



## Article

### Family Law

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# Lying low may not be the best course of action when it comes to temporary spousal support claims

By Laurie H. Pawlitza

Spousal support is one of the most discretionary areas of family law. The issue can become even more complex when a spouse claims retroactive support stretching back a decade.

It is common in a court proceeding to ask that spousal support be paid from the date of separation forward. As it can be several years after a court proceeding starts and before a trial, the courts have the jurisdiction to make orders for temporary spousal support, which are usually in place until a final settlement or a trial.

If a motion for a temporary order is not brought by the claimant spouse, the usual advice family given to payor clients is to lie low. The recipient has the onus to prove entitlement to spousal support, and the longer it is before the claim for spousal support is brought forward, the less likely it is that spousal support will be ordered.

But a 2021 case from the British Columbia Court of Appeal has made family lawyers think twice about their usual advice.

In *Legge v Legge*, the parties lived together for 8.5 years and had one daughter over whom there was highly conflictual litigation. In a 2010 provincial court proceeding, the wife claimed both child support and spousal support, but did not pursue her claim for spousal support. After several years of litigation, the parenting issues were resolved, and the daughter lived primarily with the mother. The court action went no further.

In 2020, the husband, who was still living in the parties' home with the daughter who had moved to live with him, started proceedings in the B.C. Supreme Court. He asked the court to deal with property, child support and a divorce. The wife asked for a lump sum for spousal support of more than \$100,000.

The wife justified her delay in seeking spousal support because of their lengthy parenting litigation and her limited legal resources. Her claim was based on the priority given to the husband's work over her university education and her role during marriage as the daughter's primary caregiver. As well, the daughter lived with the mother for a number of years after the separation. The husband's annual income ranged from about \$94,000 to \$125,000, while the wife's was between about \$3,300 and \$32,000.

The trial judge held that the wife was entitled to spousal support, both compensatory (based on their roles during the relationship) and non-compensatory (her needs), but there was no reasonable excuse for her 10-year delay in making a claim.

The trial judge considered her needs, the payor's conduct, the reasons for delay and the hardship to the payor, including that an order for retroactive support stretching back many years makes financial planning difficult, and may impose financial hardship on the payor. In addition, he considered the need for the claimant spouse to pursue her claim within a reasonable time.

Ultimately, the judge found that awarding retroactive spousal support a decade after the relationship ended would actually be a redistribution of the family's property.

While the B.C. Court of Appeal acknowledged the significant deference appellate courts are obliged to give trial judges on the discretionary issue of support, it, nevertheless, set aside the trial judge's decision.

The Court of Appeal held that if the spouse established a "clear entitlement" to support, experienced economic hardship after separation, and was still disadvantaged at trial, "it would be unusual for a court to make no award for spousal support where financial resources permit, notwithstanding the delay. This is because a denial of spousal support would not meet the statutory objectives."

In making this finding, the court relied on the Supreme Court's decision in *Michel v Graydon*, saying that "women will often face financial, occupational, temporal, and emotional disadvantages ... access to justice in family law is not always possible due to the high costs of litigation. In this larger social context, women who obtain custody (as the wife did in *Legge*) are often badly placed to evaluate their co-parent's financial situation and to take action against it."

The Court of Appeal found that the trial judge had overemphasized the wife's delay and underemphasized the circumstances that gave rise to the wife's claim. In addition, the trial judge looked at the wife's \$107,000 claim for retroactive spousal support as an "all or nothing" claim, when a more "holistic" and "flexible" view of the matter should have been applied.

The Court of Appeal recognized the husband's resources were somewhat limited and that ordering the entirety of the amount requested by the wife would place a hardship on him, especially given the decade-long delay. As there was a limited amount of family property available for division, the court opted to order the husband to make a lump sum payment of \$27,000 to the wife for retroactive support.

This relationship lasted only 8.5 years. The spousal support order – made a decade after separation – gives new meaning to the phrase "a diamond is forever."

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