

Disability Issues: A Family Law Perspective

by George Karahotzitis and Elliot Goodman

Thomson, Rogers

Where an individual is in the process of separating from his or her spouse and is the recipient of settlement funds arising from an action or claim related to personal injuries, or is the recipient of disability benefits, there are a number of family law issues to consider. What follows is an overview of some issues relevant to these circumstances and the accompanying jurisprudence.

Equalization – How does it Work?

One of the most common misconceptions in family law is that separated spouses are entitled to divide their assets “in half”. In Ontario, the *Family Law Act*¹ (the “FLA”) provides for a process called an “equalization of net family property”. This process applies only to married spouses. Upon separation, the married spouse whose “net family property” is the greater than the other spouse is required to pay to the other spouse one half of the difference between them. For example, if the wife’s net family property is \$100.00 and the husband’s net family property is \$50.00, the wife must pay to the husband \$25.00, which is one half the difference. A person’s net family property is the difference between their net worth on the date of marriage and the date of separation, subject to certain adjustments.

¹ R.S.O. 1990, c. F.3, as amended [FLA].

“Property” as defined in the FLA, includes any interest, present or future, vested or contingent, in real or personal property. In calculating an individual’s net family property the first step is to determine the valuation date, which in most cases is the date on which the spouses permanently separate. Specifically, the valuation date is defined as:

1. The date the spouses separate and there is no reasonable prospect that they will resume cohabitation.
2. The date a divorce is granted.
3. The date the marriage is declared a nullity.
4. The date one of the spouses commences an application based on subsection 5(3) (improvident depletion) that is subsequently granted.
5. The date before the date on which one of the spouses dies leaving the other spouse surviving.²

Calculating a party’s net family property is not as simple as it may seem. Certain property acquired during the marriage, including, but not limited to, gifts and inheritances received by a spouse may be excluded from the calculation. Property that the spouses have agreed to leave out from either of the spouse’s net family properties may also be excluded. The value of any debts and liabilities existing on the valuation date will also need to be deducted, as will any pre-marriage property.

One asset that receives special treatment under the FLA is the matrimonial home, which cannot be deducted or excluded and is included in the net family property of the title holder(s), regardless of the source of funds used to acquire the property.³ Subsection 4(1) of the FLA outlines the matrimonial home exception:

² FLA, s. 4(1).

³ Mary Jane Mossman, *Families and the Law in Canada, Cases and Commentary* (Toronto: Emond Montgomery, 2004) at 454 [*Mossman*].

“net family property” means the value of all the property, except property described in subsection (2), that a spouse owns on the valuation date, after deducting,

- (a) the spouse’s debts and other liabilities, including, for greater certainty, any contingent tax liabilities in respect of the property, and
- (b) the value of property, other than a matrimonial home, that the spouse owned on the date of the marriage, after deducting the spouse’s debts and other liabilities, other than debts or liabilities related directly to the acquisition or significant improvement of a matrimonial home, calculated as of the date of the marriage;

Subsection 4(2)1 to 4(2)5 of the FLA provide further exceptions when calculating net family property, which are as follows:

The value of the following property that a spouse owns on the valuation date does not form part of the spouse’s net family property:

1. Property, other than a matrimonial home, that was acquired by gift or inheritance from a third person after the date of the marriage.
2. Income from property referred to in paragraph 1, if the donor or testator has expressly stated that it is to be excluded from the spouse’s net family property.
3. Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages.
4. Proceeds or a right to proceeds of a policy of life insurance, as defined under the *Insurance Act*, that are payable on the death of the life insured.
5. Property, other than a matrimonial home, into which property referred to in paragraphs 1 to 4 can be traced.

A court may allocate more or less than one half of the value of a spouse’s net family property to the other; however, the Court will only do so in exceptional circumstances.

The overall objective of the FLA is to equalize the parties’ respective increases in net worth.

Excluded Property – Damages

Under the FLA, specific damages or the right to damages may be excluded from a spouse's net family property. The FLA defines this category of excluded property in section 4(2)3 as "Damages or a right to damages for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship, or the part of a settlement that represents those damages."⁴ The exclusion for damages will apply even if the damages are used to acquire other property, as long as the acquired property is not the matrimonial home and the damages can be traced into the property acquired with the excluded property.⁵

General damages for pain and suffering are excluded property within the meaning of s. 4(2)3 of the FLA. Under the FLA, the exclusion of such damages is intended to allow spouses to retain property that is completely personal to them and cannot be shared with another individual, no matter how close their relationship with the other individual.⁶

The contentious issue that arises is whether damages for loss of income should be excluded. In one Ontario case, post-separation, both parties received settlements of their claims after their separation relating to a motor vehicle accident, which accident occurred during the marriage.⁷ The court concluded that the cause of action relating to the motor vehicle accident existed on the valuation date and therefore the settlement monies paid

⁴ FLA, s. 4(2)3.

⁵ Joanna Harris, "Divorce (Family Law) and Accident Benefits, How is property divided between married spouses?" *Thomson Rogers, Accident Benefit Reporter*, Spring 2008 at 5 [Harris].

⁶ *Ibid.* at 6.

⁷ *Vanderaa v. Vanderaa*, [1995] O.J. No. 4139 (Ct. J. (Gen. Div.)).

were property, as defined in the FLA.⁸ As noted above, amounts received for general damages were excluded under s. 4(2)3 as representing compensation for personal injuries.

With respect to the damages related to income loss, the court concluded that monies received for past income loss should be included as net family property; however, monies received for the loss of future income after the date of separation should be excluded. The reasoning was that income earned following separation would not have been shared as of right, and therefore, the portion of the settlement paid to replace that lost income should not be shared. The court has taken the view that “damages received as a replacement of post valuation date wages are personal to the injured person, and should be excluded from net family property.”⁹

Disability Benefits

Disability benefits are somewhat more complicated. There is an issue regarding the treatment of such benefits and whether such benefits are property or income. Further, if they are property, whether they should be excluded from the calculation of a party’s net family property. Ontario cases indicate:

there is a difference of opinion as to whether disability benefits (or Workers' Compensation benefits or damages that represent economic loss) relating to a period after the valuation date entail “property” within the meaning of s.4(1) of the [FLA]; if they do, whether they should be excluded under s. 4(3)2 of the Act; and whether, if they are not excluded, an unequal division of net family property should be ordered under s. 5(6)(h) [of the FLA].¹⁰

⁸ *Hamilton v. Hamilton*, [2005] O.J. No. 3050 (Sup. Ct.) at para. 60 [*Hamilton*].

⁹ *Ibid.*

¹⁰ *Hamilton* at para. 83.

In cases holding that disability benefits are property, the focus has been on whether the payment should be excluded as damages under s. 4(2)3 of the FLA, without any further analysis. The end result is that they are often excluded from family property.¹¹

Two authorities on this matter have expressed the following view:

Generally speaking, where a disability payment replaces lost future earnings due to the employee spouse's physical or mental disability, the disability benefit is considered as income, or as non-family property. However, if all or a portion of the disability payments serve to replace some other benefit, for example, a retirement pension, or are based on past services or contributions made by the employee, that portion of the benefit may be characterized as shareable property. Disability benefits may serve a variety of purposes and it is sometimes difficult to separate the components that comprise matrimonial property from those that replace income. Like the situation with severance pay, the courts do not seem to have undertaken this task with any consistency in the reported cases to date.¹²

The treatment of disability benefits was recently discussed by the Ontario Court of Appeal in *Lowe v. Lowe*¹³. In that case, the husband was injured shortly after the marriage and received a permanent disability pension from the Workplace Safety and Insurance Board, which was subject to reduction if the husband was capable of earning more income. The wife was entitled to two employment pensions. The issue in that case was whether the husband's entitlement to the future income stream should be capitalized and included in his net family property. The Court of Appeal held that the purpose of Workers' Compensation Benefits is to replace all or part of the income the person would have earned during their working life. Furthermore, disability benefits, for purposes of

¹¹ *Lowe v. Lowe*, [2006] O.J. No. 132 (C.A.) at para 11 [*Lowe*].

¹² Diane Pask and Cheryl Haas in *Hamilton* at para. 83.

family property and support, should be treated like income from employment rather than property, and should be excluded when determining the equalization of family property.

In *Hamilton v. Hamilton*¹⁴, the court found that a spouse's CPP disability pension and private disability pension were not "property" under the FLA. The court stated that a disability pension is more like income than property and should be considered income for purposes of support obligations rather than as family property.¹⁵

The decision in *Lowe* was recently distinguished in *Maphangoh v. Maphangoh*¹⁶, which involved a federal government pension plan and disability payments that formed part of an employee benefit plan. The court distinguished *Lowe* based on the nature of the disability benefits. By the time of trial, the party in receipt of the disability pension was over sixty years of age. Although his pension was still called a disability pension it had in effect become a retirement pension. The value at the date of separation of the pension entitlement acquired during the marriage was properly included in the equalization of net family property calculations, just as other pension entitlements are normally taken into account. The value of the disability benefits that the party was entitled to receive up until the age of sixty were not included in the calculation.

Consequently, disability benefits that form part of an employee pension benefit plan may be considered property as alluded to by the court in *Lowe*:

¹³ [2006] O.J. No. 132 (C.A.).

¹⁴ [2005] O.J. No. 3050 (Sup. Ct.).

¹⁵ *Ontario Family Law Practice, 2010* (Markham: LexisNexis, 2010) at 760 [*Family Law Practice*].

¹⁶ [2007] O.J. No. 2409 (C.A.) [*Mephangoh*].

It might be argued that the husband's permanent disability pension, payable for life, should be included as property as it is a fixed entitlement, apparently not contingent on the husband establishing disability on an ongoing basis. I would reject this argument. It seems to me preferable from the perspective of clarity and predictability to treat all disability benefits the same whether they are calculated strictly in terms of lost income or as compensation for impairment to earning capacity. However, as I have already indicated, disability payments that form part and parcel of an employee pension benefit plan may be on a different footing. In the end, the central point is that disability benefits represent income replacement and, from the perspective of family property and spousal support, are more appropriately treated on the same basis as income for employment. [footnotes omitted]¹⁷

Child Support – General Principles

Child support in Canada is guided by the *Federal Child Support Guidelines* (the “Child Support Guidelines”). The Objectives of the Child Support Guidelines are as follows:

- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
- (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
- (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
- (d) to ensure consistent treatment of spouses and children who are in similar circumstances.¹⁸

It should first be noted that although the *Federal Child Support Guidelines* only apply to divorce proceedings, the provinces and territories have adopted identical or similar provisions that apply to cases where there is no divorce such as “common-law” relationships.¹⁹

¹⁷ *Lowe* at para. 24.

¹⁸ *Federal Child Support Guidelines*, SOR/97-175, s. 1.

There are two important levels of child support that must be considered in any case. First, pursuant to section 3 of the Child Support Guidelines, there is a presumptive rule that monthly child support will be paid in accordance with a table setting out the specified support amounts.²⁰ The table establishes the support to be paid based on the number of children and the income of the payor spouse.

To determine the amount of child support to be paid by the non-custodial parent, the first step is to determine the support payor's income. While it may seem that taking a support payor's income from his or her income tax return should be a simple and uncomplicated process, that is not always the case. Under the Child Support Guidelines, and specifically pursuant to sections 17 to 20 and Schedule II of the Child Support Guidelines, adjustments may be made to a party's income. A person's income for income tax purposes and a person's income for purposes of child support may be different.

Pursuant to section 16 of the Guidelines, a parent's or spouse's annual income is determined using the sources of income set out under the heading "total income" on the T1 General Form issued by the Canada Revenue Agency.

Section 17(1) permits the courts to average the payor's income over the past three years, where the payor's income has fluctuated. Section 17(2) allows the courts to adjust non-recurring capital or business investment losses where such losses result in an unfair depiction of the payor's income.

¹⁹ *Mossman* at 755.

Under section 18, a payor who is a shareholder, director or officer of a corporation may have all or part of the pre-tax income of the corporation and any related corporation for the most recent taxation year or any amounts commensurate with services provided by the spouse to the corporation, provided they do not exceed the corporation's pre-tax income, included in his or her income, where the spouse's income as determined under section 16 does not fairly reflect the money available to the spouse.

Section 19 allows the courts to impute income to a payor, in a number of defined but non-exhaustive circumstances. The concept of and imputation of income is relevant when determining the income of a support payor who is the recipient of benefits or damages related to loss of income, which are non-taxable.

The second level of child support addresses "special or extraordinary expenses", which are outlined in section 7 of the Child Support Guidelines. This section requires additional amounts to be paid by both parents for certain expenses depending on the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and the family's pattern of spending in respect of the child during cohabitation. These expenses include: child care expenses; medical and dental care premiums; health related expenses; extraordinary expenses for primary and secondary education; expenses for post-secondary education; and expenses for extracurricular activities.

²⁰ *Mossman* at 756 and see the Child Support Table for Ontario, attached as Schedule "A" to this paper.

Settlement Funds and Income

Where a support payor is the plaintiff in a personal injury case, he or she will usually advance claims under several heads of damage including: loss of income; diminished earning capacity; costs of personal care and treatment; and pain and suffering.²¹ Generally, courts will only regard the portion of settlement funds for loss of income as income for the purposes of the Child Support Guidelines.²² Where there is no evidence as to how payments have been allocated among the various heads of damages, the courts are guided by the following criteria when determining whether non-taxable funds received by a payor are income for purposes of the Guidelines:

1. The funds received are generated by work done or through investment, or paid as compensation to which the payor is legally entitled when deprived of such work or investments and are not a return of capital or draw on capital.
2. Receipt is not gratuitous and the recipient will have a right to receive the payments. Thus amounts received as a gift will not generally be considered income.
3. Payment is often recurrent.
4. The funds are typically used to finance a significant proportion of the recipient's ordinary living expenses.²³

Where the above factors are present, the courts are more likely to consider the funds to be income for the purpose of support. In *Dalton v. Craig*²⁴, the court considered a claim for lump sum retroactive child support pursuant to the Child Support Guidelines against a father who was seriously injured in a motor vehicle accident. The father had received a lump sum for damages from the insurer that was not allocated among the various heads of damages. The father lived on his Canada Pension Plan disability payments and interest

²¹ *Rivard v. Hankiewicz*, [2007] O.J. No. 2033 (Ct. J.) at 2 [*Rivard*].

²² *Ibid.*

²³ *Ibid.* at para. 41.

²⁴ [2001] O.J. No. 5117 (Sup. Ct.), reversed [2002] O.J. No. 4686 (C.A.) [*Dalton*].

from the lump sum as well as regular draws on the capital from the settlement fund.²⁵ The trial judge found that the father's total income should be based solely on the amount he earned from his CPP pension and interest income from the fund and found there to be no evidence to support a finding that the settlement payment was an income replacement. Furthermore, the amount of the fund's capital depleted for his own support was not considered in determining his income.²⁶

The Court of Appeal reversed the trial judge, in part, stating that there was evidence that a part of the settlement funds were paid for income loss. The appellate court allocated an amount of the fund to income that it considered "fair and just" given the circumstances of the parties. The fact was that an amount of the fund was clearly attributable to income.²⁷

The more recent case of *Rivard v. Hankiewicz*²⁸ dealt with a claim for an increase in child support for section 7 expenses. The respondent father had suffered personal injuries as a result of a motor vehicle accident and settled the action for \$440,000. The father was receiving annuity payments for life. The court in that case found the entire amount of the monthly annuity payments to be income, ordered a retroactive increase in child support and varied the father's contribution to section 7 expenses to reflect his change in income.

Where a payor spouse is in receipt of settlement funds, the courts will examine the nature of the settlement and specifically how payments have been allocated under the various

²⁵ *Rivard* at para. 36.

²⁶ *Dalton* at 2.

²⁷ *Rivard* at para. 36.

²⁸ [2007] O.J. No. 2033 (Ct. J.).

heads of damages in deciding the amount to be imputed as income for purposes of the Child Support Guidelines. Where amounts received have not been allocated among the heads of damages, courts are guided by the criteria outlined above when deciding what portion is income for support purposes.

It should be noted that where income is received on a non-taxable basis, as is usually the case where disability benefits are received, for child support purposes this income must be “grossed up” to approximate the equivalent taxable employment income.”²⁹ In other words, a person may be deemed to have an income for purposes of child support that is higher than the amount of the monthly benefit received.

Spousal Support – General Principles

In Canada, the justification for spousal support is based on three conceptual models: compensatory; contractual; and non-compensatory.³⁰ The compensatory basis focuses on a spouse’s inability to support him or herself because of foregoing career opportunities during the marriage and it examines the functions performed by each spouse during the marriage.³¹ Under this model, spouses may be compensated for contributions to the marriage and for losses incurred as a result of the marriage. The contractual or consensual model is linked to section 15.2(4) of the federal *Divorce Act*, which outlines the factors to be considered when making a support order, including the length of the marriage and any

²⁹ *Ontario Family Law Practice, Related Materials, 2010* (Markham: LexisNexis, 2010) at PN8-49 [*Family Law Practice, Related Materials*].

³⁰ *Family Law Practice* at 60.

³¹ *Ibid.*

order and agreement regarding support.³² These considerations will affect a support obligation. Finally, the non-compensatory basis provides that a support obligation can arise from the marriage itself.³³ This model permits recovery for disadvantages associated with the breakdown of the marriage in addition to disadvantages that stem from the marriage.³⁴ The non-compensatory model accounts for the fact that a spouse may not have the same economic advantages after marriage that they enjoyed during the marriage.³⁵

The courts may consider all of the above models when fashioning a support order. In making any order the court must consider the “condition, means, needs and other circumstances of each spouse” and in the case of married spouses, all of the factors under the *Divorce Act*.³⁶

In January 2005, the federal Department of Justice released the *Spousal Support Advisory Guidelines* (the “Advisory Guidelines”).³⁷ These have not been legislated and operate on an advisory basis only. They are used solely to determine the amount and duration of spousal support in matters dealt with under the *Divorce Act* and do not deal with issues regarding entitlement to support.³⁸ The Advisory Guidelines have been developed to “assist spouses, lawyers, mediators and judges in the determining the amount and

³² *Ibid.* at 61.

³³ *Ibid.*

³⁴ *Ibid.*

³⁵ *Ibid.*

³⁶ *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.), s. 15.2(4).

³⁷ *Family Law Practice, Related Materials* at PN8-7.

³⁸ *Ibid.*

duration of spousal support.”³⁹ There are two general formulas found in the Advisory Guidelines: the *without child support* formula and the *with child support* formula.

In determining the “income” to be used as the starting point for the application of the Advisory Guidelines, sections 15 to 20 of the Child Support Guidelines and Schedule III, provide the framework for determining income.⁴⁰

Determining Entitlement and Ability to Pay Spousal Support

In Ontario, every person has an obligation to provide support for their spouse in accordance with need and the extent that he or she is capable of doing so. Many of the principles applied in determining whether disability benefits or funds flowing from a personal injury settlement would be treated as income for spousal support are found in the cases previously discussed. For instance, the court in *Hamilton* noted that a disability pension is more akin to income than property and therefore should be considered for support obligations rather than for determining net family property. In *Lowe*, the Court of Appeal stated that the husband’s disability benefits replaced his income and should be treated in the same way as income from employment for the purposes of family property and spousal support.

The court in *Lowe* adopted the above reasoning from an earlier Ontario case⁴¹, where it was stated that disability benefits “are of the same nature as the income that the person

³⁹ *Ibid.*

⁴⁰ *Ibid* at PN8-47.

⁴¹ *Lowe* at para. 17.

would earn, if not disabled.”⁴² The future disability benefits should be treated just as future employment insurance benefits are treated, as a potential income source, payable if certain conditions exist.⁴³ Therefore, such an income source would be relevant for spousal support, in the same way as earned income but excluded from the equalization of family property.

While it may be difficult to appreciate how a disabled party could have the “ability to pay” spousal support, which is one of the factors that is considered when assessing a claim to spousal support, it must be remembered that “ability” refers more to financial ability as opposed to ability to earn an income. While there may be other factors that can be considered when assessing a claim for spousal support in relation to a disabled party, the income that party receives as a disability benefit will be considered an income source when the claim is being assessed.

Conclusion

The above discussion highlights some of the important issues to consider where spouses are separating and one of the parties is in receipt of settlement funds or disability benefits. Clearly, the treatment of certain funds under the relevant family law legislation is not always straightforward and the law in certain areas remains unsettled. It is critical that a

⁴² *Ibid.*

⁴³ *Ibid.*

person who finds themselves in one of the situations described above consults a family law practitioner familiar with this area.⁴⁴

George Karahotzitis
Elliot M. Goodman



3100-390 Bay Street
Toronto, Ontario
M5H 1W2
(416) 868-3100
www.thomsonrogers.com

September 30, 2010

⁴⁴ The material in this paper is for informational purposes only and is not intended nor should it be considered legal advice.