

HOW HAVE ONTARIO COURTS INTERPRETED *FISHER*?

So far, 35 reported Ontario cases mentioning *Fisher* - Here are some highlights:

- Results on Quantum and Duration

- *Gammon v. Gammon* [2008] O.J. No. 4252 (SCJ) - Nolan J. - a non-compensatory case - marriage of 15 years - the definition of the basis for support as non-compensatory resulted in a finding towards the lower end of the range, with a cut-off date
- *Weingarten v. Weingarten* [2008] O.J. No. 3383 (SCJ) - a 24 year marriage - but some unusual facts militating against an indefinite award - all four children lived with father post-separation - this was a variation proceeding, changing a previous court order requiring the husband to pay spousal support of \$5,500/mo., in addition to funding all of the children's activities - mother had moved to England with a new partner, and was supporting new partner and partner's child - spousal support terminated May 1, 2008 - mother ordered to pay child support for remaining minor child in father's care - father's income was vastly greater than mother's - court did not advert to the SSAG's (but it was a variation application, and SSAG's may therefore have had limited application), and did not advert to the length of the marriage as a factor - mother was saddled with poor choices made after her move to the UK - move was an aggravating factor, because her spousal support was not taxable there, and she moved immediately after minutes were signed, suggesting she may have planned her move knowing about the tax-free status of the support
- *Spikula v. Spikula* [2008] O.J. No. 3931 (SCJ) - support at the lower end of the range, taking into account all of the circumstances, including father's increased costs of exercising access - but note at para. 113, a statement that child and spousal support would be subject to variation upon the receipt of tax info for both parties - child support, yes - but spousal? *Fisher* also said that it may not always be appropriate to take into account post-separation increases in income
- *Vanesse v. Seguin* [2008] O.J. 2832 (SCJ) - Blishen, J. - a compensatory claim, but support not ordered on an indefinite basis - support terminated after 10 years - parties not married, but in CL relationship for 12 years - court notes that *Fisher* did not think 19 years merited indefinite award - and this affected thinking on terminating support - but in instant case, there were 2 children - an interesting application of the termination of support to a compensatory case
- *Lewis v. Lewis* [2008] O.J. No. 2227 (SCJ) - para. 11 Gray, J. - took from *Fisher* that the marital standard of living is not the determinant of quantum in a 15 year marriage with two children. This is arguably a misapplication of *Fisher*. If the claim is compensatory, or if the marriage is over 20 years, then the marital standard of living may be a more appropriate standard:

“The respondent submits that an appropriate amount for spousal support must, as required by s. 15.2 of the Divorce Act, take into account "the condition, means, needs and other circumstances of each spouse". It is submitted that nowhere in this statutory formulation is there any notion that each party is entitled to 50% of the combined income stream of both parties. At least on an interim basis, the Court must focus on the needs of the payee. There is nothing in the statute, it is submitted, to suggest that it is Parliament's intention that the payee be entitled to the same standard of living as he or she had during the marriage. Indeed, the Court of Appeal, in the recent *Fisher* decision, has suggested the contrary: see *Fisher v. Fisher*”

- *Ali v. Williams* [2008] O.J. No. 1207 (SCJ) - 15 year marriage with children - but only 5 years of spousal support (2003 - 2008) ordered at a fairly low level - interesting because the *Fisher* case is cited, but no distinction is made between marriages with children, and marriages without, although the court adverts to the length of marriage as the key factor in determining duration - no mention of the SSAG's
- *Scott v. Scott* [2008] O.J. No. 865 (SCJ) - 20 year marriage with four children - spousal support cut off at 7 years - wife had lost her job at a bank - husband had routinely under-reported his income, and was making significantly more than wife - This case is extremely difficult to reconcile with any of the SCC decisions regarding spousal support, the SSAG's or *Fisher*- the problems in the decision seem to stem from a failure to consider what the basis is for spousal support

CONCLUSIONS ON QUANTUM AND DURATION:

- There are some inconsistent applications of *Fisher* at the trial level. Some judges have applied *Fisher* in situations where there is clearly a compensatory claim (i.e., there are children), and arguably *Fisher* does not apply;
- There remains great confusion about what constitutes self-sufficiency; when a court should apply the marital standard of living in determining quantum/ and when a more objective standard should be applied to determining quantum. *Fisher* applied a more objective standard in a non-compensatory case. Cases in which compensation was the basis for support should not necessarily be decided with *Fisher* in mind on this point;
- In cases in which there are children, trial judges may want to be more specific about the basis for the original support order. It is possible to have a largely need-based claim, even if there are children, but it is less likely. If *Fisher* is going to be applied to time-limit support in a compensatory case, there need to be some clear findings of fact about the basis for the support order, and why the presence of children has not resulted in a compensatory claim.

Results on Use of SSAG's

- *Cunningham v. Montgomery* [2009] O.J. No. 1310 (SCJ) - SSAG's endorsed as per Justice Lang's decision, as a cross-check and as a foundation for appellate review;
- *Morey v. Morey* [2009] O.J. No. 1160 (SCJ), in which court saw itself as "bound" by *Fisher* to apply SSAG's (see paragraph 26); see also *Jackson v. Boyle-Jackson* [2009] O.J. No. 716 (SCJ) at paragraph 15); *McFadden v. Sprague* [2009] O.J. No. 258 (at paragraph 9)
- *Beardsall v. Dubois* [2009] O.J. No. 416 (SCJ) - the compensatory exception for short marriages needs to be considered carefully
- SSAG's used on variation applications - *Mann v. Mann* [2008] O.J. No. 2942 (OCJ) - variation application, and pursuant to *Fisher*, SSAG's used as a "starting point" for discussion on a variation application
- *Grinyer v. Grinyer* [2008] O.J. No. 290 (SCJ) - court accepted SSAG's - and fashioned an order that took into account restructuring, front end loading, and so on - the court said it would create a spousal support regime, and then "test it against the SSAG's" - but the case is controversial. This was a long-term marriage (22 years) with children, and a clear compensatory basis for the claim. The court still ordered a cut-off date, even though the SSAG's would have suggested an indefinite award - so it is not clear how the award was actually tested against the SSAG's
- *Langdon v. Langdon* [2008] O.J. No. 418 (SCJ) - confirms that support should be ordered back to the date the claim was commenced at the very least

CONCLUSION ON THE USE OF THE SSAG'S

- Some trial judges have seen themselves as bound by the SSAG's, which may not be exactly what the OCA said - rather the OCA in *Fisher* said that if the SSAG's are raised and argued by counsel, and the court deviates from the SSAG's significantly, the court should explain the basis for the deviation;
- The use of SSAG's on variation applications is interesting, but tricky - some judges are doing it, but it is a challenging area, even according to the writers of the SSAG's
- Because the SSAG's make the determination of approximately how much support should be paid more straightforward, many judges are, at trial, awarding an amount back to the date of the application at the least
- There appears to be some confusion about what the SSAG's are - Professors Thompson and Rogerson have made it clear that they are not just the formulas - so, as in *Grinyer*, it may be a mistake to simply apply the formulas and see if they match what the court would like to do - it remains important to assess the case to see whether it is compensatory or non-compensatory; to assess whether SSAG's

would suggest an indefinite award; and to consider any exceptions to the SSAG's
- it is not enough to plug the numbers into the formula

Results on Review Orders

- *Korkola v. Korkola* [2009] O.J. No. 343 (SCJ) is an odd one - the wife had not yet graduated as a nurse, and yet the court imputed future income to her of \$50,000 upon graduation (anticipated to be 2013) - this might have been a case in which a review order was appropriate - but we always need to keep in mind that final orders are subject to variation, even if they terminate support - see *Fisher*:

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

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

- So termination orders are never forever anyway - but with a termination order, the recipient bears the burden of establishing a material change
- *Benson v. Benson* [2008] O.J. 578 (SCJ) - at para. 76 - husband's income at retirement not known - not known what wife would be earning at that point - one might expect a review - but instead, MacKinnon, J. held that the husband's retirement is a material change, and confirmed that a variation was appropriate - and at para. 78 the court provides for a termination date “subject to variation” - which confirms that judicially ordered termination dates are subject to variation on material change - and formulating the order in this way is a useful guide to the reviewing judge as to what a material change will be in the case

CONCLUSIONS ON REVIEW ORDERS

- trial jj have taken to heart that review orders are to be used sparingly - and because *Fisher* makes it clear that a final termination order may not be a final answer, there is less risk in making a termination order
- trial jj are clear that a termination of spousal support may not be final, and is subject to variation upon material change, which can include the failure of the

recipient to obtain anticipated job or income;

- Some judges have determined what a material change will be in advance in their original judgments - which is of great assistance to the next judge hearing the matter - and have been careful to talk about who bears the burden of bringing the variation application

Results on the Basis for Support

- *Holmes v. Holmes* [2009] O.J. No. 94 (SCJ) - Justice Nolan noted that *Fisher* was an important case for trial judges because it drew a clear distinction between compensatory and non-compensatory cases - which determines the quantum and duration of support - paras. 47 and 48
- *Hayes v. Hanrieder* [2009] O.J. No. 421 (SCJ family) - common law relationship of somewhere between 13 and 15 years - need-based support ordered to allow wife to adjust to new lower standard of living
- The notion of self-sufficiency remains difficult - but much flows out of a determination of the basis for support - compensatory claims are likely to result in the notion that the self-sufficiency is subjectively gauged - based on the marital standard of living - non-compensatory claims are likely to be objectively based - see *Leonard v. Leonard* [2008] O.J. No. 3802 - a compensatory claim - in which court leaned on *Fisher* to say that self-sufficiency is more likely in shorter term marriages without children

CONCLUSIONS ON BASIS FOR SUPPORT

- Some trial judges are very clear about the basis for support, which makes their judgments easier to analyze and categorize - this makes it easier for subsequent variation judges to get a handle on how to move forward with the next phase of the case;
- It remains very important to determine the basis for spousal support. The failure to do so can result in anomalous decisions that do not correctly apply either the SSAG's or *Fisher* - counsel need to ensure that they make the arguments at trial as to what the basis for support is, so the court has facts to work with in coming to a decision.