
CANADA / JUDGMENT

Brown v. Cross

2007 BCSC 1221

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 1221 Brown v. Cross

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brown v. Cross,

2007 BCSC 1221

Date: 20070814

Docket: E41617

Registry: Nanaimo

Between:

Gretchen Brown

Plaintiff

And

John Harold Cross

Defendant

Before: The Honourable Mr. Justice A.F. Wilson

Reasons for Judgment

Counsel for the plaintiff:

K. M. Rongve

Counsel for the defendant:

J. Anthony

Date and Place of Chambers Hearing:

July 20, 2007

Nanaimo, B.C.

I Introduction

- [1] By Notice of Motion filed June 21, 2007, the plaintiff, Gretchen Brown, seeks orders which will deal with the outstanding issues of the parties following the breakup of a common-law relationship of approximately 13 years. Those issues relate to division of property, and spousal and child maintenance. Both parties agree that the matter is appropriate for hearing under Rule 18A. I agree, and consider that I can make the necessary findings of fact to decide the issues raised and thus dispose of the outstanding matters in the proceeding.
- [2] In paragraph one of the Notice of Motion, Ms. Brown seeks an order that:
1. Any claim that the Defendant claims to have against the property owned by the Plaintiff in Cawston, British Columbia be dismissed and the Certificate of Pending Litigation filed by the Defendant against the Cawston property be removed.
- [3] In the Response filed on behalf of Mr. Cross on July 11, 2007, he does not oppose this order, provided Ms. Brown takes responsibility for the mortgage registered against the property, and that he receive credit for the payments he has made on that mortgage since the separation, in the amount of \$8,055.00.
- [4] In paragraph two of the Notice of Motion, Ms. Brown seeks an order that:
2. The Protection Island property held in the joint names of the parties be sold and the proceeds be used to pay off the following debts/expenses:
 - a. All realtors' fees, property taxes and normal conveyancing adjustments;
 - b. The legal expenses for handling the sale of the Protection Island property;
 - c. The mortgage held against title to the Protection Island property;
 - d. The mortgage held against title to a property the Plaintiff owns in Cawston, British Columbia;
 - e. The balance owing on the joint line of credit held in the names of the Defendant and the Plaintiff as at the date of separation; and,
 - f. The balance owing on the Defendant's MasterCard as at the date of separation; with the remaining funds to be divided equally between the Plaintiff and the Defendant.

- [5] In his Response, Mr. Cross consents to that relief, except for payment of the Cawston mortgage from the proceeds. He also seeks credit for amounts which he says he contributed to the original purchase of that property, in the amount of \$50,000; the payments he has made on the mortgage on the Protection Island property since the separation, in the amount of \$47,000; and one-half the cost of the report of Dr. Elterman, in the amount of \$4,800.
- [6] The parties have accepted an offer for the purchase of the Protection Island property, in the amount of \$520,000. That sale is scheduled to close on August 31, 2007, although the "subject to" conditions have not yet been cleared. The balance on the mortgage on that property is \$112,752. Although there is a reference to realtor's fees as one of the expenses to be paid from the sale proceeds, and although each party employed real estate agents, the property was sold privately. It is thus not expected that there will be any real estate commission payable.
- [7] Paragraph three of the Notice of Motion seeks an order that the contents of the Protection Island property be divided equally, as agreed between the parties. Mr. Cross agrees to that, subject to having liberty to apply. Ms. Brown also agrees with that condition, and there will thus be an order accordingly.
- [8] In paragraph four of the Notice of Motion, Ms. Brown seeks an order that the C.P.P. credits earned during the relationship be divided equally. In response, Mr. Cross says that the Canada Pension Plan credits should be divided pursuant to the relevant provisions of the Canada Pension Plan Act. Ms. Brown is in agreement with that. Again, there will be an order accordingly.
- [9] In paragraph five of the Notice of Motion, Ms. Brown seeks an order for child maintenance for the children of the marriage, Hayden James Kubis Cross, born July 30, 1990, and Ana Emilie Kubis Cross, born December 8, 1994. In his Response, Mr. Cross alleges that there has been a settlement between the parties under which he is to be the primarily care-giver of the children, and Ms. Brown will pay him child support pursuant to the Guidelines. Ms. Brown, while conceding that there was an exchange of correspondence pursuant to which Mr. Cross was to take the primary care of the children, says that has not happened and that they are still primarily resident with her. She thus maintains her claim for child maintenance.
- [10] In paragraph six of the Notice of Motion, Ms. Brown seeks that each party pay their proportionate share of the children's extraordinary medical and dental expenses. However, no particular expenses are alleged. Nevertheless, Mr. Cross agrees that extraordinary expenses will be paid in accordance with the parties' respective incomes, (although seeking to have income imputed to Ms. Brown).

- [11] Finally, in paragraph seven of the Notice of Motion, Ms. Brown seeks spousal support until Ana completes high school. Mr. Cross submits that the claim for spousal maintenance should be dismissed, noting that Ms. Brown will have the Cawston property, with an appraised value of \$140,000. As the balance on the mortgage on that property is in the amount of approximately \$16,000, there is thus equity of approximately \$124,000. She also has job skill, obtained during the relationship, as a support worker.
- [12] By Notice of Motion filed July 11, 2007, Mr. Cross sought an order that Ms. Brown pay one-half of the costs Dr. Elterman's account for preparation of the section 15 report. That is opposed by Ms. Brown.
- [13] As noted above, there is no application to deal with the custody or guardianship of the children, or who will be their primary caregiver. That was dealt with in a settlement conference on May 11, 2007, resulting in a consent order that the parties have joint custody and joint guardianship of the children, with Ms. Brown to be the primary caregiver. In light of the fact that there is no application to vary that order, I consider it still to be in effect (although I will consider the situation of the children in relation to the claim for child maintenance).

II Background

- [14] Ms. Brown alleges that the parties began residing together in 1990, and that before that date their relationship was inconsistent. Mr. Cross says that they living in a relationship like that of husband and wife since at least 1990. Property on Pine Street where the parties commenced cohabitation was purchased in February, 1990, and Ms. Brown was pregnant at that time with Hayden. I thus take 1990 as the date of commencement of the relationship. Ms. Brown and Mr. Cross never married. They separated in August, 2003.
- [15] As noted, when they commenced cohabitation, the parties moved into a property on Pine Street. That property was purchased in the name of Mr. Cross alone. He made all payments on the mortgage on it. However, it is not suggested that either party made any capital contribution of funds of their own to the property. The down payment, in the amount of \$15,000, came by way of a loan or gift from Malcolm Elder, a long-time friend of Mr. Cross. He says that he loaned both Mr. Cross and Ms. Brown \$15,000 in 1990, although he considers that her half of the debt is repaid. The Pine Street property was sold in 1997, leaving an equity of approximately \$50,000. Although the amount is not clear, at least some part of that money went into the purchase of the family home on Protection Island. In paragraph 45 of his affidavit sworn July 5, 2007, Mr. Cross says that "a significant portion of the equity from the sale of Pine Street went into the purchase of the family home . . . " In paragraphs 27 and 28 of her affidavit sworn June 21, 2007, Ms. Brown agrees that approximately \$50,000 was received from the sale of the Pine Street home, and that all of the funds saved from that sale were used as a down payment on the Protection Island property, but says that they did not immediately invest in a property, that they lived for a period of time with her father and his partner. In paragraphs 70 and 71 of his affidavit sworn July 5, 2007, Mr. Cross says that he

received about \$50,000, which he contributed to the purchase of the Protection Island property. In response to that, in her further affidavit sworn July 12, 2007, in paragraph 23, Ms. Brown says that she believes that there was a down payment of \$20,000 on the Protection Island property. She gave no explanation as to where the other \$30,000 went. As that is in conflict with Mr. Cross's evidence, and also seems to be contrary to paragraphs 27 and 28 of her June 21st affidavit, I accept that, at the very least, a significant portion of the \$50,000 did go into the purchase of the Protection Island property.

- [16] The Protection Island property was put in joint names, and was the family home until the separation in August 2003. Since that time, it has been the home for Ms. Brown and the children.
- [17] In addition to the Protection Island property, there is a property at Cawston, which is owned solely by Ms. Brown. She has owned that property since 1985, before the cohabitation, having inherited it on the death of her mother. At that time, it did not have a mortgage on it. It has never been the family home. During the relationship, it is not in dispute that Ms. Brown and the children vacationed there, and Mr. Cross visited it occasionally. There was some rent collected from the property, but I accept the evidence of Ms. Brown that the rent went towards paying taxes and maintaining the property. However, the Cawston property was used on two occasions as security for a loan to Ms. Brown and Mr. Cross, once in the amount of \$10,000 and later in the amount of \$20,000. On both occasions, the funds were used primarily to pay income taxes owing by Mr. Cross. There is no issue, however, that they were used to pay off a family debt, and for family purposes. By securing the loans by way of a mortgage on the Cawston property, Ms. Brown and Mr. Cross were able to get a loan at a lower interest rate.

III Income of parties

- [18] During the relationship, each party was able to obtain training to increase their qualifications, thus improving their potential for employment and earnings.
- [19] Prior to their relationship, Ms. Brown worked in a fish plant, as a tree planter, and as a camp cook. However, from 1990 until 2001 she was a stay-at-home mother. In 2001, she took a six-month course at Malaspina College as a resident care attendant. She then commenced work at the Nanaimo Association for Community Living as a support worker. She gave that employment up for approximately a year commencing in November 2003 to look after the children, particularly as Hayden had been showing behavioural problems. However, apart from that time, she has continued in her employment as a support worker. In 2005 Ms. Brown's income, as shown on line 150 of her income tax return, was \$14,378. That increased to \$21,479 in 2006. She does not expect that to change in 2007. However, at her examination for discovery, Ms. Brown indicated that she would likely be able to work full-time if she chooses to do so. At her current earning rate of \$17.50 per hour, with a 37 ½ hour work week, she thus has potential earnings of approximately \$34,000 per annum.

- [20] Counsel for Mr. Cross submits that I should impute income to Ms. Brown on the basis that she could be employed on a full-time basis, earning \$34,000 per year. In *van Gool v. van Gool* (1998), 64 B.C.L.R. (3d) 94 (C.A.), at paragraph 28, the Court of Appeal noted that a court must consider not only the amount of income a spouse actually earns, but the amount of income a spouse could earn if working to capacity. Thus in *Llewellyn v. Llewellyn* (2002), 99 B.C.L.R. (3d) 361, (C.A.), where the mother worked only enough to supplement her husband's income to meet the needs of the children living with her, on her belief that it was in the best interests of the children that she remain at home, but she could earn \$18,000 per annum had she worked full-time, income of \$18,000 was imputed to her. That is analogous to the situation in this case. I thus impute income to Ms. Brown in the amount of \$34,000 for the purpose of her obligations under the Guidelines.
- [21] Mr. Cross has a background as a fisherman and mariner. However, in the 1990's he obtained qualifications as a Supercargo. He is employed by his company TPC Services Ltd. His employment does take him away from home a considerable amount of the time, approximately six months a year.
- [22] Counsel for Ms. Brown submits that Mr. Cross has been deceitful with respect to his income, that it has been significantly more than he has alleged. Mr. Cross denies that, saying the amounts as shown in his Financial Statements are based on the amounts in his income tax returns, and that he has produced the financial statements for his company on request.
- [23] In his Form 89 Financial Statement sworn December 3, 2004, Mr. Cross showed an income from employment with the Nanaimo Port Authority and Nanaimo Harbour Lynx of \$42,563, plus income from self-employment of \$8,000, for a total of \$50,563. After deducting union and professional dues, he showed a Guideline income of \$47,695. The income from employment does reflect the amount shown on his 2003 tax return, although no income from self-employment is shown on that return. A five year tax summary included with that return shows that his total income in 1989 was \$15,211; in 2000 it was \$45,105; in 2001, \$39,395, in 2002 \$26,680; and in 2003 \$42,563. His income as declared on the December 3, 2004 Financial Statement is thus in accordance with the previous year's income.
- [24] Included in that Financial Statement were financial statements for TPC Services Ltd. for the years ended July 31, 2001, July 31, 2002, and July 31, 2003. The 2001 statement also includes a comparative statement for 2000. In each year, the company had a net loss of earnings, or a small profit. However, in each year there are substantial management fees and salaries and wages. As Mr. Cross is the sole owner and employee, those amounts were presumably paid to him. Thus, in 2000, the company showed a net loss of \$81, but had management fees of \$70,800, and salaries, and wages of \$2,267.00. In 2001, there was a net loss of \$274, but management fees of \$73,537 and salaries of \$1,935. In 2002, the company showed a loss of \$394, but management fees of \$50,000 and salaries and wages of \$4,077. In 2003, there were net earnings of \$2,600, management fees of \$68,500 and salaries and wages of \$5,415. Why the salaries and wages and management fees are not reflected in Mr. Cross's income tax returns is not explained. However, as noted, the financial statements for the company were

provided in Mr. Cross's Form 89 Financial Statement. Counsel for Ms. Brown noted that he showed \$1,600 for income tax on that Financial Statement, which would be in accordance with an income in the range of \$70,000 to \$80,000. Apparently when that was drawn to his counsel's attention, Mr. Cross filed another Form 89 Financial Statement, sworn February 3, 2005. It showed the same annual income as on the one sworn in December, 2004, but reduced the expense item for income tax to \$850 per month.

- [25] On September 22nd, 2005, Mr. Cross consented to an order for payment of child maintenance in the amount of \$1,000 per month, based on a guideline income of \$75,000.
- [26] On May 16, 2007, Mr. Cross swore a further Form 89 Financial Statement, showing his income in the amount of \$100,000, only through self-employment with TPC Services Ltd. Attached to that Financial Statement was his 2004 tax summary, which showed a total income of \$84,705, of which \$69,705 is employment income reflected on T4 slips, and \$15,000 business income. The statement of business activities and the statement of self-employment income both showed gross income and net income from the business of \$15,000. Mr. Cross's 2005 tax return showed total income of \$68,425, being employment income shown on T4 slips. That tax return showed no income from self-employment or other income. However, again financial statements for TPC Services Ltd. were provided. Although the one for the year-end of July 31, 2004 is not included, the numbers are included on the 2005 financial statement. From those statements, it appears that the category of management fees has been eliminated, and consolidated under the heading "Wages and benefits". Thus, in 2004, the company showed a net loss of \$749, but there were wages and benefits paid of \$94,174. In 2005, there was a loss of \$2,017, but wages and benefits of \$115,032. For the year-end of July 31, 2006, the company showed net earnings of \$32,057, after deducting wages and benefits of \$80,395. In addition, in that year, dividends were declared in the amount of \$41,000.
- [27] I have reviewed all of the material filed on this application, including Mr. Cross's Financial Statement sworn May 16, 2007 (which includes his 2004 and 2005 Income Tax Returns), but have not been able to find any copy of his 2006 income tax return. However, in paragraph 58 of his affidavit sworn July 5, 2007, Mr. Cross says that his income as shown on line 150 of his 2006 income tax return was \$111,230. Attached to his affidavit is a letter from his accountant, indicating that included in his 2006 personal income of \$111,230 was a "one-time bonus pay-out" from TPC Services Ltd. in the amount of \$59,000. The letter also notes that there is dividend income of \$51,250 on his 2006 personal tax return, which is a "one time dividend". The accountant notes that it is not expected that Mr. Cross will receive any further such "bonus pay-outs" or dividends in the foreseeable future, and that the dividend is the only one which Mr. Cross has received from his company in the last ten years.
- [28] Based on that, Mr. Cross submits that his income should be determined to be \$88,000, being the average shown on line 150 of his income tax returns for the past three years. His counsel relies on s 17 of the Guidelines, and cases such as *Cornelissen v Cornelissen*, 2003 B.C.C.A. 666, in which the court indicated that where a person's income is highly variable, then it is

appropriate to use an average of his income in the last three years. In *Grossi v Grossi* (2005), 38 B.C.L.R. (4th) 247 (C.A.), the Court of Appeal also stated that the fairest approach may be to average the earnings, in that case where the retained earnings of the company were not included in the income of the payor in the year they were earned.

[29] While s.17 is certainly relevant, s. 18 of the Guidelines is also applicable. It provides as follows:

Shareholder,

Director or officer

18.(1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include

- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
- (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.

Adjustment to corporation's pre-tax income

- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

[30] In *Kowalewich v. Kowalewich*, [2001] B.C.C.A. 460, the Court of Appeal noted that the purpose of s. 18 is to lift the corporate veil, to ensure that the amount determined to be the income of the payor fully reflects all money available for payment of child support.

[31] In this case, it is very difficult to determine how the amounts shown on line 150 of Mr. Cross's income tax returns relate to the amounts shown in the company financial statements. Thus, in 2004, from the 2004 T4 slip summary in the income tax returns, Mr. Cross's income from employment is shown as \$60,000 from TPC Services Ltd. and \$9,705 from Nanaimo Harbour Lynx. However, the financial statement for the year ended July 31st, 2004, shows wages and benefits of \$94,174. In absence of evidence explaining the discrepancy, I consider the appropriate approach to replace the amount shown as employment income on the T4s with the wages and benefits shown in the financial statements. On that basis, I consider Mr. Cross's income for 2004 to have been \$103,879.

- [32] Similarly, the summary of his T4 slips for 2005 shows employment income from TPC Services of \$67,515, and from Harbour Lynx of \$910. However, the TPC financial statement shows wages and benefits of \$115,032. Again, replacing the amount included in the tax return with the amount shown on the company financial statement, I find Mr. Cross's income in that year to have been \$115,942.
- [33] As noted Mr. Cross's 2006 income tax return is not available. However, his company financial statement shows wages and benefits of \$80,395, and a dividend of \$41,000. That is a total of \$121,395, as compared to the amount of \$111,230 apparently shown on his income tax return. I find that amount of \$121,395 to reflect his true income. I find that notwithstanding that the 2006 income apparently included a "one-time" bonus and dividends. Those funds have only become available because they have not been withdrawn from the company, in the form of income, at an earlier time.
- [34] In summary, then, I do not accept that Mr. Cross's income should be determined based on the amounts shown on line 150 of his income tax returns. I am not satisfied that those numbers truly reflect all income available for payment of child support. I thus find Mr. Cross's "true" income in 2004 to be \$103,879, in 2005 to be \$115,942, and in 2006 to be \$121,395. Although there is not a substantial variation in those numbers, and they do show a rising trend, I will use an averaging approach to determine his income for the purposes of the Guidelines. The average of those three year's income is thus \$113,739. I find that to be Mr. Cross's income for the purpose of establishing child maintenance under the Guidelines. I do note, however, that this does not take into account benefits Mr. Cross may have, in having his expenses paid by the company, and that dividends are taxed at a lower rate than other income.

IV Division of Property

A. Cawston Property

- [35] Counsel for Mr. Cross characterizes his claim with respect to the cost of property as one of constructive trust, following the decisions of the Supreme Court of Canada in *Pettkus v. Becker*, [1990] 2 S.C.R. 834 and *Peter v. Beblow*, [1993] 1 S.C.R. 980. However, for a constructive trust, the plaintiff must have had a reasonable expectation of acquiring an interest in the property in question. In this case, Mr. Cross makes no such claim. In addition, a constructive trust will not be imposed unless one party has been unjustly enriched at the expense of the other. For an unjust enrichment to have occurred there must be:
1. an enrichment of one person;
 2. a corresponding deprivation of the other;
 3. the absence of any juristic reason for the enrichment.

In this case there was neither enrichment of Ms. Brown, nor a corresponding deprivation of Mr. Cross. In fact, Mr. Cross benefited in being able to secure debts against the property owned by Ms. Brown, thus obtaining a lower interest rate. Ms. Brown had a deprivation, in that the property, which had clear title when she obtained it, is now subject to a mortgage. I do not accept that the payments on the mortgage by Mr. Cross have established an enrichment on the part of Ms. Brown, or a deprivation on his part. The mortgages were taken to pay primarily his income tax debt, which is acknowledged to be a family debt. The payments were made from what, at least until the time of the separation, was family income.

[36] The mortgage on the Cawston property was incurred to pay off a family debt, and is itself a family debt. I can see no reason why the burden of it should be borne solely by Ms. Brown. As a joint obligation, it makes sense that it should be paid out of the funds which will be available from the sale proceeds of Protection Island.

[37] Notwithstanding that I do not accept the constructive trust analysis, I do find that Mr. Cross is entitled to benefit from the payments made by him on the mortgage since separation. In that regard, it is different from the mortgage on the family home. With respect to that debt, if Mr. Cross, having the larger income, had not made the payments on it, Ms. Brown would likely have been successful in an application for spousal maintenance. However, the same is not likely true with respect to the payments on the Cawston mortgage. With respect to those payments, the court would likely not have awarded spousal maintenance, but rather have ordered the property sold, the mortgage paid off, and the balance of the proceeds paid to Ms. Brown. In those circumstances, Mr. Cross should be entitled to a credit for one-half of the mortgage payments made by him, totalling \$8,055. The credit to which he will be entitled is thus \$4,028.

B. Protection Island Property

[38] Most of the payments to be made from the sale proceeds of the Protection Island property are agreed. Mr. Cross does claim a credit, however, for an amount of approximately \$50,000 which he says was put into the purchase of that property from the proceeds of sale of the Pine Street home. I do not accept that submission. The situation is not comparable to that in which one party brings a sum of money into the relationship, which is then used to purchase joint property. Rather, the equity in that property was built up during the relationship. The down payment for the property came from a loan from a family friend to both Mr. Cross and Ms. Brown. Although all of the payments on the mortgage were made by Mr. Cross, that is to be expected, as he has always been the major income earner, and Ms. Brown was home with the children at that time. Thus, if the parties had separated before or at the time of the sale of the Pine Street home, Ms. Brown would likely have had a valid claim for a constructive trust with respect to that property. The increase in equity during that period cannot be considered to be an amount to which Mr. Cross alone was entitled. That is illustrated as well by the fact that it was used to purchase the Protection Island property, which was put in joint names. Mr. Cross's claim for a credit for the equity from the

Pine Street property which went into the Protection Island property is thus dismissed.

- [39] Mr. Cross's second claim relates to the payments made on the Cawston mortgage. As noted above, I find that he is entitled to a credit in the amount of \$4,028. However, as the debt is a joint one, incurred for family purposes, it will be paid in full from the proceeds of sale of the Protection Island property, rather than solely by Ms. Brown.
- [40] The payments made by Mr. Cross on the Protection Island mortgage since separation I consider to be different in nature from those on the Cawston property. As noted above, if those payments had not been made by Mr. Cross, when he had a substantially larger income than that of Ms. Brown, there would likely have been a successful application for spousal maintenance to enable Ms. Brown to make the mortgage payments. Although Ms. Brown is now claiming spousal support, she does not seek a retroactive award. She submits that claim should be offset against any claim Mr. Cross has for a credit on the mortgage payments. In addition, counsel for Ms. Brown notes that there is no claim for retroactive child maintenance, notwithstanding her submissions (supported in my findings) that Mr. Cross's income has been substantially higher than the amount of \$75,000 on which the child maintenance was based. In that regard, I note that the Guideline maintenance payable in 2005, based on what I have determined to be Mr. Cross's "real income" in 2004 of \$103,879 would have been \$1,261 per month, compared to the \$1,000 per month which he paid. With his income increasing in 2005 and 2006, that amount would also increase. Using his average earnings over the three years, the maintenance for two children under the Guidelines as amended May 1st, 2006, would be \$1,620 per month. I thus consider a set-off of the potential claim for retroactive spousal maintenance, and retroactive variation of child maintenance, against the mortgage payments made by Mr. Cross on the family home to be a reasonable one. His claim for a credit of one-half of that amount is thus dismissed.

V Child Maintenance

- [41] As noted above, I find Mr. Cross's income, for the purpose of child maintenance under the Guidelines, to be \$113,739. I find that of Ms. Brown to be \$34,000.
- [42] The intent of s. 15.1 of the Divorce Act is that the spouse who has primary care of the children, and thus the expenses relating to their care and upbringing, shall be paid maintenance by the other parent. In this case, the issue of which parent will be the primary caregiver appears to be in flux. I accept that after the consent order of May 11, 2007, under which Ms. Brown was to be the primary caregiver of the children, she offered Mr. Cross the opportunity to take over that function. That offer was accepted by him. However, this is not merely a matter of enforcing a settlement between the parties. When dealing with children, their best interests always take priority. In this case, the relevant facts are:
1. Under the consent order of May 11, 2007, Ms. Brown is the primary caregiver of the children, and there is no application before me to change that;

2. For whatever reason, the children are residing primarily with Ms. Brown.

In those circumstances, I considered deferring the issue of child maintenance until the situation with the children is more stable. However, I consider that it would not be appropriate to do that, in light of the existing order, and the fact that Ms. Brown does have the expenses relating to having the children living with her. If the situation changes in the future, it is to be hoped that the issues of the primary residence of the children and the child maintenance payable can be resolved by way of consent order. If not, the parties can make an application to the court.

- [43] In the meantime, however, on the basis that the children are presently primarily resident with Ms. Brown, I order that Mr. Cross pay child maintenance, based on a Guideline income of \$113,739 in the amount of \$1,620 per month, commencing August 1, 2007, and continuing until further order of the court, by consent or otherwise.
- [44] As agreed by the parties, there will be an order that any extraordinary expenses which arise will be paid in proportion to their respective incomes. Rounding off the proportions, Ms. Brown will pay one quarter of such expenses, and Mr. Cross three quarters.

VI Spousal Maintenance

- [45] Ms. Brown claims spousal maintenance on a compensatory basis in the amount of \$500 per month until the youngest child, Ana, graduates from high school. That would be a further five years. She notes, in particular, that Mr. Cross obtained his qualifications as a Supercargo during their relationship, and has a substantially greater earning capacity than she does. Mr. Cross submits that there should be no award of spousal maintenance. He notes that Ms. Brown will have her share of the Protection Island property, and thus will leave the relationship with considerably more than she had coming into it. He also notes that she has the equity in the Cawston property. He also submits that Ms. Brown also obtained qualifications during their relationship, and is capable of being self-supporting.
- [46] Ms. Brown relies on the two leading decisions of the Supreme Court of Canada, first, *Moge v. Moge*, [1992] 3 S.C.R. 813. In that case, the court noted that all of the objectives of spousal support set out in s.15.2(6) of the Divorce Act must be considered on an application for spousal support, not merely the ability to become economically self sufficient, in order to redress the advantages and disadvantages arising from marriage and its breakdown. The objectives of a spousal support order, as set out in s.15.2(6), are as follows:
- (6) Objectives of spousal support order - An order made under subsection (1) or as interim order under subsection (2), that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [47] The second case relied on is *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. In that case, the court set out three conceptual bases for entitlement to spousal maintenance: compensatory, contractual and non-compensatory, need based.
- [48] In *Yemchuk v. Yemchuk*, 2005 B.C.C.A. 406, at paragraph 50, Prowse J.A. noted that in a long-term marriage, where each has contributed his or her own resources, an equality of standard of living (which may not be the same as an equality of income) may be a just result. She also approved the use of the Draft Spousal Support Guidelines as a useful tool for assessing the quantum and duration of spousal support, to supplement the case law.
- [49] The relationship of Ms. Brown and Mr. Cross was a "traditional" one, in that throughout Mr. Cross was the main income earner. For 11 of the 13 years of their relationship, Ms. Brown was a stay-at-home parent, thereby foregoing employment opportunities. That was particularly important in the relationship as Mr. Cross was away from home for extended periods due to his employment. In the latter years of the relationship, she did obtain training which enables her to be employed as a community support worker, capable of earning \$34,000 per year if she is employed on a full-time basis. In that regard, she is better off than she was when she entered the relationship, with limited job skills.
- [50] However, Mr. Cross, during the relationship, has obtained qualifications as a Supercargo, which has enabled him to dramatically increase his income, so that he can now earn in excess of \$100,000 per year. Even considering only his income tax returns, his income, as shown, has increased from \$15,211 in 1999 to \$111,230 in 2006. While he says that he does not want to continue to work as hard as he has been doing since the separation, and his accountant says that 2006 income includes some "one-time" entries, he clearly has the capacity to earn substantially more income than Ms. Brown will ever be able to earn.
- [51] On the other hand, Ms. Brown entered the relationship with very little except her Cawston property, and will leave it with net proceeds of sale from the Protection Island property in the range of \$180,000. However, if she continues to have the primary care of the children, a significant part or all of that may be spent in providing accommodation for them. In those circumstances, I find that Ms. Brown has established an entitlement to an award of spousal maintenance.

- [52] With respect to quantum and duration, I accept the submissions made on Ms. Brown's behalf that the spousal maintenance should be in the amount of \$500 per month for a period of five years, until it is anticipated that Ana will have completed high school. There will thus be an order that Mr. Cross pay spousal maintenance to Ms. Brown in the amount of \$500 per month commencing August 1, 2007, and continuing on the first of each month until July 1, 2012.

VII Cost of Dr. Elterman's Report

- [53] I accept the submissions on behalf of Mr. Cross that the cost of the report of Dr. Elterman should be shared. In *L.E.G. v. A.G.*, 2003 B.C.S.C. 412, at paragraphs 25 - 26, Martinson, J. ordered that the cost of attendance of the psychologist who had prepared a report under s.15 of the Family Relations Act should be shared equally. She noted that, where a case requires the assistance of a report under s.15, and there is no conduct in the litigation worthy of rebuke, the parties should usually share the cost of the attendance of the investigator at trial. The same principle should apply to the costs of preparation of the investigator's report.
- [54] In this case, there have been issues with respect to the custody, guardianship and primary residence of the children. An order was made by consent, on May 11, 2007, that the parties have joint custody and guardianship of the children, with Ms. Brown as the primary caregiver. Although that order reflects the position she has taken in this proceeding from the outset, as noted above, the issue of the primary residence of the children is still not fully resolved.
- [55] Dr. Elterman provided a very full report, dated April 27, 2006. He made a number of recommendations, which Mr. Cross says have been of considerable assistance to him regarding the children. I accept his evidence in that regard. It also appears that Dr. Elterman's recommendations may of value in the future. In particular, he notes that there has been a lack of communication between Ms. Brown and Mr. Cross with respect to the children, that Hayden has taken advantage of that, and that has resulted in a risk to his safety. It appears that that is continuing, resulting in ongoing instability in the lives of the children. Although the matter is not before me, it is to be hoped that both parties will accept Dr. Elterman's recommendations, and establish communications about the children, if not by e-mail, then in some other manner.
- [56] Although the order for preparation of the report was obtained on application of Mr. Cross, I find that it has been of benefit in resolving issues, and includes recommendations that will be helpful in the future. There is no suggestion of any misconduct on the part of Mr. Cross in obtaining the report. In those circumstances, I order that the cost of the report be shared equally. Mr. Cross will thus be entitled to a credit in the amount of \$4,800 from the proceeds of sale of the Protection Island property.

VIII Costs

[57] Although Ms. Brown has been primarily successful in this application, Mr. Cross has also had success on some of the issues. With a one-day hearing, I do not consider it appropriate to apportion costs based on success on the respective issues. In those circumstances, with the exception of the cost of Dr. Elterman's report, each party will bear his or her own costs.

Mr. Justice A.F. Wilson

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