

CANADA / JUDGMENT

Bryant v. Gordon

2021 BCSC 1315

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Supreme Court of British Columbia

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2021 BCSC 1315 Bryant v. Gordon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bryant v. Gordon,

2021 BCSC 1315

Date: 20210706

Docket: E012054

Registry: Vancouver

Between:

Janet Faye Bryant

Claimant

And

John Merrick Gordon

Respondent

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

The Claimant, appearing in person:

Janet Bryant

The Respondent, appearing in person:

John Gordon

Place and Date of Hearing:

Vancouver, B.C.

May 25, 2021

Place and Date of Judgment:

Vancouver, B.C.

July 6, 2021

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INTRODUCTION

- [1] The respondent, Mr. Gordon, applies for an order terminating his monthly spousal support obligation immediately, or, alternatively, an order significantly reducing spousal support and terminating support on a defined date in the future. The claimant, Ms. Bryant, opposes the relief sought.

- [2] Mr. Gordon is presently 65 years old, and Ms. Bryant is 67. The parties were married in May 1981, and separated in October 2000. They had three children together. Their oldest child, a daughter, tragically died in an accident in 1993. Their surviving children are now aged 36 and 31. Ms. Bryant was the primary caregiver to the children during the parties' marriage and after separation. She worked part-time. Mr. Gordon worked as a criminal lawyer with the British Columbia Ministry of Attorney General ("AGBC") in various capacities.
- [3] This application is a review of spousal support, not a variation application. The order that currently governs spousal support is the July 3, 2007 order of Justice Slade (the "2007 Order"), which set the level of monthly spousal support at \$1,800. The 2007 Order provides that either party may seek a review of entitlement and quantum of spousal support after June 30, 2009. Neither party sought a review before now.
- [4] The impetus for the present application is Mr. Gordon's impending retirement on July 1, 2021. Mr. Gordon's income will significantly reduce on his retirement. Mr. Gordon emphasizes that he has now been paying spousal support for a period of time that is longer than the parties' marriage. He says that Ms. Bryant has no continuing entitlement to support on either compensatory or non-compensatory grounds.
- [5] Ms. Bryant is semi-retired and earns a modest income. She emphasizes that she was primarily responsible for the care of the parties' children during the marriage and after separation. Ms. Bryant points out that Mr. Gordon benefitted from her contributions to the family as her efforts permitted him to pursue a full-time legal career. As a result, she says there has been a significant income disparity between the parties that continues to the present day, as well as a disparity in the parties' ability to financially plan for retirement. Ms. Bryant accepts that Mr. Gordon's spousal support obligation should terminate eventually, but she says it is premature for support to terminate now. She proposes an order reducing monthly spousal support to \$1,400, with a date of termination in five years.

FACTUAL BACKGROUND

The parties' marriage

- [6] The parties were married on May 6, 1981. They lived together for a period of time before their marriage. There is a dispute in the evidence regarding the length of the pre-marriage period of co-habitation. Mr. Gordon says the parties began to live together in the spring of 1980, while Ms. Bryant says it was the spring of 1979. I do not need to resolve this dispute for the purpose of this application.
- [7] Both parties obtained law degrees, and began to practice law around the time of their marriage. Ms. Bryant stopped working as a lawyer when their oldest child was born in 1982. She did not return to the practice of law, preferring to stay at home and care for their children. Ms. Bryant says she did not wish to pursue a legal career, as the practice of law did not suit her temperament.

- [8] Mr. Gordon worked for the BC Prosecution Service--then known as the Criminal Justice Branch--as a trial prosecutor between 1981 and 1988. He left the AGBC to start his own practice in 1988. In 1993, following the death of his oldest daughter, Mr. Gordon returned to practice with the AGBC. Between 1993 and 2000, he was appellate counsel with the Criminal Appeals and Special Prosecutions section.
- [9] In 1983, Ms. Bryant started a landscape design business out of the family home. She worked part-time during the growing season. She also did contract sewing work. In or around 1988, Ms. Bryant took a job as the Administrator at the Vancouver Waldorf School. She worked there until 1994, other than during a four-month leave of absence after her daughter's death.
- [10] During the marriage, the parties lived in a three-bedroom house in North Vancouver on West 19th Street. Mr. Gordon says the family lived from paycheck-to-paycheck. Other than personal RRSP contributions, they had no savings. The family home was their only significant asset. I do not take Mr. Gordon's evidence about the marital standard of living to be in dispute. It is common ground that the parties had to take out a line of credit to help pay for extraordinary expenses, including a trip to Florida in 1998. The parties owed \$44,000 on the line of credit at the date of separation.
- [11] In or around 1997, Ms. Bryant began a Master's Program in Education (Counselling Psychology) at the University of British Columbia. Mr. Gordon supported Ms. Bryant's decision to pursue a Master's degree, including providing financial support. She obtained her degree in 2001.

The parties' separation and divorce

- [12] In October 2000, Mr. Gordon moved out of the family home. Ms. Bryant continued to live in the residence with the children while Mr. Gordon rented an apartment. Ms. Bryant was 47 years old at the time, and Mr. Gordon was 45. Their son was in grade 10, and their daughter was in university. The length of the parties' marriage relationship, depending on which version of the length of pre-marriage cohabitation is accepted, was either 20 years or 21 years.
- [13] In June 2001, Ms. Bryant commenced an action under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], seeking orders for divorce, child and spousal support, parenting arrangements, and division of family assets.
- [14] Between November 2000 and January 2002, Mr. Gordon voluntarily paid Ms. Bryant child and spousal support. On January 29, 2002, Master Doolan issued an interim order, by consent, requiring Mr. Gordon to pay monthly spousal support of \$2,500. Master Doolan's order included a declaration, pursuant to s. 57 of the FRA, that the parties had no reasonable prospect of reconciliation.
- [15] The parties settled all issues by way of a final order issued, by consent, on March 26, 2002 (the "Final Order"). The Final Order included the following provisions:

- the parties are divorced;
- Mr. Gordon is found to have a guideline income of \$116,700, and Ms. Bryant a guideline income of \$6,000;
- the principal residence of the children is with Ms. Bryant, with reasonable and generous access to Mr. Gordon;
- Mr. Gordon shall pay child support in the monthly amount of \$1,388, as long as the children remained eligible for support;
- Mr. Gordon shall pay Ms. Bryant spousal support in the monthly amount of \$2,150, with the possibility of a review after March 31, 2004;
- the family home will be listed for sale on April 1, 2005, with Ms. Bryant having exclusive occupancy of the home until that date;
- the net proceeds from the sale of the family home will be divided 55% in favour of Ms. Bryant and 45% in favour of Mr. Gordon;
- Mr. Gordon's employment pension shall be equally divided as of January 29, 2002;
- the parties' RRSPs will be equalized by way of a spousal rollover; and
- the parties have joint responsibility for the family debt, consisting of the mortgage on the family home of approximately \$100,000, and \$44,000 owed on the parties' line of credit.

[16] Mr. Gordon deposes that the provision for unequal division of the proceeds of the sale of the family home was intended to compensate Ms. Bryant for having applied an inheritance towards the purchase of the family home. The family home ultimately sold in September 2005. Mr. Gordon rented an apartment up to the time of the sale of the family home. Mr. Gordon and Ms. Bryant both purchased property once they received their share of the net proceeds of sale. Ms. Bryant purchased a townhome in the same area, and moved there with the children. She downsized in 2015, selling the townhome and purchasing a condominium.

[17] The monthly child support payable by Mr. Gordon was reviewed and adjusted over time to correspond with changes to the parties' incomes and the children's circumstances. The children are now, of course, independent adults.

The 2007 Order

[18] In November 2006, Mr. Gordon filed an application seeking a review and reduction of spousal support payable to Ms. Bryant under the Final Order. Ms. Bryant cross-applied for an increase in both child and spousal support.

- [19] In reasons for judgment issued July 3, 2007 (indexed at 2007 BCSC 946), Justice Slade allowed Mr. Gordon's application and reduced monthly spousal support payments from \$2,150 to \$1,800, effective July 1, 2007. Ms. Bryant's application to increase child and spousal support was dismissed.
- [20] At the time of the hearing before Justice Slade, Ms. Bryant had received her Master's degree in counselling psychology and was working part-time as a contract counsellor at various independent schools. Ms. Bryant argued that full-time work might be unmanageable due to injuries she had suffered in car accidents. Justice Slade rejected this argument, finding that the evidence did not establish that Ms. Bryant was unable to tolerate full-time work. He found there was no evidence that Ms. Bryant had engaged in or looked for full-time work (at paras. 35-36).
- [21] Justice Slade commented as follows on the parties' post-separation circumstances:
- [48] As the parties have now been separated for 6½ years, and the plaintiff has two advanced university degrees, the obligation to pursue self-sufficiency is a significant consideration. She has achieved a greater measure of self-sufficiency since spousal support was initially fixed at \$2,150 monthly. This amount appeared to take account of the plaintiff's limited income at the time, her continued occupation of the home, the economic benefit associated with her completing her degree, and her child care responsibilities.
- [49] The arrangement for exclusive occupancy and delayed sale of the home, and the payment by the defendant of annual support in excess of \$42,000, indicate disparity in favour of the plaintiff in the parties' post-separation standards of living. Due to the delayed sale of the home, the defendant lacked the capital to support the purchase of alternate accommodation, and lived in rented premises until after the sale of the home. It is to the credit of the defendant that he joined with the plaintiff in the post-separation arrangements, and did not press for a review of spousal support until long after he could have.
- [22] Justice Slade found that Ms. Bryant's circumstances had materially changed since the parties' separation, in that her income had substantially increased and her childcare responsibilities had reduced. Justice Slade found Ms. Bryant had failed to achieve self-sufficiency largely as a result of self-imposed limits. He stated:
- [52] As for the plaintiff's obligation to pursue self-sufficiency, I consider her efforts somewhat wanting. While it must be recognized that full-time employment opportunities in the public schools are unavailable due to the fact that she does not have a degree in education, it is apparent that she has unreasonably failed to maintain remunerative contract employment, and wishes to restrict her employment to four days weekly, with mid-afternoon ends to the work day.
- [23] Justice Slade concluded that a downward adjustment of support would reflect an increase in Ms. Bryant's capacity to meet her needs. While Mr. Gordon's income had also increased, from \$116,700 at separation to \$140,000, Justice Slade found that the increase was a

reflection of Mr. Gordon's efforts after separation. He declined to use Mr. Gordon's current income to calculate the appropriate level of spousal support because this would result in a standard of living for Ms. Bryant that was beyond the standard of living that prevailed at separation. For the purpose of calculating an appropriate level of child support, Justice Slade used Mr. Gordon's income at separation, and imputed an income of \$38,000 to Ms. Bryant.

[24] Justice Slade accordingly ordered that Mr. Gordon pay Ms. Bryant \$1,800 per month in spousal support, with either party able to seek a review after June 30, 2009. The context for the review term is the following passage from Justice Slade's reasons for judgment:

[61] In anticipation that the plaintiff will increase her remunerative employment, there will be a review of entitlement and quantum of spousal support after June 30, 2009.

[25] Mr. Gordon twice retained counsel to pursue a review of spousal support pursuant to the 2007 Order. There was correspondence between the parties on these occasions, and some exchange of financial information. However, neither party pursued a formal review in court before now. Mr. Gordon has paid Ms. Bryant \$1,800 per month in child support since July of 2007.

THE PARTIES' CURRENT CIRCUMSTANCES

Mr. Gordon's circumstances

[26] Mr. Gordon is now 65 years old. He lives with his current spouse, Ms. Galovic, in a two-bedroom condominium in Vancouver's West End. Mr. Gordon and Ms. Galovic began to live together in November 2002, and were married in August 2006. She currently works in an administrative capacity for the Gateway Theatre in Richmond, B.C., and earns an annual salary of \$69,360. Mr. Gordon and Ms. Galovic jointly own the apartment that they live in. As of 2021, it has an assessed value of \$764,000.

[27] Mr. Gordon's other assets, as set out in his April 22, 2021 Form 8 Financial Statement, total approximately \$175,000. This is comprised of Mr. Gordon's 50% interest in funds deposited a bank account jointly held with Ms. Galovic, and Mr. Gordon's RRSP. It does not include the value of Mr. Gordon's Public Sector Pension Plan.

[28] Mr. Gordon continued to work for the BC Prosecution Service up until October of 2020, when he opted to receive pre-retirement paid leave benefits. These benefits allowed Mr. Gordon to continue to receive his pre-retirement salary for a period of eight months. His effective date of retirement is July 1, 2021.

- [29] Mr. Gordon says he is experiencing various health issues that factored into his decision to retire, including a degenerative disk in his spine that causes nerve pain, arthritis in his hip, and benign prostatic hyperplasia. It is unnecessary to review his evidence on this point in any detail as I do not understand Ms. Bryant to suggest that Mr. Gordon's decision to retire at the age of 65 was unreasonable or designed to reduce spousal support.
- [30] Mr. Gordon's career with the BC Prosecution Service since separation has been a demanding one. Between 2000 and mid-2018, he was the Deputy Director (Criminal Appeals). In that capacity, Mr. Gordon managed an office of eight to twelve appellate lawyers and administrative staff, and also had conduct or co-conduct of appeals. In mid-2018, he was seconded to a team of lawyers with conduct of appeals arising from the Surrey Six murder prosecution. Due to the volume and intensity of the work involved in this assignment, Mr. Gordon gave up his duties as Deputy Director. Mr. Gordon remained in this role until his final day of work in October 2020.
- [31] Mr. Gordon's income has increased over time. As noted, at the time of the parties' separation he earned approximately \$117,000. In 2019, his last full year of active employment, his annual salary was \$235,264. Mr. Gordon's employment income in 2020 was \$260,959. However, this included a \$20,000 payout of banked vacation time.
- [32] As of July 1, 2021, Mr. Gordon will receive \$6,751 per month in pension benefits, before tax. Based on advice he received over the phone from Service Canada, he expects that he will also receive \$1,135 per month in Canada Pension Plan ("CPP") payments, and that he will not initially receive Old Age Security benefits due to his level of income in 2021. Mr. Gordon will also receive a monthly income of \$550 from his RRSP. Mr. Gordon's combined annual pre-tax income after retirement will be approximately \$101,232.
- [33] Mr. Gordon says that the reduction of his monthly income by more than half will leave him with minimal discretionary income. He says that he and Ms. Galovic have been diligently saving to pay off the mortgage on their condominium in anticipation of a planned renovation, which has an estimated cost of \$70,000. Ms. Galovic is currently experiencing some serious dental issues that will require surgery in the near future. The estimated cost of the dental work is \$45,000 to \$50,000. Neither Mr. Gordon nor Ms. Galovic has extended health insurance to cover these expenses. They expect to cover the expenses, at least in part, with the funds held in their joint bank account.
- [34] Mr. Gordon is hoping to be able to travel in his retirement. His daughter lives in Southern California, and he wishes to visit his grandchildren there. Mr. Gordon and Ms. Galovic also hope to be able to travel to Serbia visit her family, including her elderly parents.

Ms. Bryant's circumstances

- [35] Ms. Bryant is now 67 years old. She lives in a two-bedroom condominium in North Vancouver, which has an assessed value of \$671,000. Ms. Bryant purchased the condominium after selling her townhome in 2015. There is no mortgage on the property. Ms. Bryant lives alone; she has not repartnered since her separation from Mr. Gordon.
- [36] Ms. Bryant has worked as a counsellor since receiving her Master's degree in 2001. Her area of specialization is grief, loss, and trauma. Over time, Ms. Bryant has worked as a contract counsellor at several independent schools, an employee at one school, and has operated her own private counselling practice.
- [37] In her affidavit evidence on this application, Ms. Bryant provided a list of the various positions she has held over time, including such diverse employment as bookstore clerk and panel member on the Mental Health Review Panels. Ms. Bryant's affidavit evidence provides a limited amount of detail about these positions. There is no supporting documentation. Many of the listed positions pre-date the parties' appearance before Justice Slade in 2007. It appears from the list that Ms. Bryant's employment in recent years has primarily consisted of part-time, temporary contract positions as a counsellor with independent schools. Ms. Bryant also appears to have been active as a volunteer in the field of mental health, providing presentations to various school and community groups.
- [38] As reflected in Justice Slade's reasons for judgment, Ms. Bryant says that she was unable to secure a full-time job in the public school system because she does not have a Bachelor of Education degree. She says there are few full-time counselling jobs in independent schools.
- [39] Ms. Bryant takes issue with Justice Slade's factual finding that she had not, as of the 2007 hearing, made sufficient efforts to look for full-time work. In her affidavit material on the present application, Ms. Bryant has provided a list of 62 positions she says she has applied for since the parties' separation, by way of demonstrating her efforts to obtain employment. Once again, Ms. Bryant's affidavit evidence provides limited information about these potential positions. There is no supporting documentation.
- [40] Ms. Bryant describes herself as semi-retired. She currently works one to two mornings per month at Lion's Gate Christian Academy. She has an ongoing contract with Cascade Christian Counselling to work two days per month in Smithers, BC. The contract was temporarily interrupted by the Covid-19 pandemic, but she expects it to continue in the future. She continues to see some clients in her private practice. She also volunteers for Disaster Psychosocial Services, which is part of Health Emergency Management for British Columbia.

- [41] In 2010, Ms. Bryant elected to receive her interest in Mr. Gordon's pension by way of a commuted lump sum payout. She received the funds in 2011. The cash portion of the lump sum payout was \$21,597, after the deduction of income tax. Ms. Gordon put \$14,200 of this sum into a tax-free savings account (TFSA). Ms. Gordon deposes that since 2011, she has continued to add to her TFSA, mostly by way of the proceeds from the sale of her townhouse.
- [42] The non-cash portion of the lump sum pension payout was \$187,265. This sum was initially transferred into a locked-in retirement savings plan (LRSP) at Scotiabank. In May 2012, Ms. Bryant transferred \$100,000 of the LRSP into a locked-in retirement account (LIRA) with Manulife. In October 2015, Ms. Bryant transferred the remaining amount of the LRSP at Scotiabank into a LIRA RRSP with Empire Life, and her Scotiabank RRSPs into Empire Life RRSPs. All of these RRSPs were converted to annuities--retirement income funds (RIFs)--in November 2019 when Ms. Bryant turned 66.
- [43] According to her F8 Financial Statement, Ms. Bryant's income in 2021, aside from spousal support, will consist of CPP and OAS benefits (\$18,635), the annuities from her RIFs (\$17,815), self-employment and business income (\$9,216 - gross), CERB benefits (\$1,200), and interest and investment income (\$77). The total is \$46,943.
- [44] Ms. Bryant's Line 150 income over the last five years, minus spousal support payments, is as follows:
- 2020 \$46,095
- 2019 \$54,025
- 2018 \$51,734
- 2017 \$53,124
- 2016 \$55,602
- [45] Ms. Bryant deposes that, out of necessity, she will continue to work part-time until health or other issues prevent her from doing so. Once she can no longer earn employment income, she anticipates her annual income will be \$36,000, consisting of her annuities and CPP/OAS benefits.
- [46] Ms. Bryant also reports having health issues that impact her ability to increase her employment hours at this stage of her life, including osteoporosis, cataracts in both eyes, and a disease of the cornea called Fuchs Dystrophy.
- [47] Aside from her condominium, Ms. Bryant's other assets consist of her TFSA, which has a current value of \$75,519, and other bank deposits totalling \$27,202. Other than a current credit card balance of \$868, Ms. Bryant has no debt.

[48] Ms. Bryant says that she lives a quiet and frugal life. She does not go to concerts or movies, and only occasionally goes out for meals with her children. Prior to Covid-19, Ms. Bryant travelled to California four times per year to visit her daughter and grandchildren, staying for a week or more on each visit. She is close to her daughter, and considers this travel important in order to maintain their connection, and as well as her connection with her grandchildren. Ms. Bryant says she also anticipates having to incur significant costs in the next few years in relation to her condominium. She expects to cover these costs with funds from her TFSA.

ANALYSIS

[49] The spousal support term in the Final Order does not specify whether support was ordered pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [Divorce Act], or the FRA. In his 2007 judgment, Justice Slade assumed that the Divorce Act governed. The parties make the same assumption in their submissions before me on this application. Given that corollary relief in a divorce action is typically granted under the Divorce Act, I will also assume that Mr. Gordon's review application is brought pursuant to the Divorce Act.

Legal framework

[50] Section 15.2(3) of the Divorce Act permits the court to attach a condition to an order that permits one or both spouses to return to court for reconsideration of a specified aspect of the original order: *Leskun v. Leskun*, 2006 SCC 25 at para. 36 [Leskun]. Such a review order may be useful where there is genuine and material uncertainty at the time of the original order that justifies a future reconsideration without the need for a spouse to establish a material change in circumstances. The court may put conditions on the provision for a future review that circumscribes its ambit: *Leskun* at paras. 37-39.

[51] A review term is included in the 2007 Order. As this is an application for a review of spousal support rather than a variation application, it is not necessary for Mr. Gordon to establish a material change in circumstances as a precondition to the termination or variation of support. In *Morck v. Morck*, 2013 BCCA 186 [Morck], the Court of Appeal described the nature of an application to review spousal support as follows:

[17] [O]n an application to review an earlier order of spousal support, the applicant need not establish a material change in circumstances. Instead, the review is a hearing *de novo*, and treated as an initial application for support under s. 15.2 of the Divorce Act. This permits the court to adjust support in a manner that takes into account changes that may have been contemplated by the parties at the time the order was made, but were nevertheless uncertain. Because the issues on review are similar to those on an initial application, the Spousal Support Advisory Guidelines may be used for guidance: *Domirti v. Domirti*, 2010 BCCA 472 at paras. 32-36, 10 B.C.L.R. (5th) 281; and *Tedham v. Tedham*, 2005 BCCA 502 at paras. 22, 47 B.C.L.R. (4th) 254.

[52] Sections 15.2(4) and (6) of the Divorce Act set out the factors to be considered on a review:

(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

....

(6) An order made under subsection (1) or an 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.

[53] The objectives of spousal support set out in the Divorce Act encompass both compensatory and non-compensatory grounds for support: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 34-43 and 49.

[54] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of economic advantage on the other spouse: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50-51 [Chutter]. The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming childcare and household responsibilities may impact their future financial prospects: *Chutter* at para. 50. There may be a corresponding advantage to the payor spouse in the ability to pursue career opportunities free of such responsibilities. Compensatory support should continue until compensation for the economic disadvantages of the marriage and its breakdown are achieved: *Chutter* at para. 79.

[55] Non-compensatory support is grounded in the 'social obligation model' of marriage in which marriage is seen as an inter-dependent union. Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse and not the state: *Chutter* at para. 54. "Need" in this context refers to something more than the basic necessities of life.

The concept of need may vary depending on the circumstances of the parties. In longer marriages, courts may measure need against the marital standard of living: Chutter at para. 90.

- [56] If, on a review of spousal support, the recipient spouse establishes continuing entitlement to spousal support, whether on compensatory or non-compensatory grounds, the question then becomes one of quantum. The Spousal Support Advisory Guidelines [SSAG] may provide guidance in setting the appropriate quantum, although with due sensitivity to the different considerations that may arise on a review of spousal support as opposed to an original order: Morck at para. 17; Domirti v. Domirti, 2010 BCCA 472 at paras. 40-41. Where the factors giving rise to a party's initial entitlement to support remain essentially unchanged on the variation application, it may be appropriate to apply the SSAG: Boekhoff v. Boekhoff, 2016 BCCA 33 at para. 77.

Scope of review

- [57] The entered order in the present case provides that "either party may seek a review of entitlement and quantum of spousal support after June 30, 2009". The review order is, accordingly, cast in broad terms. The only condition is that a review can only be sought after June 30, 2009.
- [58] Accordingly, the purpose of this review is to determine, as a first step, Ms. Bryant's entitlement to spousal support. If I conclude that Ms. Bryant is not entitled to support on either compensatory or non-compensatory grounds, then support will terminate. If I conclude that she is entitled to support, then the question becomes one of the quantum of support.
- [59] The context for the review term in the present case is the uncertainty over Ms. Bryant's future earnings that existed at the time of the hearing before Justice Slade. Justice Slade's order provides for a review of spousal support "in anticipation that the plaintiff will increase her remunerative employment" (at para. 61). However, the order does not restrict the review to consideration of Ms. Bryant's earnings after July 2007. Rather, the order anticipates a full hearing of all the relevant circumstances.
- [60] Before turning to consider Ms. Bryant's entitlement to ongoing support, I will address three preliminary points arising from the parties' submissions that are relevant to the scope of this review.
- [61] First, Ms. Bryant argues that Justice Slade made factual errors in his prior ruling. She attempts to supplement the record to address the alleged errors. For example, Ms. Bryant takes issue with Justice Slade's conclusion that she made insufficient efforts to find full-time employment. Ms. Bryant's affidavit evidence attempts to remedy the alleged error by listing the positions she has applied for since separation. While the relevant case authority characterizes the review of support as a "reconsideration", I do not interpret that to mean that it is appropriate to go behind Justice Slade's factual findings on the basis of evidence

that was not tendered at the original hearing. My role on this application is to undertake a fresh analysis of spousal support, but from the starting point of Justice Slade's previous factual findings. Ms. Bryant's potential remedies, if she disagreed with Justice Slade's findings, were to appeal the decision or apply to Justice Slade to re-open the application. Ms. Bryant did not pursue either remedy.

- [62] Second, relying on the "Rule of 65", Ms. Bryant claims an entitlement to "prima facie ongoing and indefinite support", absent Mr. Gordon demonstrating extraordinary circumstances. Under the Rule of 65, an order for indefinite support is appropriate where, as in this case, the length of the marriage relationship and the recipient's age at separation combined exceeds 65 years. However, indefinite support does not necessarily mean permanent support. Spousal support orders that are indefinite, that is with no fixed duration, are still subject to variation and review. A variation or review may lead to time limits, or even to the termination of spousal support where the circumstances warrant: Spousal Support Advisory Guidelines: The Revised User's Guide (April 2016) at p. 29. The present application is a review of spousal support. It is open to Mr. Gordon to seek a termination or reduction of spousal support without showing any material change in circumstances.
- [63] Third, and finally, both parties have advanced submissions based on the hypothetical outcome of a review application had one been brought at an earlier date. Mr. Gordon posits that he could have successfully applied to terminate or reduce spousal support before now, given the 2007 reasons of Justice Slade and his emphasis on the factor of self-sufficiency. Mr. Gordon considers it likely that a court would have imputed additional income to Ms. Bryant. Ms. Bryant posits that she could have applied to increase spousal support before now given the significant disparity in the parties' incomes after the 2007 Order. On Mr. Gordon's hypothetical, Ms. Bryant has received more than she was entitled to in spousal support. On Ms. Bryant's hypothetical, she was entitled to more than she received.
- [64] I do not find these submissions helpful to the resolution of the issues that arise on the application before me. There were risks to both sides in pursuing a review application. Until now, the parties were apparently content to rely on the status quo rather than press their positions in court. I must decide Mr. Gordon's application on the basis of the evidence that is before me, having regard to the applicable legal principles. I do not consider it part of my task to assess the likely outcome of a prior review application that was never brought.

Is Ms. Bryant entitled to ongoing support?

- [65] There is no dispute in this case that at the time of the parties' separation, Ms. Bryant was entitled to spousal support on both compensatory and non-compensatory grounds. Throughout the marriage, Ms. Bryant had primary responsibility for caring for the parties' children and looking after the family home. Ms. Bryant's contributions facilitated Mr. Gordon's career, and limited her own earning potential. At the time the parties separated, Ms. Bryant was still in the process of completing her Master's degree and she had limited financial resources. Absent an order for spousal support, there would have been disparity in

the parties' standards of living.

- [66] By the time of the hearing before Justice Slade in 2007, the circumstances had changed. Ms. Bryant had obtained a Master's degree and embarked on a counselling career. Justice Slade found that Ms. Bryant was capable of working full-time, and that she should increase her efforts to obtain remunerative employment.
- [67] Following the 2007 Order, Ms. Bryant appears to have continued along the same career trajectory, working part-time hours, primarily as a contract counsellor for independent schools while engaging in volunteer work. On the present application, Ms. Bryant explains that the particular career path she has chosen, specializing in trauma and grief counselling, has limited opportunities for full-time employment. Ms. Bryant's evidence on this point consists only of her own assertion that this is so. However, even assuming her assertion is correct, Ms. Bryant's impaired earning capacity is then a function of her own choice of career path rather than a function of her economic disadvantage, relative to Mr. Gordon, in assuming primary childcare and household responsibilities during the parties' marriage and in the immediate post-separation period.
- [68] I accept that Ms. Bryant's choice to pursue a graduate degree in clinical psychology was, to a significant extent, motivated by the grief she has endured as a result of the death of her oldest child, and a desire to help others in such circumstances. There is no question that Ms. Bryant and Mr. Gordon experienced a great personal tragedy. Their lives have been profoundly affected. However, to the extent that this tragedy led Ms. Bryant to focus on a career that had more limited earning potential, this not an economic consequence that arises from the marriage or its breakdown.
- [69] Furthermore, I infer from the evidence that Ms. Bryant's part-time employment suited other lifestyle choices she has made, including her frequent travel to California. Once again, it is entirely understandable that Ms. Bryant would wish to maintain a strong connection with her daughter and grandchildren. However, in choosing to travel to California four times per year, Ms. Bryant necessarily limits her ability to generate income in Canada.
- [70] Having regard to all of the relevant circumstances, I conclude that Ms. Bryant has had sufficient time and opportunity to become self-sufficient through reasonable effort on her part. Ms. Bryant is a well-educated and capable individual. She did not have health conditions that prevented her from engaging in remunerative employment. The fact that Ms. Bryant's income has not substantially increased since the hearing before Justice Slade is a function of choices she has made in her life and career. It is not a consequence of economic disadvantage to Ms. Bryant arising from the marriage or its breakdown. In my view, any continuing entitlement to spousal support can only be grounded in non-compensatory support, as compensatory objectives been achieved by the spousal support payments that Mr. Gordon has made over the past 20 years.

- [71] This leads to the difficult question of whether Ms. Bryant has a continuing entitlement to spousal support on non-compensatory grounds. The question is difficult in this case because Ms. Bryant cannot, at her current age and in her current health, reasonably be expected to engage in sustained effort to secure a full-time job. She will have a limited income without spousal support. At the same time, Mr. Gordon objects to bearing the ongoing financial burden of Ms. Bryant's limited circumstances when those circumstances are the result of Ms. Bryant's failure to make reasonable efforts to become self-sufficient.
- [72] There is undoubtedly an income disparity between the parties that will become more pronounced after Ms. Bryant stops working altogether. This is because Mr. Gordon has pension through his employer, whereas Ms. Bryant does not. However, Ms. Bryant has already been compensated for her interest in Mr. Gordon's pension through a lump sum payment. The pension benefits that Mr. Gordon will receive when he retires accrued, to a large extent, through contributions he made after separation. In any event, income disparity in itself does not automatically lead to entitlement, even to non-compensatory support: *Lee v. Lee*, 2014 BCCA 383 at paras. 45-62. This is particularly so where the disparity is measured 20 years after the parties separated and in the face of a finding that the lower income-earning spouse has not made reasonable efforts to achieve self-sufficiency.
- [73] In terms of the parties' current circumstances, they are relatively equal in their asset base. They each own a condominium in which they reside, Mr. Gordon as a joint owner with his spouse. Mr. Gordon's property has a higher assessed value, but Ms. Bryant is the sole owner of her property. Mr. Gordon has \$108,807 in RRSPs, and funds totalling \$133,000 in a joint account with Ms. Galovic. Ms. Bryant has a TFSA and bank deposits that total \$103,721. Neither party has any debt, other than their minimal credit card balances.
- [74] In her Form 8 Financial Statement, Ms. Bryant reports having total annual expenses of \$59,700. There is cause to question the necessity of some of the expenses listed by Ms. Bryant, which include items such as \$4,800 in charitable donations, \$2,100 towards gifts for children, \$1,620 in clothing purchases, and \$600 in contributions to an RESP. Ms. Bryant's statement of expenses also assumes an annual payment of \$10,500 in income tax, which is the amount she paid in tax in 2020 on a Line 150 income of \$67,693.
- [75] As long as Ms. Bryant maintains her current level of employment, she will be capable of earning an annual income that equates to the \$46,000 that she earned in 2021. This would be sufficient to cover Ms. Bryant's basic expenses such as food, housing, transportation, and personal care needs. Any extraordinary spending would likely require her to dip into her savings or incur debt. In other words, Ms. Bryant will have a standard of living that approximates her standard of living during the parties' marriage.
- [76] In the circumstances, I conclude that Ms. Bryant is not entitled to ongoing indefinite spousal support at the current level on non-compensatory grounds. The spousal support payments that Mr. Gordon has made over time have allowed Ms. Bryant to achieve a standard of living that equates to her standard of living during the marriage. She owns her home outright, and

has some savings. The fact that Ms. Bryant's financial position is not as secure as she might have wished is primarily a function of her own career and life choices and not the result of the breakdown of the marriage.

- [77] I accept that Ms. Bryant may face hardship in adjusting to the termination of spousal support, given her long-term dependence on monthly support payments. She may require some time to adjust her lifestyle to an income that does not include spousal support payments. To this extent, the non-compensatory objective of spousal support justifies a transition period during which Ms. Bryant will continue to receive a reduced level of support, with a clear termination date fixed in the future. Such a transition period will allow Ms. Bryant to adjust her lifestyle in anticipation of a termination of spousal support, while also providing Mr. Gordon with the certainty of a firm end date to his support obligation.
- [78] At the hearing of this application, Ms. Gordon proposed a form of transition period in her submission that spousal support should continue for a further five years at the reduced level of \$1,400 per month. As I understand the submission, Ms. Gordon bases the monthly level of spousal support on the SSAG calculation of low-range support on an income for Mr. Gordon of \$101,000, and for Ms. Bryant of \$46,000.
- [79] In my view, this proposal exceeds the duration of transitional spousal support that can be justified in the circumstances. The purpose of transitional support is to allow Ms. Gordon a period of time to adjust to the termination of support, and clear notice of a future termination date. Five years is an excessively long period of time to achieve that objective. In my view, a further period of one year of reduced spousal support would fairly balance the parties' needs and circumstances.
- [80] Mr. Gordon argues that if spousal support payments are to continue, those payments should be based on a calculation under the SSAG of low-range support on Mr. Gordon's retirement income of \$101,000, and an imputed income to Ms. Bryant of at least \$55,600, which is the highest income Ms. Bryant has earned in the past five years. In light of my finding that Ms. Bryant has not made reasonable efforts to achieve self-sufficiency, I agree that it would be fair to impute income to her on the basis suggested by Mr. Gordon. Using those incomes, the SSAG indicates a low-range of support of around \$1,200 per month.
- [81] Accordingly, I conclude that as of July 1, 2021, Mr. Gordon's spousal support obligation shall reduce from \$1,800 to \$1,200, and support will terminate after one year.

ORDERS

- [82] For the foregoing reasons, I make the following orders:
- a) The monthly spousal support payable by Mr. Gordon to Ms. Bryant shall be reduced from \$1,800 to \$1,200, effective July 1, 2021;

b) Spousal support shall terminate as of July 1, 2022.

[83] Mr. Gordon is the substantially successful party on this application, and is therefore entitled to recover his costs from Ms. Bryant at scale B.

"Horsman J."

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