
CANADA / JUDGMENT

Fitzpatrick v. Fitzpatrick

2020 BCSC 738

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 738 Fitzpatrick v. Fitzpatrick

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fitzpatrick v. Fitzpatrick,

2020 BCSC 738

Date: 20200514

Docket: E124459

Registry: Kelowna

Between:

James Gordon Fitzpatrick

Claimant

And

Mairead Bridget Fitzpatrick

Respondent

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Claimant:

T.M. Moore

Counsel for the Respondent:

G. Peacock

Place and Date of Hearing:

Kelowna, B.C.

January 17, 2020

Place and Date of Judgment:

Kelowna, B.C.

May 14, 2020

Introduction

- [1] The claimant, James Gordon Fitzpatrick, is obliged to pay spousal support of \$3,545 per month to the respondent, Mairead Bridget Fitzpatrick, pursuant to an order of Willcock J. (as he then was) granted on April 23, 2010 (the "2010 Order"). The spousal support provision of the 2010 Order was made by consent of the parties. It does not set a time limit on the payment of spousal support. In other words, it provides for indefinite support. Also by consent, it stipulates that "[t]he spousal support shall be reviewed in three (3) years".
- [2] Neither party sought a review of spousal support in April 2013, when that option became available.
- [3] Mr. Fitzpatrick has now applied for an order terminating his spousal support obligation effective immediately. In the alternative, he seeks an order that spousal support be reduced to \$2,000 per month and time-limited so as to terminate in December 2020. Ms. Fitzpatrick opposes the application.

Background

- [4] Mr. Fitzpatrick is 59 years old. Ms. Fitzpatrick is 58 years old. They married in May 1988 and separated in September 2007. Thus, they were married for 19 years and 4 months and have been separated for 12 years and 8 months. It has been 10 years since the 2010 Order was granted.
- [5] The parties have two children, a son born in 1993 and a daughter born in 1995. Their children are now adults and are no longer children of the marriage.
- [6] Mr. Fitzpatrick is the CEO of Fitzpatrick Family Vineyards, a winery located near Peachland (the "Fitz Winery"). The Fitz Winery is a family business owned by Point Grey Holdings Ltd. ("PGH"). The shares of PGH are owned by Mr. Fitzpatrick's father and the Fitzpatrick Family Trust (the "Trust").
- [7] Mr. Fitzpatrick has worked for PGH for 33 years. He is not a shareholder or director of PGH, but he is an officer of PGH and the President of Fitz Winery.

- [8] Mr. Fitzpatrick is a beneficiary of the Trust. The Trust is a discretionary family trust, and Mr. Fitzpatrick is not entitled to encroach on its capital or income without a majority decision of the trustees. His father and stepmother have historically exercised control over the Trust. However, the Trust is going to be wound up, imminently, and Mr. Fitzpatrick will then receive a direct interest in PGH. The record is insufficient for me to value his anticipated interest in PGH, but sufficient for me to conclude that it is of considerable value.
- [9] Ms. Fitzpatrick is the half owner of a gift basket business known as "Brighten Their Day Gift Basket Company", which she started in 2013. Prior to the marriage, she obtained a Bachelor of Arts degree in psychology, but she never worked in that field. Before the children were born, Ms. Fitzpatrick worked as a personnel manager and a bank teller. After the children were born, she did not work outside the home, except for some part-time administrative work for PGH. She assumed what is often referred to as a traditional role in the marriage, being primarily responsible for raising the children and maintaining the home.
- [10] Until 2014, PGH owned Cedar Creek Estate Winery in Kelowna ("Cedar Creek").
- [11] In 1996, the parties moved from Vancouver to Kelowna, and Mr. Fitzpatrick became the President of Cedar Creek. Initially, they lived in the winemaker's house on the Cedar Creek vineyard, which is within the Agricultural Land Reserve (the "ALR"). In 1997, they built a 7,000 square foot executive home on the same property (the "Family Home"), where they resided with the children.
- [12] PGH owned the land on which the Family Home was built. The parties held a lease with a 99-year term and an option to renew for a further term of 60 years. It was contemplated that the lot on which the Family Home was built would be subdivided and removed from the ALR. Neither event occurred. As a result, the lease could not be registered, and the property on which the Family Home had been built could not be mortgaged. This complicated the property division when the parties separated and then divorced.
- [13] At the time of the separation in September 2007, Mr. Fitzpatrick was 47 years old and Ms. Fitzpatrick was 45 years old (almost 46). The children were 14 and 12 years old. Ms. Fitzpatrick remained with the children in the Family Home for about six years after the separation. Mr. Fitzpatrick moved into his father's house. During the nearly three years between the separation and the granting of the 2010 Order, there were no formal support arrangements in place but Mr. Fitzpatrick continued to share his income with Ms. Fitzpatrick and he paid off some credit card debt.
- [14] Mr. Fitzpatrick commenced this proceeding in January 2009. By the time the matter came on for trial before Justice Willcock, the parties had resolved many issues. Specifically, they agreed:
- to share joint custody and guardianship of the children, with the children's primary place of residence with Ms. Fitzpatrick;

- for the purposes of calculating child support and spousal support, Mr. Fitzpatrick's annual income was \$170,000 and Ms. Fitzpatrick's annual income was zero;
- that Mr. Fitzpatrick would pay child support of \$2,305 per month (the table amount established by the Federal Child Support Guidelines), and 75% of the children's s. 7 expenses;
- that Mr. Fitzpatrick would pay spousal support of \$3,545 per month, with a review in three years; and
- with the exception of the Family Home, the family assets (primarily RRSPs and investments) would be divided equally with each party receiving \$267,799.

[15] The parties' agreement with respect to Mr. Fitzpatrick's income for support purposes reflected the value of significant benefits he received from his employment, in addition to his income for tax purposes. Specifically, his 2008 income was about \$135,000 and his 2009 income was about \$147,000, but the parties agreed that his income for support purposes would be set at \$170,000 to reflect the additional benefits. Ms. Fitzpatrick had no income, but she planned to undertake training and/or further education that would enable her to obtain employment as a teacher or counsellor.

[16] The disputed issues concerned the Family Home, the division of which was, as mentioned, complicated by the fact that the lease was not registrable and was therefore unenforceable and of uncertain value. Ultimately, Justice Willcock granted the following orders with respect to the Family Home:

- the parties' interests in the Family Home and lease would be apportioned 60% to Ms. Fitzpatrick and 40% to Mr. Fitzpatrick;
- Ms. Fitzpatrick would have exclusive occupation of the Family Home until the earliest of the youngest child turning 19, on February 16, 2014, or leaving home to pursue post-secondary education; and
- the parties' interest in the Family Home and lease would be sold at the conclusion of the period of exclusive possession.

[17] In his reasons for judgment (2010 BCSC 1958), Justice Willcock noted the uncertainty that existed with respect to the value of the Family Home and the complications associated with trying to sell it. He gave the parties leave to seek directions with respect to the conduct of the eventual sale (para. 73).

[18] Justice Willcock accepted Ms. Fitzpatrick's position in apportioning 60% of the value of the Family Home and lease to her (paras. 60-64). He held that an equal division would be unfair having regard to the factors set out in s. 65 of the Family Relations Act, which was in force at the time. Specifically, he concluded that Ms. Fitzpatrick had a strong compensatory entitlement to spousal support that would not be met by the payment of spousal support at the levels contemplated by the Spousal Support Advisory Guidelines, that the long term disparity in the parties' incomes was likely to endure, and that the dissolution of the

marriage would disproportionately affect her standard of living.

- [19] Both the agreed terms and the terms determined by Justice Willcock were reflected in the 2010 Order.
- [20] Following the 2010 Order, Ms. Fitzpatrick continued to reside in the Family Home with the children, who were 15 and 16 years old at the time. She continued to be primarily responsible for them. The parties' younger child suffered from generalized anxiety and, according to Ms. Fitzpatrick, she required significant support in order to participate in her activities.
- [21] In September 2013, Mr. Fitzpatrick's father acquired Ms. Fitzpatrick's 60% interest in the Family Home for \$1.2 million, which was satisfied by a cash payment of \$750,000 and title to a two-bedroom, 1,100 square-foot condominium in Kelowna. Ms. Fitzpatrick and the younger child moved into the condominium. The older child, who was then about 20 years old and attending university, moved in with Mr. Fitzpatrick. As a result, Mr. Fitzpatrick reduced the child support he paid to Ms. Fitzpatrick by 50%, to \$1,152 per month.
- [22] The younger child lived with Ms. Fitzpatrick until September 2018. She attended university in Kelowna, graduating in May 2018 with a Bachelor of Science degree. She then moved to New Brunswick where she is pursuing a PhD at the University of New Brunswick. Mr. Fitzpatrick stopped paying child support in September 2018 when she moved to New Brunswick.
- [23] Ms. Fitzpatrick did not take steps to become a teacher or counsellor as had been contemplated at the time the 2010 Order was made. She says she was still spending considerable time raising the children. Instead, in 2013, she started her home-based gift basket business, which provides modest income. In order to generate additional income, Ms. Fitzpatrick invested the \$750,000 cash payment she received when she sold her interest in the Family Home to Mr. Fitzpatrick's father. Her investment income has varied over the years from a low of about \$21,000 to a high of about \$30,000 per year. In 2018, she had had investment income of \$21,532 and business income of \$2,616.
- [24] Ms. Fitzpatrick continues to live in the condominium. Its assessed value is \$590,000.
- [25] After the 2010 Order was made, Mr. Fitzpatrick continued to work in the family business at Cedar Creek. In 2014, PGH sold Cedar Creek. Mr. Fitzpatrick received \$800,000, presumably from his father, when Cedar Creek was sold, to reflect his 40% interest in the Family Home. Mr. Fitzpatrick then purchased a 3,100 square-foot home in a lakeside community for \$1,220,000, where he now lives with a new partner. His home has an assessed value of \$1,831,000.

- [26] After PGH sold Cedar Creek, Mr. Fitzpatrick spent about three years working on starting the Fitz Winery, including overseeing construction of buildings on land near Peachland, which he referred to as the "Greata Ranch location". The Fitz Winery opened for business in April 2017.
- [27] During the eight years following the 2010 Order, Mr. Fitzpatrick's income as reported on his income tax return was higher than it had been at the time the 2010 Order was granted. For example, his income as reported on his tax return for 2015 was \$181,839, for 2016 was \$178,566, and for 2017 was \$175,677. These amounts do not include the unreported personal benefits he previously acknowledged receiving from his employment. In other words, his base salary increased following the sale of Cedar Creek in 2014, even though he was not operating a business until the Fitz Winery opened in April 2017. However, effective April 1, 2018, his salary was reduced to \$110,000 per year. According to Mr. Fitzpatrick, this decrease was necessitated by the financial performance of Fitz Winery.
- [28] As mentioned, the Trust is being wound up this year and that will result in Mr. Fitzpatrick acquiring ownership of shares in PGH. I was not provided with expert evidence of the value of PGH or Mr. Fitzpatrick's anticipated interest in it. The financial statements for PGH show that its gross profits have increased from \$139,842 in 2017 to \$1,127,015 in 2019, but it continues to operate at a net loss. The financial statements for year end March 31, 2019 report retained earnings of more than \$6 million and indicate dividends of \$2,000,000 were paid during that fiscal year.

Positions of the parties

- [29] Mr. Fitzpatrick's position is that the term in the 2010 Order providing that "spousal support shall be reviewed in three (3) years", gives rise to a right to a review of spousal support under s. 15.2 of the Divorce Act, such that he is not required to establish a material change in the condition, means, needs or other circumstances of either party since the 2010 Order was made, which he would have to do if this was a variation application under s. 17(4.1). He does not assert, in the alternative, that there has been a material of change of circumstances justifying a variation.
- [30] Mr. Fitzpatrick submits that Ms. Fitzpatrick has not taken reasonable steps toward self-sufficiency and that, as a result, employment income of \$50,000 should be imputed to her, on top of her investment income.
- [31] Mr. Fitzpatrick submits that the objectives of spousal support expressed in s. 15.2(6) of the Divorce Act have been met through the spousal support he has paid to date, combined with the \$200,000 value of the unequal division of the Family Home in favour of Ms. Fitzpatrick, even without imputing any employment income to Ms. Fitzpatrick and, as a result, his spousal support obligation should be terminated immediately.

- [32] In the alternative, Mr. Fitzpatrick submits that any ongoing need for spousal support is due to Ms. Fitzpatrick's failure to take reasonable steps to earn employment income and that, as a result, the quantum of spousal support should be reduced to reflect his current income of \$110,000 per year and an income of about \$78,000 per year for her (which includes at least \$50,000 in imputed employment income), and ordered to terminate by December 2020.
- [33] Ms. Fitzpatrick's position is that the application should be dismissed. She says there should be no change to the 2010 Order, such that spousal support of \$3,545 per month should continue indefinitely, subject to future variation for material changes in circumstances.
- [34] Ms. Fitzpatrick submits that Mr. Fitzpatrick lost his right to a review of spousal support due to the passage of time such that his application should be determined on a variation analysis that requires him to show a material change of circumstances. She says there has been no material change; in fact, he has not even asserted one, and that is a sufficient basis upon which to dismiss his application.
- [35] Alternatively, Ms. Fitzpatrick submits that even on a review analysis no change in spousal support is justified.
- [36] Ms. Fitzpatrick submits that it would be inappropriate to impute employment income to her. She says that given her age, health (she has Type I diabetes), work experience, and the needs of the children post-separation, it was reasonable for her to abandon the plan to become a teacher or counsellor and instead start a home-based business. She says she has taken reasonable steps toward self-sufficiency by operating her business and investing her capital to generate income instead of using it to acquire a larger home, which would have reduced the significant discrepancy between the parties' post-separation standards of living. Alternatively, she submits that if employment income is imputed to her, it should not be added to her investment income, which she has generated by sacrificing her standard of living.
- [37] Ms. Fitzpatrick submits that she has an ongoing entitlement to spousal support. She says that even if employment income is imputed to her, ongoing, indefinite spousal support at the current level of \$3,545 per month continues to be appropriate having regard for the objectives of spousal support, particularly the recognition of the economic disadvantages to her arising from the marriage and its breakdown, the economic advantages to Mr. Fitzpatrick arising from the marriage, and her needs in relation to the standard of living enjoyed by the parties during the marriage and Mr. Fitzpatrick's post-separation standard of living.

Issues

[38] The following issues arise:

1. Is Mr. Fitzpatrick entitled to a review of spousal support?

2. Should income be imputed to Ms. Fitzpatrick as a result of a failure to take reasonable steps towards self-sufficiency?
3. Does Ms. Fitzpatrick have an ongoing entitlement to spousal support?
4. If so, what is the appropriate order in terms of quantum and duration going forward?

Analysis

Is Mr. Fitzpatrick entitled to a review of spousal support?

[39] The right to a review of a support order is created by a term or condition of an agreement or court order: *Helle v. Helle*, 2019 BCCA 97 at para.16, citing *Jordan v. Jordan*, 2011 BCCA 518 at para. 33. This is distinct from the statutory right to a variation of a support order pursuant to s. 17 of the Divorce Act, which is subject to a preliminary threshold finding of a material change in the condition, means, needs or other circumstances of either former spouse: *Jordan* at paras. 28-32.

[40] Whether Mr. Fitzpatrick has a right to a review of spousal support depends on the proper construction of the provision in the 2010 Order that contemplates a review: *Toth v. Toth*, 2016 BCCA 50. The provision in question in this case was included in the 2010 Order by consent. It reads:

Commencing May 1, 2010 and payable on the first day of each and every month thereafter, the Plaintiff shall pay to the Defendant spousal support in the amount of \$3,545.00 per month. The spousal support shall be reviewed in three (3) years.

[41] Ms. Fitzpatrick argues that this provision permits a review in three years - no earlier, but also no later. She argues that given the passage of time (Mr. Fitzpatrick's application was heard nearly 10 years after the 2010 Order was made), Mr. Fitzpatrick has lost the right to a review such that he must seek a variation of spousal support.

[42] I do not agree with that construction of the review provision in the 2010 Order.

[43] As observed by Neilson J.A. in *Toth*, a review provision must be construed so as to give effect to the objective intent of the parties. The words used must be read in context. The surrounding circumstances may provide context, but must not overwhelm the actual words used.

[44] The relevant surrounding circumstances may be gleaned from Justice Willcock's reasons for judgment following the trial. He referred to the agreed review in these terms at para. 6:

The defendant will seek a teaching or counselling psychology qualification. The costs of her education will be shared. While no income will be imputed to her now, the parties have agreed to a review of spousal support in three years, anticipating that there may be material changes in her circumstances.

He also made the following relevant findings:

- Ms. Fitzpatrick had not been employed at all since the separation; that is, during the roughly two and one-half years before the 2010 Order was made (para. 27);
- for 10 years before that, she was largely unemployed although she provided some administrative services for PGH for the purpose of splitting the family's income (para. 26); and
- at the time the 2010 Order was made, she planned to seek a teaching or counselling qualification (para. 27).

[45] From this it is apparent that at the time the review provision was agreed to, there was considerable uncertainty about the prospect of Ms. Fitzpatrick achieving self-sufficiency and, in particular, about her income earning capacity. This is the very kind of uncertainty that review orders are intended to address: *Leskun v. Leskun*, 2006 SCC 25 at para. 36. Both parties were represented by experienced counsel when they agreed to the review provision and from that it is reasonable to infer that the purpose of review provisions, as discussed in *Leskun*, was the impetus for the agreement to a review in this case.

[46] Accordingly, I conclude that the primary intention of the parties, in agreeing to a review, was to permit a reassessment of the objectives of spousal support, without either having to demonstrate a material change in circumstances, once there was more certainty about Ms. Fitzpatrick's employment prospects.

[47] Although Ms. Fitzpatrick had recently developed an educational plan, it was only a plan. There was no way to know whether she would succeed and, if she did succeed, how long it would take and how close she would get to achieving self-sufficiency. There is no evidence before me that suggests that the parties had some specific event in mind when they selected three years as the trigger. The three-year period, considered in context, was intended to give Ms. Fitzpatrick at least three years to adjust and start moving forward. It was not intended to prescribe a fixed date on which a review had to occur lest the right to a review be lost. A construction of the provision that would only permit a review precisely three years after the 2010 Order was made, would be impractical. It would also undermine the parties' primary intention of permitting a review once there was more certainty about Ms. Fitzpatrick's earning capacity because it was possible that not enough would be known about her earning capacity in three years to make a review at that time useful.

[48] This conclusion is consistent with the result in *Helle*. The language of the spousal support review provision in that case is indistinguishable from the language of the review provision in this case. In *Helle*, the material portion of the provision of the order in question read: "[s]pousal support payable herein shall be reviewed on February 1, 2007". No review was sought until late 2016, nearly 10 years after the date specified in the provision. Although the reasons for judgment do not contain an analysis of whether the right to a review was lost after February 1, 2007, which suggests that issue was not raised, Willcock J.A. viewed the provision as defining "the period of time that must pass before review" (para. 18). In other

words, he considered the provision to permit a review on or after February 1, 2007.

- [49] For the foregoing reasons, I conclude that Mr. Fitzpatrick's application for an order terminating or alternatively reducing his spousal support obligation is to be determined on a review analysis. It is not necessary for him to demonstrate a material change of circumstances.

Should income be imputed to Ms. Fitzpatrick as a result of a failure to take reasonable steps towards self-sufficiency?

- [50] In addition to recognizing the economic advantages to Mr. Fitzpatrick and disadvantages to Ms. Fitzpatrick arising from the marriage or its breakdown (s. 15.2(6)(a)) and relieving any economic hardship suffered by Ms. Fitzpatrick arising from the breakdown of the marriage (s.15.2(6)(c)), an order for spousal support should "in so far as practicable" promote the economic self-sufficiency of Ms. Fitzpatrick within a reasonable period of time (s.15.2(6)(d)). This does not require her to achieve self-sufficiency, but merely seeks to promote self-sufficiency "in so far as practicable".
- [51] In determining what is practicable, consideration must be given to all of the circumstances, including Ms. Fitzpatrick's age and gender, her skills and education, the opportunities for retraining, and the realistic prospect of her being able to find not just a job, but one which enables her to become self-sufficient: *Tedham v. Tedham*, 2005 BCCA 502 at para. 33.
- [52] Self-sufficiency is not an absolute standard, requiring the recipient of spousal support to take any job at the end of a marriage. As the Ontario Court of Appeal said in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256 "self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties." Similarly, as our Court of Appeal said in *Tedham* at para. 38, self-sufficiency in this context means "capable of supporting [oneself] at a level in keeping with the standard of living enjoyed during the marriage without the aid of financial support from [the former spouse]".
- [53] Section 6.1 of the SSAG provides that the starting point for the determination of income for purposes of spousal support is the definition of income in the Child Support Guidelines.
- [54] Section 16 of the Child Support Guidelines establishes a presumption in favour of the party's line 150 income:
16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.
- [55] However, there are exceptions. If the court is of the opinion that the determination of income under s. 16 would not be the fairest determination then, pursuant to s. 17, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years. More broadly, pursuant to s. 19, the court

may impute such income to a spouse as it considers appropriate, based on a number of circumstances, including intentional under-employment or unemployment, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority.

- [56] At this stage, the question is whether income should be imputed to Ms. Fitzpatrick because she is intentionally under-employed.
- [57] To recap, Ms. Fitzpatrick is 58 years old. She has a Bachelor of Arts degree in psychology but she never worked in that field. She worked in administrative positions before the children were born, but she has not been employed in any conventional position since then. That is, she has not been employed for over 25 years. She did perform some administrative work during the marriage for PGH, for the purpose of splitting the family's income. That work came to an end at the time of separation in September 2007. From September 2007 until April 2010, when the 2010 Order was made, she did not make efforts to find employment as she was looking after the children. At the time the 2010 Order was made she had recently developed a plan to obtain the qualifications required to seek a teaching or counselling position.
- [58] Following the 2010 Order, Ms. Fitzpatrick did not pursue that educational plan. The children were 15 and 16 years old at the time and she says she continued to be primarily responsible for them. The younger child suffered from generalized anxiety and, according to Ms. Fitzpatrick, she required significant support in order to participate in her activities.
- [59] In 2013, Ms. Fitzpatrick and the younger child moved to the condominium, while the older child went to live with Mr. Fitzpatrick. The younger child was then 18 years old. She started university in Kelowna. Ms. Fitzpatrick started her business. Her evidence about why she chose to start a home-based business rather than pursue an employment position is brief and vague. She states that "one of the reasons" she decided to start a home-based business was that it would provide her with flexibility to deal with her health issues. Her evidence about her health issues is also brief and vague. She has Type I diabetes. She deposed that her "eyes, kidneys, and heart have borne the effects of the illness", every 2 to 6 weeks she has eye injections "to help curb the bleeding in her eyes", and at times her sugars have been low "requiring attendance at emergency (3 times between mid 2017 to end 2018)". There is no medical evidence.
- [60] Ms. Fitzpatrick's business has achieved very modest success. She reported relatively small losses in 2014 and 2015 and net income of \$635 in 2016, \$3,030 in 2017 and \$2,616 in 2018.
- [61] I accept that it was reasonable for Ms. Fitzpatrick to delay her attempts to re-enter the workforce while the younger child was still in high school. Although the evidence of the child's particular needs is vague, the fact of the anxiety is not disputed, and both children have now successfully launched into adulthood. They both have university educations. The older child is a police officer. The younger child is pursuing a PhD. I have no doubt that Ms. Fitzpatrick's efforts contributed to a significant extent to their success, particularly to that of

the younger child.

- [62] Having said that, the evidence fails to adequately explain why Ms. Fitzpatrick did not start taking steps towards obtaining paid employment after about 2013, when the younger child commenced university, the older child went to live with Mr. Fitzpatrick, and Ms. Fitzpatrick no longer had the responsibility of maintaining a large home. I appreciate that by that time she was in her early 50s and had not been employed for 20 years. Any return to the paid workforce would have been slow and gradual. However, she had a university education and some work experience, albeit dated, and it is reasonable to expect that following a period of education upgrading, she would have eventually succeeded in obtaining an administrative position. The evidence of her health issues provides an insufficient basis to conclude that she could not have pursued a path that would have provided her with significantly more income than is generated from her business. Accordingly, I find that she has not made reasonable efforts toward achieving self-sufficiency. It would be appropriate to impute some income to her because she is under-employed.
- [63] As mentioned, given her age and the length of time she had been out of the workforce, Ms. Fitzpatrick's efforts to return to work would have been slow and gradual. Starting down a path toward becoming a teacher or counsellor at her age in 2013 would not have been the most reasonable step. It appears that Mr. Fitzpatrick agrees with that assessment as he submits that employment income of \$50,000 a year should be imputed, which reflects evidence of the salaries for administrative jobs rather than the salaries for clinical psychologists or clinical counsellors.
- [64] I have concluded that it is appropriate to impute employment income to Ms. Fitzpatrick of \$50,000 per year going forward. For purposes of determining whether the objectives of spousal support have already been met, I also conclude that Ms. Fitzpatrick could have been earning more income from employment than she has earned from her business since about 2015 (allowing a period for upgrading her education), but the extent to which she could have done so is very uncertain given that her efforts to return to work would have been slow and gradual.
- [65] The next question is whether \$50,000 of imputed employment income should be added to Ms. Fitzpatrick's passive investment income. As mentioned, she submits that if employment income is imputed to her, it should not be added to her passive investment income because she generates the passive income by sacrificing her standard of living. I have concluded that the imputed employment income should be added to Ms. Fitzpatrick's investment income because this best reflects reality and my assessment of the income she would now be earning had she taken reasonable steps toward self-sufficiency. I appreciate that she has chosen to sacrifice her standard of living to generate passive income but that is something that, in my view, is better addressed in the course of determining whether it would now be appropriate to terminate or reduce the spousal support payments. I address that issue later.

[66] The most current evidence of Ms. Fitzpatrick's investment income is for 2018. In that year, she earned investment income of \$21,532. Her investment income has fluctuated over the years and, accordingly, in determining her income for spousal support purposes it is appropriate to consider the investment income she has earned over the last three years, as contemplated by s. 17 of the Child Support Guidelines. The average of her investment income over the years 2016, 2017 and 2018 is just over \$25,000. Accordingly, her annual income for purposes of going forward spousal support is \$75,000. Of course it would not be appropriate to include her business income as well as imputed employment income as there is no suggestion that it would be reasonable for her to work in an employment position and operate a business.

Does Ms. Fitzpatrick have an ongoing entitlement to spousal support?

[67] In *Jordan* at para. 34, the Court of Appeal reiterated the importance of clearly identifying, in a provision permitting a review of spousal support, the issue or issues to be reviewed in order to avoid the difficulties that arise when the party seeking a change attempts to reargue their case. This point was made by the Supreme Court of Canada in *Leskun* at para. 39.

[68] Once the event or condition that triggers a right to a review has occurred, the task is to consider "the issues to be reviewed and whether the evidence supports a change in the earlier order": *Jordan* at para. 33.

[69] The difficulty in this case, as in many, is determining the issues to be reviewed because the 2010 Order itself does not tightly circumscribe the scope of the agreed review. However, as explained above, the purpose of the review provision was to mitigate the uncertainty that existed in April 2010 about the prospect of Ms. Fitzpatrick achieving self-sufficiency and, in particular, her earning capacity. That issue is relevant both to her continued entitlement to spousal support and, if entitled, its quantum: *Domitri v. Domitri*, 2010 BCCA 472 at para. 38. As in *Domitri*, this review requires a reconsideration of Ms. Fitzpatrick's entitlement to and the quantum (amount and duration) of spousal support, having in mind the guidance offered by the SSAG.

[70] There are three conceptual bases for entitlement to spousal support: compensatory, non-compensatory, and contractual. Contractual support is not an issue here.

[71] The objectives of spousal support identified in s. 15.2(6) of the Divorce Act, are the starting point for determining entitlement. They require an order for spousal support to:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[72] Section 15.2(4) of the Divorce Act sets out the factors to be considered when making an order for spousal support.

- 4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

[73] Compensatory support is intended to provide redress to the recipient spouse for his or her efforts, which conferred an economic benefit or advantage on the other spouse. Compensatory support also addresses the economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown: *Chutter v. Chutter*, 2008 BCCA 507, at paras. 50-51, leave to appeal ref'd [2009] S.C.C.A. No. 41. It is recognized that assuming primary responsibly for child care and management of the household, in particular, often results in lower earning potential and fewer prospects for financial success in the future: *Chutter* at para. 50.

[74] Non-compensatory support aims to narrow the gap between the needs and means of the spouses: *Chutter* at para. 54. The concept of need, however, goes beyond the basic necessities of life and varies with the circumstances of the parties: *Chutter* at para. 55; *H.C.F. v. D.T.F.*, 2017 BCSC 1226, at para. 196; *Loesch v. Walji*, 2008 BCCA 214, at para. 39. The same is true for self-sufficiency. In longer marriages, the courts measure both need and self-sufficiency against the marital standard of living or the payor's post-separation standard of living: *Chutter* at para. 59; *Hodgkinson v. Hodgkinson*, 2006 BCCA 158, at paras. 68-69. In *Lee v. Lee*, 2014 BCCA 383 at para. 66, Newbury J.A. noted that a spouse who experienced a marked decline in standard of living should receive some financial assistance upon a relationship breakdown, but a mere disparity in the spouse's incomes was not sufficient to create entitlement.

[75] The assessment of Ms. Fitzpatrick's ongoing entitlement should reflect current circumstances, including the specific changes contemplated by the parties at the time the review provision was agreed to (in this case, Ms. Fitzpatrick's earning capacity), as well as unforeseen developments: *Helle* at para.18. However, that does not mean that the parties are free to litigate matters already determined.

[76] In this case, Justice Willcock has already determined that Ms. Fitzpatrick had an extremely strong compensatory entitlement to spousal support. That determination was made in the context of considering her request for an unequal division of the parties' interests in the Family Home. He concluded that an equal division would be unfair having regard for the factors mentioned in s. 65(1) of the Family Relations Act and, in particular, Ms. Fitzpatrick's need to become or remain economically independent and self-sufficient (s.65(1)(e)), and the circumstances relating to the Family Home as well as Mr. Fitzpatrick's capacity (s. 65(1)(f)). At the heart of his analysis was his conclusion that spousal support at the levels contemplated by the SSAG would not meet Ms. Fitzpatrick's compensatory entitlement. The relevant portions of his reasons read:

61] This was a long marriage, and for that reason the significance of many factors tending to unequal division, particularly inheritances and gifts, diminishes as the length of the marriage increases. Some of the factors enumerated in the statute however, call for an unequal distribution of matrimonial assets in this case -- particularly those set out in s. 65(1)(e) and (f). Specifically, Ms. Fitzpatrick's need to become economically independent and self-sufficient, the circumstances relating to the acquisition, maintenance, improvement or use of the property, and Mr. Fitzpatrick's capacity.

[62] In this case, Ms. Fitzpatrick has certainly been economically disadvantaged by marriage. She has supported Mr. Fitzpatrick in the development of a family business from which he stands to profit, but in which he has no shares. She has forgone income to contribute to his potential inheritance. By contributing to his business, directly and indirectly, by assisting him in doing so, Ms. Fitzpatrick has contributed to his income earning capacity at her expense.

[63] Setting spousal support at Guideline levels will not adequately compensate her for the disparity that will result in this case if assets are divided without regard to the very significant family asset that lies outside this litigation, Point Grey Holdings. Having contributed to the acquisition, improvement, and maintenance of value in that company, Ms. Fitzpatrick can fairly expect that its potential value to Mr. Fitzpatrick can be taken into account in a division of assets that are in the names of the parties. Even excluding the potential inheritance to Mr. Fitzpatrick, the court should take notice of the long-term disparity in their income earning capacity that is likely to endure.

[64] Seeking to minimize the effect of the dissolution of marriage on her standard of living, and taking into account the enumerated factors in s. 65, I agree with her submission that an equal division of the asset in the home would be unfair. I accept the defendant's submission that the parties' interest in the home and lease be apportioned 60% to Ms. Fitzpatrick and 40% to Mr. Fitzpatrick.

[77] In my view, Justice Willcock's comments remain applicable. Ms. Fitzpatrick continues to have a strong entitlement to compensatory spousal support based on the same factors: specifically, the length of the marriage and the functions performed by each party during

cohabitation, which resulted in significant economic disadvantage to her and significant economic advantage to Mr. Fitzpatrick arising from the marriage. The disadvantage to her continues and is likely permanent because she will never achieve the income earning capacity required to return her to the marital standard of living. The advantage to him also continues as reflected in his income earning capacity, which was developed during the marriage. The role Ms. Fitzpatrick assumed in the marriage provided support for Mr. Fitzpatrick in the progression of his career with PGH. He is now on the cusp of realizing significant value through the ownership position in PGH he will receive when the Trust is wound up. According to Justice Willcock (at para. 30), Ms. Fitzpatrick did not learn that Mr. Fitzpatrick was not a shareholder in PGH or that he had no ownership interest in the business to which both parties had dedicated themselves until the separation.

- [78] The only difference in the analysis of Ms. Fitzpatrick's ongoing compensatory entitlement is that the limits of her earning capacity are now more certain. However, an annual income in the range of \$75,000 by 2015 only partially mitigates the economic disadvantages to her as a result of the marriage. It does not detract at all from the significant economic advantages to Mr. Fitzpatrick as a result of the marriage.
- [79] Justice Willcock's analysis clearly indicates that he considered Ms. Fitzpatrick to also have a non-compensatory entitlement to spousal support. As mentioned, in longer marriages, need and self-sufficiency are both measured against the marital standard of living and the payor's post-separation standard of living. Justice Willcock noted the long-term disparity in the parties' income earning capacity and the need to minimize the effect of the dissolution of the marriage on Ms. Fitzpatrick's standard of living.
- [80] In my view, Ms. Fitzpatrick continues to have a non-compensatory entitlement to spousal support. Even with an annual earning capacity in the range of \$75,000 by 2015, there remains a significant disparity in the parties' incomes. Until recently, Mr. Fitzpatrick earned annual income in the range of \$175,000 to \$180,000 before consideration of the benefits that the parties agreed warranted the attribution of additional income to him. He earned that income working in the same position he had during the marriage. Ms. Fitzpatrick supported him in the development of his career.
- [81] Mr. Fitzpatrick says that his base salary was reduced to \$110,000 effective April 1, 2018, but I am not persuaded that is a fair determination of his income for spousal support purposes. He deposed that he does not anticipate his income to change significantly based on the performance of Fitz Winery. However, the financial statements of PGH (March 31 year end) indicate that its revenues have increased dramatically since the inception of Fitz Winery. Gross sales improved from \$280,955 in 2017, to \$1,461,417 in 2018, to \$1,808,508 in 2019. While it continues to operate at a net loss, the magnitude of the loss has decreased year over year. In these circumstances, it is difficult to understand why Mr. Fitzpatrick does not anticipate an increase in his income in the future.

- [82] Mr. Fitzpatrick has not adequately explained why his salary was reduced on April 1, 2018 following several years of receiving a significantly higher salary while PGH had minimal, if any, operations, and in the face of the dramatic increase in gross sales from the year ending March 31, 2017 to the year ending March 31, 2018. His father and stepmother control his salary through their ownership of PGH, and the timing of the decrease in his salary on April 1, 2018 aligns with his initial request for a review of spousal support which, on his evidence, was conveyed to Ms. Fitzpatrick in May 2018. In addition, he is on the cusp of receiving an ownership interest in PGH. The specific size and value of that interest has not been disclosed but, as noted, PGH had retained earnings of more than \$6 million as at March 31, 2019 after paying dividends of \$2 million that fiscal year. It is likely that Mr. Fitzpatrick will receive dividend income in the near future.
- [83] Notwithstanding the unequal division of the Family Home in favour of Ms. Fitzpatrick, which was intended to reduce the discrepancy between her post-separation standard of living and the standard of living enjoyed by the parties during the marriage, I am satisfied that a significant disparity continues to exist even though there is not a lot of evidence in the record about the parties' lifestyles, either currently or during the marriage.
- [84] From their Form F8 Financial Statements, it appears that neither party lives an extravagant lifestyle. Ms. Fitzpatrick is financially comfortable. For example, she is saving more than \$800 a month and recently undertook fairly significant repairs on her condominium. However, the stark reality is that she went from living in a 7,000 square-foot executive home on the site of Cedar Creek, with professionally landscaped grounds, to a 1,100 square-foot condominium in town. She has assets valued at about \$1.5 million. In contrast, Mr. Fitzpatrick lives in a 3,100 square-foot home in a lakeside community and he has assets valued at about \$2.3 million, before consideration of the interest he is about to receive in PGH. Even with an imputed income of about \$75,000 per year, Ms. Fitzpatrick is not capable of supporting herself at a level in keeping with the standard of living she enjoyed during the marriage without Mr. Fitzpatrick's financial support. She is not capable of becoming economically self-sufficient in that sense.
- [85] Mr. Fitzpatrick submits that the objectives of spousal support expressed in s. 15.2 (6) of the Divorce Act have been met through the spousal support he has paid to date, combined with the \$200,000 value of the unequal division of the former Family Home in favour of Ms. Fitzpatrick, even without imputing any employment income to Ms. Fitzpatrick and, as a result, his spousal support obligation should be terminated immediately.
- [86] I do not agree. Mr. Fitzpatrick has been paying spousal support for about 13 years. During the last 10 years, he paid \$3,545 per month pursuant to the 2010 Order. Before that, he shared his income with Ms. Fitzpatrick. In addition, Ms. Fitzpatrick received 60% of the Family Home which had a value to her of \$200,000. At a periodic rate of \$3,545 per month, the unequal division represents about five years of spousal support payments. Accordingly, it is fair to say that Mr. Fitzpatrick has paid the equivalent of about 18 years of spousal support.

- [87] As noted, Justice Willcock concluded that Ms. Fitzpatrick's strong compensatory entitlement could not be met with spousal support at SSAG levels. In other words, he concluded that to satisfy her compensatory entitlement it was necessary for her to receive spousal support at the maximum of that contemplated by the SSAG, in addition to the unequal division. DivorceMate calculations provided by Mr. Fitzpatrick's counsel that apply the SSAG to the parties' circumstances at the time the 2010 Order was made generate a range of spousal support from a low of \$3,461 per month to a high of \$4,308 per month for a duration of between 9.5 years and 19 years. The spousal support Mr. Fitzpatrick has paid to date reflects the low end of the range in terms of amount. The top end of the range in terms of duration has not yet been achieved. Even though it is reasonable to expect that Ms. Fitzpatrick could have earned some employment income after about 2015, it is unlikely that she would have earned enough to materially shift the SSAG ranges given her re-entry to the workforce would have been slow and gradual. The compensatory entitlement Justice Willcock found to exist has not been satisfied by the payments made to date.
- [88] In summary, after reviewing the factors and objectives relevant to a spousal support order as set out in s. 15.2 of the Divorce Act, particularly in light of what is now known about Ms. Fitzpatrick's efforts to achieve self-sufficiency and the prospects of her doing so, I am satisfied that Ms. Fitzpatrick continues to have a strong compensatory entitlement as well as a non-compensatory entitlement to spousal support.

What is the appropriate order in terms of amount and duration, going forward?

- [89] For the reasons I have given, I am satisfied that it would be appropriate to set Ms. Fitzpatrick's income at \$75,000 per year for the purpose of calculating the quantum of spousal support going forward. I am not persuaded that there should be any change to Mr. Fitzpatrick's income. Leaving aside the fact that there is nothing in the evidence to suggest the parties considered the scope of the review to encompass changes in Mr. Fitzpatrick's income, as already explained, I am not satisfied that \$110,000 per year fairly reflects his income.
- [90] DivorceMate calculations applying the "without child support formula" of the SSAG to the parties' current circumstances, including an income for Mr. Fitzpatrick of \$170,000 and an income for Ms. Fitzpatrick of \$75,000, yield a support order in the range of \$2,256 to \$3,008 per month with a duration of between 9.5 years and 19 years.
- [91] It is almost trite that a strong compensatory claim is a factor that favours support at the higher end of the ranges for both amount and duration. Ms. Fitzpatrick's needs and Mr. Fitzpatrick's ability to pay also favour the higher end of both ranges.
- [92] In terms of amount, I conclude that spousal support at the high end is required to meet the objectives of spousal support. Again, Ms. Fitzpatrick's compensatory entitlement is particularly strong, even after considering the unequal division of the Family Home. The economic disadvantages of the marriage to her are likely permanent. Mr. Fitzpatrick continues to enjoy the economic advantages of the marriage through his ongoing work for

PGH. He has the ability to pay at the top of the range. There remains a gap between the needs and means of the parties as reflected in the disparity in Ms. Fitzpatrick's standard of living as compared to the standard of living the parties enjoyed during the marriage and as compared to Mr. Fitzpatrick's post-separation standard of living. For these reasons, the amount of ongoing spousal support shall be \$3,000 per month.

- [93] In terms of duration, in my view the order for support should remain indefinite even though the top of the SSAG range is 19 years. This was a long marriage (19 years and 4 months). Ms. Fitzpatrick was almost 46 years old at the time of the separation. More importantly, Mr. Fitzpatrick is continuing to receive substantial benefit from the advantages he realized from the marriage, not only through his ongoing work with PGH, but also from the interest he is about to receive in PGH. Mr. Fitzpatrick deposed that he will be entitled to "future growth" in PGH but he also said its value "is comprised of the Fitz Winery business and underlying assets". The reasonable inference that flows from the evidence as a whole is that those underlying assets were acquired, at least in substantial part, from the proceeds of the sale of Cedar Creek - the very business Ms. Fitzpatrick dedicated herself to during the marriage without knowing that Mr. Fitzpatrick did not have an ownership interest. Although the potential, albeit unquantified, value of PGH was notionally taken into account by Justice Willcock in ordering an unequal division of the Family Home, Ms. Fitzpatrick still has a strong compensatory claim based in part on her direct and indirect contributions to the business operated by that company.

Conclusion

- [94] I have concluded that the spousal support provision in the 2010 Order should be varied to reduce the amount of support to be paid by Mr. Fitzpatrick to Ms. Fitzpatrick, but I am not persuaded that his spousal support obligation should be terminated or made time-limited.
- [95] Commencing June 1, 2020, Mr. Fitzpatrick shall pay spousal support of \$3,000 per month to Ms. Fitzpatrick on the first day of each and every month. The order shall not specify any duration - in other words, this is an indefinite order. It is not necessary to provide in the order that the parties have a right to apply for a variation under s. 17(1) of the Divorce Act, as that follows as a matter of law.
- [96] If the parties wish to speak to costs they may do so if, within 60 days of the release of these reasons for judgment, they contact Supreme Court Scheduling to secure a date for a judicial telephone conference to discuss the process for making submissions on costs in light of the current suspension of regular court operations due to the COVID-19 pandemic.

"Warren J."

The Honourable Madam Justice Warren

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