

CANADA / JUDGMENT

Dextraze v. Dextraze

2024 BCSC 1544

COURT

Supreme Court of British Columbia

DECIDED

23 August 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 1544 Dextraze v. Dextraze

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dextraze v. Dextraze,

2024 BCSC 1544

Date: 20240823

Docket: D9776

Registry: Kamloops

Between:

Rhonda Dianna Dextraze

Claimant

And

Dale Barry Dextraze

Respondent

Before: The Honourable Justice Donegan

Reasons for Judgment

Counsel for the Claimant:

J.M. Hogg, K.C.

Counsel for the Respondent:

A.L. Glaicar

Place and Date of Hearing:

Kamloops, B.C.

March 8, 2024

Place and Date of Judgment:

Kamloops, B.C.

August 23, 2024

Table of Contents

Introduction.. 2

Admissibility Determinations. 2

The Respondent's Fourth Affidavit 3

The Respondent's Fifth Affidavit 4

Background Facts. 6

The Application.. 15

Has the respondent established a material change in circumstances?. 15

What variation is appropriate in light of the change in circumstances?. 18

What was the basis of the claimant's entitlement to support?. 19

Decision. 24

Introduction

- [1] Nearly 30 years ago the parties reached an agreement resolving matters arising from the breakdown of their roughly 21-year marriage. Their agreement formed the basis of a final order made on November 25, 1996 (the "Final Order"), that required, among other things, the respondent to pay the claimant spousal support in the amount of \$2,000 per month. Now 75 years old and retired, the respondent applies under s. 17(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] for an order terminating this obligation.
- [2] The claimant, now 74 and still working, opposes termination. She says the real question on this application - whether the respondent's spousal support obligation should be reduced given the parties' circumstances - should be answered in the negative and the application dismissed.
- [3] Before outlining the facts, I must first address the claimant's objections to the admissibility of aspects of the respondent's evidence.

Admissibility Determinations

- [4] In support of his application, the respondent filed: (a) his updated Form 8 Financial Statement (his third affidavit) sworn on November 15, 2023; (b) his fourth affidavit sworn on November 27, 2023; and (c) his counsel's assistant's first affidavit, also sworn on November 27, 2023. He also relies upon his responding materials: (d) his fifth affidavit sworn on January 23, 2024; and (e) his counsel's assistant's second affidavit sworn on February 29, 2024.
- [5] In response to this application, the claimant filed: (a) her first affidavit sworn on January 18, 2024; and (b) her updated Form 8 Financial Statement (her second affidavit) sworn on January 24, 2024. The parties have also placed before me an affidavit sworn by the claimant on October 4, 1994, in support of an application for interim relief.
- [6] The claimant objects to the admissibility of certain aspects of the respondent's fourth affidavit and most, if not all, of the respondent's fifth affidavit. I find that a few of the claimant's objections have merit, but most do not.

The Respondent's Fourth Affidavit

- [7] Relying on *Dakota Ridge Builders Ltd. v. Niemela*, 2015 BCSC 581, the claimant argues that paragraphs 32 and 45 of the respondent's fourth affidavit are inadmissible on the basis that their contents are more argument than fact. The respondent disagrees.
- [8] Rule 10-4(12) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Family Rules] requires that an affidavit must state only what a person swearing or affirming the affidavit would be permitted to state in evidence at trial.
- [9] At paragraph 32, the respondent deposes that he cannot sustain paying spousal support while he is retired, and that he finds it "unfair" to him, and his spouse, to "dip into our capital that we worked hard to acquire over the last 23 years".
- [10] I am satisfied this evidence is evidence the respondent would be permitted to state in evidence at trial. Other than his characterization of the situation as "unfair", I find this evidence is factual, not argumentative. As his feeling that the situation is "unfair" tends toward argument, I find that aspect of his evidence inadmissible.
- [11] At paragraph 45, the respondent deposes that he and his spouse have taken a higher level of income from their investments over the last few years to be able to enjoy their retirement while they are more able-bodied, and that they will not be able to withdraw as much from their investments and savings in the future. I see nothing in this paragraph that is argument. It is factual evidence and admissible.

The Respondent's Fifth Affidavit

[12] This is the respondent's response affidavit. The claimant initially argued that this affidavit was so flawed that it should be struck entirely under Rule 11-2(1) of the Family Rules. Her counsel did not press this position at the hearing, but rather argued that certain paragraphs should be struck as inadmissible. Specifically, the claimant says the following paragraphs should be struck as inadmissible:

- paragraphs 5, 9 and 11-18 - on the basis that they are not proper reply evidence;
- paragraph 17 - for all of the grounds set out in Rule 11-2(1) of the Family Rules and on the basis that it is inadmissible hearsay;
- paragraph 18 - on the basis that it is inadmissible hearsay;
- paragraphs 6, 10-12, 15-16 and 18-21 - on the basis that they are argument and/or opinion.

[13] This affidavit was filed in response to the claimant's first affidavit. As the applicant, the respondent has the right to respond as he has done: Family Rules, Rule 10-6(12). The claimant contends that paragraphs 5, 9 and 11-18 contain evidence that the respondent should have tendered in support of his application and is not proper reply. I disagree.

[14] Paragraph 5 is in direct response to the claimant's evidence that she left her teaching job in Alberta in 1975 to follow the respondent to Kamloops. Paragraph 9 is in direct response to the claimant's evidence that her professional career was compromised, delayed or sacrificed by her "spousal responsibilities". Paragraphs 11-16 are also responsive to the claimant's evidence, although I find one aspect of paragraph 11 inadmissible for reasons I will explain shortly. I find paragraphs 17 and 18 inadmissible, for other reasons I will now explain

[15] Paragraphs 17 and 18 rely on inadmissible hearsay. Rule 10-4(13) of the Family Rules allows for affidavit evidence to contain statements made upon information and belief only if the applicant is not seeking a final order (or a change in a final order) and if source of the information is given. Not only does the respondent seek a final order here, he does not identify with sufficient particularity the source of the information he relays in these two paragraphs. This evidence is inadmissible.

[16] Finally, I am satisfied that most of the contents of paragraphs 6, 10-12, 15-16, 18 and 19-21 do not contain inadmissible argument or opinion evidence.

[17] In paragraph 6, the respondent is responding directly to the claimant's evidence that she was the primary caregiver of the children during the marriage. I am satisfied his response is factual and not argumentative. In paragraph 10, the respondent is responding directly to the claimant's evidence about her understanding of the Minutes of Settlement at the time of their agreement by relaying his understanding, and the basis for it, at the time. I do not view the evidence of either the claimant or the respondent on this point as argument or opinion.

- [18] Paragraph 11, as it relates to the respondent not contemplating retirement when they signed the Minutes of Settlement, is admissible. However, his evidence about what the claimant was thinking at the time is inadmissible. This is merely a general assertion, not grounded in anything he witnessed and is not admissible in evidence.
- [19] I have reviewed the balance of the impugned paragraphs and do not view them as argument, opinion, irrelevant, speculative or otherwise flawed, as the claimant argues, or at all.
- [20] I turn now to outline the background facts. I will make additional findings of fact during my consideration of the issues.

Background Facts

- [21] The claimant was born on October 2, 1949. She is currently 74 years old and is employed as a clinical counsellor running her own practice.
- [22] The respondent was born on December 16, 1948. He is currently 75 years old. He was a dentist who owned and operated his own dental practice until he retired in 2018.
- [23] The parties met in 1970, when they were both studying at the University of Alberta in Edmonton, Alberta. The claimant was in her third year of a Bachelor of Education degree and the respondent was in his fourth year of a Bachelor of Arts and Science degree, with an intention to pursue a career in either dentistry or medicine.
- [24] The parties began living together in a rented communal house in 1972. The claimant was in the final year of her education degree and the respondent was in the dentistry program. The claimant's financial situation required the respondent to assist her with her living expenses.
- [25] The claimant obtained her Bachelor of Education degree in the spring of 1972. She began teaching at a junior high school in Edmonton shortly thereafter while the respondent continued his dentistry degree.
- [26] The parties were married on January 19, 1973, in Edmonton. At the time, the claimant was working and supporting them financially while the respondent was completing his degree. The respondent graduated in 1975 and the parties moved to Kamloops that same year.
- [27] Why the parties moved to Kamloops is an area of disagreement, one that I am unable to resolve on the competing affidavits. The claimant deposes that it was the respondent who wanted to move to Kamloops to open a dentistry practice and that she "followed him" here, leaving her teaching position in Alberta in June 1975 to do so. The respondent denies this and deposes that it was the claimant who wanted to move to Kamloops, to be near her family. Although he wanted to move to Victoria, he agreed with what she wanted.
- [28] Whatever the reason, the parties moved to Kamloops in 1975. They both began working in their chosen fields right away. The respondent began to practice dentistry and the respondent began teaching English and counselling at a junior high school.

- [29] The respondent owned and operated his own dental practice under Dr. D Barry Dextraze Corporation (the "Corporation") throughout the marriage and until he retired in 2018.
- [30] It is clear from the whole of the evidence that both parties worked outside of the home during the marriage. The claimant also furthered her education.
- [31] In the summer of 1976, the claimant began taking graduate courses toward a Masters degree in counselling psychology at the University College of the Cariboo in Kamloops ("UCC"), later known as Thompson Rivers University. From September 1978 to April 1979, she took an unpaid leave of absence from her teaching position to attend the University of British Columbia full-time to continue advancing toward that degree. While she did so, the respondent continued to practice dentistry in Kamloops and support them financially. By April 1979, the claimant had finished all of the necessary course work and all that remained was her thesis.
- [32] The claimant returned home and continued teaching. She does not explain why she chose to discontinue working toward her Master's degree at this time.
- [33] Upon her return to Kamloops, in September 1979, the claimant took a position at a high school teaching English and counselling. She worked there until 1981. Just before their first child, Blake, was born in April 1981, the claimant started working part-time at UCC teaching "Assertiveness and Coordinating the Women's Access Centre". The claimant took a one-year maternity leave following Blake's birth. After her maternity leave, the claimant moved into a full-time counselling position at UCC.
- [34] The parties' second child, Ben, was born in October 1983. Following a one-year maternity leave following his birth, the claimant continued working at UCC. Both parties worked in their chosen fields outside of the home and both of them contributed to the care of their children. They retained full-time nannies to assist them with childcare and housework.
- [35] In 1986, the claimant decided to resume her educational pursuits. She successfully defended her thesis and received her Master's degree in Counselling Psychology. She began teaching psychology at UCC in 1989 and continued teaching there until 1999. During this timeframe, in 1991, she also began a private practice in counselling psychology, a practice she continues to operate to this day.
- [36] At some point when the children were young, the claimant contemplated getting her PhD. She applied to the University of British Columbia and was accepted, but deposes that she declined to go "because the children were too young". She never pursued this again.
- [37] The parties first separated in October 1992. The claimant moved out of the family home in Kamloops and into their recreational property in Sun Peaks. The respondent remained living in the family home in Kamloops with the children.

- [38] The claimant commenced this proceeding in January 1993. An order for interim spousal support was granted, by consent, on March 1, 1993, requiring the respondent to pay spousal support to the claimant in the amount of \$1,750 per month.
- [39] The parties reconciled a very short time after this, in the spring of 1993. Despite this, the respondent continued to pay the claimant spousal support in accordance with the interim order. While back together, the parties sold their family home and used the proceeds to purchase a condominium located at #13-255 Pemberton Terrace in Kamloops (the "Family Residence"). Thereafter, the parties and the children lived together in the Family Residence, until the parties permanently separated on August 24, 1994.
- [40] Upon separation, the respondent moved out of the Family Residence and into their recreational property on Shuswap Lake. The claimant remained living in the Family Residence with the children.
- [41] On November 28, 1994, the parties agreed to an interim child support order requiring the respondent to pay the claimant the amount of \$2,500 per month.
- [42] The parties were divorced on October 2, 1995.
- [43] In 1996, the parties and their lawyers met and reached an agreement settling all matters arising from the breakdown of their marriage. Their agreement was set out in two separate Minutes of Settlement. The first pertained to the parties' claims for custody and guardianship of the children, child support and spousal support under the DA. The second pertained the parties' claims for property and debt division under the Family Relations Act, R.S.B.C 1996, c. 128 (collectively the "Minutes of Settlement").
- [44] In the Minutes of Settlement, the parties agreed to share joint custody and guardianship of the children. They also agreed that commencing on January 1, 1997, the respondent would pay the claimant the sum of \$1,300 per month for the support of the children and \$2,000 per month for spousal support.
- [45] Regarding spousal support, the parties also agreed:
4. The obligation of the Respondent to pay spousal support to the Petitioner shall terminate on either:
 - (a) the remarriage of the Petitioner; or
 - (b) the Petitioner entering into a common-law relationship.
 5. The Petitioner and the Respondent acknowledge that the changes and amendments to the Divorce Act effective May 1997 shall not constitute a material change in circumstances with respect to the quantum of spousal or child support.

6. The Petitioner and the Respondent acknowledge that a change in the employment status of the Petitioner shall constitute a material change in circumstances with respect to the issue of support, entitling the Respondent to a review of his spousal support obligation.

[46] At the time, the respondent was said to be earning approximately \$85,000 annually, and the claimant was said to be earning about \$30,000 annually.

[47] As part of the agreement pertaining to division of assets and debts, the claimant received the following:

- The Family Residence;
- Real property located at Strata Lot 28, Alpine Road, Kamloops Rural, BC at Sun Peaks Resort (the "Sun Peaks Property");
- a 1990 BMW;
- RRSPs having a value of approximately \$128,000;
- Rhonda Dextraze Counselling Psychology, a sole proprietorship;
- a majority of the household furnishings, art, silverware and crystal; and
- a motorcycle.

[48] As part of the agreement pertaining to division of assets and debts, the respondent received the following:

- Real property located at 2868 Grant Road, Sorrento, BC (the "Shuswap Lake Property");
- RRSPs having a value of approximately \$125,000;
- The Corporation;
- a 1992 Toyota Forerunner;
- a 1984 Nissan pickup truck; and
- a ski boat.

[49] The respondent also purchased the claimant's Class D shares of the Corporation for \$125,000 net of any income tax payable and the Corporation issued a dividend to the claimant for \$125,000, with the respondent indemnifying the claimant for any tax liability associated with the dividend.

[50] As well, the claimant maintained responsibility for a personal loan for her business in the amount of \$10,000. She also assumed full responsibility for the mortgage registered against the Family Residence in the amount of approximately \$50,000.

[51] The respondent deposes that from his recollection, the claimant received at least an equal share of the family assets, if not a greater than equal share. The claimant does not dispute this assertion.

[52] The parties also agreed that they would consent to judgment of the court in the terms of the Minutes of Settlement. Accordingly, the parties agreed to the Final Order. Regarding spousal support, the Final Order provides:

THIS COURT FURTHER ORDERS THAT the Respondent shall pay to the Petitioner spousal support in the sum of \$2,000 per month, commencing on the first day of January 1997 and payable on the first day of each and every month thereafter.

[]

THIS COURT FURTHER ORDERS THAT the obligation of the Respondent to pay spousal support to the Petitioner shall terminate on either:

A. the Petitioner remarrying; or

B. the Petitioner entering into a common law relationship.

[53] The Final Order also provided for an order that the parties are required to make "material financial disclosure on reasonable request" to the other, not more than twice per calendar year.

[54] The respondent remarried in 2000. His wife, an American citizen, operates a small business making jewellery. She is ineligible for government pensions.

[55] In 2004, the parties both applied to vary the Final Order. The respondent applied to reduce his child support obligation and the claimant sought to increase it. The claimant also sought to increase the respondent's spousal support obligation. At the time, the children were aged 20 and 23.

[56] In reasons indexed at *Dextraze v. Dextraze*, 2004 BCSC 215, Justice Edwards dismissed both applications. At the time of these applications, the respondent's Federal Child Support Guidelines, SOR/97-175 [Guidelines] income was about \$210,000 and the claimant's Guidelines income was approximately \$37,000.

[57] The parties' children are now adults and have children of their own. When precisely the respondent stopped paying child support to the claimant is unclear from the evidence, but given the ages of their grandchildren, I accept it was many years ago now. The respondent has continued to pay the claimant spousal support pursuant to the Final Order for approximately 28 years now.

- [58] The respondent wrapped up his dental practice and retired in 2018 at the age of 69. Since separation, he has been very strict with personal expenditures and budgeting to ensure retirement savings. Since retirement, he and his spouse use their investments and savings as their main sources of income, aside from Old Age Security pension ("OAS") and the Canada Pension Plan ("CPP"). They keep their investments in the Corporation. Using it as a vehicle for tax purposes, they pay themselves out of the investments held in the Corporation.
- [59] When he retired in 2018, the respondent retained a lawyer who contacted the claimant to request a variation or termination of spousal support. The claimant took the position that the Final Order only allowed for spousal support termination in two scenarios--her remarriage or her entering into a common-law relationship. Since she has done neither of these things, she responded to his request by telling him that he should "sell his house" to pay her. She also declined to provide the financial information the respondent requested from her.
- [60] Although the respondent disagreed with the claimant's interpretation of the Final Order, he decided to avoid what he predicted would be a drawn out and expensive court application, and simply kept paying the monthly spousal support required by the Final Order.
- [61] About five years later, in May 2023, the respondent inquired with the claimant again about terminating spousal support. The claimant did not agree and continued to decline to provide her financial information. The respondent filed the within application in September 2023. It took time for the claimant to retain counsel and to provide the financial information she was obligated to provide.
- [62] From the parties' financial evidence, I derive the following facts.
- [63] In 2021, the respondent's line 150 income was \$128,514.21, which was comprised of: OAS (\$7,486.71); CPP (\$8,924.64); pension (\$41,009.79); dividends (\$69,580.50); and taxable capital gains (\$1,512.57).
- [64] In 2022, the respondent's line 150 income was \$154,676.50, which was comprised of: OAS (\$7,929.75); CPP (\$9,165.60); pension (\$44,337.67); and dividends (\$93,243.48).
- [65] In 2023, the respondent's line 150 income was \$87,880, which was comprised of: OAS (\$7,930); CPP (\$9,200); pension (\$42,000); and dividends (\$28,750). This reduction is explained by the respondent's evidence that he and his spouse had taken a higher level of income from their investments over the last few years to enjoy their retirement while they were more able-bodied, but are now withdrawing less into the future.
- [66] When the parties agreed that the respondent would receive the Shuswap Lake Property in the settlement, it had a small structure on it. The respondent has since built a home on this property. He and his spouse have lived there for many years now. With this property and various investments, the respondent estimates the current value of his assets at approximately \$3,000,000. He estimates the value of the Shuswap Lake Property at \$958,000, below the value it is assessed for property tax purposes. He owns a vehicle valued at \$33,000

and a boat valued at \$8,000. His investments include: funds held in a Tax-Free Savings Account (\$135,000); funds held in a Retirement Income Fund (\$1,112,000); and funds held in the Corporation (\$800,000). He has no debts to speak of.

- [67] In 2021, the claimant had total income of \$109,794.64, which was comprised of: self-employment income (\$52,158.39); support payments (\$24,000); CPP (\$11,372.04); OAS (\$7,486.71); RRSP (\$65.24); and pension (\$14,712.26). Less support payments, her gross annual income was \$85,794.64.
- [68] In 2022, the claimant had total income of \$121,029.95, which was comprised of: self-employment income (\$53,464.40); support payments (\$24,000); CPP (\$11,679); OAS (\$7,929.75); and pension (\$23,956.80). Less support payments, her gross annual income was \$97,029.95. She anticipates roughly the same for 2023.
- [69] In the Minutes of Settlement relating to division of assets and debt, the claimant received two properties--the Family Residence and the Sun Peaks Property. She has since sold them both, realizing considerable gains. It is unclear on the evidence when she sold the Family Residence, but she realized about a \$210,000 gain. She sold the Sun Peaks Property in 2007, for approximately \$350,000. The parties had purchased it in 1977 for \$15,000.
- [70] The claimant currently owns, and resides in, a condominium in Kamloops. With her home and various investments, she estimates the current value of her assets at \$814,000. She estimates the value of her home at \$376,000, below the value it is assessed for property tax purposes. She owns a vehicle valued at \$26,000, a painting valued at \$5,000, and \$7,000 held in her two bank accounts. She has funds held in a Retirement Income Fund in the amount of \$400,000. The claimant has debts in the total amount of approximately \$132,000, which are comprised of: a modest car loan (\$2,600); unpaid tax debt (\$21,580); and a mortgage encumbering her home (approximately \$107,000).
- [71] Since the Final Order, the claimant has never remarried nor lived in a common-law relationship.

The Application

- [72] The respondent applies under s. 17(1) of the DA for an order terminating spousal support. Termination of spousal support is a form of variation: *Raschpichler v. Raschpichler*, 2024 BCCA 94 at para. 26.
- [73] Applications to vary or terminate spousal support are to be assessed under a two-stage framework.
- [74] Stage one requires, under s. 17(4.1) of the DA, that the applicant establish 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.

[75] Once the material change threshold is met, the court moves on to stage two, which requires the court to determine what variation is appropriate in light of the change in circumstances. A court "should limit itself to making only the variation justified by the change": *Hague v. Hague*, 2022 BCCA 325 at para. 30.

Has the respondent established a material change in circumstances?

[76] The respondent submits that his retirement and resulting reduction in income amounts to a material change in circumstances under s. 17(4.1) of the DA.

[77] A material change in circumstances is a change that, "if known at the time, would likely have resulted in different terms": *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688 [Willick]; *L.M.P. v. L.S.*, 2011 SCC 64 at para. 32 [L.M.P.]. The test for what constitutes a "material change" focuses on what the parties actually contemplated at the time that the order was entered into by agreement, rather than what one party knew or reasonably foresaw: *Dedes v. Dedes*, 2015 BCCA 194 at para. 25.

[78] A material change cannot be one that the parties actually contemplated when the spousal support order was made: *L.M.P.* at paras. 66-67. However, a material change may have been objectively foreseeable when the support order was made: *L.G. v. G.B.*, [1995] 3 S.C.R. 370 at para. 51, citing *Willick* at 734; *L.M.P.* at para. 67.

[79] I am satisfied the respondent has established that his retirement, and resulting reduction in income, amounts to a material change in circumstances.

[80] At the time of the Final Order, the respondent was 45 years old and working full-time. His annual income was said to be \$85,000 and the claimant's annual income was said to be \$30,000. At the time, the Spousal Support Advisory Guidelines [SSAG] had not been pronounced, but I observe that if they were, the spousal support award agreed to by the parties would be far in excess of the highest end of the range, utilizing the "with child" support formula. In 2004, when the respondent's annual income for support purposes was found to be \$210,000 and the claimant's was found to be \$37,000, the court ordered his spousal support obligation to remain unchanged.

[81] The respondent chose to wind up his dental practice and retire in 2018, when he was 69 years of age. This is a more than reasonable retirement age. This is not a situation where he has decided to retire early or withdraw from the workforce with the intention of avoiding his support obligations. To the contrary, the respondent has met his spousal support obligations since the time of separation 30 years ago.

[82] The respondent is now 75 years of age and has not generated any income from employment for five years. He is supporting his spouse of 23 years and they have been living off his investments and savings. The respondent's income has reduced significantly in retirement, and will continue to reduce further in the future. This is not a temporary change. It is permanent.

- [83] I am satisfied the respondent's retirement was not contemplated by the parties at the time of the Minutes of Settlement and Final Order. The respondent was not contemplating retirement when the parties signed the Minutes of Settlement pertaining to support. The claimant's evidence does not address this issue specifically, but I am satisfied, from the whole of the evidence, that she was not contemplating retirement at the time either.
- [84] The parties signed the Minutes of Settlement and agreed to the Final Order 28 years ago, at a time when they were in their mid-40s and their children were young. The terms of their agreement reflect that the parties were contemplating certain things. First, they were contemplating that the claimant might re-partner in a committed relationship, so they included a term that, if that contemplated event occurred, spousal support would terminate. I pause here to observe that the claimant misstates this term in her response materials when she claims it reads that spousal support "should only terminate" on the claimant's remarriage or her entering into a common-law relationship. The term does not purport to outline the only situation upon which spousal support would terminate. It provides an example, one that was contemplated by the parties at the time, of when this would occur.
- [85] Second, the terms of their agreement also show that the parties contemplated that the claimant might experience a change in employment status. For this reason, they included a term that if this contemplated event occurred, it would automatically be characterized as a material change in circumstances, allowing for a review of spousal support.
- [86] Third, the terms of their agreement also show that the parties contemplated there may be other, unforeseen reasons that spousal support might be varied in the future, so they included a term allowing them to request financial information from the other on an indefinite basis.
- [87] In these circumstances, I am satisfied that had the parties contemplated their retirements at the time, they would have included such a term addressing that event in their agreement.
- [88] Accordingly, the respondent has met the first stage of the analysis. I will now consider the second stage, namely, what variation is appropriate in light of the change of circumstances.

What variation is appropriate in light of the change in circumstances?

- [89] The respondent submits that termination is appropriate. The claimant submits that she has a continuing entitlement to support and that no reduction in support is appropriate. She says that if any variation is found to be warranted, it should be only a modest reduction.
- [90] A variation order should serve the relevant objectives of spousal support listed set out in s. 17(7) of the DA: (a) recognize economic advantages or disadvantages to the former spouses from the marriage or its breakdown; (b) apportion the financial consequences arising from care of the children of the marriage over and above child support; (c) relieve economic hardship arising from the marriage breakdown; and (d) as far as is practicable, promote economic self-sufficiency of the former spouses within a reasonable period of time.

- [91] The four objectives of variation are the same as the objectives of an initial support order under s. 15.2(6) of the DA. The court must consider all four relevant objectives, no one being paramount: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 852.
- [92] The objectives to be achieved by a spousal support order, or a variation, are to be considered in the context of the grounds for entitlement to spousal support. Continuing entitlement is always in issue at variance proceedings and can lead to termination of support: see e.g., *Eichen v. Eichen*, 2012 BCCA 32; *Price v. Price*, 2010 BCCA 452 at paras. 19, 35-37.
- [93] There are three grounds for spousal support: compensatory, non-compensatory and contractual support. Compensatory support primarily concerns the first two s. 17(7) objectives and non-compensatory support concerns the third and fourth. The third and fourth may also embrace compensatory support. Regarding the third objective, one is to ask "what loss the marriage or marriage breakup caused that would not have been suffered but for the marriage" and, also in the compensatory context, regarding the fourth objective, one is to ask whether a "spouse's lack of self-sufficiency [is] related to foregoing career and educational opportunities because of the marriage": *Rozen v. Rozen*, 2016 BCCA 303 at para. 22, citing *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 41-42.
- [94] The Minutes of Settlement and the Final Order do not set out the grounds upon which the claimant's entitlement to spousal support was based and the parties take differing views. The claimant says that the basis for her spousal support was strongly compensatory, with a non-compensatory aspect as well. The respondent says her entitlement was wholly non-compensatory.

What was the basis of the claimant's entitlement to support?

- [95] In *Chutter v. Chutter*, 2008 BCCA 507 [Chutter], the Court described the basis for compensatory 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 in original.]

[96] More recently, in *Zacharias v. Zacharias*, 2015 BCCA 376, the Court discussed compensatory spousal support, its rational and goals:

[44] During a marriage, a couple typically operates in a financial partnership. Each partner will take on roles that support mutual goals. If one partner makes economic sacrifices, it will usually be with a view to improving the financial position or quality of life of the family as a whole. Upon the breakdown of a marriage, the situation of mutual benefit is substantially disturbed. The financial sacrifices that a spouse has made will, absent some form of compensation, be borne exclusively by that spouse in the form of diminished earning capacity. Equally, the financial benefits conferred on the other spouse will, absent compensation, exclusively benefit the advantaged spouse. The goal of compensatory support is to ensure that, going forward, the economic consequences of choices made by the couple during the course of the marriage will be shared equitably.

[97] A compensatory award stays in place until compensation has been achieved. In *Tedham v. Tedham*, 2005 BCCA 502, the Court held:

[60] an order of spousal support which is based on compensatory principles should continue until adequate compensation has been made, even if the spouse has achieved a degree of self-sufficiency. It also reinforces the point that self-sufficiency must be viewed in the context of the marital standard of living...

[98] The Court in *Chutter* also described the basis for non-compensatory support:

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (*Bracklow*, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (*Bracklow*, at para. 23). Non-compensatory support aims to narrow the gap

between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[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.

[99] The Court in *Chutter* also held that although the compensatory and non-compensatory grounds for spousal support entitlement are "animated by different models of marriage", there will be many claims that involve aspects of both compensatory and non-compensatory principles and that:

[49] A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (*Bracklow*, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (*Moge*, at 864).

[100] On the evidence tendered on this application, I am satisfied that the claimant's entitlement to support involved aspects of both compensatory and non-compensatory principles, with more emphasis placed on non-compensatory, or needs-based, support.

[101] The parties had a long-term marriage of approximately 21 years. They were married for eight years before having children. They both worked outside the home. Prior to their having children, the claimant completed her under-graduate degree and worked in her chosen field. She supported the respondent for about two years while he completed his university education. When he completed his education, the parties moved to Kamloops and both worked in their chosen fields. Then, when the claimant decided to further her education, the respondent worked and supported her while she did so. Following her completion of the coursework toward her Master's degree in counselling, the claimant returned to work in her chosen field.

[102] The claimant obtained her Master's degree in counselling and worked during the marriage as a counsellor. She started her private counselling practice in 1991, three years before separation. She has continued to work as a counsellor in that practice for the 30 years following separation.

[103] I am satisfied that, for the most part, the parties both actively shared the childcare and household responsibilities during their marriage. Although the parties' conflicting evidence on this point does not allow me to reach any precise conclusions, the evidence as a whole

allows me to draw some general ones. Generally, I am satisfied that it was most likely the claimant who assumed more of the childcare and household responsibilities when the children were very young. The claimant was at home during her first maternity leave, worked only part-time following this and prior to the birth of their youngest child, and then stayed home again during her second maternity leave. The respondent worked full-time outside of the home during these few years. I have no difficulty concluding that the claimant's sacrifices during these years delayed the progress of her career and allowed the respondent to enhance his.

- [104] Generally, I am also satisfied that following the claimant's return to work after her second maternity leave, the parties most likely equally shared childcare and household responsibility thereafter. They were both working full-time in their chosen fields and hired full-time nannies to assist them in their child and homecare responsibilities. I am not satisfied that during these later years the claimant's career was adversely affected or the respondent's career was enhanced by the claimant's assumption of family responsibilities.
- [105] The claimant deposes that her professional career was compromised, delayed or sacrificed by her "spousal responsibilities by giving birth to the two boys where I took a one year maternity leave each time". I accept that her two maternity leaves interrupted, and consequently delayed, the progress of her career as I have outlined above, but there is no evidence to support her assertion that her career was "compromised" or "sacrificed".
- [106] Following her second maternity leave, the claimant moved into a full-time counselling position at the university, and commenced her private practice in counselling. This was years before the parties separated. She has continued to work in her private practice since then. The claimant offers no specific evidence about why she claims her career was "compromised" or "sacrificed". She discusses the delay in obtaining her Master's degree and her decision not to pursue her PhD, but does not provide any evidence about how this delay and/or this decision impacted her career decisions, aspirations or trajectory.
- [107] While I am satisfied that all of this provides some basis for the claimant's entitlement to compensatory support, I would see it as a very modest claim. The evidence provides a much stronger basis to conclude that her entitlement to support was based primarily on non-compensatory principles.
- [108] During their marriage, the claimant earned her own income, but the respondent was the greater income-earner. The duration of their marriage and the degree of their economic interdependence are factors that favour finding non-compensatory entitlement. Upon the dissolution of their marriage, there was a disparity in income between the parties that created a gap in their respective needs and means. Although disparity in income alone does not give rise to entitlement (see *Lee v. Lee*, 2014 BCCA 383), it is evident that in this case, that it fell to the respondent to meet the needs of the claimant created by the dissolution of their marriage through spousal support.

- [109] The terms of the Minutes of Settlement and Final Order also provide strong support for the conclusion that the claimant's entitlement was primarily needs-based.
- [110] The parties agreed, in the Minutes of Settlement and the Final Order, that the respondent's obligation to pay spousal support to the claimant would terminate if the claimant remarried or entered into a common-law relationship, at any time. This is a clear indication that the parties recognized the claimant's entitlement to support as primarily non-compensatory. The parties contemplated that a new partner would improve the claimant's economic circumstances and thereby eliminate the gap in their respective needs and means such that it would automatically disentitle her to support. Such a term is consistent with needs-based entitlement, and inconsistent with compensatory entitlement.

Decision

- [111] Taking into account the objectives in s. 17(7) of the DA in light of all of the circumstances of this case, I am satisfied that support should be terminated.
- [112] Before turning to my reasons for this decision, I will first address a central feature of the claimant's argument in favour of continuing support indefinitely.
- [113] The claimant submits that by virtue of her age (44 years) and the length of the marriage (21 years) at the time of separation, the "Rule of 65" expressed in the SSAG requires that support be indefinite in this case. I disagree.
- [114] The SSAG generate ranges and durations for spousal support based on the age of the parties, the length of their marriage, and their incomes. The SSAG also set out a number of factors to assist the court in determining where within those ranges awards should be made. Though not mandatory, the SSAG have long been recognized as providing useful guidance to courts in determining fair spousal support awards: *Venables v. Venables*, 2018 BCSC 1736 at para. 148, *aff'd* 2019 BCCA 281 [Venables], citing *Yemchuk v. Yemchuk*, 2005 BCCA 406 at paras. 62-64 [Yemchuk] and others.
- [115] There are many factors that will determine whether a spousal support award should be varied or terminated. To simply say the "Rule of 65" is determinative and requires that support continue indefinitely is problematic for two central reasons. First, the SSAG provide guidance in making appropriate spousal support awards, but they do not, and cannot, replace the discretion of the court in such matters: *Yemchuk* at para. 64. Second, there are many case-specific factors that must be considered in the exercise of that discretion, far beyond the scenario to which the "Rule of 65" is intended to respond.

- [116] In terms of duration of spousal support, the "Rule of 65" provides for spousal support of indefinite duration in cases where the years of marriage, plus the age of the support recipient at the time of separation, equals or exceeds 65. This "Rule" is intended to respond to the scenario of an "older" spouse who is economically dependent during a medium-length marriage and may have difficulty becoming self-sufficient, given his or her age: Venables at para. 153.
- [117] Justice Marchand, as he then was, noted in Venables at para. 154, that "indefinite" support does not mean "permanent" support. Indefinite support in this context simply means that, although support will continue without a time limit, it remains subject to review and possible variation. He also observed that a review frequently occurs upon the retirement of the payor spouse and that the SSAG authors note that "indefinite" often means that support will continue until the payor spouse turns 65.
- [118] It is the court's obligation to decide, on the circumstances and factors present in this case, whether a variation is appropriate having regard to the statutory support objectives and, if so, the extent of the variation: Thompson v. Thompson, 2006 BCSC 130 at para. 32, citing commentary on Prendergast v. Prendergast, 2004 BCSC 1213. This is what I turn to now.
- [119] The parties have tendered no specific evidence about their standard of living during the time of their marriage, but I can conclude from the whole of the evidence that their standard of living was comfortable. They both worked and earned good incomes. They owned a lot at Sun Peaks, a property with a small structure on Shuswap Lake, and a condominium in Kamloops (encumbered by a fairly modest mortgage). They owned the claimant's counselling practice, the respondent's dental practice and some chattels, and they held some investments.
- [120] At separation, the parties divided all of these assets at least equally, if not unequally in the claimant's favour. Based upon their incomes attributed to them at the time, the claimant received a generous spousal support award. Since then, both parties remained working in their professions.
- [121] After working full-time since 1975, the respondent reasonably retired in 2018 at the age of 69. He did not retire early. He and his spouse have been supported by his investment and pension income for five years now. They will continue to draw upon those finite resources into the future. He chose to draw higher amounts in the last few years to take advantage of their good health, but is unable to continue drawing such amounts. The respondent's income is currently roughly \$90,000, derived from investment and pension income. The respondent and his wife generate enough retirement income to meet their monthly expenses. They live in a home on Shuswap Lake, but they do not appear to lead a lavish lifestyle.

- [122] The claimant is highly educated and trained. Her current income, without spousal support, is approximately the same as the respondent's. Her income is derived from her employment and pension income. She is able to generate enough income to meet her monthly expenses, but does not appear to lead a lavish lifestyle either.
- [123] While the respondent's assets are more significant than the claimant's, he is also supporting his current spouse in their retirement. This is also a consequence of his investment decisions, budgeting and savings he has generated since separation.
- [124] The respondent has paid the claimant over \$650,000 in spousal support over the last three decades. To continue to pay her will require him to utilize his share of their already equalized assets. While this fact, on its own, would not matter if I were to conclude the claimant has not overcome the disadvantage arising from their relationship or that she continues to need additional support to maintain herself, I do not conclude either of these things.
- [125] Rather, I conclude that the objectives underlying the claimant's very modest compensatory support claim have long been satisfied, and that the objectives underlying her stronger needs-based claim are now satisfied as well.
- [126] Similar to the Court's conclusion in *Cramer v. Cramer*, 2000 BCCA 272 at para. 12, I am satisfied in this case that any "need" the claimant continues to have is largely attributable to the fact that she has not managed her resources well. The financial disclosure she has provided does not explain where her money has gone and why she has the mortgage debt she does.
- [127] The claimant has had over 28 years to become self-sufficient and self-supporting. She has become self-supporting. She was 44 years old when the parties separated. She was solidly established in her career at that time, with many years of prime earning capacity ahead of her. Since then, the claimant has received \$24,000 per year from the respondent in support payments. She sold both of the properties she received in the settlement, for considerable profits. She owns her own condominium in Kamloops. While she held the children's primary residence for a time after their separation, the children have been adults and self-supporting for many years now. While it is true that the claimant has not derived any potential economic benefit from re-partnering, it is also true that she does not have anyone other than herself to support. She holds an advanced degree in her profession and has continued to work in that profession, earning income through her own practice prior to, and since, the Final Order. There is no suggestion that she has been unable to work full-time during any of the last three decades for reasons of ill-health or otherwise.
- [128] In all of these circumstances, it cannot be said that any differences that may exist in the parties' current standards of living are as a result of the claimant's disadvantage arising from the marriage or its breakdown.

- [129] In the end result, I am satisfied that all of the objectives of spousal support have been met in this case and that the respondent's obligation to pay spousal support should end, with his last payment on August 1, 2024.
- [130] I am not satisfied a transitional period is warranted in this case. The claimant knew as far back as 2018 that the respondent had retired and wished to have spousal support varied or terminated. He raised it again, well over a year ago, and then filed his application in September 2023. The claimant has had substantial notice of both the respondent's retirement, and his desire to reduce or cancel spousal support. She has had ample time to prepare for this eventuality. In my view, terminating spousal support as of the date of this decision properly balances the various factors and considerations, and is in the interests of justice.
- [131] As the successful party, the respondent is entitled to his costs of this application, on the ordinary scale, to be assessed or agreed between the parties.

"S.A. Donegan J."

DONEGAN J.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/15/2024BCSC1544.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/dextraze-v-dextraze-2024>

Prepared on 25 October 2026 · Esheria