

Lump Sum Spousal Support: Refining A Blunt Instrument

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I. Introduction

A decade ago, commentators characterized lump sum spousal support awards as “an uncertain subset of an uncertain area” of law.¹ Today, court ordered lump sum spousal support awards remain unpredictable. Few courts make lump sum spousal support awards; of those that do, few provide detailed analyses of how those awards are calculated or advance principles of general application. Comparisons between cases reveal a variety of calculation methods and results.

A review of recent jurisprudence highlights issues and trends for determining whether lump sum spousal support is suitable in a given case and factors that should be considered when calculating an appropriate award.

II. Legislation

Section 15.2(1) of the *Divorce Act*² provides:

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

Various provinces have similarly worded statutory provisions that apply to married and common law spouses.³

The *Divorce Act* draws no distinction between lump sum and periodic spousal support, nor does its legislative history reveal any intention on the part of Parliament to impose any special restrictions on the use of lump sum spousal support.⁴

¹ Trudi L. Brown, “Spousal Support” (BC CLE Family Law Conference – 2001, Vancouver, BC July 2001) at p. 1.1.01.

² R.S.C. 1985, c. 3 (2nd Supp.) (“*Divorce Act*”).

³ See e.g. *Family Relations Act*, R.S.B.C. 1996, c. 128, s. 93(5); *Family Law Act*, S.A. 2003, c. F-4.5, s. 66(3); *Family Maintenance Act*, C.C.S.M. c. F20, s. 10(1); *Family Law Act*, R.S.O. 1990, c. F.3, s. 34(1); *Maintenance and Custody Act*, R.S.N.S. 1989, c. 160, s. 3(1).

⁴ *Davis v. Crawford*, 2011 ONCA 294 (CanLII) (“*Davis*”) at paras. 54-58.

III. Lump Sum Spousal Support – A Court’s Other Option

Despite the plain wording of the governing legislation, courts across Canada have historically treated periodic spousal support awards as the default position and lump sum spousal support as the exception to the rule.⁵

The stated reasons for this preference include:

1. the “difficulty of disentangling the economic lives of divorcing spouses”;⁶
2. a desire to ensure that support orders are directed at providing recipients with proper maintenance, rather than effecting a property division;⁷ and
3. a concern that positive or negative life changes could potentially occur for one or both of the spouses that would warrant a future variation of support.⁸

In *Davis v. Crawford*,⁹ the Ontario Court of Appeal, sitting as a five-member panel, recently reconsidered the principles underlying lump sum spousal support and discussed in detail the factors that a court should consider when determining whether to order lump sum spousal support.

The issue in that case was whether the lower court had erred in awarding a 66-year old common-law spouse of 23 years \$135,000 in lump sum spousal support pursuant to Ontario’s *Family Law Act*. In deciding that the lump sum award was appropriate in the circumstances, the lower court was heavily influenced by the fact that the dependent spouse was under financial hardship and deprived of any claim for property division because the parties were unmarried. On appeal, the 64-year old payor argued that the lower court’s decision was inconsistent with the Ontario Court of Appeal decision in *Mannarino*.¹⁰ In that decision, the Ontario Court of Appeal held that “lump sum maintenance should be awarded only in very unusual circumstances, where there is a real risk that periodic payments would not be made.”¹¹

The payor husband also argued that the award was inconsistent with other widely accepted principles in the jurisprudence. Specifically, he argued that lump sum spousal support should not be awarded to effect a redistribution of property under the guise of support or where it would deprive the payor of the ability to apply for a variation.

⁵ See e.g. *Rockall v. Rockall*, 2010 ABCA 278 (CanLII) (“*Rockall*”) at paras. 20 & 23; *Hauff v. Hauff* (1994), 95 Man. R. (2d) 83, 5 R.F.L. (4th) 419 (Man. C.A.) (CanLII) at p. 5; *Pettigrew v. Pettigrew*, 2006 NSCA 98 (CanLII) at para. 29; *Elliott v. Elliott* (1993), 48 R.F.L. (3d) 237 (Ont. C.A.); *Mannarino v. Mannarino* (1992), 43 R.F.L. (3d) 309, [1992] O.J. No. 2730 (QL) (“*Mannarino*”) (Ont. C.A.).

⁶ See e.g. *Rockall*, supra note 5 at para. 23.

⁷ See e.g. *Hrenyk v. Berden*, 2011 SKQB 305 (CanLII) at para. 149; *Mannarino*, supra note 5 at para. 2.

⁸ See e.g. *Litzenberger v. Litzenberger*, 2012 SKQB 122 (CanLII) at paras. 78; *Mannarino*, supra note 5 at para. 2.

⁹ *Davis*, supra note 4.

¹⁰ *Mannarino*, supra note 5.

¹¹ *Ibid.* at para. 2.

The Ontario Court of Appeal made the following observations with respect to the balancing of considerations a trial court must undertake in deciding whether to structure a spousal support award as a lump sum:

Most importantly, a court considering an award of lump sum spousal support must weigh the perceived advantages of making a lump sum award in the particular case against any presenting disadvantages of making such an order.

The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example: short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.

Similarly, the disadvantages of such an award can include: the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.

In the end, it is for the presiding judge to consider the factors relevant to making a spousal support award on the facts of the particular case and to exercise his or her discretion in determining whether a lump sum award is appropriate and the appropriate quantum of such an award.¹²

The Ontario Court of Appeal endorsed the view that spousal support should not be made for the purpose of redistributing property; however the court recognized that a lump sum award can be made to relieve the financial hardship of a dependent spouse. The court ultimately concluded that all lump sum awards have the effect of transferring assets from one spouse to another, but the purpose needs to be distinguished from the effect.¹³

In dismissing the husband's appeal, the Ontario Court of Appeal rejected the view that lump sum spousal support should only be awarded where there is a real risk that a payor will not make periodic payments or limited to other very unusual circumstances. The court held that to the extent *Mannarino* has been interpreted that way, the interpretation is incorrect. The court nonetheless recognized that lump sum spousal support will be rarer than periodic support awards for practical reasons, such as:

1. many payors have an inability to make a lump sum payment;
2. married dependent spouses often have their need for transitional capital addressed by equalization of family property;
3. many cases involve situations where neither party's circumstances favour a lump sum support award; and

¹² *Davis*, *supra* note 4 at paras. 66-69.

¹³ *Ibid.* at paras. 60-62.

4. the potential for changed circumstances will outweigh factors favouring a lump sum award for many spouses.¹⁴

Both the trial judge and the Court of Appeal placed considerable reliance on the findings of credibility and lack of disclosure made against the payor husband in concluding that a lump sum award was appropriate in the circumstances.

At least one commentator has observed that *Davis* does not represent a drastic departure from past jurisprudence because *Mannarino* has always been restrictively interpreted.¹⁵ However, *Davis* clearly represents a nuanced and positive framing of lump sum spousal support. Its thorough analysis may ultimately promote more widespread consideration and use of this remedy by courts.

Outside Ontario, at least two British Columbia Supreme Court judges have looked to *Davis* for guidance on the issue of when to award lump sum spousal support.¹⁶

IV. Reasons for Awarding Lump Sum Spousal Support

Courts most frequently award lump sum spousal support in situations where both spouses agree that it is the appropriate method of structuring the award. However, consensus among the parties is not a necessary prerequisite. In fact, a court can exercise its discretion to make a lump sum award even if such an award is not sought by either party.

In *Lace v. Gray*,¹⁷ the Nova Scotia Court of Appeal, upheld an award of both lump sum and periodic support made pursuant to s. 3(1) of Nova Scotia's *Maintenance and Custody Act*, though neither party had made submissions about the appropriateness of a lump sum award before the trial judge. The Nova Scotia Court of Appeal held that the trial judge had not erred in exercising her discretion to award lump sum support because of the financial dependency of the recipient spouse; she had considerable debt accumulated during the relationship. The recipient spouse had applied for "spousal support" without specifying whether she was seeking lump sum or periodic support. The Nova Scotia Court of Appeal noted that it would have been preferable for the trial judge to seek submissions from counsel on this point.¹⁸

The Ontario Court of Appeal in *Davis* discussed the responsibility of counsel to assist the court in determining how to structure a spousal support award and the need for courts to provide clear explanations in their reasons for judgment:

Irrespective of whether the proposed support is periodic or lump sum, it is incumbent upon counsel to provide the judge deciding the matter with submissions concerning the basis for awarding and the method of calculating the proposed support, together with a range of possible outcomes. Further, it is highly desirable that a judge making a lump

¹⁴ *Ibid.* at paras. 70-74.

¹⁵ See Philip M. Epstein, QC, "The Year in Review (2010)" (CLE BC Family Law Conference – 2011, Vancouver, BC July 2011) at p. 3.1.48.

¹⁶ See *Robinson v. Robinson*, 2011 BCSC 1489 (CanLII) ("*Robinson*") at para. 96 (currently under appeal); *Brandl v. Rolston*, 2012 BSCS 902 (CanLII) at para. 84.

¹⁷ 2009 NSCA 26 (CanLII).

¹⁸ *Ibid.* at para. 19.

sum award provide a clear explanation of both the basis for exercising the discretion to award lump sum support and the rationale for arriving at a particular figure. Clear presentations by counsel and explanations by trial judges will make such an award more transparent and enhance the appearance of justice. Over time, this approach will undoubtedly foster greater consistency and predictability in the result.¹⁹

The importance of clear reasons is illustrated by the Alberta Court of Appeal decision *Rockall v. Rockall*.²⁰ In *Rockall*, the Alberta Court of Appeal reversed a decision to award lump sum spousal support to a terminally ill spouse and converted the value of the lump sum award to periodic payments effectively because the trial judge's failure to give reasons for making the lump sum award was an error reviewable on appeal.²¹

While there is no exhaustive list of reasons why a court will exercise its discretion to award lump sum spousal support, such reasons include:

1. the payor spouse has a history of failing to pay either periodic child support or spousal support under an earlier order or agreement;
2. there is some indication that the payor's responsibility towards the recipient is dwindling over time and that he views the recipient's well-being as a lower priority than other financial or personal commitments;
3. the payor spouse has a history of deceitful conduct;
4. the payor spouse has an inability to pay periodic payments based on an income stream, but has available assets to make a lump sum payment;
5. the payor has the ability to make a lump sum payment without undermining his or her future self-sufficiency;
6. the payor is of advanced age;
7. the payor's livelihood seems precarious;
8. there is a risk that the payor will leave the jurisdiction;
9. the payor resides in a jurisdiction outside of Canada where periodic payments are not tax deductible;
10. the recipient needs lump sum support to compensate him or her for lost career opportunities;
11. the recipient has an immediate need for a lump sum to retrain or purchase a home;
12. the recipient needs to discharge a debt;
13. the recipient is under financial hardship that is not addressed by property division;
14. the recipient needs a nest-egg against the contingencies of life;

¹⁹ *Davis*, *supra* note 4 at para. 75.

²⁰ *Rockall*, *supra* note 5.

²¹ *Ibid.* at paras. 26-34.

15. the recipient has established a new relationship;
16. the lump sum will enable the recipient to establish and maximize an independent income stream;
17. the parties' relationship was short in duration;
18. the parties' relationship is marked by high levels of ill will, conflict or poor communication, particularly with respect to financial issues;
19. the imposition of an obligation to pay periodic sums would create further conflict between the parties;
20. termination of personal contact between the parties is desirable;
21. the lump sum is for a retroactive award; and
22. the support award is based on compensation rather than on need, so future changes in circumstance are less likely to result in a variation and the uncertainty element is less of a concern.²²

V. Determining the Award

Once a court decides that it is appropriate to award lump sum spousal support, the next challenge is determining the appropriate quantum.

The widespread use of the *Spousal Support Advisory Guidelines*²³ has brought more predictability and uniformity to periodic spousal support awards for payors and recipients who do not fall within the exceptions outlined in the *SSAG*. The same cannot be said for lump sum spousal support awards. In reviewing the case law, it is often difficult to understand how courts arrive at specific lump sum awards because explanations are frequently not provided.

The failure of litigants to provide courts with sufficient evidence and detailed submissions on quantum can result in awards that appear arbitrary for their lack of explanation.²⁴

In *Davis*, the Ontario Court of Appeal observed that as a means of promoting consistency and predictability, counsel and courts should consider whether the amount awarded is consistent with the *SSAG*.²⁵ Where the award departs from the quantum of support prescribed by the *SSAG*,

²² *Carter v. Carter* (1978), 3 R.F.L. (2d) 355 (Nfld. T.D.) at para. 37; *Beck v. Beckett*, 2011 ONCA 559 (CanLII) at para. 12; *Rockall*, supra note 5 at para. 24; *Robinson*, supra note 16 at paras. 97-105; *Davis*, supra note 4 at paras. 62, 63 & 67; *Stace-Smith v. Lecompte*, 2011 BCCA 129 (CanLII) ("*Stace-Smith*") at para. 31; *S.F. v. G.F.*, 2009 BCSC 1760 (CanLII) at para. 41; *Vermeulen v Vermeulen*, 1999 CanLII 1543 (N.S.C.A.) at para. 13; *Beese v. Beese*, 2008 BCCA 396 (CanLII) ("*Beese*") at para. 64; *English v. English*, 2011 BCSC 90 (CanLII) ("*English*") at para. 50-52.

²³ Professor Carol Rogerson & Professor Rollie Thompson, *Spousal Support Advisory Guidelines* (Ottawa: Department of Justice, 2008).

²⁴ See e.g. *Stace-Smith*, supra note 22 at paras. 32-33.

²⁵ *Davis*, supra note 4 at para. 76.

courts should provide some explanation as to why the SSAG do not provide an appropriate result.²⁶

Some courts rely on computer generated models to calculate lump sum spousal support awards.²⁷ Other courts have shown reluctance to base lump sum awards on computer generated models, preferring to develop their own models based either on extrapolations from monthly SSAG figures or on their own sense of fairness.²⁸ The stated reasons for this include concerns that the discount rates or other assumptions built into the software lead to inappropriate results in the circumstances.²⁹

VI. Theoretical Underpinnings of Award Determination

One view of lump sum spousal support is that it is merely a substitute for periodic support. From this perspective, the purpose of a lump sum award is to provide the support recipient with the same benefit that he or she would otherwise receive if the court made an award on a periodic basis and the payor fulfilled those obligations. In order to achieve this result, counsel and courts need to consider how lump sum spousal support differs from periodic spousal support and make adjustments so that the value to the recipient and the cost to the payor mirror as closely as possible the value of a periodic award. Factors to address include:

1. tax consequences;
2. present value discounting; and
3. future contingencies such as mortality, job loss, catastrophic life events, retirement, the termination of child support and the future financial prospects of the recipient spouse.

An alternative view is that lump sum spousal support is a unique bargain that allocates risk differently than periodic payments. From this perspective, the above noted factors may still be considered, but in a less formulaic fashion.

Where the amount of periodic support would otherwise be paid over a relatively short period, counsel and courts can be more confident that the lump sum award is merely a substitute for periodic spousal support. The longer the period of entitlement, the less reliable the substitute model becomes due to the potential for unforeseen changes.

Determining an appropriate award is not an exact science and the challenges of striking the right balance between various competing considerations should not be underestimated. Conversely, the challenges presented by the exercise should not eliminate its consideration.

²⁶ *Ibid.*; see e.g. *Smith v. Smith*, 2006 BCSC 1655 (CanLII) at paras. 37-40; see e.g. *Foster v. Foster*, 2007 BCCA 83 (CanLII) (“*Foster*”) at paras. 63-68.

²⁷ See e.g. *J.T.D. v. J.P.D.*, 2012 BCSC 343 at paras. 222 & 230; *English*, *supra* note 22 at paras. 54-55.

²⁸ See e.g. *Robinson*, *supra* note 16 at para. 128; *Hartshorne v. Hartshorne*, 2009 BCSC 698 (CanLII) (“*Hartshorne*”) at paras. 130-135 (rev’d in part on other issues 2010 BCCA 327).

²⁹ See e.g. *Robinson*, *supra* note 16 at para. 121 & 128; *Hartshorne*, *supra* note 28 at paras. 130-135; and *Luehr v. Luehr*, 2011 BCSC 359 (CanLII) (“*Luehr*”) at paras. 29-30.

VII. Tax Adjustments

Lump sum and periodic spousal support carry different tax consequences for Canadian taxpayers. Under the *Income Tax Act*, a payor spouse who pays periodic support pursuant to a written agreement or order is permitted to claim all of his spousal support payments as a deduction to his taxable income on his Canadian income tax return. Conversely, a recipient spouse must declare all of the spousal support received as taxable income on his or her Canadian income tax return. In contrast, lump sum payments are not tax deductible to the payor or taxable in the hands of the recipient.

Counsel should not assume that courts will automatically address the different tax treatment of lump sum and periodic awards. Many courts, including the British Columbia Court of Appeal, have simply multiplied the amount of monthly support prescribed by SSAG (or otherwise determined by the court) by the number of months that periodic support would be paid to arrive at a lump sum figure.³⁰ When this occurs, the recipient receives more and the payor pays more than would otherwise be achieved by periodic payments; however, the cases in question have tended to be ones that would have resulted in modest periodic awards of short duration.

There is generally no reason given for this approach, however, in some circumstances, courts deliberately opt not to adjust for tax consequences.³¹ For example in *C.C. v. J.M.*,³² Herauf J. of the Saskatchewan Queen's Bench opted not to adjust for tax consequences to the payor because the lump sum award was being ordered due to the payor's history of non-compliance with periodic payments. The court concluded that since the lump sum payment was made necessary by the payor's conduct, he should bear the burden of the tax on the payment.³³ It is difficult to understand why a lump sum award should not be discounted for tax for this reason alone. If the lump sum is ordered solely for security, that should not affect its quantum.

Adjusting for tax consequences is complicated by the fact that the tax effect of a lump sum award is generally different for the payor and the recipient, depending upon their respective marginal tax rates. Consequently, courts and counsel typically need to strike a balance between the tax effects to the payor and the recipient.

Balancing the tax effects does not necessarily mean that the court will split the effects evenly. For example, in *Patton-Casse v. Casse*,³⁴ the payor and the recipient each argued that the court should calculate the award on their respective marginal rates. The court endorsed the view that where the marginal tax rates of the parties differ, the court should take a balanced approach, but decided that the midpoint figure from the DivorceMate calculation was inappropriate in that particular case because the award was retroactive and the lack of pre-judgment interest on the arrears favoured a tax adjustment that was closer to the effects experienced by the recipient spouse.³⁵

³⁰ See e.g. *Beese*, *supra* note 22, *Stace-Smith*, *supra* note 22, *Foster*, *supra* note 26.

³¹ See e.g. *Kerman v. Kerman*, 2008 BCSC 852; *C.C. v. J.M.*, 2010 SKQB 79 (CanLII) ("*C.C.*") at paras. LIII-LV.

³² *C.C.*, *supra* note 31.

³³ *Ibid.* at para. LIV.

³⁴ 2011 ONSC 6182 (CanLII).

³⁵ *Ibid.* at paras. 14-15.

In every case, counsel should understand the magnitude of the tax effect of a lump sum award to both the payor and the recipient, lead evidence on this point and make submissions to the court about how to adjust for the tax effects of a lump sum payment. Failing to do so can be a costly mistake. For example, in *Fuller v. Matthews*,³⁶ the payor husband applied to re-open the case because the court had failed to deduct tax from a lump sum award. The court refused to re-open the case because it had been open to the husband to tender evidence and make submissions on the tax consequences of a lump sum award at trial.³⁷

VIII. Discounting

In addition to adjusting for tax consequences, some courts apply discounting to lump sum awards to account for present value discounting and/or future contingencies. It is important to remember that these types of discounting should only be applied to prospective awards. Retroactive awards do not involve the same pre-payment advantages to the recipient, nor are they fraught with the uncertainty of prospective awards.

When a recipient spouse receives a lump sum award for future support, he or she receives the added benefit of being able to invest and earn income on the lump sum and the payor loses the opportunity to do the same. In order to adjust for this, it may be appropriate to apply a present value discount rate to the lump sum. An appropriate present value discount rate should correspond to the interest that the recipient could reasonably expect to receive. The rate can also be inflation adjusted so that the real value of the award to the recipient and the real cost to the payor remain constant over time.

When considering what present value discount rate to apply, counsel must consider the conservative nature and purpose of a lump sum spousal support award. It is unreasonable to expect that a recipient spouse would invest lump sum spousal support in high risk, high yield investments. Applying too high of a present value discount rate unfairly erodes the benefit to a recipient spouse.

It is also useful to consider how lump sum payments are dealt with in other areas of law, such as personal injury litigation. For example, in British Columbia, s. 56 of the *Law and Equity Act*³⁸ authorizes the Chief Justice of the British Columbia Supreme Court to set the discount rate for future damages. The purpose of these statutory rates is to eliminate the need for expert evidence in every case.³⁹ Pursuant to the *Law and Equity Regulation*,⁴⁰ which was adopted pursuant to s. 56 of the *Law and Equity Act*, the Chief Justice fixes two discount rates – one for future earnings (currently 2.5%) and one for all of the future costs (currently 3.5%).⁴¹

In *Wilson v. Wilson*,⁴² the British Columbia Court of Appeal ordered a lump sum spousal support award equal to 60 consecutive monthly payments at the discount rate used for the calculation of

³⁶ 2007 BCSC 1099 (CanLII).

³⁷ *Ibid.* at para. 17.

³⁸ R.S.B.C. 1996, c. 253 (“*Law and Equity Act*”).

³⁹ *Townsend v. Kroppmanns*, 2004 SCC 10, [2004] 1 SCR 315 (CanLII) at para. 5.

⁴⁰ B.C. Reg. 352/81 (“*Law and Equity Regulation*”).

⁴¹ *Ibid.* at s. 1; see also British Columbia Supreme Court PD-7, Practice Direction: Discount Rate pursuant to the *Law and Equity Act*.

⁴² (1997), 27 R.F.L. (4th) 131 (B.C.C.A.) (CanLII).

future loss in personal injury cases.⁴³ Similarly, in *Luehr v. Luehr*, Barrow J. of the British Columbia Supreme Court modified the award suggested by DivorceMate calculations by applying a 2.5% discount rate to comply with the *Law and Equity Regulation*, rather than the 1.5% discount rate generated by the software.⁴⁴

Courts may also discount for future contingencies to address the fact that the payor will be unable to apply to vary the lump sum award in the future, even if his financial situation drastically deteriorates due to health problems, job loss or other factors or the recipient's situation improves. A review of the case law on negative contingency discounting provides little guidance on how courts arrive at specific discount rates.

Several lower court decisions in Ontario have applied a formulaic method to discounting.

In *Sharpe v. Sharpe*,⁴⁵ Campbell J. of the Ontario Supreme Court determined that the recipient spouse should receive eight years of periodic support at \$15,000 per year for a total of \$120,000 based on an imputed income of approximately \$55,000 to \$60,000 to the payor. From this figure, the court deducted 30% for tax, 6% for present value discounting and 50% for negative contingencies. The court discounted sharply for negative contingencies to adjust for the recipient's potential for remarriage and the possibility that the payor (whose employment had been terminated) would be unable to obtain adequate employment.

In *Durakovic v. Durakovic*,⁴⁶ Scott J. of the Ontario Superior Court of Justice ordered a lump sum award based on a monthly figure of \$3,500 per month over 28 months, but deducted 30% for tax, 3% for present value discounting and 25% for negative contingencies. The court noted that the 25% negative contingency discount rate was lower than other cases because the lump sum calculation was for only two years. This resulted in an award of \$49,907.

In *Raymond v. Raymond*,⁴⁷ Hennessy J. of the Ontario Superior Court of Justice ordered lump sum spousal support of \$268,800 based on 10 years of mid-range SSAG support of \$2,240 per month (net of taxes), less 6% for present value discounting and 50% for future contingencies. This resulted in an award of \$98,585. The court did not explain what future contingencies warranted a 50% discount rate.

In *Fountain v. Fountain*,⁴⁸ Lemon J. of the Ontario Superior Court of Justice based the award on 15 years of periodic support totaling \$90,000, less 6% for present value discounting and 25% for negative contingencies, resulting in an award of \$49,500. The stated reasons for negative contingency discounting in this case included the recipient's mortality and the possibility that the payor would be unable to pay support to the age of 65 years.

This formulaic approach has also been applied in at least one British Columbia Supreme Court decision. In *Robinson*,⁴⁹ Watchuk J. of the British Columbia Supreme Court ordered lump sum

⁴³ *Ibid.* at para. 19.

⁴⁴ *Luehr*, *supra* note 29 at para. 29.

⁴⁵ 1997 CanLII 12236 (ON SC) at paras. 49-52.

⁴⁶ [2008] O.J. No. 3537 (ON SC) (QL) at paras. 106-107.

⁴⁷ (2008), 64 R.F.L. (6th) 160, 2008 CanLII 68138 (ON SC) (CanLII) at paras. 23-27.

⁴⁸ 2009 CanLII 56741 (ON SC) at paras. 46-50.

⁴⁹ *Robinson*, *supra* note 16 at paras. 121 & 128-131.

spousal support equal to nine and one-half years of monthly support at a mid-range SSAG figure of \$6,000 per month. From this figure the court deducted 35% for taxes, 7% for present value discounting and 20% for contingencies (the payor had a history of heart attacks and stroke). This ultimately reduced the award from \$684,000 to \$330,000. In comparison, DivorceMate models suggested an award between \$380,050 and \$544,152. The difference can partially be attributed to differing present value discount rates. The court found that the present value discount rate of 1.6% applied by the DivorceMate software was too low. Arguably, the discount rate of 7% applied by the court was too high, particularly in light of British Columbia's *Law and Equity Regulation* and prevailing interest rates. The largest adjustment, however, was for contingencies. The DivorceMate software has a built in function that allows users to choose whether to adjust for a recipient's life expectancy, but does not specify other contingency discounting. It was unclear to the court what, if any, contingency discounting was built into the DivorceMate models.

IX. Actuarial Evidence

One way to address the arbitrariness of discounting is to retain an actuary or an economist to give an expert opinion. Few spousal support cases involve this sort of expert evidence. Those that do, serve as a useful reminder that the utility of such evidence to courts is largely based upon the quality of the instructions provided by counsel to the expert. If an expert is retained, counsel should take pains not to provide skewed instructions that will leave the court with the impression that the expert is a hired gun whose evidence is unreliable and unhelpful.⁵⁰

Counsel should also ensure that the expert's opinion is responsive to the questions before the court. In *Pollitt v. Pollitt*,⁵¹ Czurtin J. of the Ontario Superior Court of Justice invited the parties to tender actuarial evidence to assist the court in determining the appropriate amount of lump sum spousal support. The court instructed the parties on the non-exhaustive list of factors it needed considered:

1. the life expectancy of the recipient spouse;
2. the cessation of child support;
3. changes for the recipient spouse as she begins to receive CPP and withdraw from her RRSPs;
4. the age at which the recipient should be expected to encroach on her savings;
5. the circumstances of the payor – specifically his health and life expectancy and its impact on his earnings and whether he would need to encroach on his savings; and
6. the possibility of future variations as the payor's income and needs change.⁵²

The court recommended the appointment of a joint expert, but the parties were ultimately unable to agree and instead each relied on the actuarial evidence of their respective actuaries. The two actuaries received drastically different instructions. The court found the wife's actuarial evidence to be of limited use because her actuary did not address the variables outlined by the court. The payor husband's actuary, in contrast, had considered a multitude of scenarios based on the variables set out by the court.

⁵⁰ See e.g. *Hartshorne*, *supra* note 28 at paras. 149-150.

⁵¹ *Pollitt v. Pollitt*, 2010 ONSC 1186 (CanLII).

⁵² *Ibid.* at para. 4.

Pollitt was a high-stakes case that ultimately resulted in the recipient spouse receiving slightly more than \$1 million in lump sum spousal support. It contains a very thorough analysis of the potentially numerous factors that can affect the calculation of a lump sum award, including the use and limitations of actuarial evidence. Not all cases will warrant the expense of expert actuarial evidence.

X. Conclusion

The following themes emerge from the case law:

1. The *Divorce Act* draws no distinction between lump sum and periodic support.
2. Lump sum awards are most frequently awarded in situations where both parties agree that this is the appropriate type of award, but consensus is not mandatory.
3. Counsel should not assume that, in the absence of argument to the contrary, periodic spousal support will be awarded. Counsel should make submissions about how a spousal support award should be structured.
4. There are practical reasons why periodic spousal support is more frequently awarded than lump sum spousal support.
5. When deciding whether to award lump sum or periodic support, courts need to weigh the respective advantages and disadvantages of making a lump sum award and counsel should make submissions that are targeted at this weighing.
6. Where the advantages outweigh the disadvantages of making a lump sum award, the court should provide an explanation why lump sum spousal support is appropriate. A failure to do so may result in the lump sum being converted to periodic payments on appeal.
7. There is no closed list of reasons why a spousal support order will be made as a lump sum. The reasons are case-specific. Common themes include a need for finality, a payor's ability to make a lump sum payment and a risk that the payor will not honour periodic support obligations.
8. A lump sum award should generally not be made for the purpose of effecting a property division, but if the lump sum is made for another reason, such as to alleviate the hardship of a recipient spouse, the fact that its effect is to cause a property division does not prevent the court from making the award.
9. When assisting courts to determine the appropriate quantum of lump sum spousal support, counsel should present submissions on *SSAG* ranges. If counsel wants the court to depart from the *SSAG* ranges, an explanation should be provided.
10. Counsel may put before the court computer generated models of lump sum support, but should not assume that the court will merely apply those models.
11. Counsel should tender evidence and make submissions on the differential tax treatment of lump sum and periodic awards for both the payor and the recipient. Failing to do so may result in this factor not being addressed. If representing a recipient, counsel should consider whether there are reasons a court should not make a tax adjustment, such as

circumstances where the award is being made only to combat the payor's past non-compliance with an order for periodic support.

12. If the award is for future support, counsel should consider whether it is appropriate to make submissions on present value discount rates and negative contingency discounting. Counsel should also consider whether it would be of assistance to the court to have expert evidence on these issues.