
CANADA / JUDGMENT

Campbell v. Campbell

2008 BCSC 154

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 154 Campbell v. Campbell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Campbell v. Campbell,

2008 BCSC 154

Date: 20080208

Docket: E072194

Registry: Vancouver

Between:

Raymond Alexander Campbell

Plaintiff

And:

Vanessa Lania Campbell

Defendant

Before: The Honourable Mr. Justice Warren

Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

P.M. Daltrop

Counsel for the Defendant:

H. Wiebach

Date and Place of Trial/Hearing:

January 21-22, February 1, 2008

Vancouver, B.C.

I. Introduction

- [1] The plaintiff [the husband] and the defendant [the wife] were married in Vancouver on June 17, 1995 and separated on October 1, 2006. There were four children of the marriage, the eldest, D. was the child of a previous relationship of the defendant, and the three others were born during this marriage on August 20, 1998, February 10, 2000, and March 30, 2001.
- [2] The wife is a successful financial advisor and, until two years prior to the separation, the husband had worked in the same field. There is dispute as to why he left his employment, he saying it was by agreement so he could spend more time with the children; she saying that he was fired.
- [3] The husband deposed that he was primarily at home during the day with the children and the wife was primarily involved with business, although the husband continued to "work" for his wife and receive an income. The wife says that she hired nannies who were primarily caring for the home and children. It appears that the wife was particularly successful in her field. With the separation of the parties, the wife instructed her former counsel to draw up a form of a separation agreement. The parties never executed it.
- [4] The portion of the draft agreement that is of a particular note on these interim applications is that which deals with the custody of and access to the three children of the marriage. The wife's counsel had drafted a clause that provided for a shared custody regime with joint guardianship and with the more or less equal sharing of the time with the children. Clause 3.9 of the draft form of the separation agreement provided:

Notwithstanding the following, Raymond agrees to provide to Vanessa each Thursday at 5:00 P.M. prior to Raymond's week of custody of the children a medical test certificate certifying as to whether he has consumed any illicit substance and in the event that he either does not provide such test certificate or is certified that Raymond has ingested such drugs, the children will remain in the sole custody and care of Vanessa and Raymond will not have the children in his custody or have access to them until he has provided to Vanessa a test certificate certifying that he has not ingested such drugs.

- [5] In spite of the concern with the husband's use of illicit drugs expressed in this clause, the plaintiff continued to have extensive contact with the children; indeed, it appears that there was a more or less continuous equal sharing of the children's time. Although there is some evidence before this Court from the husband that it was he who was primarily responsible for taking the children to doctors' and dentists' appointments and to their other activities,

the wife disputes this evidence and says that she was the one who primarily took the children to their appointments.

- [6] It is common ground, and acknowledged by the husband, that he has had a long-standing drug abuse problem. The wife acknowledged that she too had used illicit drugs but she says that is in the past and that she has not used drugs for approximately the past four years.
- [7] For the year following the separation of the parties in October 2006, the shared custody regime continued. On or about June 29, 2007, the husband filed a Writ of Summons and a Statement of Claim seeking a divorce, joint guardianship of the children, joint custody of the children with primary residence with him, and claiming spousal and child support as well as a reapportionment of family assets in his favour.
- [8] The wife filed a Statement of Defence opposing the claim for guardianship and custody of the children, child and spousal support, as well as reapportionment of family assets. The wife counter-claimed for sole custody and guardianship, supervised access for the husband, child support, and reapportionment of the family assets in her favour. From that point in time, the relationship between the parties that had arguably been one of grudging cooperation seems to have deteriorated into one of a more litigious nature. It may be purely coincidental that following the separation and prior to the commencement of the husband's action the wife had established a new relationship with another man.
- [9] In any event, on November 8, 2007, the husband filed applications seeking interim spousal and child support, both retroactively and prospectively; the return by the wife of the husband's 2003 Hummer motor vehicle; and an order that the wife pay him \$30,000 for the sale of a horse and \$34,481.54 for the husband's 2004 Income Tax refund, which was apparently cashed by the wife.
- [10] These applications were opposed by the wife who in turn filed her own application seeking sole interim custody of the three young children of the marriage; interim child support; and only supervised access to the children by the husband "on the condition that the plaintiff remain free of substance abuse, including drugs and alcohol". The wife also asks for an injunction restricting the husband's communications with her.

II. Custody and Guardianship

- [11] In the husband's first affidavit in support of this application, he deposed that he had been primarily a stay-at-home father until the separation and that he had devoted himself to the care of the children. The only complaint that he made about the wife, at least that which I can see in the first affidavit, was that when the children were with her, she employed two nannies to help her look after the children and was not actively involved in their lives. The husband's first affidavit is primarily, if not exclusively, devoted to the financial circumstances of the parties and particularly to the wife's ability to pay support.

- [12] In her affidavit in response, and in part in support of her application seeking sole interim custody of the children, the wife deposed that the separation occurred because of the husband's addiction to cocaine. It was because of his addiction to cocaine that it was necessary "to have a nanny in attendance whenever the children were at home and I was at work." The wife attached a log maintained by the husband concerning his drug use, which was part of his treatment at a narcotic rehabilitation clinic where the husband had attended for roughly one month in May 2006. It indicates that notwithstanding the drug treatment the husband was an active user of cocaine.
- [13] There was an altercation between the parties on November 9, 2007. The wife says that her husband used foul language directed at her in the presence of one of the children. This evidence is corroborated by the wife's boyfriend, but is denied by the husband. In any event, matters deteriorated more substantially thereafter and approximately a month later, on December 7, 2007, there was another altercation between the parties at the children's school and both the RCMP and Deanna Stobbe, a social worker from the Ministry of Children and Family Development (the "Ministry") intervened. Because of the husband and wife's mutual allegations of drug use, the social worker required, and parties agreed, that the parties would take a "hair strand drug test" and submit the results to her.
- [14] On December 14, 2007, the wife provided a hair sample for testing. The test report, dated December 19, 2007, came back negative for any of the proscribed substances including amphetamines, cocaine, and opiates.
- [15] The husband had provided his hair sample on December 11, 2007 and the test report, dated December 17, 2007, came back positive for the presence of cocaine at 11,691 pg/mg., a very high level. Regrettably, this confirmed the wife's belief that he was a "heavy user of drugs".
- [16] Although the results of the wife's drug test were made available to Ms. Stobbe as agreed, the husband did not make his test results available to the wife or her counsel until after the parties had appeared before Mr. Justice Rice on January 11, 2008 and then only as a result of the wife's application for production.
- [17] The wife's counsel submitted the husband's test results to one Mariah L. Wallener of Wallener Consulting to report on the results of the hair sample analysis. Upon her review of the test results, Ms. Wallener was of the opinion that the presence of this concentration of cocaine was not accidental but consistent "with cocaine use in accordance with guidelines established by the Substance Abuse and Mental Health Services Administration (2004)". She was of the further opinion that the husband's test result findings were consistent with heavy use.
- [18] On December 21, 2007, Ms. Stobbe wrote a letter to the wife with a copy to the husband. The letter read in part:

Again, I would like to stress the importance of being a protective parent and ensure that the children are never being cared for by an individual under the influence of drugs or alcohol. As the children's father, Raymond Campbell's drug screen returned testing positive for cocaine, MCFD is requesting that you act protectively and ensure that the children are not being cared for by Raymond Campbell unsupervised if you suspect that he has or may use drugs. Over the past two weeks, Raymond Campbell has been having access to the children while supervised by his mother. You have also been having access to the children while supervised by your sister. As your drug screen came back negative and there are no present concerns in regards to drug misuse, MCFD is requesting that you act protectively and ensure that when Raymond is having access to the children that his visits are supervised until he can maintain a period of sobriety and that his access continue to remain the same.

- [19] It was against this background that the application for interim custody came on for hearing [before me] on January 21, 2008. During the course of Mr. Daltrop's submissions on the husband's behalf, I repeatedly expressed concerns about the husband's continuing drug use notwithstanding the abundance of affidavit's material supporting his abilities as a parent.
- [20] What is clear to me is that credibility is very much in issue. Both sides have their champions and some supporting the husband's claim include members of the wife's family. I note that the wife has been estranged from several family members for a number of years and the currency of their opinions may be in issue. Further, her father has a judgment against both parties for a substantial amount and that litigation was highly contentious.
- [21] The plaintiff's affidavit material supports the husband's position that he was a parent who had been fully involved in the lives of the children since their birth. As I endeavoured to indicate to counsel during the course of the submissions, I am also fully aware that the husband has a long-standing substance abuse problem. On the affidavit material before me, I am not satisfied that there is a similar cause for concern on the part of the wife. Although she may have been less involved in the daily lives of the children, as the husband's materials indicate, she does not present the kind of risk to their young lives as does the husband's drug use. It may be noteworthy that although the husband deposed that he was a "stay-at-home" parent, there were nannies present and doing much of the household chores.
- [22] The husband's drug test results from mid-December 2007 are consistent with heavy cocaine use within 90-day period prior to submitting his hair sample. The fact that he did not readily disclose the results of that test until after the appearance before Rice J. on January 11, 2008, fortifies my concern that he was endeavouring to withhold this evidence from the court at least temporarily until the matter could be resolved in an interim basis. In fact, the husband had submitted a urine sample that indicated negative presence of cocaine. A urine sample does not indicate historic drug use.

- [23] The husband submitted results of a mid-January hair sample test showing a significantly reduced amount of cocaine in his system from that of the test in mid-December 2007. Nevertheless, it continues to show the presence of cocaine and I have a continuing concern about his drug use.
- [24] On the second day of the hearing, I indicated to the parties that interim custody of, or unsupervised access to the children by the husband was not in their best interests, and I ordered ongoing testing in order to establish whether there is a continuing risk of the children being exposed to the dangers inherent with a parent who is a drug user.
- [25] When I made these observations to counsel and indicated a course of childcare arrangements that I considered appropriate, counsel obtained instructions from their clients and then advised me that the clients had agreed on the interim living arrangements for the children. The result was that the children would continue to live with the wife and the husband would have access to them on alternating weekends and alternating weeks provided the children were supervised by the husband's mother at all times when they are with him. Further, the children were not to be in a vehicle operated by their father. As well, both parties are to participate in continuing drug testing and the matter is to come back before me in three months.
- [26] As the children will reside primarily with the wife, the husband's claim for interim child support is adjourned generally.

III. Spousal Support

- [27] The crux of the spousal support issue, according to Mr. Daltrop, is the significant disparity of the parties' current circumstances. The husband's first Form 89 disclosed \$6,000 for 2007 income from working part of the year for a friend as a car salesman. He claimed offsetting expenses of \$196,000. The wife's first Form 89 claimed income of \$785,000 with offsetting expenses of \$573,250. Both parties' Form 89s were incomplete.
- [28] The husband's first Form 89 did not have any tax statements attached as required nor did it attach the last pay statements. Although the husband claimed he had looked for work since the separation, there was no supporting information including the names of prospective employers or copies of written applications or responses. It may well be that this lack is consistent with the wife's evidence of a serious and ongoing drug problem or of a lack of attempts to find employment or both. In any event, I found that the evidence fell far short of satisfying the burden on the husband to show his condition, means, needs and circumstances.
- [29] For that matter, the wife's financial information was not complete either and did not have her tax returns or recent income information. Because of these deficiencies, I ordered both parties to file updated and complete financial statements and adjourned the applications to February 1, 2008.

[30] When the matter came back on for hearing on February 1, 2008, both parties had filed current expense and income statements. The husband's Form 89 showed monthly employment income of \$1,100 or \$13,200 annually. His declared offsetting expenses remained at \$196,600, including a number of items that, in my view were either excessive or inappropriate for consideration on an interim spousal support application where there is an early trial date, as there is here, or where the children are primarily in the care of the payor, the defendant in this case. Some of these monthly expenses attracted the attention of the wife's counsel and some did not.

A. The Plaintiff's Submissions

[31] As described above, on February 1, 2008 Mr. Daltrop handed up the latest drug test for his client that showed a continuing decline in the level of drugs in the husband's system although still above the cut off level of 500pg/mg.

[32] In his second affidavit sworn on January 31, 2008, the plaintiff deposed to his employment history, his efforts since the separation to find employment, and his role in the family. He also attached several supporting documents including his income tax returns for 2004, 2005, and 2006. The 2005 and 2006 tax returns were completed at the end of November 2007 and neither declared any employment income.

[33] The plaintiff's 2004 tax return showed income of \$23,644.14 of which \$20,082.88 were commissions. He also deposed to self-employment business income of a gross amount of \$180,571.23 with a net of \$77,873.62. Offsetting a Line 150 Total Income of \$91,517.76 are childcare expenses of \$25,000. The husband's statement of business activity included home-office business expenses of approximately \$40,452, management and administrative fees of roughly \$31,000, meals and entertainment expenses of approximately \$5,200, motor vehicle expenses of approximately \$4,000, telephone and utilities of approximately \$4,000, and miscellaneous office expenses of approximately \$3,200.

[34] In his second affidavit, the plaintiff deposed that he had been employed in the investment business and had worked for the National Bank from April 2000 to November 2002 and then for ScotiaMcLeod from November 2002 until January 2004. ScotiaMcLeod was also the defendant's employer. The plaintiff deposed that he passed the securities course and another CTH industry exam. He deposed that he had worked:

in the auto retail sector since 1988. From 1997 to 2000, I was self-employed running a successful business called R&R Financial, doing high risk auto loans.

[35] The plaintiff deposed that he quit ScotiaMcLeod in January 2004, "as a result of a discussions with the defendant" and because he wanted to spend more time with the children. He also deposed that he had the defendant's full support for the decision and that after January 2004, he and his wife "explored other business possibilities for me."

[36] The plaintiff deposed that prior to the end of cohabitation, he was accustomed to a very comfortable lifestyle and that would indeed appear to be the case. He also deposed that he has not had an income for the three years between January 2004 and October 2006; that the income shown on his tax returns was "for income splitting purposes"; and it was the monies that the defendant earned at ScotiaMcLeod that was the source of his income. With reference to his employment searches following the separation in October 2006, the plaintiff deposed that he worked for West Coast Financial for one week in December 2006, "but I found the work impossible given the children's schedules." He made inquiries with an automotive dealer but deposed that it was impossible to properly care for the children and work the hours required.

[37] The plaintiff deposed that he wants to be self-employed. To that end, he:

tried to arrange to operate a hotel and pub in Logan Lake. My girl friend at the time worked there. I had talks with the owner in June 2007. The defendant promised that she and I could come to a financial settlement but ultimately reneged. In July 2007, I telephoned my friend, Joseph Frye, the General Manager of Langley Suzuki, and asked him for a job. He hired me and has been extremely tolerant of my lack of hours based on the children's schooling and their sporting needs on the weekends.

Notably, Langley Suzuki is one of the automobile dealerships that Mr. Campbell deposed that he could not work for because of the work hours required.

[38] In his submissions, Mr. Daltrop pointed out that the plaintiff has been a stay-at-home father from January 2004 until the parties' separation in October 2006. Following the separation, the defendant gave Mr. Campbell \$100,000 to purchase a home. He later refinanced that property and obtained another \$55,000 for living expenses, and, as well, drew down on a line of credit and borrowed money from his mother.

[39] The husband deposed that he had devoted himself to the care of the children and took the children to their activities including softball, soccer and swimming, had taken the children to their medical and dental appointment, attended the parent teacher interviews, taken the children on school trips, and coached two of the children's soccer and softball teams.

[40] The plaintiff's counsel submitted that the defendant's income is more likely the \$758,000 disclosed in her first Form 89 rather than the significantly lower amount reported in her second Form 89 filed on January 31, 2008. In support of this, Mr. Daltrop relied upon the Notice of Assessment that shows a Total Line 150 income of \$668,595 less deductions of some \$442,300, and after losses of \$72,152 on horses and employment expenses of \$905,300. Mr. Daltrop was suspicious of the lack of adequate explanation for the expenses claimed in the defendant's tax return and her Statement of Income and Expense.

- [41] The defendant's 2005 tax return showed a gross income of \$1.2 million against which there were deducted losses on horses of approximately \$70,000 and business expenses of \$595,000, for a net total of \$535,000. Mr. Daltrop said that I should be suspicious that the defendant's employment expenses increased remarkably in 2006 over the tax return 2005.
- [42] With reference to the defendant's employment income during 2007, Mr. Daltrop pointed to the fact that she worked at ScotiaMcLeod until May 22, 2007 when she switched to RBC, where she worked until the end of the year. Although there is no precise documentation of her ScotiaMcLeod income, she earned \$487,000 over the following seven month period at RBC which, annualized, amounts to approximately \$780,000. This is in addition to the approximately \$300,000 earned at ScotiaMcLeod.
- [43] Mr. Daltrop submitted that the defendant's gross income from both sources would be at least \$787,000 in 2007. In addition to her income, she received a substantial loan from her new employer repayable over a five year period using anticipated annual bonuses. Accordingly, counsel submitted that there is ample evidence to show that an income of \$785,000 a year is a conservative estimate.
- [44] Turning to his client's needs, Mr. Daltrop pointed to the fact that this was a 13-year marriage and his client had worked at an income producing job and been fully involved with the children until January 2004, when he left employment with the defendant's support in order to give more attention to the children. Until the end of September 2006, he was fully supported by the defendant and, during this time, he was primarily looking after the children.
- [45] Mr. Daltrop pointed to the fact that although the plaintiff's annual expenses appeared to be high, they were only one third of those claimed by the defendant.
- [46] Mr. Daltrop urged me to adopt the position that the Spousal Support Advisory Guidelines (the "SSAG") are to be followed unless there are exceptional circumstances: *Redpath v. Redpath*, 2006 BCCA 338; see also *Ladd v. Ladd*, 2006 BCSC 1280.
- [47] In support of his submission that the SSAG are particularly well suited for interim spousal support applications, Mr. Daltrop referred me to the decision of Martinson J. in *M. (D.R.) v. M. (R.B.)*, 2006 BCSC 1921 paragraph 10:

The SSAG are designed to apply to interim spousal support. The authors, Professors Rogerson and Thompson, conclude that they are particularly well suited to the determination of interim spousal support.

- [48] Mr. Daltrop submitted that even with an income imputed to the defendant of \$350,000, and an income of the plaintiff at \$11,000, the SSAG show a range of spousal support of \$6,738 to \$8,153 or a midpoint of \$7,400. He submitted that if the court finds that the defendant's income is actually \$780,000 rather than \$350,000, this would result in a range of spousal support of \$16,220 to \$19,126 with a midpoint of \$17,673.

- [49] Martinson J., in *Loesch v. Walji*, 2007 BCSC 1807, held that it was an appropriate exercise of the court's discretion on interim support applications to maintain the status quo and that a party need not use up assets in order to meet their needs. In the case at bar, Mr. Daltrop submitted that an award of spousal support based on the greater amount of income for the defendant is necessary to meet the plaintiff's self-support needs and to provide for the children when they are with him. The defendant continues to enjoy a very affluent lifestyle and she earns a substantial income. Her fortunes have remained level whereas the plaintiff's fortunes have declined substantially and although part of the decline may be attributable to his use of drugs, it is primarily the result of the breakdown of the marriage. Mr. Daltrop submitted that both parties should have a relatively similar standing of living.
- [50] Mr. Daltrop also submitted that although the plaintiff does have substantial debt, his explanations demonstrate that his claimed needs of \$20,000 a month are realistic. In his affidavit sworn November 8, 2007, the plaintiff deposed that out of the \$100,000 that his wife gave at the time of the separation, he used \$85,000 to buy his residence and he then refinanced his equity therein to obtain \$55,000 to have money to live on. A review of his first Form 89 reveals that in the first year immediately post separation, Mr. Campbell used \$240,000, including \$7,500 drawn on his MasterCard, \$26,500 drawn on a line of credit with the Scotia Bank, another \$80,000 drawn from the RBC, \$25,000 drawn from Maple Trust, and \$30,000 borrowed from his mother.
- [51] Mr. Daltrop submitted that the issue before the court is what amount does the plaintiff require in order to maintain himself in a lifestyle equivalent to that of the defendant until the trial. He conceded that the plaintiff is not entitled to the same income as the defendant, but the award of interim spousal support should fit within the SSAG range. Mr. Daltrop urged on me an earlier decision of mine in *Short v. Short* (1996), 21 R.F.L. (4th) 429 at para. 12 (S.C.), where I expressed the view that:

While the needs and means ought not to take a predominant position in the considerations of the Chambers Judge or Master, they are factors which do provide some greater initial certainty at a time where there is still a lack of complete information and where there has not been a full opportunity for the court to determine whether there is some economic advantage or disadvantage or some economic hardship arising from the marriage or its breakdown and the considerations to promote economic self-sufficiency. These considerations must, in most cases, await a more fulsome consideration of the entire history of the marriage and, in all likelihood, an opportunity to hear the parties and their witnesses.

- [52] A similar approach was earlier taken by Errico L.J.S.C. (as he then was) in *Parsons v. Parsons* (1985), 48 R.F.L. (2d) 98 (S.C.). At paragraph 6 he wrote:

but, where the application is for interim maintenance, the requirement of the applicant spouse to be self-supporting, subject to the matters raised in s. 57(1) and in particular s. 57(1)(d) of the Family Relations Act ('the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves'), should not be scrutinized as closely as it might be on the

final determination of entitlement to permanent maintenance. The application by its very nature is for a relatively short period of time in which the applicant for interim maintenance may not have the full opportunity to become or remain self-sufficient, and is prior to the time that the economic circumstances of the parties with respect to the family assets of the marriage have been determined. While keeping the provisions of s. 57 of the Family Relations Act in mind, the court must still consider whether there is a need on the part of the applicant and an ability to pay on the part of the respondent.

See also *Dion v. Dion*, [1998] B.C.J. No. 648 (S.C.), where Ralph J., at paragraph 22, wrote:

While in an interim application it is necessary to consider more than the needs and means of the parties, there is not the same opportunity for the court to examine all of the circumstances of the relationship, the standard of living and other matters that may be examined in a full trial.

B. The Defendant's Submissions

- [53] Mr. Wiebach, counsel for the wife, vigorously opposed the application for interim spousal support arguing by way of introduction that there are indeed exceptional circumstances in the case at bar that militate against awarding interim spousal support: Ladd, *supra*; M. v. M. *supra*; and Redpath, *supra*.
- [54] Mr. Wiebach submitted that the wife's income is uncertain and is nowhere near what her husband says it is, and the substantial expenses that she has claimed are legitimate expenses appropriately incurred in order to earn the kind of gross income she does. As well, there will be a further period of uncertainty because the defendant "transferred" her business from ScotiaMcLeod to RBC.
- [55] Mr. Wiebach argued that the plaintiff does not incur one-third of the expenses of the defendant, and the claimed expenses are deliberately elevated in order to hide the amount of money he is or was actually using on drugs.
- [56] Further, Mr. Wiebach argued that the plaintiff's low monthly income - whether it is \$600 per month or \$1,100 per month - is the direct result of his addiction to cocaine. The plaintiff is capable of gainful employment and he should be earning much more than the declared amount. Accordingly, it is appropriate for the court to impute a substantial income to him.
- [57] With reference to the defendant's taxable income, Mr. Wiebach said that although her gross income for 2007 was likely \$787,000, she will not be in a position to say what her Line 150 income will be until after her accounts have been determined. The defendant's taxable income in 2005 was \$583,000 and \$384,000 in 2006, which I note is an average of approximately \$291,500. Mr. Wiebach submitted that the defendant would have little income to meet her own expenses and those of the children. Finally, he argued that the materials do not allow the court to arrive at an income of between \$750,000 and \$785,000 as argued by the plaintiff.

- [58] In response to the plaintiff's argument that he is entitled to a similar lifestyle as that enjoyed during cohabitation, Mr. Wiebach submitted that the defendant did not start earning anywhere near these levels of income until 2003, or roughly two or three years prior to the breakdown of the marriage. All of the defendant's income went to meet expenses, whether for business or living, and the simple fact is that the parties spent too much money during cohabitation and acquired no assets.
- [59] Mr. Wiebach argued that there is also the outstanding judgment owing to the defendant's father, which, although owed jointly and severally by ScotiaMcLeod, Mr. Campbell and the defendant, may well result in Mrs. Campbell being obliged to pay the plaintiff's share because he is effectively judgment proof. This is a significant liability hanging over the defendant's head and one that she must prepare to pay in the event her appeal of that judgment is unsuccessful.
- [60] Mr. Wiebach submitted that the evidence provided by the plaintiff is unreliable and changes between affidavits. The plaintiff sees the children as his "life jacket" so that he can get both child support and spousal support and continue, inappropriately, to rely upon the income earning abilities of the defendant. The simple fact of the matter is that the plaintiff had demonstrated ability to earn a comfortable income and there is no reason why his monthly income is as low as \$1,100.
- [61] With reference to the plaintiff's Form 89, Mr. Wiebach repeated his argument that the only explanation for the extremely high expenses is that they are inflated in order to provide a surplus to support his drug habit. Also, there are no supporting documentation to corroborate his claimed expenses. In particular, the defendant's counsel is critical of the high cost for groceries and supplies expenses, the \$500 per month for meals outside the home, a claim for furnishings and holiday expenses, and the nanny, clothing and dry cleaning expenses. Further, Mr. Wiebach said that the court ought to be extremely suspicious of the fact that the plaintiff has provided no current bank statements for the period since the separation in 2006.
- [62] In summary, the defendant's counsel submitted that given his client's present circumstances, her recent change of employers, her sole responsibility for the day-to-day expenses and care of the children and the plaintiff's cocaine use and his ability to go out and work, there should be no interim spousal support ordered.
- [63] Alternately, if the court is inclined to make an award of spousal support, Mr. Wiebach submitted that this is an exceptional case allowing an award outside the SSAG range, that the court should find the defendant has an income of no greater than \$150,000, and that the court should attribute income to the plaintiff of \$50,000. In these circumstances, the appropriate amount of spousal support would be \$1,147. The simple fact is that there is not enough money to go around and the plaintiff expects the defendant to borrow so that he could sit back, remain underemployed and indulge his drug habit.

C. The Plaintiff's Reply

- [64] Mr. Daltrop argued that there is no evidentiary basis whatsoever for the defendant to say that she is in financial distress. She earned a large income at ScotiaMcLeod and has not explained why she left that employment. The court can infer that the move was to improve her circumstances and, therefore, it was not a negative step for her, but rather a positive one. Further, the defendant does not say what she did with the substantial signing "bonus" she received by joining RBC. The defendant's evidence alone demonstrated that she does not need to borrow money in order to pay support.
- [65] As for the income earning ability of the plaintiff, Mr. Daltrop submitted that this is a factor for the trial judge to consider and is not suitable for determination on an interim spousal support application: see *Parsons*, supra at para. 6, and *Nankivell v. Nankivell*, 2002 BCSC 778 at para. 18. Accordingly, there is no basis for attributing increased income to the plaintiff and the court must determine the husband's support claim based upon the materials before it.
- [66] Mr. Daltrop also argued that the plaintiff's expenses are reasonable and there is no evidentiary basis for concluding that the plaintiff has or had a drug habit costing \$10,000 per month as argued by the wife. There is a serious conflict in the evidence on this topic and it is not suitable for a determination on an interim support application. This application for interim spousal support is not a "conduct" case but a "needs" based case. The wife has an ability to pay having regard to the SSAG and the plaintiff has a demonstrated need.

D. Conclusions and Orders

- [67] In my view, many of the plaintiff's claimed expense are either inappropriate or excessive in the circumstances of this interim support application. There is an early trial date, the plaintiff has a history of significant drug use (although that now appears to be under some measure of control), he is working well below his historic ability and capacity and only part-time, he has no physical impediment that would limit his ability to work, and he does not have the primary responsibility for the children.
- [68] The plaintiff's expenses are, in my view, excessive and the following ones attract my particular attention and reduced or not allowed:

No.

Description of Monthly Expenses

Claimed

Amount

Allowed

Amount

1.

vacation allowance

\$2,000

\$0

2.

house repairs

\$400

\$0

3.

cell phone

\$200

\$100

4.

household furnishings and equipment

\$400

\$0

5.

meals outside the home

\$500

\$300

6.

gas and oil

\$600

\$200

7.

non-specific dental care

\$400

\$100

8.

personal clothing

\$800

\$0

9.

toiletries and cosmetics

\$200

\$50

10.

dry cleaning

\$250

\$50

11.

entertainment/recreation

\$500

\$300

12.

personal gifts

\$300

\$0

13.

child care (not paying now)

\$1,400

\$0

14.

children's' clothing

\$300

\$0

15.

children's entertainment

\$500

\$100

16.

children's activities, lessons and gifts

\$450

\$50

17.

Other expenses

\$7,184

\$7,184

Total Monthly

\$16,384

\$8,434

Total Yearly

\$196,608

\$101,208

[69] I am of the view that when I eliminate those expenses which the plaintiff is either not actually paying or which are inappropriate, and reduce those which are excessive, as shown in the table above, the plaintiff's realistic interim monthly expenses come to \$8,434 or approximately \$101,000 annually.

[70] The plaintiff's declared present monthly income is \$1,100, however I am not satisfied that he has made sufficient effort to find the fully remunerative employment he is capable of finding. The plaintiff's employment history before he worked with the defendant's employer demonstrated a significant ability to earn a good income. His childcare responsibilities are currently not extensive and, although he claims that he was a stay-at-home parent for the roughly two years prior to separation, the fact is that the defendant employed two nannies from time to time to care for the home and children. His role or function during this relatively brief period of their cohabitation was not of a kind contemplated by s. 15.2(4)(b), and there is the complicating feature of the evidence of his drug use during the same time period.

- [71] I find that the plaintiff's use of drugs has affected his ability to work around and outside the home. His drug use is not an involuntary medical or psychological condition, nor is it the result of some disadvantage resulting from the marriage or its breakdown. His drug use is of some duration and the preliminary evidence in the plaintiff's drug treatment log, his cell phone calls and the corresponding ATM withdrawals are prima facie evidence that the husband has expended considerable amounts of money on drugs both before and since the separation.
- [72] In the defendant's affidavit sworn January 17, 2008, she deposed to significant sums of money that the plaintiff has gone through since the separation. She deposed that following the separation she gave \$100,000 to the plaintiff and later another \$10,000. As well, she deposed that he sold his BMW 850 worth "about \$20,000" to his drug dealer. She further deposed that the plaintiff has not paid the mortgage on the residence he purchased using \$85,000 of the \$100,000 she provided and the mortgage is in foreclosure, that he borrowed a further \$90,000 from the RBC, he is indebted to the Scotia Bank for \$26,500, and has borrowed a further \$35,000 from his mother. The plaintiff's only response was that he had no money to live on after October 2006 and used borrowed money to pay his living expenses.
- [73] Any ruling on an interim spousal support application starts with s. 15.2 of the Divorce Act, subsection (4) of which requires the court to take into consideration the condition, means, needs and other circumstances of each spouse, including the length of cohabitation, their respective functions during cohabitation and any order, arrangement or agreement to support either spouse.
- [74] The objectives of an interim spousal support order are set out in s. 15.2(6) and require the court to: recognize any economic advantages or disadvantages of the marriage or its breakdown; apportion the financial consequences arising from the care of any children over and above support; relieve any economic hardship arising from the breakdown of the marriage; and promote the economic self sufficiency of each spouse within a reasonable time period.
- [75] The SSAG has been the subject of several recent decisions of our courts. In *Redpath*, supra at paras. 37-39, Newbury, J.A. considered the role of the SSAG in the context of its impact on the assessment of quantum of spousal support and wrote:

Spousal Support

- [37] The last area of contention is the award of \$3,500 per month ordered to be paid to Ms. Redpath by way of spousal support, an order to be reviewed in three years' time. The wife's first ground of appeal on this point is that although she relied at trial on the Spousal Support Advisory Guidelines and did a "Support Mate" calculation, the trial judge did not refer in his reasons at all to the Advisory Guidelines or to any calculation he had done in reaching this amount. In the wife's submission, this alone is an error of law. Counsel naturally refers to *Yemchuk v. Yemchuk*, 2005 BCCA 406, in which Prowse J.A. stated for this court:

This brings me to the question of whether, and to what extent, I should rely on the Guidelines in determining the quantum of support. In answering that question, I will briefly describe the Guidelines, as I understand them.

(e) The Spousal Support Guidelines

In my view, the best source of the history and nature of the Advisory Guidelines is the report prepared by Professors Carol Rogerson and Rollie Thompson dated June 2005 entitled *Spousal Support Advisory Guidelines: A Draft Proposal* (which I commend for its clarity to any writer embarking on this subject).

An important point to make at the outset of this discussion is that the proposed Advisory Guidelines are just that - proposed advisory guidelines. They are in a draft form and are subject to ongoing consultation with various interest groups. Further, unlike the Federal and Provincial Child Support Guidelines (which, in fact, are not guidelines at all, but form part of the substantive law), there is no plan to draft legislation to implement these Advisory Guidelines as law. Rather, their purpose is to be advisory only, with a view to bringing more certainty and predictability to the determination of spousal support under the Act. They are a response to what has been perceived as a significant lack of predictability in spousal support awards, which commentators suggest are even less predictable following the Bracklow decision.

It is also important to note that the Advisory Guidelines do not deal with entitlement to support, but are only relevant to issues of quantum and duration of support once entitlement has been resolved. Nor do they address situations in which there are prior agreements between the parties dealing with spousal support.

It should also be stressed that the Advisory Guidelines are intended to reflect the current law, rather than to change it. They were drafted by the authors after extensive analyses of the authorities regarding spousal support across the country, particularly the Moge and Bracklow decisions and those following thereafter. While decisions can undoubtedly be found in which the result would not accord with the Advisory Guidelines, I am satisfied that their intention and general effect is to build upon the law as it exists, rather than to present an entirely new approach to the issue of spousal support. For that reason, like Madam Justice Martinson and many other judges, I have no hesitation in viewing the Advisory Guidelines as a useful tool to assist judges in assessing the quantum and duration of spousal support. They do not operate to displace the courts' reliance on decided authorities (to the extent that relevant authorities are forthcoming) but to supplement them. In that regard, they do not constitute evidence, but are properly considered as part of counsels' submissions. [Paras. 60-4; emphasis added by Newbury J.A.]

[38] I do not read Yemchuk as indicating that the Guidelines must, as a matter of law, be used by a judge in determining support. The same is true of this court's judgments in *Tedham v. Tedham*, 2005 BCCA 502 (see especially paras. 75-6), and *Kopelow v. Warkentin*, 2005 BCCA 551 (see especially paras. 75-6). However, as a "useful tool", the Guidelines may indicate whether a proposed award is "in the range" of what should be a pattern of predictable maintenance awards across the province and across Canada. If one assumes an income of

\$260,000 for Mr. Redpath, counsel for the wife calculates the Guideline range as between \$4,542 and \$5,510 per month, a range materially higher than the \$3,500 that was awarded.

- [39] Counsel for Ms. Redpath also submitted that the trial judge's reasoning overemphasized the wife's means and her obligation to become economically self-sufficient - factors that are less important in the context of a long marriage during which an affluent lifestyle was enjoyed, and after which a considerable stream of income can be expected to continue. There is also the fact that Ms. Redpath, who is now age 41, did not work outside the home to any significant degree during the marriage, but stayed home by mutual agreement to raise the couple's five children. [emphasis added]
- [76] When I apply the authorities referred to by counsel and take into account the affidavit evidence and apply the factors and objectives in s. 15.2, I arrive at the following conclusions: the plaintiff has a far greater ability to work than he has demonstrated heretofore; the plaintiff has squandered money on drugs and run up debt as a result; his expenses are inflated and do not reflect the current reality; the primary day-to-day physical and financial responsibility for the children rests with the defendant; the defendant has changed employers, likely to enhance her future prospects, but her present income and business expenses are uncertain; and the defendant will likely bear the brunt of any exposure to the judgment against her and her husband (at least initially) and she must prepare for that possibility.
- [77] This is an interim application and the truth of the affidavit evidence is yet to be tested by cross-examination and full document disclosure. Although the court should endeavor to maintain the status quo and apply the SSAG guidelines absent exceptional circumstances, in the case at bar, I find that exceptional circumstances do exist including the plaintiff's past substance abuse and his failure to work to his ability. Although there is evidence that he has recently abstained from the use of cocaine, the defendant's submission that he will use spousal support to finance his habit has some demonstrated validity.
- [78] Although the trial is scheduled for September 2008 and the trial judge will be in a better position to determine the competing positions, the trial is sufficiently distant in time to warrant some interim spousal support contribution by the defendant. I must say that I make the following order with considerable reservations, mindful of the lure that cocaine appears to have for the plaintiff and the desirability of assisting him to contribute fully to his support and the support of the children.
- [79] This is one of those exceptional cases where the SSAG do not apply. I am confident that the plaintiff is capable of earning a minimum of \$60,000 annually and that his efforts to find employment have been far below what he is capable of doing. I also take into account the recent change in the defendant's employment, the uncertainty of her income and expenses and mindful that the trial judge may make whatever adjustments are necessary to effect a just result.

[80] In the result I order the defendant to pay \$1,500 to the plaintiff commencing November 1, 2007 and continuing on the first of each month until further order.

[81] Because there has been mixed success on these applications and because the full picture will not be known until the trial I order that the claims for costs be left for the trial judge.

"The Honourable Mr. Justice Warren"

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