

# Spousal Misconduct as a Basis for the Award of Lump Sum Spousal Support

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## General Principles Applicable to Awards of Lump Sum Support

Lump sum awards are exceptional, and require special circumstances to warrant deviating from periodic support, which is the rule. The factors justifying such a deviation include anticipated difficulties in enforcing periodic support where there is a history of non-compliance with prior orders, resistance to disclosure, a stated resistance to support obligations, or other forms of non-compliance. In addition, the need for a “clean break” where there is significant animosity between the parties, or antagonism particularly from one of the spouses, may also justify a lump sum award.

A lump sum award also requires a demonstration that the payor has the means to make the lump sum payment, either through liquid assets, or through an adjustment in the equalization payment arising from the matrimonial property settlement.

A summary of the approach to lump sum spousal support awards is provided in ***Rockall v. Rockall***, 2010 ABCA 278, 490 A.R. 135; ***Nuttall v. Rea***, 2005 ABQB 151, 374 A.R. 1 and ***Sharpe v. Sharpe***, [1997] O.J. No. 336, 27 R.F.L. (4th) 206 (Ont. GD).

## Spousal Misconduct As a Basis for the Award of Lump Sum Spousal Support?

What if there has been spousal misconduct, for example, physical abuse? Can an argument be made that such misconduct justifies a lump sum spousal support award?

Section 15.2(5) of the *Divorce Act*, RSC 1985, c. 3, 2<sup>nd</sup> Supp., states that in making a spousal support order, “the court **shall not** take into consideration any misconduct of a spouse in relation to the marriage.” [Emphasis added]

Pursuant to this language, courts have held that neither a party’s entitlement to spousal support, nor his/her obligation to pay spousal support rests on his/ her conduct during the marriage. This includes abusive conduct; the fact that abuse occurred during the marriage does not in itself create an entitlement to support, nor influence the quantum of support payable.

However, the Supreme Court has clarified that while misconduct in itself is not relevant in the spousal support analysis, the financial or emotional consequences flowing from the misconduct may well be relevant. Thus, if spousal misconduct has affected the payee spouse’s ability to earn an income, or has precipitated, prolonged or aggravated the need for support, the consequences of that conduct may be taken into account in evaluating the right to support, its duration and its amount. The Court stated the principle as follows in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920:

21 There is, of course, a distinction between the emotional consequences of misconduct and the misconduct itself. The consequences are not rendered irrelevant because of their genesis in the other spouse's misconduct. **If, for example, spousal abuse triggered a depression so serious as to make a claimant spouse unemployable, the consequences of the misconduct would be highly relevant (as here) to the factors which must be considered in determining the right to support, its duration and its amount.** The policy of the 1985 Act however, is to focus on the consequences of the spousal misconduct not the attribution of fault. [Emphasis added]

Subsequent case law adopts the *Leskun* reasoning. See for example *N.R.I.H. v. M.G.S.H.*, 2015 ONSC 3277, [2015] O.J. No. 2668:

315 In *Leskun v. Leskun*, 2006 SCC 25, [2006] S.C.J. No. 25, at para. 20, the Supreme Court reinforced that the Divorce Act is clear that spousal misconduct is not to be considered in determining spousal support. **Misconduct, including domestic**

**violence, is "off the table"** and should not creep back into the court's deliberation as a relevant "condition" or "other circumstance", which the court is to consider in making a spousal support order.

316 However, the emotional or physical effects of misconduct, such as domestic violence, may be relevant to a determination of spousal support, if they affect the ability of either spouse to earn an income. [...] **Section 15.2(5) does not preclude considering the consequences of the alleged misconduct, when the court is determining the proper amount, duration, and form of any award of spousal support.** [Emphasis added]

Similarly, in *Bruce v. Vaughan*, 2016 BCSC 2258, [2016] BCJ No. 2546:

14 I recount the respondent's post-trial conduct mindful that conduct is irrelevant for the purposes of fixing or varying spousal support; see *Leskun v. Leskun*, 2006 SCC 25, at para. 20. In *Leskun*, however, Binnie J. at para. 21 drew **a distinction between the emotional and economic consequences of misconduct - the latter, but not the former, may be considered in determining the right to support, its duration and amount.** To disregard the economic consequences that flow from the respondent's misconduct would do violence to the needs-based object that motivated the spousal support award made by Saunders J. [Emphasis added]

For specific examples of cases in which spousal misconduct has led to a lump sum spousal award see:

- *Sharpe v. Sharpe*, [1997] O.J. No. 336, 27 R.F.L. (4th) 206 (Ont. GD)

The couple had experienced serious financial difficulties during the marriage, which the husband blamed (it appears unfairly) on the wife, and displayed a high level of animosity toward her (see para. 14). He candidly admitted to being opposed to the idea of support, and had stated he might resist employment or move to the US to avoid paying support. Campbell J ordered that support be paid as a lump sum, observing that a "clean break" was appropriate:

20 Mr. Sharpe has made it plain during the trial and in affidavits filed in interim proceedings that he is unimpressed with his wife's efforts to obtain full-time employment and "has difficulty" with the concept of spousal support. His obvious continued antagonism towards his wife, as was evidenced by his demeanour during

his testimony, confirmed by the independent witness, his behaviour towards his wife at and since separation, his threats to leave the jurisdiction, and the observations of Margie Poirier (contained in the Children's Lawyer's report, filed at tab one in Exhibit 1) all support the applicant's claim for a lump sum spousal support award on the basis of the need for a "clean break" between the parties.

- ***Kuzmanovic v. Kuzmanovic***, [2001] O.J. No. 1450, 16 R.F.L. (5th) 300

The parties were married for nearly 30 years, during which the wife stayed at home or worked in the family business. The parties were equal shareholders in the business. After separation, the husband, who was extremely domineering, failed to pay support, and took various steps to siphon money from the company, falsify corporate records, and otherwise deplete value that otherwise should flow to the wife. Quinn J held that a clean break was appropriate, and ordered a lump sum payment of support:

62 The wife did not move for interim spousal support choosing, instead, to encroach upon her capital. This was, in part, I think, the path of least resistance for her. As well, the parties, historically, took very little money out of the Company and the husband, as a result, showed only a modest income. Accordingly, I do not severely fault her course of conduct (although I do not recommend it). In the circumstances of this case, I suppose it reflected a measure of practicality. I am confident, however, that had she known her husband was engaged in the economic misconduct already mentioned, she would have acted otherwise and quickly.

63 The figure of \$50,000 is not the result of any formulaic approach. This fact is readily conceded by Mr. McIntyre. Gauging spousal support, particularly the lump-sum variety, does not often permit anything bordering on mathematical precision. Mr. McIntyre submits that, given the length of the marriage, the roles adopted by the parties during the marriage and the fact that the husband has not paid any support since separation, \$50,000 is reasonable. As for the lump-sum character of the support, he argues that the husband cannot be trusted to make periodic payments and a "clean break" is desirable.

64 I agree with Mr. McIntyre. The attitude of the husband toward the wife has been contemptuous. His blatant efforts to bleed the Company to death and defraud his wife highlight the extent to which he is prepared to go in order to defeat her claims. This is a deserving case for lump-sum support. As for the amount, I cannot say that it is unreasonable. It reflects the many considerations which I set out above when discussing s. 15.2. In addition, the husband has the ability to pay the amount requested.

- ***Kennedy v. Sinclair***, [2001] O.J. No. 1837, 18 R.F.L. (5th) 91; affirmed [2003] O.J. No. 2678, 42 R.F.L. (5th) 46

The parties had a seven year marriage and were both in their forties at the time of trial. The husband was charged with criminal offences related to physical abuse of the wife during the marriage, and had a history of failing to make support payments. The wife's ability to work had been affected by the physical and emotional toll of the abuse. It was not clear how long it might take her to recover, or whether she would in fact fully recover. A clean break was warranted in the circumstances:

22 The Court finds, as described above, that the current level of the wife's income has been reduced by approximately twenty-two thousand dollars (\$22,000.00) annually, by circumstances generally arising from the marriage and its disintegration.

23 This loss of income flow as a direct consequence of the marriage established entitlement to the wife for compensatory spousal support. There is little direct evidence in the wife's materials to enable the court to project the likely length of this negative impact on her financial circumstances. Reviewing the wife's materials it is obvious that the effect will be at least long term, perhaps, permanent.

24 Given the wife's age at the date of trial, the court could project loss of income of at least ten years (coincidentally the approximate length of the relationship) to a maximum of fifteen years (if the wife retires at age 65). I determine therefore that the wife is entitled to be compensated for the discrepancy between her actual and potential income for the average length of the likely loss, being twelve and one half years.

25 Lump sum support should only be awarded in unusual circumstances, which must be justified by the party seeking it (*Urbanowicz v. Urbanowicz*, [1998] O.J. No. 2523, [1999] WDFL 104 (Ont. Gen. Div.)). In the case at bar not only must the court not award such support to reallocate family property (*Gallant v. Gallant* (1988) 42 R.F.L. (4th) 353) but also the calculation of this lump sum must be separate from and not be confused with the analysis that another court may make arising out of the claim for damages that has been put over to the settlement/trial management conference.

26 Mr. Sinclair's history of failure to pay support or to comply with the provisions of the court orders has been consistent throughout this action. There is a

consequent high degree of risk that the respondent husband would not honour an order for periodic support.

**27 In addition, the findings of fact that the court has had to make regarding spousal abuse relevant to the custody analysis also justify an order that would promote a "clean break" regime to lessen the necessity of any financial connection between these two parties.**

28 In these circumstances, I have determined that the above noted factors satisfy the onus imposed on the applicant mother to justify the court ordering lump sum spousal support. [Emphasis added]

- ***Fraser-Tabak v. Tabak***, 2016 ABCA 79, 612 A.R. 354

The parties had a 20 year traditional marriage. The trial decision awarding lump sum support is not available, but the appeal decision indicates that the wife has unspecified health issues, and that the couples' sons made some allegations that they were abused by the father. It is not clear whether abuse toward the wife was also alleged. The Court gave the following reasons in affirming the trial decision:

95 This Court opined in *Krause v. Krause* that "there are many cases where lump sum awards should be made". At the same time, a periodic award is the norm.

96 *Rockall v. Rockall* records some of the fact patterns that merit a lump sum order:

While there is no closed list of situations in which that exception has been exercised, Alberta courts have held that lump sum support may be appropriate where, for example, the payor spouse may fritter away capital, leaving him or her unable to pay periodic support; where the recipient needs a lump sum amount to go to university or otherwise retrain; or where the level of ill will between the parties is such that a clean break will benefit them ... .

97 The trial judge expressly stated that the animosity this broken relationship still features warrants a clean break:

In my view, the clean break is clearly extremely desirable from both parties' perspective. In fact, I consider that would be extremely beneficial to everyone in the circumstances. ...

... A lump sum with no ongoing need for the parties to continue to have to deal with each other will enable both of them to move on with their lives, and that should reduce the stress that each is experiencing. In particular, it should assist Ms. Fraser with reducing her distress. That should improve her ability to earn income.

98 This is a defensible position. Had the trial judge come to the contrary conclusion, Ms. Fraser would not likely have been able to successfully challenge it on appeal. This was a call that could have gone either way.

99 In summary, we are satisfied that the trial judge's spousal support award was fair and consistent with the spousal award provisions in the *Divorce Act*.

- ***Bensadoun v. Bensadoun***, [2002] O.J. No. 2023

The parties had an 11 year marriage and were in their thirties with two children at the time of trial. The wife was the primary caregiver but also trained as a dental hygienist. The husband was the owner of several night clubs. He invoked the protection of the Canada and Ontario Evidence Acts before testifying that he had earned substantial amounts of unreported cash income and that his financial statements for his businesses were meaningless. James J found that the husband “considers cheating on his personal and his business taxes as a normal business practice”, and that his “evidence disclosed a patent abuse of business, financial, and personal conscience”. Lump sum spousal support was ordered:

22 The husband has not been forthright with the court. He has misled the court. He failed to disclose securities held in trust by others. He failed to provide an accounting for \$56,000.00 in investments. He undervalued the current worth of his present residence. He failed to register cash in two sworn financial statements. He failed to disclose a bank account he opened in April 2001.

23 The husband has not provided a single sheet of documentation to explain, support, or corroborate his evidence relating to his income during the past 16 years. He has admitted that the court has no source documents to assist it in determining his income.

[...]

84 If the spousal support order is periodic, the husband will not make payments and the wife will have to spend her energy and money pursuing every payment

through the court. Her efforts will be futile. The wife and the children will suffer economic instability. The wife's career plans will be adversely affected.

- ***Droit de la famille - 16100***, 2016 QCCS 178, [2016] Q.J. No. 256

The parties, originally married and residing in Lebanon, had a roughly 20 year marriage during which the wife did not work, was subject to abuse, and had little control or information about the husband's substantial finances. A lump sum payment was ordered:

15 The Mother explains that, from 2005 and until her departure for Town A in July 2008, the Father physically and mentally abused her and the children. In early 2008, she had to be hospitalized further to a serious altercation with the Father. In March 2008, he sent her a harsh e-mail advising that he would break her apart, get rid of her and the children, who all were a wrong investment for him.

[...]

18 The Father abandoned the family and stopped all financial support as of August 1st, 2008, save for the rent of the condominium, which was paid in advance until the end of December 2008.

19 The Mother and the three children stayed in the condominium rented by the Father for a few months and subsequently moved. She has not received any financial assistance from the Father

[...]

24 Since 2005, the Mother lives in fear of the Father. In November 2011, she was granted the status of protected person by Citizenship and Immigration Canada. On January 24, 2012, Justice Louis Lacoursière authorized the non-disclosure of her domicile or residence.

[...]

44 The Court will order the payment of spousal support for a lump sum of \$750,000, for the following reasons, which justify the Mother's request to obtain a clean break :

1. The length of the marriage;
2. The difficulties for the Mother to enter the work force since her arrival in Canada, in 2008;
3. The fact that the Mother is presently 56 years of age;



4. The standard of living of the parties before their separation;
5. The necessity for the Mother to meet her alimentary needs and other related basic needs;
6. The unilateral decision of the Father to cease providing his financial support to the family in August, 2008;
7. The failure of the Father to respect the Court order for the payment of \$12,500 to the Mother, as interim provision for costs;
8. The difficulties anticipated concerning the execution of this judgment; and,
9. The behaviour of the Father since the separation.

### Conclusion

Thus the fact that abuse occurred during the marriage does not in itself create an entitlement to support, nor influence the quantum of support payable. However, while misconduct in itself is not relevant in the spousal support analysis, the financial or emotional consequences flowing from the misconduct may well be relevant. If spousal misconduct has affected the payee spouse's ability to earn an income, or has precipitated, prolonged or aggravated the need for support, the consequences of that conduct may be taken into account in evaluating the right to lump sum spousal support. The essence of the argument would be that the past spousal abuse necessitates the need for a clean break between the parties, and hence lump sum spousal support.

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