of Benefits and Obligations Act*, R.S.C. 2000, c. 12.

<sup>75</sup> *Halpern v. Toronto (City)* (2003), 36 R.F.L. (5th) 127 (Ont.C.A.)

<sup>76</sup> 1993 CarswellOnt 3632 (Ont. C.J.(Gen. Div.)).

<sup>77</sup> (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.). In *Molodowich*, the court outlined the following factors that are relevant to a determination of whether a couple was cohabiting at the relevant time, at para. 17:

1. Shelter:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

2. Sexual and Personal Behaviour:

- (a) Did the parties have sexual relations? If not, why not?
- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings toward each other?
- (d) Did they communicate on a personal level?

court took a broad view of the relationship: “When you find as here a fifteen year period of companionship and commitment and an acceptance by all who knew them as a couple, surely you must have continuous cohabitation. It has been said that cohabitation is a state of mind.”<sup>78</sup> The applicant was awarded monthly support.

In *Thauvette v. Malyon*,<sup>79</sup> the parties had an affair for approximately three years at which time both parties left their respective spouses. The plaintiff, Ms. Thauvette, moved into a home with her children that was bought and paid for by the defendant, Mr. Malyon. He did not move in with Ms. Thauvette, and instead kept his own residence in a rented home. The evidence was that the parties spent approximately four to five nights a week together, but that they did not interact with each other’s children. Although Mr. Malyon was having several other affairs at the same time, the court found that he continuously assured Ms. Thauvette that he was faithful and that the relationship was permanent. Under the circumstances, including the finding that the parties had provided each other with economic support, Ms. Thauvette was considered a spouse for the purposes of s. 29 of the *FLA*.

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- (e) Did they eat their meals together?
  - (f) What, if anything, did they do to assist each other with problems or during illness?
  - (g) Did they buy gifts for each other on special occasions?

3. Services:

What was the conduct and habit of the parties in relation to:

- (a) preparation of meals;
- (b) washing and mending clothes;
- (c) shopping;
- (d) household maintenance; and
- (e) any other domestic services?

4. Social:

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community toward each of them and as a couple?

6. Support (economic):

- (a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation, etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning children?

<sup>78</sup> *Supra* note 76 at para. 21.

<sup>79</sup> (1996), 23 R.F.L. (4th) 217 (Ont. C.J. (Gen. Div.)).

The Court of Appeal went a step further in *Nowell v. Town Estate*,<sup>80</sup> where the parties had had a twenty-four year affair and the applicant sought a constructive trust interest in the deceased's farm. The applicant and the deceased maintained separate residences, and the evidence was that the deceased had no intention of ever leaving his wife. He had, however, bought a farm in Peterborough where he and the applicant resided on most weekends. The Court of Appeal found the relationship to be "quasi-spousal" and allowed the applicant's claim for constructive trust (support under the *SLRA* was not claimed).

*Town Estate* in particular seemed to suggest to courts that a more modern and nuanced approach to the concept of spouse was warranted. To the extent that this case prompted some courts to extend support to mistresses and other companions, it was heavily criticized. And while such a shift might properly have been called "astounding",<sup>81</sup> it also arguably represented a recognition that dependency can be engaged where a relationship is substantively spousal no matter whose name is on the lease (or the marriage license, for that matter).

Thus, in *Mahoney v. King*,<sup>82</sup> where the parties had had a six year affair, Wilson J. held on an interim motion for support that there was sufficient evidence both for and against cohabitation that a trial of the issue should be heard.

In *Danovitch v. Tatoff*,<sup>83</sup> the parties had a two year relationship during which time they had a child together. They kept separate residences throughout the relationship and resided together on weekends. Upon termination of the relationship, the mother sought spousal support under the *FLA*. The court found that the relationship was marriage-like and that the parties' work schedules, their divergent sleeping patterns, and the mother's fibromyalgia were all good reasons for keeping separate residences during the week. The father was ordered to pay lump sum support to assist the mother with her prenatal expenses.

In *Campbell v. Szoke*,<sup>84</sup> the parties were in their seventies and had been in a relationship for over seventeen years. They socialized together as a couple and were intimate. For six months of the year, they lived together in Florida; for the remaining six months, they lived in separate residences in Ontario, although Mr. Szoke was a frequent visitor at Ms. Campbell's

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<sup>80</sup> (1997), 35 O.R. (3d) 415 (C.A.).

<sup>81</sup> See Professor McLeod's annotation in *Mahoney v. King*, *infra* note 82.

<sup>82</sup> (1998), 39 R.F.L. (4th) 361 (Ont. C.J. (Gen. Div.)).

<sup>83</sup> 1999 CarswellOnt 5047(C.J.).

<sup>84</sup> (2003), 45 R.F.L. (5th) 261 (Ont. S.C.J.).

apartment. In 1989, after nine years together, they signed a cohabitation agreement in which Ms. Campbell promised to make no financial claim against Mr. Szoke arising from their relationship. The relationship ended when Ms. Campbell underwent treatment for breast cancer and could no longer look after Mr. Szoke. As she was living on CPP and Old Age benefits only, Ms. Campbell sought spousal support under the *FLA* and a beneficial interest in Mr. Szoke's rental properties. Karakatsanis J. held that cash and cheques that had been given to her throughout the relationship were in the nature of spending money, and not compensation for employment services. The parties cohabited in a long term relationship; although the 1989 agreement was signed under duress and not binding, its existence was an acknowledgement that the parties viewed their relationship as one of cohabitation. Ms. Campbell was found to be a spouse pursuant to the *FLA*, but her claim for constructive trust failed on the facts.

The pendulum may be swinging, however, at least with respect to the recognition of affairs as spousal relationships. In *Sturgess v. Shaw*,<sup>85</sup> the parties were engaged in a twenty year affair. They had one child together, who the father supported but kept secret from his wife and other children. During the relationship, the parties got together approximately four times per month at hotels, the mother's home, or the father's cottage. The mother also accompanied the father on various work-related trips. When the parties' relationship broke down, the mother sought an interim order for spousal support under the *FLA*. Even though the mother's motion was interim, Ingram J. held that she still had not made a good, arguable case that she had standing as spouse. The parties had never shared a residence or integrated their finances, and they had not held themselves out as a couple to third parties. Therefore, although they spent considerable time together, the evidence did not establish that the parties had ever cohabited. The mother's motion was dismissed.

Following the Supreme Court's decision in *Bracklow*, entitlement to spousal support is almost always found where the party seeking support has standing and there is an income differential between the parties. In most spousal support cases, the only question will be amount and duration.

Although *M. v. H.* was a landmark case, there are very few reported cases of spousal support awards in favour of lesbians or gay men. Recently, support was awarded in *Feaver v.*

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<sup>85</sup> (2002), 28 R.F.L. (5th) 449 (Ont. S.C.J.).

*Curno*,<sup>86</sup> where the parties had cohabited for twenty years. Although Ms. Feaver only earned approximately \$30,000 per year, this was double the income of Ms. Curno. Support was payable in the amount of \$400 per month for an indefinite duration. The decision does not make any reference to the SSAGs, and we are left wondering if they were even argued by the parties.

Reports from the trenches suggest that many same-sex spousal support cases are settling or avoiding court because of a myriad of factors, including a fear of discriminatory attitudes toward their claims. Given the focus of spousal support jurisprudence on distinguishing between “traditional” and “modern” marriages, and the unspoken burden to show “sameness” to an opposite-sex model, many same-sex couples understandably feel that their interests will be better served through negotiation or mediation/arbitration. While this may indeed be the better decision, it does nothing for the evolution of the law. The almost total absence of caselaw about same-sex spousal support is shocking, particularly when we consider the sheer volume of opposite-sex cases released every week in this province.

Perhaps we should not be so quick to conclude that we achieved real and meaningful access to justice in *M. v. H.* after all. Certainly, we can say that *M. v. H.* was the catalyst for a long line of positive law reforms in this province, and an attitude of equality for same-sex couples is now (mostly) the norm in negotiations, ADR and in our courts. However, on the ground, discrimination is still affecting the support claimants. It’s a bit of an eerie parallel to M. herself, who, despite bringing several interim motions (three were dismissed), and despite being successful at every level of court over a period of nine years, never actually saw a penny of spousal support.

(b) *Who is a child?*

Thankfully, the *Child Support Guidelines* have taken much of the mystery out of child support payments. While parents may fight over income, few actually claim that their children are not entitled to support. That is, until they start accumulating university degrees.

Courts in Ontario have vacillated on when a child in post-secondary education ceases to be a child of the marriage. The statutory language in the *Divorce Act* differs from that in the *FLA* on this question. Specifically, s. 2(2) of the *Divorce Act* provides:

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<sup>86</sup> 2010 ONSC 4009. Support was also awarded in the following two reported decisions: *Ross v. Reaney*, 2003 CarswellOnt 2240 (S.C.J.) and *A.(N.) v. W.(C.M.)* (2003), 39 R.F.L. (5th) 1 (Ont. S.C.J.)

child of the marriage means a child of two spouses or former spouses who, at the material time,

(a) is under the age of majority and who has not withdrawn from their charge, or

(b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessaries of life;

Section 31 of the *FLA* provides:

(1) Every parent has an obligation to provide support for his or her unmarried child who is a minor or is enrolled in a full time program of education, to the extent that the parent is capable of doing so.

(2) The obligation under subsection (1) does not extend to a child who is sixteen years of age or older and has withdrawn from parental control.

Notwithstanding the difference between the two statutes, courts in Ontario have considered ongoing dependency as an indicator of parental control. As a result, cases decided under both the *Divorce Act* and the *FLA* are instructive.<sup>87</sup> However, it is important to note that the *FLA* only applies to adult children enrolled in a full-time educational program. The effect is to deny support for the adult children of unmarried former cohabitants who have a disability or illness. Unfortunately, this distinction perpetuates the discrimination between “legitimate” and “illegitimate children” that child reform legislation in Ontario intended to cure.<sup>88</sup> The Supreme Court’s decisions in *M. v. H.* and *Miron v. Trudel*<sup>89</sup> suggest that the distinction is unconstitutional and demands an equality analysis under s. 15 of the *Charter*, although no case has advanced this argument as of yet.<sup>90</sup>

In *Barbeau v. Barbeau*,<sup>91</sup> the parties’ daughter had obtained her undergraduate degree and wanted to pursue a one year teaching certificate. The mother sought ongoing child support, and the father sought termination. Pardu J. was not persuaded that the *Divorce Act* provided a parent with an automatic right to terminate child support after one post-secondary degree:

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<sup>87</sup> See *Martin v. Taylor* (2007), 51 R.F.L. (6th) 154 (Ont. S.C.J.) at para. 17 and *Oates v. Oates*, 2004 CarswellOnt 2878 (S.C.J.) at para.24.

<sup>88</sup> For example, s. 1(1) of the *Children’s Law Reform Act*, R.S.O. 1990, c.C12, provides: “Subject to subsection (2), for all purposes of the law of Ontario a person is the child of his or her natural parents and his or her status as their child is independent of whether the child is born within or outside marriage.”

<sup>89</sup> [1995], 2 S.C.R. 418.

<sup>90</sup> On the *Charter* analysis and the importance of pleading equality claims, see Joanna Radbord and Martha McCarthy’s annotation to the Alberta case *M.(L.L.) v. K. (W.L.)* in (2007), 47 R.F.L. (6th) 299 (Alta. Q.B.).

<sup>91</sup> (1998), 41 R.F.L. (4th) 24 (Ont. C.J. (Gen. Div.)).

She has long aspired to a career in teaching. I agree with the observations of Freeman J.A. in *Martell v. Height* (1994), 3 R.F.L. (4th) 104 (N.S. C.A.) at p. 106,

It is clear from the various authorities cited by counsel that courts recognize jurisdiction under s. 2(1) of the Divorce Act to hold parents responsible for children over sixteen during their period of dependency. How long that period continues is a question of fact for the trial judge in each case. There is no arbitrary cut-off point based either on age or scholastic attainment, although as these increase the onus of providing dependency grows heavier. As a general rule, parents of a bona fide student will remain responsible until the child has reached a level of education, commensurate with the abilities he or she has demonstrated, which fit the child for entry level employment in an appropriate field. In making this determination the trial judge cannot be blind to prevailing social and economic conditions: a bachelor's degree no longer assures self-sufficiency.

I would respectfully disagree with the view that there is an automatic cut-off of child support after one degree or four years of post-secondary education. To adopt this approach would be to create a judge-made rule which is not mandated by the legislation.<sup>92</sup>

In *Arnold v. Washburn*,<sup>93</sup> the parties' eldest child had obtained her undergraduate degree at the University of Ottawa and turned down a full-time job with the federal public service to pursue a graduate degree in England. While Rutherford J. recognized that the father's position in favour of terminating child support was not unreasonable, in his view the parties' daughter was still a child of the marriage under the *Divorce Act*.

The decision in *Arnold* was an endorsement, and Rutherford J. provided minimal analysis with respect to the question of child support and post-secondary education. In the subsequent case of *Jazerbinski v. Jazerbinski*,<sup>94</sup> the court held that "[t]here must be some degree of congruency between the circumstances of the family and the educational plans of the child" and that the plans must be reasonable.<sup>95</sup> In that case, Smith J. terminated child support for the parties' two eldest children, where the son was engaged in a second degree in the United

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<sup>92</sup> *Ibid.* at paras. 8-9.

<sup>93</sup> (2000), 10 R.F.L. (5th) 1 (Ont. S.C.J.)

<sup>94</sup> 2004 CarswellOnt 4600 (S.C.J.).

<sup>95</sup> *Ibid.* at para. 23.

States, and the daughter “had worked for several years and should be in a position to contribute or fund her own education”.<sup>96</sup>

*Blaschuk v. Bridgewater*<sup>97</sup> was decided shortly thereafter under the *FLA*. In that case, the parties had three children. Quinn J. found that the youngest child, who was sixteen years old, was enrolled in a full-time program of education and therefore entitled to support. The middle child, who was twenty years old, was not enrolled in a full-time program of education and not eligible for support. This is where the case gets interesting. The eldest child, who was twenty-two years old, had completed a three-year engineering diploma at Niagara College and was enrolled in a full time Bachelor of Engineering degree at Laval University. Quinn J. refused to recognize the young man as a child of the marriage under s. 31 of the *FLA*, on the basis that his course of study was not reasonable:

Section 31 of the Family Law Act does not circumscribe the child-support obligation by reference to the length or type of program of education required to create or continue the obligation. Nevertheless, common sense and fairness frequently end the obligation upon, or shortly after, completion of the first undergraduate degree or diploma. After all, section 31 was never intended to finance professional students. In my view, the first question to be asked when considering whether to extend a child-support obligation beyond the initial undergraduate degree or diploma is this: is the educational path upon which the child has been travelling, and upon which he or she wishes to continue travelling, a reasonable one? If the answer is "No", there usually is no need to ask further questions. Here, the path of Blake was poorly mapped out: it was an educational cul-de-sac and not reasonable. Three years were wasted academically. I do not think that there should be a legal obligation imposed on the mother to pay child support for Blake. In the circumstances, the stuttering start to his post-secondary education is a disqualifying factor. I add that, bearing in mind the number of degrees obtained by the mother and the double training of the father, I might have viewed the matter differently were Blake pursuing a degree for which the diploma was, in some significant way, preparatory.

Both parents were self-represented at the hearing before Quinn J., and we do not know if there was a particular dynamic underlying the proceedings that was not reflected in the judgment. With respect, this approach seems unnecessarily harsh and suggests that a child must “get it right” the first time or risk losing parental support altogether.

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<sup>96</sup> *Ibid.* at para. 24.

<sup>97</sup> (2005), 18 R.F.L. (6th) 271 (Ont. S.C.J.).

However, recent cases on this topic appear to take a more expanded view of entitlement. In *Albert v. Albert*,<sup>98</sup> the court awarded support for an adult child pursuing her third post-secondary degree. The court found that the child had been diligent in pursuing her post-secondary studies at Western and Windsor Universities, and was currently enrolled in a more practical program at George Brown College. Herman J. stated as follows:

The entitlement to child support for post-secondary education, and in particular, second and third post-secondary programs, depends on the circumstances of the case. Considerations to be taken into account include: (i) the financial circumstances of the family; (ii) the child's educational and career plans; (iii) the child's age; (iv) the child's academic performance; (v) the family's educational expectations; (vi) the parents' involvement in the decision-making process; (vi) the extent to which the program prepares the child to become financially independent (See *Jarzebinski v. Jarzebinski*, 2004 CarswellOnt 4600 (Ont. S.C.J.) *Oates v. Oates*, [2004] O.J. No. 2984 (Ont. S.C.J.); *Reno v. Bertol-Renouf* (2004), 253 A.C.W.S. (3d) 940, [2004] A.J. No. 1402 (Alta. Q.B.)). Ms. Albert stated that she has more than one post-secondary degree and it was her expectation that her children might well obtain further degrees as well.

In *Van Vroenhoven v. Van Vroenhoven*,<sup>99</sup> Greer J. ordered the father to contribute to the child's law school expenses because they were reasonable and he had the means to do so. Most recently, Taliano J. reviewed both lines of cases in *Haist v. Haist*.<sup>100</sup> In that case, the father was ordered to continue support for the parties' daughter until completion of her teacher's certificate.

Where parents have the means to pay and are themselves educated people, it is not unreasonable to require them to contribute to an adult child's continuing education. This is particularly true when, as is the case today, graduate degrees are a necessary prerequisite for many higher paying jobs. Particular sensitivity may be warranted, having regard to the fact that an adult child of divorce has likely overcome emotional challenges that might have otherwise hindered his or her education. On the other hand, we recognize that it can be challenging to a payor parent as well, especially given that in intact families, the parents' decisions about whether to or how much to fund a child's education are not subject to judicial oversight.

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<sup>98</sup> (2007), 40 R.F.L. (6th) 203 (Ont. S.C.J.).

<sup>99</sup> 2009 CarswellOnt 1288 (S.C.J.).

<sup>100</sup> 2010 ONSC 1283.

(c) *Who is a parent?*

In twenty-five years, courts in Ontario have expanded the group of people eligible for parental status, both with respect to child support and custody and access issues. This shift is rooted in a more comprehensive understanding of second families (where one or both parents has remarried) and the relationships that flow from them.

(i) *Assisted reproduction*

Recently, courts across the country have struggled with dated legislation that does not respond appropriately to families whose children have been conceived through assisted reproduction methods. In *A.A. v. B.B.*,<sup>101</sup> the Ontario Court of Appeal considered the circumstances of a three-parent family. In that case, A.A. and C.C. were female same-sex partners who decided to start a family. They asked their friend, B.B., to be the biological father of their child and he agreed. Although A.A. and C.C. were the child's primary caregivers and he referred to them as his mothers, the parties all agreed that it would be in the child's best interest to have a relationship with B.B. None of the parties favoured applying for an adoption order in favour of the non-biological mother, because that would have had the effect of denying B.B.'s parentage. Before the court, C.C. applied for a declaration that she, in addition to A.A. and B.B., was also the child's parent. Her application was dismissed at first instance by Aston J., who held that he did not have jurisdiction to make the order under the *Children's Law Reform Act (CLRA)*, on the basis that the statute recognized a declaration of parentage for "the mother" and "the father" in the singular only. *Charter* arguments were not before Aston J., and were raised for the first time on the appeal of the decision.

The non-biological mother was self-represented on the appeal and made a persuasive and touching argument about her role in the family and her request that the Court of Appeal simply recognize the reality of their family life, for the sake of the child.

The Ontario Court of Appeal declined to address the *Charter* issues. Nonetheless, it reversed Aston J.'s decision, holding that this was an appropriate case for the exercise of the *parens patriae* jurisdiction. Advances in technology had created a legislative gap in the *CLRA*, and it was contrary to the child's best interests for one of his mothers to be denied legal recognition of parentage.

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<sup>101</sup> (2007), 83 O.R. (3d) 561 (C.A.).

Many commentators were concerned that the case-by-case nature of the *parens patriae* jurisdiction would have unpredictable results in future cases, and would have preferred for the Court of Appeal to decide the issue on the *Charter* grounds. There was fear that every potential parent would have to lead extensive evidence about his or her role in the family, as proof of his or her sameness to an opposite-sex parent, making such applications costly and demeaning. There were also concerns that same-sex parents in less urban courthouses would feel the effect of *parens patriae* differently than those in Toronto. To date, we understand that lawyers have had little difficulty in getting these declarations in Toronto, although it is not clear whether the same is true in other parts of the province.

Courts in Ontario have also denied parentage in an effort to be sensitive to the realities of assisted reproduction. Thus, in cases of surrogacy where the parties have signed a Gestational Carriage Agreement and the child has no genetic connection to the surrogate parents, the court has used its *parens patriae* jurisdiction to declare that the surrogate mother is **not** the child's mother.<sup>102</sup>

Not all parental relationships remain amicable and cooperative. Courts continue to feel their way through the complexities of three or more parent families, usually by erring on the side of recognizing more parents, rather than fewer. *C (M.A.) v. K (M)*<sup>103</sup> concerned an application by a female same-sex couple to dispense with the biological father's consent to adoption. In that case, the couple had decided to have a child, and wanted to choose a biological father who would take an active role in the child's life. They did so, and the parties entered into an agreement that expressed, among other things, their desire for the child to have two mothers and a father. The agreement also anticipated adoption proceedings that could eventually terminate the father's parental rights. The father had regular access with the child until an incident arose between the parents in August 2007. The mothers brought a joint application for adoption, but the father refused to provide his consent, contrary to the agreement.

Cohen J. dismissed the mothers' motion to dispense with the father's consent on the basis that they had not shown that it was in the child's best interests. The child had had a meaningful relationship with her father, and the Court felt that his status in any future access proceeding would be permanently prejudiced by an adoption. The adoption provisions in the parties' agreement did not bind the court, because no decision regarding the child's best interests

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<sup>102</sup> See *D. (M.) v. L. (L.)* (2008), 90 O.R. (3d) 127 (S.C.J.), and *R. (J.) v. H. (L.)*, 2002 CarswellOnt 3445 (Ont. S.C.J.).

<sup>103</sup> 2009 ONCJ 18

could be determined by contract. Where a party, or parties, choose to have a child with a known donor, the court may well hold them to their decision, without reference to the other “rules” they seek to impose:

When they decided to have a child, they fully understood that, although engaging a sperm donor was a biological necessity, engaging a known sperm donor was not. Thus, when they decided, even before they had chosen the respondent, that they wanted their child to have a known and involved father, they knew that, if they chose well, their child would develop a relationship with a parent who was not part of their immediate family. They knew that a parent-and-child relationship gives rise to rights and responsibilities. They anticipated that a third parent would be involved with their family and had to have anticipated that this parent might disagree with, or challenge, their parenting choices, just as they must do with one another...Now they want to turn back the clock and make a different choice. If this was ever possible, it is not possible after six years. Time and experience have proven that the respondent is not a "mere sperm donor" and B. is no longer a theoretical proposition, nor is her relationship with her father.<sup>104</sup>

*H (D.W.) v. R (D.J.)*<sup>105</sup> is a similar case from Alberta. In that case, the parties were a male same-sex couple who sought to have a child together. They cooperated with a lesbian couple, Ms. D. and Ms. C.S., to have a child using assisted reproductive technology. In 2003, Ms. D gave birth to a child for Mr. H. and Mr. R., using Mr. R.'s sperm.

Mr. H. and Mr. R. were the child's primary caregivers, although she had regular access with Ms. D. and Ms. C.S. In 2005, Ms. D. had a second child using Mr. R.'s sperm. Ms. D. and Ms. C.S. were the mothers of the second child, and Mr. H. and Mr. R. had regular access.

Mr. H and Mr. R. ended their relationship in 2006. At that time, Mr. R. and Ms. D. refused access between Mr. H. and his child. Without deciding whether Mr. H. should be declared a parent (as in *A.A.*), the judge nevertheless analysed the access application as though Mr. H. were the child's legal father. Reasonable and generous access was granted.

The definition of parent has been expanded such that using a known donor is now a risky business in Canada, at least if the mothers wish to have parental autonomy and control. Essentially, the recent cases are the death knell for donor contracts that seek to set different rules for parents and children in non-nuclear families. While no one can argue with the general principles of best interests and access as the child's right, it is unfortunate that

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<sup>104</sup> *Ibid.* at para. 74.

<sup>105</sup> 2009 ABQB 438

contracts on these topics cannot be relied upon by gay or lesbian parents who are or were building their families in a totally uncertain legal environment, in all kinds of ways that straight couples do not ever experience. It is particularly stinging that similar agreements entered into by opposite-sex couples are often respected, despite all of the same principles being in play.

(ii) (Opposite-sex) Step-parents

It is clear that a step-parent may be required to pay child support, if he or she has demonstrated a settled intention to treat the child as a child of his or her own family.<sup>106</sup> This requires something more than simple kindness by the step-parent toward the child,<sup>107</sup> although the case-by-case nature of this determination can make it difficult to detect a clear pattern in the case law. Essentially, the more you treat your spouse's child as your own – that is, live with her, discipline her, drive her to piano lessons, take her on vacations, give her lunch money and otherwise provide for her financially – the more likely it is that you will incur a child support obligation post-separation.

What is wholly unclear is the proportionate sharing of the child support obligation between the step-parent and the child's non-residential biological parent. Section 33(7) of the *FLA* provides as follows:

An order for the support of a child should,

- (a) recognize that each parent has an obligation to provide support for the child;
- (b) apportion the obligation according to the child support guidelines

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<sup>106</sup>See s. 1(1) of the *FLA*. In *Chartier v. Chartier*, [1999] 1 S.C.R. 242, the Supreme Court of Canada outlined the test for whether a person stands in the place of a parent under the *Divorce Act*. These factors include (i) whether the child participated in the extended family in the same way as would a biological child; (ii) whether the person provides financially for the child (depending on ability to pay); (iii) whether the person disciplines the child as a parent; (iv) whether the person represents to the child, the family, and the world, either explicitly or implicitly, that he or she is responsible as a parent to the child; (v) the nature or existence of the child's relationship with the absent biological parent. Although the statutory language of s.1(1) of the *FLA* differs (“demonstrated a settled intention to treat a child as a child of his or her family”) the court has held that the test under the *Divorce Act* and the *Family Law Act* is essentially the same: see *Kincaid v. Arsenaault* (2002), 27 R.F.L. (5th) 84 (S.C.J.) at para. 26: “In light of these decisions, I conclude the test of whether a person stands in the place of a parent (the words of the *Divorce Act*) or treats a child as a child of his or her family (the words in the *Family Law Act*) is essentially the same. The court must determine the nature of the relationship by looking at various factors including intention which may be expressed but more often will be the subject of inference from actions of the parties.”

<sup>107</sup>There has been some concern that the threshold under s. 1(1) should not be too low, so as not to risk children being ignored or financially rejected by a step-parent wishing to avoid a support obligation. See *Segal v. Qu*, (2001), 17 R.F.L. (5th) 152 (S.C.J.) and Professor McLeod's annotation. See also the discussion in *Neil v. Neil*, 2002 CarswellOnt 2513 (S.C.J.).

Section 5 of the *Child Support Guidelines* considers the amount of support payable by a person standing in the place of a parent:

Where the spouse against whom an order for the support of a child is sought stands in the place of a parent for a child or the parent is not a natural or adoptive parent of the child, the amount of the order is, in respect of that parent or spouse, such amount as the court considers appropriate, having regard to these guidelines and any other parent's legal duty to support the child.

In *M.(C.) v P.(R.)*,<sup>108</sup> the Ontario Court of Appeal reversed a decision by the Divisional Court which held that “the financial obligation of the natural parent should exceed 50 per cent when weighed against the obligation of a parent who is not.”<sup>109</sup> The Court of Appeal weighed the involvement of each of the parents in the child's life and ordered the biological father to pay 15 per cent of the obligation, and the step-parent to pay 85 per cent.

In *Wright v Zaver*,<sup>110</sup> the biological father sought to have his child support obligation reduced on the basis that his child's step-father was also paying child support to the mother. The step-father, who had a child with the mother and had also treated her child from the previous relationship as his own, had agreed to pay Table child support for two children. The Court of Appeal dismissed the biological father's argument that his obligation should be reduced and ordered him to pay the full Table amount:

Mr. Zaver could not have relied on s. 37(2.3) to relieve him of the obligation to pay the guideline amount of child support if Mr. Wright and Ms. Wright had remained together. The result should be no different simply because Mr. Wright and Ms. Wright are separated and Mr. Wright is making direct monthly payments of child support.

However, there remain concerns that a child's mother will receive a windfall by having two fathers pay full Table support following separation, and that a step-parent may be unfairly punished in cases where the biological father is a delinquent payor. In *Oxley v. Oxley*,<sup>111</sup> the parties had been married for fourteen years, and the wife had two children from a previous relationship. The biological father had been excluded from the children's lives, and the wife had not applied for financial support from him. The husband had essentially raised the children since they were eight and six years old, and had supported them financially during the course of the marriage. Finding that the wife should have pursued the biological father for

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<sup>108</sup> (1997), 26 R.F.L. (4th) 1 (Ont. C.A.).

<sup>109</sup> *Ibid.* at para. 3.

<sup>110</sup> (2002), 24 R.F.L. (5th) 207 (Ont. C.A.).

<sup>111</sup> (2003), 1 R.F.L. (6th) 354 (Ont. S.C.J.).

support, the court fixed the step-father's obligation at fifty per cent of the Table amount. This is strange when it is likely that the step-parent participated in the decision not to seek support from the biological father during the fourteen years of marriage.

In *Offen v. Offen*,<sup>112</sup> the parties had one child together and the husband had a son from a previous relationship. It was conceded that the wife had demonstrated a settled intention to treat the husband's son as her own. As both children were to remain in the custody of the husband, child support was at issue. The court calculated the support payable by the wife for two children; of the additional amount attributable to support for the husband's son, the wife was required to pay fifty per cent, having regard to duty of the child's biological mother to contribute to his support as well.

*Lebeck v. Laurin*<sup>113</sup> is a child support claim by a father against his children's former step-father. At the time of the application, the mother was waiting for her medical residency program to commence and did not expect to earn any income for at least another year. The court found that the step-father had treated the children as members of his family from 1996 to 2003, and that support was payable. Having regard to the fact that the children had two biological parents with a duty to provide support, Wood J. ordered the step-father to pay "25% of the support which would be payable under the guidelines by Mr. Lebeck were he the biological parent of the children or were their parents not both present and legally obligated to support their offspring."<sup>114</sup>

More recently, step-parents have been ordered to pay support in greater proportions. In *Schiller v. Schiller*,<sup>115</sup> the court ordered the step-father to pay two-thirds of the Table amount of support, where the biological father was required by court order to pay support but was in significant arrears. And in *Pigeau v. Pigeau*,<sup>116</sup> the step-father was ordered to pay the full amount of Table support for the wife's child from a previous relationship, where the biological father rarely, if ever, made his court-ordered child support payments.

If the court is not inclined to respect the provisions of a donor contract, as in *C (M.A.) v. K (M)* discussed above, then it should follow that domestic contracts that absolve a step-parent of any child support obligation should also be unenforceable. Certainly the court has the

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<sup>112</sup> 2005 CarswellOnt 2116 (S.C.J.).

<sup>113</sup> 2004 CarswellOnt 5339 (S.C.J.)

<sup>114</sup> *Ibid.* at para. 27.

<sup>115</sup> 2007 CarswellOnt 360 (S.C.J.).

<sup>116</sup> 2009 CarswellOnt 2102 (S.C.J.).

jurisdiction to set aside the child support provisions of any such agreement.<sup>117</sup> However, the case law to date presents no identifiable pattern.<sup>118</sup>

In *Jane Doe v. Alberta*,<sup>119</sup> Jane and John Doe were unmarried cohabitants in a long term relationship, who found themselves in an awkward situation. When Jane wanted to have a baby but John did not, she conceived by way of artificial insemination using an unknown sperm donor. The parties wanted to continue their relationship, but John did not want to assume any legal obligation for the child. Before entering into an agreement to exclude John from any child support, guardianship or parenting obligations, they brought an application before the court for a determination that such a contract would be binding under the *Alberta Family Law Act*<sup>120</sup>.

The court declined to find any proposed contract between the parties binding, in so far as it would seek to regulate John's obligations toward the child. Martin J. stated:

Whether John Doe stands in the place of a parent remains to be determined by a Court under s. 48 and will be based on a review of what has actually occurred between the child and John Doe. Section 48(2) therefore contemplates a contextual, holistic and ex poste inquiry into the relationship between the child and a particular person which the Applicants cannot oust by even the most carefully drafted contract. See *Chartier v. Chartier*, [1999] 1 S.C.R. 242 (S.C.C.) at para. 32. The Applicants cannot by agreement preclude the possibility that a Court may sometime in the future find John Doe to stand in the place of a parent. Under s. 48(2) contractual intent may be relevant but it is not determinative.

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<sup>117</sup> Section 33(4) of the *FLA* provides:

The court may set aside a provision for support or a waiver of the right to support in a domestic contract and may determine and order support in an application under subsection (1) although the contract contains an express provision excluding the application of this section,

(a) if the provision for support or the waiver of the right to support results in unconscionable circumstances;

(b) if the provision for support is in favour of or the waiver is by or on behalf of a dependant who qualifies for an allowance for support out of public money; or

(c) if there is default in the payment of support under the contract at the time the application is made.

<sup>118</sup> It is settled that parents cannot contract out of child support on behalf of their children, and that the court may vary an agreement if the child support provisions are inappropriate. See *Louie v. Lastman* (2002), 29 R.F.L. (5th) 93 (Ont. C.A.), and *Kovacs v. Nelson*, 2008 CarswellOnt 410 (S.C.J.). Under s. 15.1(5) of the *Divorce Act*, a court may depart from the Guidelines where the parties have reached an agreement on child support that makes special provision for the benefit of the child and where the application of the Guidelines would be inequitable in those circumstances.

<sup>119</sup> 2005 ABQB 885

<sup>120</sup> S.A. 2003, c. F-4.5 (Alta).

...

The FLA recognizes agreements between parties in the family law context in ss. 48, 53, 85 and 86 but such agreements are not determinative or binding. Any "person" is not precluded from applying to the Court for a child support order under s. 53 with an order terminating any previous agreements; s. 85 confers on the Court the "discretion" to make an order or declaration with regard to the wishes of the parties at issue; and, s. 86 states that the Court "may" incorporate an agreement in an order, but does not require it to do so. In this way, the Act gives the Court a supervisory jurisdiction over support orders, guardianship orders and parental orders with the result that the agreement proposed by Jane Doe and John Doe are not guaranteed to be binding.<sup>121</sup>

In *Stefaniuk v. Tomasic*<sup>122</sup> Van Melle J. considered a cohabitation agreement that sought to exclude a child support obligation. In this case, the parties began cohabiting in 1994, were married in 1999 and separated in 2004. In 1999, the parties entered into a marriage contract which provided that the husband had no obligation to support the wife's child, and that any financial support provided during the marriage was not evidence of an intention on the husband's part to stand in the place of a parent. Interestingly, Van Melle J. held that the marriage contract was an acknowledgement by the wife that no parent-child relationship existed between the husband and the child prior to 1999. As such, in determining whether the husband stood in the place of a parent, the court was required to consider only the period from 1999 to the date of separation. Ultimately Van Melle J. held that, on the facts, the husband did not stand in the place of a parent and had no support obligation to the child.

In considering who is a parent, we cannot help but wonder if there is at least some degree of "traditional family" bias at play. The underlying theme seems to favour the existence of a father or father-figure in a child's life, which can have significant – and vastly different – consequences for same-sex families, second families and single mothers.

### (iii) Parental rejection

In keeping with the trend that more child support is better than less, the long-standing rule that a child's unilateral repudiation of the parent-child relationship disentitles him or her to support, is under attack. In *Law v. Law*,<sup>123</sup> child support for a twenty-two year old undergraduate student was terminated on the basis that she had unilaterally repudiated her

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<sup>121</sup> *Supra* note 119, at paras. 23 and 38. Martin J. also dismissed the *Charter* claims advanced by Jane Doe, holding that the s. 7 right to life, liberty and security of the person was not violated because, inter alia, the *Charter* does not give parents unfettered discretion to make decisions on behalf of their children (para. 65).

<sup>122</sup> (2004), 12 R.F.L. (6th) 217 (S.C.J.).

<sup>123</sup> (1986), 2 R.F.L. (3d) 458 (Ont. Sup. Ct., H.C.J.).

relationship with her father and had “not seen fit to contact her father to keep him apprised of her progress in university and no evidence was made available to the respondent until he unilaterally ceased making maintenance payments for her benefit when she turned 21 in 1985.”<sup>124</sup>

This approach was ambiguously endorsed in *Whitton v. Whitton*,<sup>125</sup> where the Ontario Court of Appeal held that the child “[a]t age 22 she should have the maturity to deal with her father directly to help him in discharging his legal and parental duties to assist in her education... If she continues to refuse to engage in any sensible discussion with her father on the matter of her future education, the appellant's only recourse would be to pursue a parallel proceeding, already instituted, to have the quantum of her maintenance reviewed by the court.”<sup>126</sup>

In *Farden v. Farden*,<sup>127</sup> a child’s unilateral termination of his or her relationship with the payor parent was included as a factor in determining whether an adult child should receive support pursuant to the *Divorce Act*. The “*Farden* factors” are routinely cited in Western jurisprudence, but are occasionally considered in Ontario as well.

In *Park v. Thompson*,<sup>128</sup> however, the parties had entered into a separation agreement that made special provisions for child support. The father’s relationship with the child, which was once excellent and very involved, became strained when she was approximately fifteen years old, and deteriorated thereafter. After trying various strategies to re-establish the relationship, the father eventually discontinued support and stated that he would begin to pay again when he and the child attended counselling sessions. The child refused. When the child turned eighteen and enrolled in university, the mother brought an application for support. The trial judge rejected the father’s argument that support was not payable because the child had withdrawn from contact with the father. Notwithstanding that the father had a new family and no relationship with the child, the trial judge ordered him to pay full Table support, his proportionate share of the child’s university fees, and significant retroactive support. The decision was reversed on appeal and sent back for a trial of the issues on the questions of retroactivity, section 7 expenses and on-going support. Unfortunately, the court did not deal with the issue of parental repudiation on appeal, and the case now actually stands for the principles of child support payable for children living away at university and the definition of

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<sup>124</sup> *Ibid.* at para. 5.

<sup>125</sup> (1989), 21 R.F.L. (3d) 261 (Ont. C.A.).

<sup>126</sup> *Ibid.* at para. 9.

<sup>127</sup> (1993), 48 R.F.L. (3d) 60 (B.C.S.C.).

<sup>128</sup> 2004 CarswellOnt 6209 (S.C.J.); rev’d (2005), 13 R.F.L. (6th) 415 (Ont. C.A.).

s. 7 expenses. In reality, this was a very sad case, as the father continued to mourn the loss of his daughter and yet was treated like a “wallet”<sup>129</sup> in a way that had severe financial consequences for his new family.

Recently, in *Caterini v. Zaccaria*,<sup>130</sup> Pazaratz J. undertook a thorough review of the cases on this topic and concluded that courts are generally adopting a more nuanced view of how parent-child relationships ebb and flow in the context of separation and divorce. In *Caterini*, the father had an estranged relationship with his eldest three children, all of whom were over the age of majority and pursuing post-secondary education. However, Pazaratz J. declined to attribute blameworthy conduct to the children sufficient to justify cutting off their support. Further, he questioned the usefulness of this factor in considering whether child support should continue for an adult child:

This case illustrates some of the inevitable difficulties which arise when an adult child's entitlement to support is tied to the quality of their relationship with the payor. Parent-child relationships are very complex, with lots of history - just like spousal relationships. We don't require that otherwise dependant spouses "be nice" or get along with payors in order to qualify for support. To the contrary, we have systematically tried to remove "fault" or "conduct" from the equation, in approaching spousal support as a purely economic model.

Spousal support usually arises at precisely the moment when parties are not getting along. Sometimes we actually order spouses to stay away from one another, through restraining orders - and yet we still order spousal support if appropriate.

On what basis do we consider the current status of the father-child relationship as potentially precluding or reducing support, in circumstances where the child is otherwise dependant and entitled?<sup>131</sup>

In coming to his conclusion, Pazaratz J. also quoted at length from a paper presented by Corbett J. at the Superior Court of Justice Judges' Conference in November 2010, which he endorsed as a useful summary of the legislation and authorities in this contentious area:

In an excellent paper on Child Support for Estranged Adult Children, presented in November 2010 at a Superior Court of Justice Judge's Conference in Toronto, Justice David L. Corbett thoroughly reviewed the legislation and

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<sup>129</sup> The appeal in *Park v. Thompson* was argued by Philip Epstein, and it was in this case that he coined the phrase, “the father as wallet.” He subsequently published an article with the same title: Philip M. Epstein and Ilana I. Zylberman, “Support for adult children in cases of estrangement: the parent as wallet.” (2006) Spec. Lect. L.S.U.C. 233.

<sup>130</sup> 2010 ONSC 6473. Specifically, see paras. 143 to 171 for a comprehensive review of the case law in this area.

<sup>131</sup> *Ibid.* at paras. 127-129.

authorities. He provided the following summary:

(a) Contrary to certain recent literature, there has not been "growing judicial recognition" that the quality of the relationship should have a bearing on child support.

(b) Courts have been willing to impose a few specific responsibilities on adult support recipients, and may properly do so, but not conditions that include maintaining a social relationship with a parent.

(c) The statutory basis for taking the quality of the child-parent relationship into account is dubious.

(d) There is appellate authority permitting the court to place some weight on the parent-child relationship, but that authority is more ambiguous than trial and motions court decisions suggest.

(e) On the current state of the law, there seems to be a discretion to take this factor into account, though few courts do, and fewer have found it a significant factor in a support decision.

(f) The better view is that if conduct is ever relevant, it should only be in truly egregious cases of misconduct by a child against a parent.<sup>132</sup>

We agree that all family relationships are complex, and that assigning blame between a parent and child for a breakdown in the parent-child relationship will usually be unproductive and unfair. Of course, there will also be cases where fairness dictates that an estranged parent should be relieved of his or her support obligation, at least in part.<sup>133</sup> As we have seen with other issues in the area of support, there is no answer book, there are no easy labels available, there are no "bad" and "good" people. Such is the human condition. An individualized, nuanced approach that recognizes the reality of each family's unique situation still promises the best outcome.

## **V. Conclusion**

The pendulum metaphor illuminates the court's inconsistent approach to spousal support awards and changing views with respect to who should pay child support and who should receive it.

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<sup>132</sup> *Ibid.* at para. 112, citing Justice David Corbett, "Child Support for Estranged Adult Children" (November 2010) presented to the Superior Court of Justice Judge's Conference in Toronto, Ontario.

<sup>133</sup> See *Colford v. Colford*, 2005 CarswellOnt 1527 (S.C.J.) where Goodman J. ordered the father to contribute to the child's university expenses, but declined to order monthly support. Her decision was based in part on the mother's rejection of the father as a meaningful parent in the son's life, which in turn led to the son's complete rejection of his father.

With respect to the child support jurisprudence, the court's desire to strike a balance between protecting children on the one hand, and respecting parental choices on the other, has been challenged by advancing technologies, new conceptions of family, and the demands on young people to achieve higher levels of education. However, we suggest that child support jurisprudence is, in many ways, on a more progressive track than is spousal support. While the child support case law continues to be informed by biases rooted in misconceptions about gender, sexual orientation and family status, it is nonetheless ideologically driven by the requirement that any decision must be in the best interests of the child.

Spousal support jurisprudence benefits from no such mandate. As a result, we have seen widely divergent precedents over the last twenty-five years with respect to entitlement to, quantum, and duration of spousal support awards. Arguably, the pendulum continues to swing because we have not, as a society, come to terms with the "why" of spousal support. While the objectives outlined in the *Divorce Act* and the *FLA* are instructive with respect to what a spousal support award should *do*, neither helps us understand our society's overarching philosophy about the meaning of marriage and the meaning of divorce. In fairness to the courts, then, how can we expect any certainty in spousal support awards when we have not agreed on why, exactly, we make them? The words of Justice Abella written thirty years ago apply almost equally now as they did then:

To try to find a comprehensive philosophy in the avalanche of jurisprudence which is triggered by the Divorce Act (1970) and the various provincial statutes is to recognize that the law in its present state is a Rubik's cube for which no one has yet written the Solution Book. ... The problem really lies in an inability to agree on what the purpose of economic adjustments on divorce or separation should be. And this not surprisingly derives from an inability to agree on what the purpose of marriage should be.<sup>134</sup>

The recognition that spousal support jurisprudence is subject to the swinging ideological views of lower court judges is depressing. It also makes it especially difficult to advise clients about their rights and obligations in a responsible and settlement-focussed manner.

In these uncertain times, counsel are well-served by returning to the Supreme Court of Canada's decisions in *Moge* and *Bracklow*. Read together, these decisions provide the ideological foundation of consistent, equality-promoting spousal support jurisprudence. *Moge* requires generous, indefinite awards whenever there are compensatory factors, with or

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<sup>134</sup> R. Abella, "Economic Adjustment on Marriage Breakdown: Support" (1981), 4 Fam.L. Rev 1 at 1.

without children, in "traditional" or "modern" marriages. *Bracklow* recognizes that the shorter-term obligation of transitional, non-compensatory support may be extended by a recipient's need. Both cases acknowledge the uncertainty in assessing the full extent of the recipient's disadvantage and economic dislocation. Time-limited awards following long-term marriages, or where there are compensatory factors, do not accord with Supreme Court of Canada authority and do not satisfy the *Charter's* requirement of remedying women's systemic inequality.

Spousal support claims properly require highly individualized determination. Every family is unique and all of the circumstances must be considered in fashioning an appropriate remedy. Support awards must be sufficiently high and payments sufficiently long-lasting to appropriately compensate for the serious economic disadvantages suffered by women as a result of marriage and its breakdown, where there are children of the marriage, and whenever a spouse has made financial sacrifices that have advantaged the other spouse. The SSAGs attempt to offer more certainty and consistency, but we must be alive to their limitations, and we must not be lulled into dependency on formulaic calculations or give in so easily in the push to termination and lump sums. Ultimately, the best results will be achieved, even in a regime of SSAGs, by developing consistent, fair, equality-promoting spousal support jurisprudence in line with the Supreme Court of Canada's leading cases.

*“Yet even pendulums,” the good-natured young soldier observed, as he carefully released his hand from Bruno's grasp, “are not a joy for ever.”*

*Sylvie and Bruno, Lewis Carroll*