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CANADA / JUDGMENT

## C.R. v. A.R.

2003 BCSC 973

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COURT

Supreme Court of British Columbia

DECIDED

20 June 2003

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2003BCSC0973

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

C.R. v. A.R.

2003 BCSC 973

Date: 20030620

Docket: D103487

Registry: Vancouver

Between:

C.R.

Plaintiff

And

A.R.

Defendant

Before: The Honourable Mr. Justice Chamberlist

Reasons for Judgment

Counsel for the Plaintiff:

L.A. Kahn

Counsel for the Defendant:

P.M. Daykin

## Date and Place of Hearing:

December 18, 2002

Vancouver, B.C.

- [1] On December 18, 2002, I reserved my decision with respect to the determination of the outstanding issues arising from the Minutes of Settlement dated November 19, 1997, and the Judgment of the Court of Appeal in Action #CA028912 dated September 27, 2002. I am now advised by Mr. Kahn, on behalf of himself and Mr. Daykin, that the parties have resolved all outstanding issues other than the spousal maintenance review mandated by the Minutes of Settlement. The Minutes of Settlement provided for spousal support in the amount of \$2,350 per month with the entitlement of Ms. C.R. to and quantum of spousal maintenance to be reviewed on June 30, 2002.
- [2] Pursuant to para. 35 of the Minutes of Settlement, the parties also agreed that the agreement they reached on spousal support would be subject to review in the event that Ms. C.R.'s share of her late father's estate exceeded \$200,000.
- [3] By further background, the plaintiff and defendant met when they were 17 and 19 years old respectively, and began living together in 1973, just after Ms. C.R.'s 19th birthday. She obtained her Bachelor of Arts in April 1976, and the parties were married on June 1976. They separated in January 1996. Over the years of their marriage they had three children, now aged 21, 18 and 17 respectively.
- [4] Although Ms. C.R. had planned to continue her academic pursuits, the parties' financial circumstances dictated that only one of them could continue with their studies. As a result Ms. C.R. entered the work force and Mr. A.R. continued his studies full time, ultimately obtaining his Master of Business Administration, while Ms. C.R. ultimately obtained a diploma in Business Administration in 1981. Mr. A.R. is presently a chartered accountant and a partner in KPMG earning approximately \$425,000 net annually after business deductions.
- [5] After her graduation from University, Ms. C.R. obtained full time employment with the Federal Government as a clerk in the Citizenship Court. In 1979 she was promoted to Citizenship Officer and in 1980-81 was promoted to Project Officer with the Secretary of State Department at their regional office in Vancouver. In 1981-82 the parties moved to Dallas, Texas, to further Mr. A.R.'s career. While there Ms. C.R. was seconded to the Canadian Consulate General. In 1982, 1984 and 1986, the couple's three children were born and Ms. C.R. was out of the work force until September 1987 when she returned to work part-time while remaining primarily responsible for the day-to-day responsibilities of the children.
- [6] Ms. C.R. submits that she was not eligible to contribute to a pension plan, nor advance her career as a part-time employee because of the child rearing responsibilities and running the home. She says, that if she too had followed the part of Mr. A.R. in attending Graduate school and working full time, she would now be earning between \$75,000 and \$100,000 and

have a substantial pension. Ms. C.R. says that she supported Mr. A.R. in obtaining his education in the early years of his accounting practise and that a choice was made by the two of them to work together in establishing Mr. A.R.'s chosen career. As the result of these decisions, freely made with a view to enhancing the family fortunes, they now, with the separation that comes with divorce, have vastly different financial situations. Mr. A.R. has an annual income of some \$425,000 and Ms. C.R. has annual employment income of some \$30,500.

- [7] In addition, while Mr. A.R. appears to have enjoyed good health, Ms. C.R., starting some time in 1992, has suffered from chronic fatigue syndrome. This condition worsened until 1994 when she found she could not get out of bed for days. Finally she was forced to take medical leave from August 1997 to March 1998. She was again off work with chronic fatigue syndrome from December 1999 to April 2000, when she was able to return to work on a reduced work schedule of two days per week.
- [8] At present she works a three day work week, due in part to the care required for the children who are still at home, and her reduced energy level and back problems which emanate from a motor vehicle accident that occurred in 1999. Her present net assets are valued between \$479,390 to \$579,390, assuming her interest in her late father's estate to be worth between \$100,000 to \$200,000 and valuing her home in Richmond at \$330,000.
- [9] Mr. A.R. does not own a home although he indicates that he wishes to acquire one shortly. His net assets are some \$421,600. Ms. C.R. is approaching 50 years of age. She says she is capable of working four days a week, if that work is available to her and she is physically able to perform the duties assigned to her. She has also recently received a promotion with an approximate salary increase of \$1,800 annually, based on a three-day week, which I find would be more should she be able to work a four-day week.
- [10] The Minutes of Settlement provided that Mr. A.R. would pay to Ms. C.R. spousal support in the amount of \$2,350 per month. It is common ground that at the time the settlement of spousal support was made it was based on Mr. A.R.'s 1996 income tax return and information about his income current to October 1997. The parties did not determine a precise amount for 1997 before reaching their agreement (see *C.R. v. A.R.* 2002 B.C.C.A. 537 at para. 34). It is sufficient that Mr. A.R. left the relationship with income in excess of \$200,000. Of further importance is the fact that Ms. C.R. received an extra 10% share of the family assets under the Minutes of Settlement. That is not an exceptional amount given the circumstances of this case. The Court of Appeal in *C.R. v. A.R.*, supra, commented on this factor at para. 8 when it said:

While the mother's 10% share of her family assets can be seen as an indirect benefit to the children, that \$40,000 more importantly represents the only compensation by way of capital the mother received for the sacrifice of her earning capacity to the care of three children while the father pursued a successful career.

- [11] In addition, my review of the Minutes of Settlement clearly indicate that this review was to consider future developments affecting Ms. C.R. respecting inter alia her late father's estate; her position once the three children were no longer dependent on her to the same extent they were at the time of separation; and lastly, to provide an opportunity for assessing Ms. C.R.'s progress in obtaining full time employment.
- [12] Ms. C.R.'s ultimate interest in her late father's estate has not been determined even at this time. She has commenced action under the Wills Variation Act, but no further steps have been taken. It appears that she has received a \$44,000 advance against her interest. She has decided to attempt to settle the claim rather than litigate it. She indicates that she does not have the energy to pursue that litigation while this litigation is ongoing. Her entitlement could be anywhere from \$100,000 to \$200,000 based on Ms. C.R.'s assessment and in excess of \$500,000 based on Mr. A.R.'s assessment.
- [13] Based on Ms. C.R.'s own documents disclosed in these proceedings pertaining to the estate, her interest based on those documents could be some \$361,000. All amounts referred to are gross amounts without taking into account tax implications.
- [14] Her property and financial statement filed in these proceedings is generally of no assistance. It discloses total expenses of \$170,856 against total income of \$57,495, consisting of the spousal support in the amount of \$28,200 and employment income of some \$28,737. In addition to that amount Ms. C.R. was receiving child support in the amount of \$40,004.
- [15] Mr. A.R.'s property and financial statement is also unrealistic.
- [16] The best indicator of a monetary amount required to be available to Ms. C.R. to enjoy a lifestyle similar to that enjoyed during her 20 year marriage with Mr. A.R. would, I think, be the amount of spousal support they settled upon in their negotiations. There is no doubt from a review of the material, and the decisions of this Court and the Court of Appeal that this litigation has been hard fought by both Mr. A.R. and Ms. C.R.. The Minutes of Settlement were reached on the eve of trial. While it is true that Mr. A.R.'s income was not accurately disclosed for the year 1997, there is no doubt that the parties, up to their separation date, had lived within their means and on the approximately \$200,000 that had been received up to the year 1996.
- [17] Mr. A.R.'s income had increased in 1997 and in the following years by reason of a re-organization of his accounting firm and additional work being required of him. That additional income, in my view, is not related to the breakdown of the marriage or to the sacrifices made by Ms. C.R. during her marriage to Mr. A.R..
- [18] Against this background, Ms. C.R. submits that she should be awarded permanent spousal maintenance in the amount of \$7,500 per month. Mr. A.R. submits that Ms. C.R. has not taken the steps required of her to obtain self sufficiency in that she had, firstly, not pursued the litigation involving her late father's estate with a view to obtaining the maximum entitlement due to her; and secondly, that she has not obtained full time employment. Mr.

A.R. says that her income from full time employment, together with income that could be used from her various investments, including the interest in her late father's estate, would be sufficient to meet her requirements now and into retirement. Mr. A.R. submits that even if I were to review the support obligations in accordance with the Minutes of Settlement, that I ought not to order permanent spousal support, certainly not in the amount claimed, and if I do find an entitlement, it should be for a limited period.

[19] The relevant provisions of the Divorce Act are found in s.15.2(4) and (6) and s.17(4.1) and (7). These sections provide as follows:

#### 15.2 Factors

(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.

#### Objectives of spousal support order

(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.

#### 17 Factors for spousal support order

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

Objectives of variation order varying

spousal support order

- (7) A variation order varying a spousal support order should
- (a) recognize any economic advantages or disadvantages to the former spouse arising from the marriage or its breakdown;
  - (b) apportion between the former spouses any financial consequences arising from the care of the 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 former spouses arising from the breakdown of the marriage; and
  - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.
- [20] The principles which support Ms. C.R.'s claim for permanent spousal maintenance are set out in *Moge v. Moge*, [1992] 3 S.C.R. 813, and the more recent decision of *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. At para. 82 of the *Moge* decision, Madam Justice L'Heureux-Dubé said:
82. It is important to note that families need not fall strictly within a particular marriage model in order for one spouse to suffer disadvantages. For example, even in childless marriages, couples may also decide that one spouse will remain at home. Any economic disadvantage to that spouse flowing from that shared decision in the interest of the family should be regarded as compensable. Conversely, the parties may decide or circumstances may require that both spouses work full-time. This in and of itself may not necessarily preclude compensation if, in the interest of the family or due to childcare responsibilities, one spouse declines a promotion, refuses a transfer, leaves a position to allow the other spouse to take advantage of an opportunity for advancement or otherwise curtails employment opportunities and thereby incurs economic loss. Such a situation occurred in *Heinemann v. Heinemann*, *supra*, where the court recognized that, despite the fact that the wife had worked full-time for nearly the entire duration of the marriage, she had foregone her own career aspirations in the interest of the family. The family had made three major moves occasioned by advancements in the husband's career. This caused a lack of continuity to the wife's career and in the result, the wife had no seniority, had obtained no promotions in her original career and would have returned to it "at the bottom of the pile", thus obviously disadvantages in comparison to her husband.
- [21] At para. 84 following, the Court recognized that a lengthy marriage leads to a presumptive claim to equal standards of living:

...great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

- [22] In Bracklow, supra, the Supreme Court of Canada identified an additional social obligation model of support hitherto not discussed in the authorities. But the Court also made it clear that in determining a support dispute, as in this case, the starting point is the objectives which the Divorce Act in s.15.2(6) stipulates the support order should serve. The Court reaffirmed that no single objective is paramount and that all must be borne in mind.
- [23] Against the background of those objectives, I am required to consider the factors set out in s.15.2(4) of the Act which includes non-compensatory factors like needs and means. While there is no hard and fast rule or methodology or application for doing the same, I am required to look at all the factors in light of stipulated objectives of support and exercise my discretion in a manner that strikes a balance and achieves justice in the particular case. In doing so the models referred to in Bracklow represent the litmus test for achieving justice between the parties.
- [24] The concepts of permanent support versus limited support orders are used in individual cases to do justice in the circumstances of the particular marriage break up. It is not always easy to rationalize a circumstance where permanent support is ordered compared to a circumstance where a limited time order is put in place. In *Edwards v. Edwards*, [2001] B.C.J. No. 1540 (B.C.S.C.), the Court was concerned with a marriage of 21 years. The parties had two children aged 17 and 19. The husband earned \$81,000 and the wife worked part-time and earned some \$25,000. Assets were also reapportioned in the wife's favour. The Court referred to Bracklow, supra, and noted that during the marriage that the wife was the primary caregiver and the husband was able to pursue his education and advance his career. The Court awarded permanent indefinite spousal support of \$1,000 per month and made these comments at paras. 35, 36 and 37:
35. ...Her level of income ... leaves her in a lifestyle that is considerably lower than that which the plaintiff can enjoy at his level of income.
36. ...The plaintiff requires spousal support in order to enable her to enjoy a lifestyle that provides more than the necessary and that is comparable to that which the defendant can enjoy. The defendant has the capacity to pay spousal support and still be able to meet his reasonable needs. It is appropriate that he be held to that commitment.

37. In my opinion this is not a case where it is appropriate that there be a time limited support order. This was a long marriage. The plaintiff has suffered serious economic disadvantage which cannot be overcome quickly. The plaintiff's future prospects are uncertain. In all the circumstances, I am of the opinion that it is appropriate that there be an order for the payment of support for an indefinite period.
- [25] I note in *Edwards* that the Court came to its conclusion to award permanent spousal support in spite of the fact that the wife had not given up any clear aspirations, nor lost any work related advancements or opportunities.
- [26] A similar conclusion was reached in *Merali v. Merali*, [2002] B.C.J. No. 951 (B.C.S.C.). In that case the Court was dealing with the marriage of some 20 years duration. The husband was a doctor earning \$133,000 per year and the wife was a science student. During the marriage the wife undertook clerical work while in school; managed the husband's medical practice; and, near the end of the marriage, retrained and obtained a job earning \$43,000. The Court concluded that the wife had given up her own opportunities to pursue a career in science to assist the husband in making his chosen career as a medical doctor a success.
- [27] Recently, in *Trajan v. Trajan* (1999), 2 R.F.L. (5th) 130 (B.C.C.A.), the Court of Appeal had occasion to deal with the issue of spousal support where the wife had retained significant assets. As in this case, that case concerned a marriage in excess of 20 years and there were children aged 17, 16, 15 and 14. The husband was a doctor earning \$260,000 per annum and the wife was a dentist who was capable of earning at least \$25,000. The wife worked part-time throughout the marriage with time out for maternity leaves. Assets were significant, being approximately \$1,472,000, as identified by the trial judge in his reasons (*Trajan v. Trajan*, [1998] B.C.J. No. 1118 (S.C.)). The Court of Appeal increased the spousal support order by the trial judge from \$1,400 to \$2,000 per month.
- [28] The facts of this case are strikingly similar to those of *Trajan*, supra. Ms. C.R. does have earning potential greater than that disclosed by her employment income which is based on a three day week. She is willing to attempt a four day working week, but as I have indicated, she does not indicate that she is desirous or even searching for employment that will offer her five days a week. She does have assets that are capable of generating income. On the evidence before me it is not unfair, or inappropriate, to consider her interest in her late father's Estate to be \$300,000. At current rates of return that could generate some \$15,000 per year in income.
- [29] This investment income will, over the years, replace the income she had coming into her household when all three children were residing with her and which will ultimately cease when the two children who reside with her are no longer children of the marriage as defined by the Divorce Act.

- [30] I have concluded that in all of the circumstances of this case, taking into account Ms. C.R.'s contribution to the family unit, the economic advantages obtained by Mr. A.R. by being able to excel in his chosen profession as a result of the joint decision made by the two of them some 25 years ago that he should go on in his academic pursuits, and the relieving of the economic hardship which befalls Ms. C.R. in not being able to pursue her own professional aspirations, that her support should not be terminated.
- [31] Rather, this is a case, in my view, which requires an order for permanent spousal support. Ms. C.R. will never earn the income that Mr. A.R. presently earns, nor does she have time to build up any substantial pension income. She does have approximately \$130,000 in bank accounts, mutual funds and RRSPs, and, as I have indicated, a potential for earning income from her late father's estate. Assuming \$300,000 would net her \$200,000 net of taxes, she would then have some \$350,000 for investment purposes. A 5% yield is not unrealistic, yielding some \$18,000 per annum (recognizing that some of the money is within an RRSP). If she is able to work four days per week she would have gross income of approximately \$40,000 per year, or \$50,000 if she could secure full time employment through her present employer. She would thus have gross income available to her of some \$68,000 without spousal support.
- [32] As I have indicated, the quantum of spousal support is difficult to ascertain given the parties' property and financial statements. I am of the view that the most accurate quantum amount in the circumstances has to be the amount that was bargained between the parties when they reached their settlement in 1997. That amount of \$2,350 annualized equals \$28,200. That amount added to a reasonable return on Ms. C.R.'s investments, together with income in the \$40,000 to \$50,000 range, would yield close to \$100,000 per annum. That is roughly one half of what Mr. A.R. was earning in 1996, and one quarter of what he is earning presently.
- [33] To maintain the standard of living she enjoyed while living with Mr. A.R. it will be necessary for Ms. C.R. to continue to be employed if she does not wish to encroach on capital. As was stated in *Moge, supra*, spousal support does not guarantee to either party the standard of living that they enjoyed during the marriage, but nevertheless, Ms. C.R. is entitled to a reasonable standard of living having in mind the circumstances of the marriage, the fact that it was a long term marriage, and the fact Mr. A.R. has an ability to pay, (see *Touwslager v. Touwslager* (1992), 63 B.C.L.R. (2d) 247 (B.C.C.A.)).
- [34] While Ms. C.R. has not been out of the workforce for a long period of time, she has nonetheless been prejudiced by the joint decisions made by the parties during this long traditional marriage.
- [35] As a result I order that Mr. A.R. continue to pay spousal support to Ms. C.R. for an indefinite period in the amount of \$2,350 per month.

[36] As most matters were resolved by further discussions after the hearing date, the parties re at liberty to make submissions regarding costs, otherwise, the plaintiff will have her costs on Scale 3.

"E.G. Chamberlist, J."

### **The Honourable Mr. Justice E.G. Chamberlist**

June 27, 2003 - Corrigendum to the Reasons for Judgment issued by Mr. Justice E.G. Chamberlist advising that the second to last line of paragraph 32 on page 18, which reads:

" is roughly one half of what Mr. A.R. was earning in 1986, "

Should read:

" is roughly one half of what Mr. A.R. was earning in 1996, "

Please note and apply this change.

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