
CANADA / JUDGMENT

D.A.C. v. R.W.C.

2018 BCSC 317

COURT

Supreme Court of British Columbia

DECIDED

5 March 2018

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2018 BCSC 317 D.A.C. v. R.W.C.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.A.C. v. R.W.C.,

2018 BCSC 317

Date: 20180305

Docket: E001372

Registry: Victoria

Between:

D.A.C.

Claimant

And

R.W.C.

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Claimant:

Mark J. Walton

Counsel for the Respondent:

Eugene Raponi, QC

Place and Dates of Hearing:

Victoria, B.C.

November 28 and 29, 2017

Place and Date of Judgment:

Victoria, B.C.

March 5, 2018

- [1] This is an application under s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA], brought by the respondent, R.W.C. ("Dr. C."), to vary his spousal support obligations as set out in the order made by Mr. Justice Hutchison on April 26, 2001 (the "Hutchison Order"), reasons for judgment indexed at 2001 BCSC 630 ("Trial Reasons"). Dr. C. seeks to terminate his obligation to pay spousal support, or, in the alternative, an order reducing the amount of spousal support he pays since he plans to retire and has sold his dental practice. The claimant, D.A.C. ("Ms. C."), is opposed to any reduction in the quantum of support.
- [2] Ms. C. served an application seeking that Dr. C. pay retroactive increases to spousal support commencing January 1, 2013. During the hearing her counsel advised that this application would not proceed and that if spousal support was reduced, Ms. C. would only seek retroactive spousal support to July 2017.

Background Facts

- [3] Dr. C., aged 66, was born on February 23, 1952. Ms. C., aged 65, was born on May 29, 1952.
- [4] The parties were married on August 23, 1975. They separated in approximately September 1999 and were divorced in 2001.
- [5] There were two children of the marriage: C.C. born March 30, 1979, and R.C. born August 7, 1981. After the birth of C.C., Ms. C. was primarily a homemaker.
- [6] There was a five-day trial before Mr. Justice Hutchison in March and April 2001. At the time of the trial, Dr. C. was a dentist and Ms. C. was training to become a hair stylist. Ms. C. had previously worked as a registered nurse.
- [7] The two children of the marriage were attending university as of the date of the trial. Dr. C. committed to continuing to fund a family trust for each child, which paid \$1,500 per month living allowance, while the children were attending university.
- [8] The Hutchison Order included:
- the valuation of the shares in Dr. C.'s dental practice at \$550,000;
 - division of other family assets and pensions;

- c. an equalization payment of approximately \$290,000 by Dr. C. to Ms. C. on a payment schedule; and
 - d. Dr. C. to pay spousal support to Ms. C. in the amount of \$14,000 per month between May and December 2001, and \$12,000 per month commencing on January 1, 2002.
- [9] Of significance on this application from the Trial Reasons are the following:
- [11] Life insurance can be valued at its cash surrender value and [Dr. C.] agrees that [Ms. C.] can maintain Policy No. LI8134,6235-7 on his life, provided that she maintain the premiums.
- [13] The rather bizarre manner in which [Ms. C.] removed approximately \$250,000.00 from [Dr. C.]'s company account to her personal chequing account over a period of approximately 18 months, ending in March 2001, gives rise to the contentious issue.
- [14] However it occurred, the funds were moved to [Ms. C.]'s personal account from the corporate account and it would seem that she spent it largely on lavish entertainment, furniture, art supplies, clothing and hair styling.
- [16] In coming to that conclusion, it is important to briefly review [Ms. C.]'s mental condition following her husband's discovery of her financial misadventures. On March 28, 1999 she was admitted to Edgewood, a 74-bed in-patient chemical dependency treatment centre in Nanaimo. After a 42-day stay, her discharge summary made May 15, 1999 indicates that [Ms. C.] was receiving treatment primarily for her addiction to shopping, having spent \$250,000.00 in the past 12 to 18 months. The report indicated that [Ms. C.] shopped five days per week for the last 28 years, with the amount of money spent increasing steadily over that time. It also indicates that she was taking sleeping pills on a daily basis for the past 18 years and drinks wine three times per week. She was also addicted to codeine from age 34 to 41, stopping use only after she was hospitalized and detoxified. Her counsel argues that she has a compulsive-addictive personality and that she must continue treatment and counselling for her problems.
- [18] Apart from putting aside money for her annual income tax, there is little indication that she is capable of changing her somewhat elaborate lifestyle in order to live within her means.
- [21] While it is clear she has an obligation to make herself self-supporting, at age 49 she can never hope to achieve the kind of lifestyle that she grew accustomed to during the marriage. It is clear [Dr. C.] has the means to support her in a more affluent style than will be available to her if she graduates from her present hairdressing course and becomes a hair stylist.
- [22] It is clear that the marital break-up has been highly detrimental to [Ms. C.]'s well being and health.

- [23] Fortunately, now that [Dr. C.] has reached the age and experience to be at his highest earning years, he is in a position to maintain [Ms. C.] somewhat in the lifestyle she has become accustomed to. [Dr. C.'s] corporation is in a position to make approximately \$525,000.00 per year available to shareholders, prior to personal taxes.
- [24] However, he is entitled to put aside sufficient sums for retirement, a concern that he legitimately has. Indeed, one of the financial disputes during the marriage arose when [Ms. C.] cashed in and spent the proceeds from a spousal R.R.S.P. that [Dr. C.] set up. As a single practitioner, he is entitled to take a larger share of the family income to prepare for his retirement.
- [25] Before arriving at a final figure for spousal maintenance, one has to take into account assets gained by [Ms. C.] as a result of a division of assets.
- [26] the equalization payment required to be paid by [Dr. C.] to [Ms. C.] would be \$291,964.91.
- [27] [Dr. C.] will have to make an equalization payment in excess of \$250,000.00 to [Ms. C.] He shall pay forthwith to [Ms. C.] any sum in excess of \$250,000.00. As for the additional \$250,000.00, [Dr. C.] may pay the sum to [Ms. C.] over a five-year period at \$50,000.00 per annum, with the whole sum bearing interest at the rate of 5% per annum, payable monthly and commencing May 1, 2001.
- [29] One can only hope that [Ms. C.] is wise enough to maximize her R.R.S.P. contributions and save her capital payments on their receipt.
- [30] I fix monthly maintenance for [Ms. C.] at \$14,000.00 per month, commencing May 1, 2001 until December 31, 2001; thereafter, the monthly maintenance will be reduced to \$12,000.00 per month, since by that time, [Ms. C.] will have completed her hair styling course, and should have found some gainful employment.
- [10] Since the divorce, Dr. C. continued to work full-time as a dentist until October 2016 when he sold his dental practice. He earned on average approximately \$650,000 annually. He has managed to save a substantial amount of money and accumulate assets.
- [11] Dr. C. paid \$1,500 per month to each of his children while they attended university, and \$1,000 per month to R.C. while he was in residency. In May to November 2016, Dr. C. made a gift of \$225,000 from his earnings to his son R.C. to pay off his student loan which was incurred while R.C. attended medical school.
- [12] Dr. C. deposed to developing severe back and shoulder problems over the past few years. In the spring of 2011, he had to take time off work because of considerable shoulder pain. In May 2011, he was diagnosed with moderate-advanced aggressive prostate cancer. This cancer required surgery. As a result of the surgery he is incontinent. He has been cancer-free since the surgery but there remains risk that the cancer may return.

- [13] He deposed that he has now developed pain in both his hands and wrists. He was diagnosed with arthritis and bursitis. He would like to retire.
- [14] In approximately September 2016, Dr. C. advised Ms. C. of his impending retirement and need for reduced spousal support payments. Dr. C. stopped paying spousal support for November and December 2016 up until January 12, 2017. Ms. C. registered the Hutchison Order with the Family Maintenance Enforcement Program. As a result, Dr. C. resumed paying the spousal support of \$12,000 per month.
- [15] On October 1, 2016, Dr. C. sold his dental practice for the sum of \$2,300,000. He had to pay approximately \$50,000 in legal and accounting fees and \$360,802 for taxes relating to the sale. After the sale, he began working two days a week as an associate for the dentist who purchased the practice. This was originally intended to last for one year. This has been extended, and Dr. C. plans to stop working in March 2019. Commencing on January 1, 2017, Dr. C. earned \$9,421 a month, net including taxes, as self-employment income.
- [16] Dr. C. has remarried and has a stepson who lives with him part-time.
- [17] Ms. C. deposes that during the 24-year marriage, she developed lifelong addictions to alcohol, drugs (prescription and non-prescription) and shopping. Since her discharge from Edgewater in 1999, she has been "dry". She suffers from depression, anxiety, and post-traumatic stress disorder. These conditions are supported by a letter from her family doctor that was placed in evidence.
- [18] Since May 1999, she has taken antidepressants and since October 2016 she has been taking two antidepressants. She continues to attend up to five support meetings per week to address her addiction issues.
- [19] Ms. C. deposes that in 2000, C.C. disclosed details of her alleged abusive relationship with Dr. C., and up until approximately 2014, Ms. C. has been focused on trying to support C.C., develop a jewelry business, and deal with her own recovery issues.
- [20] C.C. has suffered from mental health challenges. Ms. C. deposes that she paid for C.C.'s therapy, subsidized her rent until 2013, and helped her with living costs. She estimates that on average, she assisted C.C. with about \$25,000 per year for approximately 14 years.
- [21] C.C.'s evidence confirms that her mother has provided financial and emotional support. C.C. estimates that she has received at least \$250,000 from her mother since her parents divorced. She asserts that she has needed her mother's support because of the abuse she suffered from her father. Dr. C. denies any such abuse. C.C.'s evidence is that she has suffered from bouts of severe depression and since September 1999 has been on antidepressants and anti-anxiety medications.
- [22] In 2000, C.C. confronted her father with allegations of abuse. Since that confrontation, Dr. C. has been estranged from his daughter.

[23] In 2002, Dr. C. agreed to pay about \$1,400 per month towards C.C.'s treatments. He deposes that these payments were made for approximately 12 months. Dr. C. stopped making payments because he was not sure if C.C. was using the money for treatment. C.C. disputes this and says that it was in 2004 and that her father only made two months of payments.

[24] In 2002, Ms. C. worked as a hair stylist and earned about \$15,000 gross. She did not enjoy this work as she found it physically demanding and emotionally stressful. She operated a jewelry business from approximately 2002 to 2010, and in 2010, Ms. C. wound up the business at a significant loss.

[25] Between 2004 and 2007, Ms. C. withdrew approximately \$185,000 from her RRSPs to help fund the jewelry business and to support C.C. She has no money saved for her retirement.

[26] In the spring of 2017, Ms. C. sold her home in Vancouver for \$1,288,000. At the date of the application, she was renting an apartment for \$2,800 per month.

[27] Ms. C. remains single.

Dr. C.'s Current Financial Circumstances

[28] According to his property and financial statement sworn May 1, 2017, Dr. C. has income, assets, and debts consisting of the following:

Employment and interest income

(less union/professional dues)

\$183,750

Interest in Victoria property

\$1,144,000

Vehicles

\$120,000

Financial assets

\$2,759,124.73

Pensions and RRSPs

\$770,134.98

Debts

none

Total

\$4,793,259.71

- [29] Since the property and financial statement was sworn, there has been some further improvement in Dr. C.'s financial status. He will also be applying for CPP benefits.
- [30] Since 2001, Dr. C.'s dental practice continued to flourish post-separation. Dr. C. took the position that his income earned between 2001 and 2016 was of no relevance to the issue of whether Ms. C. should be entitled to any future spousal support. Ms. C. argues it was relevant as it supports that Dr. C. was underpaying spousal support for many years.
- [31] An expert report tendered by Ms. C. set out that Dr. C. earned an average income of \$649,000 between 2001 and 2016, not including the one-time capital gain in 2016 from the sale of his dental practice.

Ms. C.'s Current Financial Circumstances

- [32] According to her property and financial statement sworn May 25, 2017, Ms. C. has income, assets, and debts consisting of the following:

Spousal Support

\$144,000

Vancouver condo

\$1,288,000

Vehicle (leased)

\$21,000

Financial assets

(\$266.93)

Sub Total

\$1,308,733.07

Debts (secured/unsecured)

\$692,896.33

Total

\$615,836.74

- [33] Ms. C.'s current financial circumstances have changed since she sold the Vancouver condo on May 31, 2017 for \$1,288,000. After payment of the mortgage and other expenses, she was left with approximately \$466,000. It was not clear from the evidence whether some of the unsecured debt has also been paid. In addition she now owns the leased vehicle. She is currently renting at a cost of \$2,800 per month. She has applied for CPP and will be receiving \$617 per month as of June 2017. She potentially may receive an inheritance from her father.

Issues

[34] The issues to be decided on this application are:

- a. whether Dr. C. has established a material change in circumstances under s. 17(4.1) of the DA such that the Court may vary the spousal support award in the Hutchison Order;
- b. if so, whether and in what manner the Court should vary the award given the change and the objectives of spousal support variations as set out in s. 17(7) of the DA; and
- c. should there be any security provided?

Dr. C.'s Position

[35] Dr. C. submits that there has been a material change since the Hutchison Order, as he has sold his dental practice, has reduced the days he works as a contractor dentist to two days a week, and intends to retire in March 2019.

[36] Counsel for Dr. C. submits that the two bases for spousal support relevant to the facts of this case are compensatory and non-compensatory. He submits that the compensatory claim has long since lapsed. The spousal support made on compensatory grounds was on the basis that Ms. C. stayed home with the children and had worked in Dr. C.'s dental practice. The compensatory model of support has elapsed as a result of the property division and the years of spousal support he has paid. As such the non-compensatory model is to be applied in the event that the Court finds a material change in circumstance.

Ms. C.'s Position

[37] The retirement of Dr. C. was contemplated by the Trial Reasons, and as a result, his impending retirement should not be considered to be a material change in circumstances.

[38] Ms. C. submits that Dr. C. has not shown a material change because he chose to sell his practice and work only two days a week. He can and should be working more than two days a week.

[39] If there has been a material change of circumstances, the spousal support should continue at the current rate indefinitely.

[40] She further seeks that any spousal support order should be secured pursuant to s. 170 of the Family Law Act, S.B.C. 2011, c. 25, by a life insurance policy or against the estate of Dr. C.

Legal Principles

- [41] The order for spousal support made in the Hutchison Order was made under the DA. In determining the ongoing application for spousal support, the law recognizes three models of spousal support as described in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 15 [Bracklow], namely: compensatory, contractual, and non-compensatory (needs-based). In this case, compensatory and non-compensatory come into play.

Compensatory Spousal Support (Moge)

- [42] The nature and significance of compensatory spousal support is discussed in numerous authorities including *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge], and *Bracklow*. The appropriate measure of compensatory support is not assessed by doing a detailed accounting at the end of a marriage to determine what financial "losses" a spouse suffered as a result of expenditures made during the marriage (including the period of cohabitation). Instead, the court must have regard to the statutory provisions governing support, the relevant authorities, and the Spousal Support Advisory Guidelines [SSAG].
- [43] The importance of the marital standard of living in lengthy marriages has been emphasized in many cases, including *Tedham v. Tedham*, 2005 BCCA 502 [Tedham] at para. 51, where the Court of Appeal referred, with approval, to the following passage from the reasons for judgment of Madam Justice L'Heureux Dubé, speaking for the Court in *Moge* at p. 870 of that decision:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement [citations omitted]. Furthermore, 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 [citations omitted].

- [44] More recently in *Chutter v. Chutter*, 2008 BCCA 507 [Chutter], Madam Justice Rowles described the purpose and rationale underlying the compensatory grounds for spousal support:
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning

potential and fewer future prospects of financial success (Moge, at 861-863; Bracklow, at para. 39). In Moge, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

[51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in Moge at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added).

[52] The Court in Moge discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. 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.

[Emphasis added, internal citations omitted.]

[45] In *W. v. W.*, 2005 BCSC 1010, Madam Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in Moge:

[11] In British Columbia this comment in Moge has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2949

(S.C.)(QL); O'Neill v. Wolfe (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); Walton v. Walton, [1997] B.C.J. No. 1089 (S.C.)(QL); Ulrich v. Ulrich, 2003 BCSC 192; and Carr v. Carr (1993), 46 R.F.L. (3d) 326 (B.C.S.C.);

[Emphasis in Chutter.]

[46] In determining whether a party has been economically disadvantaged as a result of the marriage, Madam Justice Rowles in Chutter noted that the fact that a woman worked outside the home does not necessitate preclusion from an award for spousal support (at para. 71):

... [T]he fact that the support-seeking spouse was employed outside the marriage, or engaged in the same career at the end of the marriage as at its start, does not necessarily preclude entitlement to spousal support on compensatory grounds. What was said by McLachlin J. (as she then was) in concurring reasons in Moge, at 882, is apposite:

Even women who have worked outside the home during the marriage may find that their career advancement has been permanently reduced by the effort which they devoted to home and family instead of their jobs, whether the woman be a janitor like Mrs. Moge or a well-trained professional.

[47] A compensatory award should continue until compensation is achieved even if the spouse has attained self-sufficiency (Chutter, at para. 79; Tedham, at para. 60, Morigeau v. Moorey, 2015 BCCA 160 at para. 37).

Non-Compensatory (Needs-Based) Spousal Support (Bracklow)

[48] Non-compensatory support is "grounded in the 'social obligation model' of marriage, in which marriage is seen as an interdependent union". Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, not the state (Chutter, at para. 54). "Need" alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43).

[49] "Need" is something more than basic necessities (Chutter, at para. 55):

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in Myers v. Myers (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[50] Likewise, economic self-sufficiency is a relative concept (Chutter, at paras. 56-58):

- [56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (*Bracklow*, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:
- [21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.
- [57] In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 41, 48-49, 16 R.F.L. (6th) 430, Prowse J.A. referred to *Myers* and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown. In *Yemchuk*, the husband had appealed the decision of the trial judge dismissing his claim for spousal support on the basis that he had not established any need. While Prowse J.A. found that the husband was entitled to spousal support on compensatory grounds, she also went on to state that the trial judge's treatment of the husband's need for support had been "unduly restrictive":
- [41] I am also satisfied that the trial judge erred in viewing Mr. Yemchuk's "need" for support from too narrow a perspective. He treated "need" as solely a question of whether Mr. Yemchuk could meet his stated expenses with the income available to him. After attributing \$800-\$1,000 per month to Mr. Yemchuk, the trial judge found that Mr. Yemchuk could meet his expenses and, therefore, was not entitled to support.
- [58] In *Tedham v. Tedham*, 2005 BCCA 502, 20 R.F.L. (6th) 217, Prowse J.A. referred to *Yemchuk* as illustrative of the fact that the courts, at least in longer marriages, are measuring need against the marital standard of living (para. 55), and followed *Allaire* in finding that the objective of self-sufficiency must be viewed in the context of the marital standard of living (para. 60).
- [51] Madam Justice Rowles explained that a spouse suffers hardship where she must encroach on her capital in order to maintain the same standard of living that was enjoyed during the marriage (at para. 90):

If the appellant must encroach upon her capital to maintain a standard of living comparable to that which she enjoyed during the marriage, then arguably she is suffering hardship from the breakdown of the marriage and experiencing the loss of marital standard of living, since her capital would deplete over time and eventually she would be in a worse position than had the marriage continued. If that is so, whether the respondent has the means to assist her financially to live a lifestyle closer to what they shared as a couple is a relevant question (*Allaire*, at para. 21; *Hodgkinson*).

- [52] Madam Justice Rowles sets out an example where an award for spousal support went beyond basic necessities:
- [59] Non-compensatory support was also considered in *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, 25 R.F.L. (6th) 235. In that case, the parties divided assets of close to \$7 million, and the wife was awarded time-limited spousal support on non-compensatory grounds. The trial judge had found that the wife was not entitled to spousal support on either compensatory or non-compensatory grounds: she was not financially disadvantaged by the marriage; she was both highly trained and capable of stepping back into the work force; and she was able to earn investment income from her share of the capital assets. On appeal, Saunders J.A., for the court, held that the trial judge's analysis of the wife's needs and means was "impermissibly narrow"; in part because it had not taken into account the marital standard of living or the husband's post-separation standard of living:
- [68] However, the trial judge did not relate that capacity to earn income from her capital assets and from employment to the standard of living the parties enjoyed during marriage or to the standard of living of Mr. Hodgkinson after trial, or advert to the time lag that would be involved in earning income from a business if Mrs. Hodgkinson immediately resumed work as a chef or caterer. While none of these factors is, by itself, a determinant of Mrs. Hodgkinson's entitlement to spousal support, their absence illustrates what I consider an impermissibly narrow approach to the issue of spousal support.
- [69] Both the question of hardship to Mrs. Hodgkinson ([15.2(6)(c)]) and her self-sufficiency ([15.2(6)(d)]) bear some relationship to the standard of living enjoyed by the parties during the marriage (tempered by the income available) and by the other spouse after the marriage. While Mrs. Hodgkinson is not entitled to support at a level that would maintain the highly affluent lifestyle the parties shared, particularly as it appears to have been beyond the level of Mr. Hodgkinson's earnings, in these circumstances she is entitled to a degree of comfort well beyond "basic needs".
- [74] It was an error, in my view, for the trial judge to fail to recognize these several aspects. The arrangement between the parties during marriage as described by the trial judge, in my view, required consideration of spousal support from the perspective of the standard of living that is still reasonably available to them, although in two residences. While recognizing that Mrs. Hodgkinson is not necessarily entitled, step for step, to Mr. Hodgkinson's standard of living, something closer is required.

Spousal Support Variation and Review Applications

- [53] Applications to vary spousal support orders are governed by s. 17 of the DA. In determining the amount and duration of spousal support on a variation application under the DA, the court must consider the change in the "condition, means, needs or other circumstances" of the parties (s. 17(4.1)), and give effect to the objectives of spousal support (s. 17(7)):

(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.

...

- (7) A variation order varying a spousal support order should
- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
 - (b) apportion between the former 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 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.
- [54] Mr. Justice Saunders in *MacCoubrey v. MacCoubrey*, 2017 BCSC 1305, provided an excellent summary of the approach to take on a variation application and the application of the leading case *L.M.P. v. L.S.*, 2011 SCC 64:
- [24] In *L.M.P. v. L.S.*, 2011 SCC 64 [L.M.P.], Abella and Rothstein JJ., writing for the majority, held at para. 30 that the proper approach under this section is the one established in *Willick v. Willick*, [1994] 3 S.C.R. 670 [Willick], and *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370. Under that approach, the original order is treated as correct and the court must first determine whether the party seeking a variation has established that, since the making of the prior order, there has been a change in circumstances that is material in the sense that the change, if known at the time of the prior order, would likely have resulted in different terms: *L.M.P.* at paras. 31-33. If the applicant has established this threshold requirement, the court must then determine what variation is necessary in light of the change in circumstances and the objectives of spousal support variation listed in s. 17(7) of the Divorce Act, and should limit itself to the variation justified by the change: *L.M.P.* at paras. 47-48. See also *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 29-30; and *Powell v. Levesque*, 2014 BCCA 33 at paras. 23-25.
- [25] A material change must generally have some degree of continuity and not represent a merely temporary set of circumstances: *L.M.P.* at para. 35. In determining whether there has been a material change the court must consider the actual circumstances of the parties at the time of the prior order: *L.M.P.* at para. 34. In *Willick* at para. 21, Sopinka J. wrote for the majority that "if the matter which is relied on as constituting a change was known at the

relevant time it cannot be relied on as the basis for variation." In separate concurring reasons in the same decision, L'Heureux-Dubé J. wrote at para. 99 that "the fact that a change was objectively foreseeable does not necessarily mean that it was contemplated by the parties."

[26] With respect to the determination of the appropriate variation once the threshold of a material change in circumstances has been established, Abella and Rothstein JJ. wrote as follows at paras. 47-50 of L.M.P.:

[47] If the s. 17 threshold for variation of a spousal support order has been met, a court must determine what variation to the order needs to be made in light of the change in circumstances. The court then takes into account the material change, and should limit itself to making only the variation justified by that change. As Justice L'Heureux-Dubé, concurring in Willick, observed: "A variation under the Act is neither an appeal of the original order nor a de novo hearing" (p. 739). As earlier stated, as Bastarache and Arbour JJ. said in Miglin [v. Miglin, 2003 SCC 24], "judges making variation orders under s. 17 limit themselves to making the appropriate variation, but do not weigh all the factors to make a fresh order unrelated to the existing one, unless the circumstances require the rescission, rather than a mere variation of the order" (para. 62).

[48] Variation involves the application of both s. 17(4.1) and s. 17(7) of the Divorce Act. In Hickey [v. Hickey, [1999] 2 S.C.R. 518], L'Heureux-Dubé J. described the interplay between them as follows:

On an application for variation of an award of spousal support, the court must first find, under s. 17(4), that there has been a material change in the conditions, means, needs, or circumstances of either spouse (see Moge [v. Moge, [1992] 3 S.C.R. 813] at pp. 875-76, and Walker v. Walker (1992), 12 B.C.A.C. 137, at pp. 141-42) and in making the order, the court must take into consideration that change. As with the variation of child support orders, this change must be material, and cannot be trivial or insignificant. The factors enumerated give the court considerable discretion in determining whether a variation order is justified: see J. Payne, *Payne on Divorce* (4th ed. 1996), at p. 321. Once this threshold is passed, the court must consider the four objectives of spousal support enumerated in s. 17(7) of the Divorce Act. [para. 20]

[49] Julien D. Payne and Marilyn A. Payne observed that "[t]here is nothing in the Divorce Act to suggest that any one of the objectives [in s. 17(7)] has greater weight or importance than any other objective" (Canadian Family Law (3rd ed. 2008), at p. 253). Rather, the objectives "operate in the context of a wide judicial discretion" and "provide opportunities for a more equitable distribution of the economic consequence of divorce between the spouses".

- [50] In short, once a material change in circumstances has been established, the variation order should "properly reflect the objectives set out in s. 17(7),... [take] account of the material changes in circumstances, [and] consider the existence of the separation agreement and its terms as a relevant factor" (Hickey, at para. 27). A court should limit itself to making the variation which is appropriate in light of the change. The task should not be approached as if it were an initial application for support under s. 15.2 of the Divorce Act.
- [55] A substantial reduction in a payor's income due to retirement can be a material change of circumstances but not always: *Peters v. MacLean*, 2014 BCSC 990 at para. 27 [Peters].
- [56] Mr. Justice Joyce explained in *Peters* when a reduction in income due to retirement can constitute a material change in circumstances:
- [29] Even though it may be argued that retirement is always an event that is foreseeable, particularly with regard to persons who are approaching what might be thought of as a "normal" retirement age when the order is made, there are a number of cases where reduction in the payor's income due to retirement has been held to be a material change of circumstances. See, for example: *Cramer v. Cramer*, 2000 BCCA 272 [Cramer]; *Burroughs v. Burroughs*, 2004 BCSC 7 [Burroughs]; *Stones v. Stones*, 2004 BCCA 99 [Stones]; and *Butler v. Butler*, 2013 BCSC 315 [Butler].
- [32] In my view, it is necessary to consider the particular facts of each case to determine whether a substantial reduction in income will constitute a material change of circumstances
- [33] One of the considerations in deciding whether a retiring spouse can establish a material change of circumstances is whether the retirement is at a time that is in advance of when he might be expected to retire and whether it is voluntary (voluntary early retirement) or was forced upon the payor by circumstances beyond his control, including the decision of his employer or health considerations. The important consideration in cases where the payor is not forced to retire is his intention when the decision was made. As I stated in *Butler*, at para. 39:
- [39] The authorities demonstrate that the change of circumstances relied on in support of an application to vary a spousal support order must be substantial, unforeseen and continuing. Even if those three factors are established the application may be refused where the change of circumstance is voluntary early retirement or withdrawal from the work force if it was brought about with the intention of frustrating a support order or without some satisfactory reason.
- [57] As noted by the Court of Appeal, in *Stones v. Stones*, 2004 BCCA 99 at paras. 15-16, the circumstances of each case must be considered:

- [15] In my opinion, the question of what is a material change of circumstance may vary from one case to another. That is particularly so in relation to foreseeability. There are a group of cases which decide that retirement from employment, even at the retirement age set by the employer, or by collective agreement, can be a material change of circumstances, although clearly it would be foreseeable.
- [16] I suppose that the question should really be asked in each case of whether the circumstance in question was one which the parties must have had in contemplation and built into the framing of their agreement. Perhaps it is a change that the parties were prepared to leave out of contemplation in the agreement because of complexity or some other reason, so that when it occurs it is a material change of circumstances, even though the parties knew it must be going to happen at some time or another.

Application of the Spousal Support Advisory Guidelines

- [58] At the time of the Hutchison Order, the SSAG had not been pronounced. It is appropriate in the context of this review to consider the SSAG as a guide, once continuing entitlement has been established: *McEachern v. McEachern*, 2006 BCCA 508; *Redpath v. Redpath*, 2006 BCCA 338 [Redpath]; *Tedham*; and *Yemchuk v. Yemchuk*, 2005 BCCA 406 [Yemchuk]. However, the SSAG are guidelines and not law: see *Beninger v. Beninger*, 2007 BCCA 619 [Beninger]; and *Yemchuk*. In *Redpath*, at para. 42, the Court of Appeal extended that view to state that an award which substantially differs from the range set by the SSAG might constitute an error of law in the absence of a reasonable explanation for the difference.
- [59] In certain circumstances, the SSAG can also be used on a variation application, albeit with care: *Beninger*. In that case, Madam Justice Prowse for the Court of Appeal noted (at para. 52) that the SSAG "were not designed to address some of the more complex issues which can arise on variation proceedings, including the impact of remarriage, second families and retirement". She concluded, however (at para. 53), that "the more significant complications referred to by the authors of the SSAG arising on a variation application are not a barrier to using the SSAG as a tool in determining either the quantum or duration of spousal support". She cautioned (at para. 55) that "the decision whether to use the SSAG as a guide on variation applications will have to be made cautiously and on a fact-specific basis".
- [60] The SSAG are intended to guide the court in the determination of the appropriate award. The authors of the SSAG point out that the most difficult aspects of spousal support duration arise in "medium length marriages" (6 to 19 years) (SSAG at 64-66), and where illness or disability are involved (SSAG at 121-124). It is ultimately for the court to determine, based on all the circumstances of the particular case, the appropriate amount and duration of spousal support.

Analysis

Material Change

- [61] In my view Dr. C. has established a material change in circumstances since the making of the Hutchison Order, when Dr. C. was 49 years old and was working full-time. As of October 2016, Dr. C. had sold his dental practice and began working on a part-time basis two days a week. He wants to fully retire. He plans to do so in March 2019, at age 67. His current employment income is approximately \$100,000 a year, with added investment income of \$90,000. Upon retirement his employment income will end and he will be left to live on his investment income and accrued assets. At this time the current spousal support payments amount to \$144,000 per year to Ms. C. If that continued Ms. C.'s spousal support payments would exceed, by over \$50,000, the amount of investment income Dr. C. receives.
- [62] This is not a case in which Dr. C. has decided to retire early or withdraw from the work force with the intention of frustrating a support payment. His reasons for selling the dental practice, because he was nearing retirement, had suffered serious health problems, and wanted to capitalize on his business, were reasonable. I accept that Dr. C. is entitled to retire.
- [63] Dr. C. submits that the reference in the Trial Reasons at para. 24 to Dr. C. being entitled to put away sums for retirement does not equate to the trial judge making a provision on what should have happened on retirement. I agree that the trial judge did not take into account the impact of Dr. C.'s retirement and it was not litigated in the trial. At para. 29, the trial judge made it clear that Ms. C. would be "wise enough to maximize her R.R.S.P. contribution and to save her capital payments on receipt". This comment does not support that the trial judge was contemplating that the support payment of \$12,000 would continue for life after Dr. C. had retired. There was a responsibility placed on Ms. C. to plan for that eventuality.
- [64] In all the circumstances of this case, I find that Dr. C. has met the burden of demonstrating a material change of circumstances and the spousal support order should be varied.

Valuation

- [65] I turn now to the question of the appropriate valuation. Once entitlement to continued spousal support has been established, as I have found, the factors relevant to assessing that entitlement include the parties' incomes and other means of support, the applicability of the SSAG, and the duration of the obligation.
- [66] Ms. C. has experienced economic disadvantage and hardship as a result of the breakdown of the marriage. The marriage lasted 24 years. During the marriage she primarily assumed the role of homemaker. She did attempt to become self-sufficient after the marriage breakup but that has failed. She has faced and continues to face ongoing mental health challenges. She has no employment income. She has no employment prospects, which Dr. C. accepts. She has no pension income and no RRSPs. Her CPP income will be grossly insufficient to meet

her annual expenses.

- [67] Dr. C. submits that in addition to CPP, Ms. C. will be entitled to the Old Age Security ("OAS") pension, and as such, this should be factored in to any calculation of how much she will receive. Ms. C. takes the position that this benefit may be available, but there is no affidavit evidence that supports it will be.
- [68] Ms. C. has not planned for her retirement and has little financial security. She has no RRSPs and her only monies are the net proceeds from the sale of her Vancouver condo. She submits the reason for this is that her business endeavour failed, she has had to devote herself to caring for her daughter and herself, and she has no current means of earning any income.
- [69] Without further spousal support she will have no means to support herself once the net proceeds from the sale of her Vancouver condo have been depleted. Her standard of living will plummet. The result will be a large disparity in the parties' standards of living. As noted in *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 54-56:
- [54] Where entitlement to compensatory support is established, and the marriage has been a long one, the marital standard of living is often a reasonable measure of appropriate compensation. It represents the standard that the parties themselves established as a result of each individual's sacrifices and advantages during the union, and will often represent the standard that they could have expected to maintain if the marriage had not broken down.
- [55] In saying this, I do not imply that this measure will always be determinative of the amount of spousal support. All of the factors set out in s. 17(7) must be considered by a judge in fixing appropriate spousal support. As was said in *Moge* at 866-67:

The exercise of judicial discretion in ordering support requires an examination of all four objectives set out in the Act in order to achieve equitable sharing of the economic consequences of marriage or marriage breakdown. This implies a broad approach with a view to recognizing and incorporating any significant features of the marriage or its termination which adversely affect the economic prospects of the disadvantaged spouse.

- [56] It should be remembered, as well, the payee spouse, no less than the payor, is entitled, if possible, to maintain a standard of living similar to that enjoyed during a long marriage. Where the resources of the parties are not sufficient to allow both to enjoy that standard, it will usually be reasonable to equalize the deficit and allocate resources so as to allow each party to enjoy a similar standard of living.

- [70] By contrast, Dr. C. continued to work full-time, and earn more income than he was at the time of the trial, up until October 2017 when he sold his dental practice. He has been fiscally responsible and has accumulated a large nest egg for his retirement. He has no debts. The evidence supports that his resources are such that they can continue to support a reasonable standard of living for Ms. C. into the future without suffering a disproportionate reduction in his standard of living.
- [71] I accept that Ms. C. continues to have an entitlement to spousal support based on a compensatory and on a non-compensatory basis. The factors I take into account in coming to this conclusion on the compensatory basis are these:
- a. the marriage was of a long duration, lasting 24 years;
 - b. Ms. C. was primarily a homemaker;
 - c. she gave up her career path to support Dr. C. in his education and career;
 - d. she assisted in the dental business;
 - e. she was not able to successfully return to any employment post-separation;
 - f. she developed an addiction to prescription medication during the marriage;
 - g. she suffered from mental health issues during the marriage; and
 - h. since separation she has been the only emotional and primary financial support for their daughter, who has suffered from significant mental health challenges and has needed extensive and costly therapeutic interventions.
- [72] The factors I have taken into account in coming to this conclusion on the needs basis are these:
- a. Ms. C.'s current financial situation;
 - b. her ongoing mental health issues requiring prescription medicine and attendances at weekly support meetings;
 - c. her age and lack of any income-earning potential; and
 - d. her past financial support provided to her daughter.
- [73] In assessing this entitlement, I have regard to Dr. C.'s means and needs, including his assets, banks accounts, and RRSPs. Dr. C. has vastly greater assets than does Ms. C.

Lump Sum vs. Monthly

- [74] Dr. C. submits that if there is further spousal support paid, it should be in the form of a lump sum payment. This would allow Dr. C. to plan for the future, discharge his support obligation to Ms. C., and allow for a clean break, acknowledging that he has been paying spousal support payments from 2001. He submits that a lump sum payment that provides for spousal support until 2024 would be appropriate. The suggested range of the lump sum would be approximately \$150,000 to \$175,000.
- [75] In support of the lump sum approach, reference was made to the C. Rogerson and R. Thompson, Spousal Support Advisory Guidelines: The Revised User's Guide, April 2016 at p. 51, under the heading Lump Sums, and the principles stated in the Ontario Court of Appeal's decision in *Davis v. Crawford*, 2011 ONCA 294 [Davis] on the expanded scope of a court's ability to order lump sum support.
- [76] Ms. C. submits that a lump sum amount could be problematic in light of the addiction issues that she has faced for many years. The record before me shows that Ms. C. has difficulty managing her finances. This was clear in 2001 in the Trial Reasons (see e.g. at paras. 16-19), and it is still evident today through her own admissions in her affidavit evidence.
- [77] As noted in Davis at para. 66, a court considering an award of lump sum spousal support should weigh the perceived advantages of making the order in the particular case against any presenting disadvantages of making the order. In view of the objectives of spousal support under the DA and of the disadvantages posed by Ms. C.'s unfortunate circumstances, I find that the continued monthly payment of support is the most appropriate approach in this case.

Amount

- [78] Dr. C. has provided a SSAG printout basing Dr. C.'s total income at \$216,420 (CPP Retirement benefit - \$13,658; interest and other investment income - \$90,000; and net self-employment income - \$113,052). He has based Ms. C.'s income at \$14,412 (OAS pension - \$7,008; and CPP retirement benefit - \$7,404). An application of the "without child support" formula under the SSAG would result in a range of support of \$6,060 to \$8,080 per month for an indefinite period.
- [79] If Ms. C.'s income is at \$7,404, without the OAS, the formula under the SSAG would result in a range of support of \$6,270 to \$8,361 per month.
- [80] If the \$12,000 a month spousal support continued, this would result in Ms. C. receiving 67% of the parties' income and Dr. C. receiving 32%.
- [81] After Dr. C. retires and self-employment income is removed, based on an income of \$103,368, and Ms. C.'s income at \$14,412, the application of the "without child support" formula under the SSAG would result in a range of support of \$2,669 to \$3,558 per month.

- [82] If Ms. C.'s income is at \$7,404, without the OAS, the formula under the SSAG would result in a range of support of \$2,879 to \$3,839.

Duration

- [83] Dr. C. submits that the termination date for any spousal support should be no later than 2024. He submits that when considering spousal support duration in cases that do not have the rule of 65 minimum under the SSAG, duration should be a minimum of half of the cohabitation period to a maximum of the full cohabitation period. As this was a 24-year relationship, 24 years from the date of separation in 1999 is 2024, which is roughly five years from the fall of 2018.
- [84] Taking into account the facts of this case and the various factors referred to in the SSAG at s. 9, it appears to me that this is a case in which an order for ongoing spousal support should be made in the high range of the SSAG. This is particularly so considering the vastly different financial circumstances the parties are currently experiencing.
- [85] There will be no retroactive adjustment to the spousal support from October 2016 to date. The rationale for this is that during the period from 2001 to 2016, Dr. C.'s income was such that it allowed him to accumulate substantial assets. Furthermore, during this period of time, Dr. C. was receiving about two-thirds of the income, which assisted him in amassing his financial wealth and funding his retirement. In addition, to retroactively assess a new lower spousal support for this period will result in a significant hardship to Ms. C.
- [86] In my view, commencing on April 1, 2018, the appropriate amount of spousal support is \$8,000 per month. When Dr. C. retires, presently scheduled for March 2019, his obligation to pay spousal support will be reduced to \$4,000 per month. If the date of his retirement changes, then the date on which this change is made will also vary. The reduction in the spousal support is tied to when Dr. C. ceases to receive employment income.

Potential Inheritance

- [87] Dr. C. submits that Ms. C. should be obliged to advise when her father passes away and on the size of any inheritance she receives. Ms. C. takes the position that since she is entitled to support on a compensatory basis, any inheritance she receives is irrelevant. In support reference is made to the trial decision in *Rozen v. Rozen*, 2014 BCSC 2426 at para. 28, *aff'd*, 2016 BCCA 303:
- [28] Turning first to Ms. Rozen's inheritance and re-partnering, our jurisprudence regards changes to a payee's fortunes due to an inheritance or a re-partnering as irrelevant where the entitlement to support is primarily compensatory in nature: *Murphy v. Murphy*, 2000 BCSC 974 at para. 30. In any event, the support order in question was made well after Ms. Rozen's father's death. It was known to Chamberlist J. that Ms. Rozen would inherit from her father, and he took her inheritance into account before he concluded that she was entitled to permanent support and made the order Mr. Rozen now seeks to vary.

- [88] I have found, however, that Ms. C.'s entitlement to spousal support rests both on compensatory and non-compensatory bases. As mentioned earlier, non-compensatory spousal support should be viewed in the context of factors such as the standard of living previously enjoyed by the parties, the economic consequences of the marital breakdown, and the self-sufficiency of the parties after the breakdown: see Chutter, at paras. 56-58. In addition, compensatory spousal support may be viewed in light of standard of living: see Chutter, at para. 53; W. v. W., at para. 11.
- [89] In *S.A.L. v. K.C.L.*, 2012 BCSC 422 at para. 66, Madam Justice Arnold-Bailey held that inheritance was relevant to the reduction of spousal support in this context:
- [66] To my mind, given the parties' present financial circumstances and the respondent's increased resources due to her fortuitous inheritance it is entirely fitting to reduce the spousal support she is entitled to, to an amount towards the low end of the range from the SSAG calculation. This amount of ongoing spousal support reflects the respondent's entitlement based mainly on the compensatory principle. There also remains a lesser needs-based, or non-compensatory aspect, with regards to the recipient's entitlement that is tempered by the imputation of an annual income to her of \$25,000. This reflects the objective of promoting as far as practicable her economic self-sufficiency.
- [90] I find that future inheritance would be relevant to Ms. C.'s standard of living, her economic self-sufficiency, and the needs-based aspect of her spousal support claim. As a result, it is reasonable that Ms. C. advise Dr. C. if she receives a future inheritance and the amount of such.

Security for Spousal Support

- [91] Ms. C. requested that some type of security, such as an insurance policy, be provided for the future spousal support. Dr. C. submits that Ms. C. was given the opportunity to continue paying life insurance premiums on Dr. C.'s life.
- [92] Section 15.2(1) of the DA provides that the court may make an order requiring a spouse to secure any reasonable sum for spousal support. The jurisdiction to make an order regarding security by means of, for example, life insurance, is discretionary. This discretion should be exercised with the spousal support objectives, e.g., recognizing disadvantages, relieving economic hardship, and promoting economic self-sufficiency within a reasonable period of time: see *Pepper v. Pepper*, 2016 BCSC 1542 [Pepper] at paras. 119-133. Further, as noted by Madam Justice Dardi in *T.N. v. J.C.N.*, 2015 BCSC 439 [T.N.] at paras. 197, cited in *Pepper*, at para. 130, "a determining factor in the cases in which courts have secured a support order was 'the extremely necessitous circumstances' of the recipient spouse", in addition to a spouse in relatively affluent circumstances.

- [93] Although Dr. C.'s circumstances may be characterized as relatively affluent, the evidence before me does not establish that this is a case of extreme necessitous circumstances. The case at hand draws analogy to the holding in *Waters v. Conrod*, 2007 BCCA 230 at paras. 36-38, cited in T.N. at paras. 192-193:
- [36] Here, Mr. Conrod is in relatively affluent circumstances; the judge found that he has the ability to pay support for Ms. Waters of \$7,000 per month. With respect to Ms. Waters's circumstances, the judge found that, given her medical condition, it is not expected that she will be able to earn a reasonable amount of money on her own in the near future. The judge noted that, notwithstanding the division of assets, Ms. Waters will still need financial assistance. But that does not mean that her circumstances are sufficiently extreme to justify the order that she seeks.
- [37] Following the separation, Ms. Waters received payments from Mr. Conrod totalling \$78,000. She also retained the Jaguar convertible, stocks valued at about \$5,000, her wardrobe and jewellery, some furniture, and a mutual fund account worth about \$10,000. In addition, the judge awarded her an equalization payment of \$413,800. Ms. Waters has received, and will continue to receive, substantial spousal support from Mr. Conrod. It is important to bear in mind that the judge anticipated a change in Ms. Waters's financial circumstances and ordered a review of her support. The quantum of support was not indefinitely fixed.
- [38] Considered in their entirety, the circumstances of this case do not support an order securing spousal support against Mr. Conrod's estate. The judge cannot be said to have exercised his discretion wrongly such as would permit this Court to intervene.

[Emphasis added.]

- [94] I also note that in the Trial Reasons, Mr. Justice Hutchinson provided that Ms. C. could continue to maintain the existing life insurance policy if she paid the premiums (at para. 11). Since then, she has failed to do so.

- [95] For all these reasons, I decline to exercise discretion to revisit the life insurance issue.

Summary of Orders Made

- [96] The following orders are made:

1. Dr. C. pay spousal support for the period of June 1, 2017 to March 31, 2018, in the amount of \$12,000 per month;
2. the order of Mr. Justice Hutchison dated April 26, 2001 is varied as follows: Dr. C. will pay to Ms. C. for her support the sum of \$8,000 per month, commencing on April 1, 2018 and continuing on the first day of each and every month thereafter until Dr. C. retires and is no longer earning employment income;

3. the first of the month that Dr. C. retires from earning employment income, the support payment will be varied and Dr. C. will pay to Ms. C. for her support the sum of \$4,000 per month and continuing on the first day of each and every month thereafter.
 4. if Ms. C. receives an inheritance, she will provide particulars of the amount of the inheritance to Dr. C. within 21 days upon her receipt of the inheritance; and
 5. Dr. C. has leave to apply for a review of the quantum and entitlement of Ms. C. to support upon receiving the particulars of the inheritance.
- [97] In the circumstances, the success of this application was divided and each party will bear their own costs.

"The Honourable Madam Justice Forth"

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