
CANADA / JUDGMENT

Deboer v. Deboer

2017 BCSC 735

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Supreme Court of British Columbia

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2017 BCSC 735 Deboer v. Deboer

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Deboer v. Deboer,

2017 BCSC 735

Date: 20170505

Docket: E162869

Registry: Victoria

Between:

Wilhelmina Agnes Deboer

Claimant

And:

Edward Deboer

Respondent

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

Counsel for the Claimant:

G.J. Loster

Counsel for the Respondent:

J.M. Hutchison, Q.C.

Place and Date of Trial/Hearing:

Victoria, B.C.

March 13 and 23, 2017

Place and Date of Judgment:

Victoria, B.C.

May 5, 2017

Introduction

- [1] Twelve years ago the parties entered into a separation agreement that dealt with property division and spousal support. Ms. Deboer now asks this court to set aside the terms of the agreement that concern Mr. Deboer's spousal support obligations.
- [2] The application is founded on the proposition, first of all, that Mr. Deboer failed to disclose his annual income prior to the parties entering into the agreement, and secondly, that his income has increased since their separation. As a result, Ms. Deboer says the agreement is unfair and does not satisfy the objectives of spousal support set out in s. 161 of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). She seeks a retroactive determination of Mr. Deboer's spousal support obligations, in line with the Spousal Support Advisory Guidelines (SSAG), for a three-year period starting January 1, 2014.
- [3] Mr. Deboer opposes the application on the basis that both parties were fully informed and aware of their respective rights and obligations when they agreed to sign a final and binding agreement.
- [4] For the reasons that follow, I dismiss the application.

Background

- [5] The parties were married on August 19, 1972 and separated on December 1, 2003. They divorced on July 27, 2006. Ms. Deboer is now 64 years old. Mr. Deboer turned 65 on April 6, 2017. During their marriage they had five children. All were self-supporting adults by the time of separation.
- [6] When the parties separated Ms. Deboer was working as a school bus driver. She had been employed on a part-time basis driving buses in Victoria since 1989 and obtained full-time employment in 1991. She continued that work until December 2012, but stopped for health reasons. Ms. Deboer also served as a foster parent from 2006 to November 2013. She stopped doing this because she was "burnt out," and that the demands of being a foster parent "were more than I could handle." Ms. Deboer is currently employed as a driver on a casual basis for Wilson's Transportation and receives benefits through the Canada Pension Plan and the Municipal Pension Plan. Ms. Deboer expects to earn approximately \$40,700 from all sources in 2016, but says that figure will soon decrease to \$34,312 because of reduced hours at

Wilson's Transportation.

- [7] When the parties separated Mr. Deboer was working as a bus driver for B.C. Transit, a position he obtained in 1999 or 2000. He continued to do so until December 19, 2016, when he retired, four months shy of his 65th birthday. Mr. Deboer's income for 2013, 2014 and 2015 was \$65,649, \$65,706 and \$67,042 respectively. For 2016, Mr. Deboer's financial statement discloses income of \$66,215.
- [8] After their separation the parties negotiated the separation agreement, which they signed on March 16, 2005. Mr. Deboer agreed to pay Ms. Deboer \$400.00 per month in spousal support commencing July 1, 2006. The parties agreed that he would pay that amount each month until August 1, 2010, at which point he would pay \$300.00 per month. Under the terms of the agreement, he would pay this lower amount until he retired at age 65 or "a material change in circumstances occurs." As well, the parties agreed to delay the start of Mr. Deboer's payments so that he could finish paying off a bank loan. Ms. Deboer had also paid off some debts prior to signing the agreement using money she received a short time before separation from a settlement for an historic sexual assault involving a church minister. The amount of this settlement was not disclosed to Mr. Deboer.
- [9] The separation agreement did not set out the parties' respective incomes, nor did it require them to disclose annual financial statements to each other. In my view, this supports Mr. Deboer's contention that both parties were content with the state of disclosure and were aware of each other's incomes at the time the agreement was finalised. The parties also dealt with their respective pension issues and the division of personal property. In addition, Mr. Deboer agreed that Ms. Deboer could retain the family car as he could walk or ride a bike to his work place.
- [10] Since July 2006, Mr. Deboer has paid the required amounts for spousal support each month. He missed payments on two occasions, once in January 2013 when he did not realize that Ms. Deboer had run out of his post-dated cheques, and again in October 2015, when he mistakenly thought that his support obligations had come to an end when Ms. Deboer began to cohabit with a new partner. Mr. Deboer forthwith remedied both mistakes after receiving correspondence from Ms. Deboer's lawyer, the first letter on February 8, 2013, and the second on October 15, 2015.

The Agreement

- [11] The starting point in this analysis is the separation agreement itself, which clearly states that the parties wanted to finally resolve their property division and spousal support issues. Recital H states:

it is the intention of the Husband and Wife that this shall be a complete, final and effective settlement of their respective rights in and to the property of each other and to property held jointly be [sic] them together with a settlement of all questions relating to maintenance, alimony and support for each other.

Similarly, paragraph 40 of the agreement states:

The Husband and Wife acknowledge and agree that the terms of this Agreement are fair and reasonable and that each accepts the terms of the Agreement in satisfaction of all claims and causes of action which each now has or may hereafter acquire in any manner pursuant to the provisions of any present or future legislation, including, but not limited to, claims and causes of action for possession of or title to property of for maintenance and support from the other and any other claim arising out of the marriage of the Husband and Wife, whether in British Columbia or any other jurisdiction

Finally, paragraph 45 states:

Each of the parties confirms that this Agreement has been entered into without any undue influence, fraud, coercion, or misrepresentation whatsoever and that each has read the Agreement in full and has fully understood the contents and executed the same freely and voluntarily.

[12] In support of her application, Ms. Deboer points out that she did not receive independent legal advice prior to signing the agreement. However, Mr. Deboer's lawyer at the time urged her to do so in a letter dated June 30, 2004. In this regard, paragraph 46 of the agreement also states:

Each party has received independent legal advice or has had the opportunity of receiving independent legal advice and is fully aware of the legal effect and of the purpose and intent of this Agreement.

Despite the fact that Ms. Deboer opted not to obtain independent legal advice, Recital G of the agreement states:

the Husband and Wife are each fully advised and informed of the property, estate and prospect of the other and have been each been [sic] fully advised and informed by their respective solicitors of their rights and liabilities against and to the other and to and on the property and estate of each other, and each party has made full disclosure of his/her assets to the other.

Analysis

[13] The claimant relies on the provisions of the FLA that permit the court to set aside an agreement concerning spousal support in certain defined circumstances. For ease of reference, I will set out the relevant sections of the statute dealing with spousal support objectives, determining spousal support, and setting aside spousal support agreements as follows:

Objectives of spousal support

161. In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:
- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
 - (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162. The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:
- (a) the length of time the spouses lived together;
 - (b) the functions performed by each spouse during the period they lived together;
 - (c) an agreement between the spouses, or an order, relating to the support of either spouse.

Setting aside agreements respecting spousal support

164. (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.
- (3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.

- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;
 - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
 - (c) the intention of the spouses, in making the agreement, to achieve certainty;
 - (d) the degree to which the spouses relied on the terms of the agreement;
 - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].
- [14] Ms. Deboer alleges three reasons for setting aside the provisions in the agreement dealing with spousal support: (1) Mr. Deboer failed to disclose his income level before they made the agreement; (2) a power imbalance between the parties existed at the time they negotiated and signed the agreement; and (3) failing these considerations, given the modest amount of support, the agreement is significantly unfair having regard to the factors outlined in s. 164(5). I will consider each of these in turn.

Did Mr. Deboer Fail to Properly Disclose his Income?

- [15] Ms. Deboer deposes that she and Mr. Deboer did not exchange financial information at the time of their separation, and that she was not aware of his income level at that time. In response, Mr. Deboer deposes that he fully disclosed his financial circumstances while the parties were negotiating the separation agreement.
- [16] He deposes, moreover, that Ms. Deboer was "intimately familiar" with his income level as she handled the family finances and deposited his paycheques from B.C. Transit into their joint bank account. On this point, in a further affidavit Ms. Deboer agrees that she did handle the family finances before the parties separated but says that she "had no involvement" in Mr. Deboer's financial matters after the separation in December 2003. On the latter issue, Mr. Deboer points out that the separation agreement lacks any provision for an annual exchange of financial information and says that he was under no obligation to provide updated financial disclosure.
- [17] In resisting Ms. Deboer's application, Mr. Deboer relies on the several provisions in the agreement that I have already noted. Ms. Deboer, on the other hand, submits that the provisions in the agreement which state that the parties wish to finalize their financial matters and that there has been full disclosure of their financial information should carry little weight, because other portions of the agreement are inaccurate, undermining the suggestion that these provisions accurately reflect the parties' intention at the time.

- [18] For example, even though the parties had no minor children when they separated, Recital H refers to "questions relating to custody, guardianship and access relative to the infant children of the marriage as well as support for the infant children." Similarly, as I have noted, Recital G refers to each party being "informed by their respective solicitors of their rights and liabilities," which was clearly not the case.
- [19] While the separation agreement certainly would have benefitted from some thoughtful proof-reading, I am not persuaded that these inaccuracies undermine those sections that expressly state what the parties wanted to achieve by negotiating the agreement. To the contrary, I find that the agreement is clear enough in its terms and adequately expressed the parties' objectives and intentions at the time they formalized their separation arrangements. This finding applies not only to the provisions concerning financial disclosure, but also those relevant to whether a power imbalance existed between the parties, and the overall fairness of the agreement.
- [20] Given the extent of the head on conflicts in the affidavit evidence, and in light of Recital G of the separation agreement, I am not satisfied that Ms. Deboer has established that she was unaware of Mr. Deboer's income at the time of separation, or that Mr. Deboer failed to fully disclose his income. In fact, I accept Mr. Deboer's evidence that Ms. Deboer handled their finances prior to separation and knew very well how much income he earned. Ms. Deboer has not seriously challenged this averment. In addition, while she may not have known about his exact income level after the separation, he remained in the same job with B.C. Transit, with the potential only for modest, predictable and readily ascertainable annual increases.

Did an Imbalance of Power Exist Between the Parties?

- [21] While her counsel submits that Ms. Deboer was "modestly involved" in the negotiations for the separation agreement, Ms. Deboer deposes that "there really was no negotiation" regarding the terms of the agreement. She alleges that Mr. Deboer "browbeat" her, dictated its terms, and knew that she was vulnerable to coercion because she had faced abuse when she was younger. She deposes she did not want to ask for more support because she thought Mr. Deboer would be stubborn and angry and she lacked the emotional strength to confront him. She again emphasizes that she did not have a lawyer.
- [22] In response, Mr. Deboer denies that he continually browbeat or demeaned Ms. Deboer, and says he tried to support her however he could when she was dealing with her past abuse. Mr. Deboer deposes that he and Ms. Deboer negotiated the terms of the agreement and that it was Ms. Deboer who suggested the quantum of spousal support, to which he agreed. He denies that he unilaterally imposed any amount of support.
- [23] In a further affidavit Ms. Deboer deposes that no "meaningful negotiation" of the terms occurred. She says she agreed to the quantum and start date of the spousal support payments because Mr. Deboer "unilaterally stipulated" them and that she had "no personal confidence or strength to disagree with him." On this point, Mr. Deboer points out that the

lawyer he retained to finalize a written agreement wrote to Ms. Deboer in the June 2004 letter stating that counsel was instructed to draft an agreement based on the terms that the parties "had agreed upon." Mr. Deboer emphasises that the parties had been apart since December 2003, the agreement was drafted by an intermediary, and he denies that he influenced her or that she was "timid in his presence," as she now claims.

- [24] Moreover, the agreement specifically stipulates that no "undue influence, fraud, coercion, or misrepresentation" existed when the parties entered into it. While it is a relevant factor that Ms. Deboer did not have her own counsel during this process, in the June 2004 letter, counsel for Mr. Deboer "strongly" urged her to get independent legal advice. I am unable to conclude, based on the evidence before me, that Ms. Deboer wished to have independent legal advice but for some reason could not get it. She had ample opportunity in the 15 month period between separating and signing the agreement to retain her own lawyer. There is no evidence to suggest that Mr. Deboer did anything to prevent or discourage her from obtaining legal advice. Ms. Deboer decided on her own that she would not do so. In any event, as Williams J. noted in *Bradshaw v. Bradshaw*, 2011 BCSC 1103 at para. 49, "the absence of independent legal advice will not, by itself, invalidate an agreement."
- [25] Ultimately, the evidence before me is insufficient to establish that Mr. Deboer took improper advantage of any alleged vulnerability or distress on the part of Ms. Deboer. Ms. Deboer has also failed to show that she did not understand the nature or consequences of the separation agreement, or that there are other grounds referred to in s. 164(3) of the FLA that would make it fair, just or appropriate to set aside the spousal support provisions of the separation agreement.

Is the Separation Agreement Significantly Unfair under s. 164(5) of the FLA?

- [26] Having reached these conclusions, I must now consider whether the separation agreement is "significantly unfair", based on the factors set out in s. 164(5) of the FLA. In *Remmem v. Remmem*, 2014 BCSC 1552, the court emphasized that the test was now not whether the agreement was unfair, but whether it was "significantly unfair," noting at para. 44 that:

The Concise Oxford English Dictionary defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact - something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness

- [27] In this regard, Ms. Deboer points to the modest amount of \$400 per month (later \$300 per month) after a 31 year marriage as evidence, by itself, that the agreement is significantly unfair. The SSAG calculations suggest she was entitled to more support, and she relies on the additional fact that Mr. Deboer's income has increased over the last three years. She says that this constitutes the sort of material change in circumstances that is referred to in the agreement itself as well as in s. 164(5)(b) of the FLA.

- [28] I agree that \$400 is not a particularly generous amount of monthly support given the parties' long marriage and Ms. Deboer's traditional role in its early years, and in all likelihood it is less than this court would have ordered in the circumstances. However, it is important to recognize that the relevant sections of the FLA have incorporated the principles outlined by the Supreme Court of Canada decision in *Miglin v. Miglin*, 2003 SCC 24, in which the court introduced the following limitations on exercising the discretion to review and possibly set aside the terms of a pre-existing agreement:
55. To impose on all separating or divorcing persons an obligation to adhere strictly and exclusively to the statutory spousal support objectives denies them the autonomy to organize their lives as they see fit and to pursue their own sense of what is mutually acceptable in their individual circumstances. Accordingly, the spousal support objectives should not operate so as to preclude parties from bringing their own concerns, desires and objectives to the table in negotiating what they view as a mutually acceptable agreement, an agreement they consider to comply substantially with the objectives of the Act. In that way, the policy goals of autonomy and certainty will be rendered consistent with Parliament's recognition of "the diverse dynamics of the many unique marital relationships" (Bracklow, *supra*, at para. 35).
78. Therefore, in searching for a proper balance between consensus and finality on the one hand, and sensitivity to the unique concerns that arise in the post-divorce context on the other, a court should be guided by the objectives of spousal support listed in the Act. In doing so, however, the court should treat the parties' reasonable best efforts to meet those objectives as presumptively dispositive of the spousal support issue. The court should set aside the wishes of the parties as expressed in a pre-existing agreement only where the applicant shows that the agreement fails to be in substantial compliance with the overall objectives of the Act. These include not only those apparent in s. 15.2 but also, as noted above, certainty, finality and autonomy.
- [29] Turning to the first factor in s. 164(5), the parties made the agreement over 12 years ago. Mr. Deboer has relied on the agreement since 2005 to plan for his retirement. In addition, when the parties separated, all five of their children were already self-supporting adults, and Ms. Deboer had been working outside of the home for many years. Significantly, even though almost eight years had passed since the agreement was signed, Ms. Deboer had two earlier opportunities to challenge the fairness of the support payments when she sought to compel Mr. Deboer to make up his two missed payments. Delay and the length of time since the parties entered into the agreement are factors not only in contemplating a retroactive spousal support application, but also in weighing the fairness of setting aside an agreement. Waiting until a few months before Mr. Deboer's support obligations come to an end, when Ms. Deboer had retained counsel as early as February 2013 to compel compliance with the agreement, militates against the granting of Ms. Deboer's application.

- [30] On a similar note, I am not convinced that there has been any material change in either party's condition, means, needs or other circumstances. While Ms. Deboer has some health issues, her income has remained consistent since the agreement was entered into. While both parties now have new partners, I have no evidence of how this has affected their respective standards of living such that this is a neutral factor. Overall, the evidence suggests that both parties improved their financial circumstances by repartnering.
- [31] More significant is the fact that Ms. Deboer has been consistently employed since separation, and while her income has fluctuated each year, it has remained within a narrow band. She earned \$40,700 in 2016 and expects to earn \$34,300 in 2017. Mr. Deboer was a bus driver with B.C. Transit when the parties separated with an ascertainable source of income from his long-established employment. This continued until he retired in December 2016. Now that he is retired, his annual income will be approximately \$26,000.
- [32] In my view, the modest increases in Mr. Deboer's income were reasonably foreseeable when the agreement was signed and were within the contemplation of both parties when they signed their separation agreement. This is clearly relevant to the question whether a change in circumstance has made an agreement significantly unfair. Whether in respect of the terms of an agreement or an application under s. 164(5) of the FLA, the comments of Fitch J. in *Megson v. Megson*, 2014 BCSC 2467, are instructive:
- [151] Dealing first with the terms of the agreement, while it is true the parties did not define what would amount to a "material change in circumstances", the phrase is a term of art having a particular and settled meaning in the law; one that would have been known to the parties on execution of the agreement.
- [152] A material change in circumstances was defined in *Willick v. Willick*, [1994] 3 S.C.R. 670, a child support case, to mean:
- [21] a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is 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.
- [153] The test is the same where a variation is sought in relation to spousal support: *L.G. v. G.B.*, [1995] 3 S.C.R. at para. 48; *L.M.P. v. L.S.*, [2011] 3 S.C.R. 775, 2011 SCC 64 at paras. 29-46.
- [156] Under the Act, the onus is on the party seeking a variation to establish a material change in circumstances. I see no reason to depart from this rule in circumstances where the applicant relies on a material change in circumstances clause that forms part of a separation agreement.
- [33] Mr. Deboer remained with the same employer, doing the same job over the last 12 years. Taking account of his modest annual increases in income, I am unable to conclude that Ms. Deboer has established that a material change in circumstances has occurred justifying a variation of his spousal support obligations set out in the separation agreement. In making their final separation arrangements, I find that the parties actually contemplated Mr. Deboer

would remain employed with B.C. Transit until his retirement. This came with the probability that there would be some incremental increases in annual income, and yet the parties agreed to fixed spousal support without provision for any review. Nothing has occurred in the decade or more since the separation agreement was signed pertaining to Mr. Deboer's employment that was not known to the parties in 2005.

[34] I now turn to the principles of certainty, predictability and finality when it comes to parties entering into negotiated matrimonial agreements, instead of taking the more expensive and uncertain route of going to court. Ms. Deboer submits that the parties contemplated revisiting their spousal support arrangements in the future because the agreement refers to "interim" spousal support. She also submits that the agreement is so full of irrelevant boilerplate that I should not place any more emphasis on Recital H of the separation agreement, which provides that the parties intended the agreement to be final, than on the obviously misleading representation that both parties consulted with lawyers.

[35] In *Reid v. Reid*, 2017 BCCA 73, Groberman J.A. considered the significance of recitals and clauses in a similar separation agreement, and concluded that "[I]t is evident that the parties placed considerable emphasis on certainty and finality in entering into the agreement," relying on such phrases as, "[T]he Parties intend this Agreement to be the final settlement and release of their respective rights" and "the final settlement of any claim for spousal support."

[36] In rejecting Ms. Reid's claim for an increase in retroactive spousal support, Groberman J.A. concluded at para. 80:

I do not suggest that all of the provisions were strictly enforceable, nor that they constitute a complete answer to Ms. Reid's claim. They do, however, indicate a strong intention toward finality, and affirm that the parties understood the objectives of the applicable legislation.

[37] It is clear in my view that these types of provisions must be given significant weight when considering the parties' intention in reaching their agreement. They are incorporated in separation agreements for a reason.

[38] It is also important to note Groberman J.A.'s observations as to the different analysis that will be undertaken when considering a change or variation in child support as opposed to spousal support. At para. 87, he notes, "child support provisions in separation agreements are not subject to the same level of deference that spousal support provisions enjoy," and cites with approval the following observations of Levine J.A. in *Kopp v. Kopp*, 2012 BCCA 140 at paras. 35-37:

35. Miglin dealt with an initial application for spousal support four years after the parties had entered into a comprehensive separation agreement which contained a clause releasing the spouses' claims of spousal support. The majority of the Supreme Court held that "a fairly negotiated agreement that represents the intentions and expectations of the parties and that complies substantially with the objectives of the Divorce Act as a whole should receive

considerable weight" (at para. 4). That approach recognizes the policy goal of negotiated settlement, reflected in s. 15.2(4)(c) of the Divorce Act (which requires a court, on an initial application for spousal support, to take into consideration any agreement relating to support of either spouse), and reflects the wide discretion given to separating parties to bring "their own concerns, desires and objectives to the table in negotiating what they view as a mutually acceptable agreement" (at paras 54-55).

36. The Court was careful, however, to distinguish the broad objectives for spousal support, set out in s. 15.2(6) of the Divorce Act, with the clear standard for child support promulgated by Parliament in the Guidelines, pointing out that "[u]nlike child support, for which relatively clear normative standards have been set, spousal support rests on no similar social consensus" (at para. 56). The Court suggested (at para. 67):

Therefore, an assessment of the appropriate weight to be accorded a pre-existing agreement requires a balancing of the parties' interest in determining their own affairs with an appreciation of the peculiar aspects of separation agreements generally and spousal support in particular.

37. The generally deferential approach to separation agreements mandated by the Supreme Court in *Miglin* applies, in my opinion, primarily in the context of agreements for spousal support.

[39] While the present separation agreement refers to "interim" spousal support, other provisions establish firmly that the parties intended this to be a final resolution of rights and obligations stemming from the breakdown of their marriage. The agreement also does not set out any review procedure for revisiting spousal support arrangements, or obligate the parties to exchange updated financial information, provisions one would expect to see if the parties had truly made temporary arrangements that were subject to periodic review.

[40] Overall, I find that the totality of the agreement supports Mr. Deboer's position that the parties intended it to be a "complete, final and effective settlement of all questions relating to support," as referenced in Recital H, notwithstanding the reference to "interim" spousal support in paragraph 21. In fact, the evidence received from both parties supports this conclusion. Mr. Deboer said that the provisions of the separation agreement reflected their mutual desire to finalize all the terms of their separation, and Ms. Deboer confirmed that the separation agreement "was intended to resolve all issues regarding property division and spousal support."

[41] Turning to the next factor in s. 164(5)(d), in my view both parties have relied on the terms of their agreement. Mr. Deboer deposed that he arranged his financial affairs and retirement date in light of the agreement. Ms. Deboer did not address this point in her affidavits, but her actions suggest as much.

- [42] On the two occasions when Mr. Deboer missed payments, Ms. Deboer retained counsel to enforce the agreement. In addition, in February 2013 Mr. Deboer retained counsel in response to the February letter from Ms. Deboer's lawyer requesting the missed support payment. At that time, Mr. Deboer's lawyer requested financial information from Ms. Deboer.
- [43] There was no response to this request and all issues lay dormant until Mr. Deboer missed the October 2015 support payment and received another letter from Ms. Deboer's counsel. There was no further mention of financial disclosure, only an admonition from Ms. Deboer that it was Mr. Deboer's "ongoing obligation for payment of spousal support as provided for in the agreement" and that the agreement would be registered with the Family Maintenance Enforcement Program "to ensure that you continue to meet these obligations."
- [44] Mr. Deboer submits that these circumstances support his contention that both parties intended the separation agreement to be a final determination of their marital issues, including support. I agree with his submission. The reasonable inference arising from these circumstances is that Ms. Deboer was relying on the agreement and as such updated financial information was unnecessary. I am not satisfied it is appropriate to interfere with a 12 year old agreement that the evidence clearly shows was intended by both parties to be final and binding. As Williams J. put it in Bradshaw, "[t]heir agreement is owed judicial deference" (at para. 96).
- [45] As for the last factor in s. 164(5)(e), the degree to which the separation agreement meets the objectives of spousal support, Harris J.A. of the Court of Appeal noted in *S.E. v. J.E.*, 2013 BCCA 540 at para. 25:

the purpose of compensatory spousal support is to foster the equitable sharing of the economic consequences of the marriage and its breakdown. This requires, amongst other matters, an analysis of the economic costs borne by a spouse in the marriage (for example, sacrificing a career to support the family) in limiting that spouse's future earning capacity, the needs and living standards of the spouses, and the ability to pay. The court must therefore assess the effect the marriage had on the parties' economic circumstances and try to alleviate disadvantages and hardships.

- [46] While the court in *S.E.* was referring specifically to the spousal support objectives in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the same objectives are to be found in s. 161 of the FLA.
- [47] On this point, counsel for Ms. Deboer submits that the separation agreement fails to meet the objectives of spousal support because the parties had a traditional marriage, raised five children, and Ms. Deboer is presently not self-sufficient and, in fact, is "living in squalor." The problem with this last suggestion is that there is no evidence to support it. Nevertheless, I accept that this could properly be considered a traditional marriage and that Ms. Deboer's claim for spousal support would have been compensatory at the time of separation. It is important to recognize, however, Ms. Deboer began working as a school bus driver in 1986

when her youngest child would have been only three years old. She had been working full-time for 12 years by the time of separation. Her path to economic self-sufficiency, in other words, began long before the dissolution of the parties' marriage.

- [48] That said, I accept that Ms. Deboer has likely faced some economic disadvantages given the role she played in the marriage. She had a limited education when she married and would have had little opportunity to pursue either education or full-time work until her children were older. I also accept that Mr. Deboer would have had a relative economic advantage in that he was able to work full-time outside the home because he was not primarily responsible for raising the children.
- [49] Evaluating these circumstances in combination, I can see why the parties considered it fair to include a provision for spousal support in their separation agreement in order to close the economic gap between them. It may be that the modest sum agreed to came down to the recognition that Ms. Deboer had already made great strides towards self-sufficiency, and that only a modest financial boost was required to equalize the parties' respective financial positions over the long-term. These are precisely the sorts of pragmatic agreements between autonomous adults that the court must defer to, absent the establishment of material changes or significant unfairness.
- [50] The evidence does not disclose any financial consequences arising from the care of their children at the time of separation. Accordingly, s. 161(b) of the FLA is not relevant.
- [51] Turning to the objective of spousal support in s. 161(c), while Ms. Deboer may have faced some economic hardship arising from the breakdown of her marriage, as she could no longer share living expenses with Mr. Deboer or combine her income with his, there is insufficient evidence to establish that this has not been redressed by the spousal support that Mr. Deboer has paid every month for twelve years. The absence of any complaint before now is confirmation, in my view, that the level of support that Ms. Deboer received successfully offset any economic hardship that she would have otherwise suffered, especially given the not inconsiderable post-agreement income she earned as a foster parent. I am not satisfied that Ms. Deboer has suffered economic disadvantage or lost any economic opportunities as a result of the marriage or its breakdown.
- [52] I am similarly unable to find that the separation agreement failed to satisfy the objective set out in s. 161(d) of the FLA of promoting the self-sufficiency of the parties within a reasonable period of time, given the circumstances of each party when they signed this agreement. Mr. Deboer points out that, according to Municipal pension documents he has included in his affidavit, Ms. Deboer was earning almost \$40,000 in 2006, not the \$20,000 she initially said was her income at separation. In addition, Mr. Deboer notes that from 2008 until late 2012, Ms. Deboer received approximately \$168,000 as a foster parent, income that is non-taxable.

[53] Even though the quantum of spousal support the parties agreed to is modest, given the circumstances I am not persuaded that the separation agreement fails to meet the overall objectives of spousal support.

Conclusion

[54] Applying the principles outlined in the various authorities and the factors enumerated in s. 164(5) of the FLA, I am not persuaded that Ms. Deboer has shown the separation agreement is significantly unfair or that there has been a material change in the parties' means, needs and circumstances that would justify setting aside the terms of the agreement.

[55] It follows that Ms. Deboer's application is dismissed. Mr. Deboer has been successful and is entitled to costs on Scale B, subject to any agreement between the parties.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie

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