

CANADA / JUDGMENT

Goldstone v. Clarke

2019 BCSC 243

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 243 Goldstone v. Clarke

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Goldstone v. Clarke,

2019 BCSC 243

Date: 20190225

Docket: E47049

Registry: New Westminster

Between:

Thomas William Goldstone

Claimant

And

Susanne Clarke

Respondent

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for Claimant:

M. Lam

Counsel for Respondent:

T. Baradziej

Place and Date of Hearing:

New Westminster, B.C.

November 22, 2018

Place and Date of Judgment:

New Westminster, B.C.

February 25, 2019

I. Introduction

- [1] The parties to this family dispute bring cross-applications relating to child support and spousal support issues. The issues relate to a separation agreement they entered into several months after their separation in January 2011.
- [2] The separation agreement is undated, but the evidence establishes it was executed by them sometime in June 2011.
- [3] Both applications are brought under Supreme Court Family Rule [SCFR] R. 11-3, which is the summary trial rule. The parties agree that both applications are suitable and should be decided on the summary trial.

II. Factual Background

- [4] The claimant, ("Mr. Goldstone", or "the husband") is presently 53 years of age. The respondent, ("Ms. Clarke", or "the wife") is presently 49 of age.
- [5] They have three children:
 - a) Tanesha, currently 25 years old;
 - b) Taylen, currently 22 years old; and
 - c) Teanna, currently 19 years old.
- [6] The parties began cohabiting in or about August 1988, were married on November 3, 1990, and they separated in January 2011. Upon separation the parties continued to reside together at the former family residence in Surrey until July 1, 2011, when Ms. Clarke moved out. Under the terms of the separation agreement, the husband purchased the wife's equity interest in the family residence by payment to her of \$130,000.
- [7] The parties were divorced by court order dated September 18, 2013. The divorce order was made in a separate action brought by the husband seeking divorce, only. The divorce action was undefended.

- [8] The separation agreement referenced the then applicable Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], the predecessor legislation to the current Family Law Act, S.B.C. 2011, c. 25 [FLA], and provided that the agreement was to be interpreted in accordance with the laws of B.C.
- [9] At the time of the agreement, the children were 18, 15, and 12 years of age. The agreement provided that the parties would have joint guardianship and custody of the children, with equal shared residency, "as may be agreed between Susanne and Thomas from time to time in consultation with the children".
- [10] The agreement provided for child support payments by the husband of \$1,600 per month, and spousal support payments of \$700 per month, (total, \$2,300 per month) to commence when the wife moved out of the home, and transferred her interest to the husband. She departed July 1, 2011.
- [11] The immediately material child support and spousal support provisions of the separation agreement are as follows:

CHILD MAINTENANCE AND SUPPORT

10. (a) For the purposes of this Agreement, it is agreed that the current guideline income of Thomas is \$100,000.00 and the current guideline income of Susanne is \$14,856.00;
- (b) In consideration of the residential arrangements for the children, the provisions of this Agreement and the requirements of the Child Support Guidelines, Thomas shall pay to Susanne as child maintenance for the children, the sum of \$1,600.00 per month commencing on the 1st day of the month following the month in which Susanne vacates the Home pursuant to paragraph 13 of this Agreement, and continuing thereafter pursuant to this Agreement;
- (c) Thomas shall maintain and pay for such basic and extended medical, health and dental insurance coverage for Susanne and the children so long as coverage is reasonably available to him through his employment;
- (d) Thomas and Susanne shall share all other net special and extraordinary expenses for the children proportionate to their incomes; provided that all such expenses shall be discussed and agreed on in advance;
- (e) Susanne and Thomas shall only review the child maintenance provisions of this Agreement in the following circumstances:
- (i) Ten (10) years after the date of this Agreement,
- (ii) Susanne dies;
- (iii) Susanne remarries or lives in a common-law relationship for a period exceeding 3 months;

- (f) For the purposes of child maintenance review, on request each party shall provide to the other party a copy of their most recent Income Tax Return and Notice of Assessment;

SPOUSAL MAINTENANCE

11. (a) In consideration of the terms of this Agreement, and the provisions for property and child maintenance contained therein, Thomas will pay to Susanne for Susanne's support and maintenance the sum of \$700.00 per month commencing on the 1st day of the month after Susanne vacates the Home pursuant to paragraph 13 of this Agreement and on the 1st day of each month thereafter until the first to occur of the following events:
- (i) Susanne dies,
- (ii) Thomas dies,
- [iii] Susanne remarries or lives in a common-law relationship for a period of at least 3 months, after which Susanne's entitlement to further spousal maintenance and support ends;
- (b) Susanne and Thomas shall review the amount and duration of spousal maintenance and support ten (10) years after the date of this Agreement unless spousal support has ended as set out in this Agreement.
12. (a) Subject to this Agreement Thomas acknowledges that his employment and the terms of this Agreement properly and adequately provide for his present and future needs for maintenance and support, and hereby releases and surrenders to Susanne any and all claims for interim or permanent spousal maintenance pursuant to the Divorce Act (Canada) the Family Relations Act, or otherwise at law;
- (b) Thomas shall not be entitled to and shall not apply for spousal support or maintenance from Susanne regardless of any change in the circumstances of either party whether foreseen or unforeseen, radical, catastrophic, causally connected to the marriage or otherwise, including any changes resulting from increasing age, declining health or a change in employment, voluntary or otherwise.
- [12] The parties entered into the separation agreement with the aid of a mediator, Mr. Wayne Stilling, Q.C. They met with him on four occasions, noted in the separation agreement. The final session was on June 3, 2011. Mr. Stilling sent the draft separation agreement to the parties for execution on June 7, 2011. They signed the agreement sometime thereafter. The agreement is not dated but it must have been signed sometime later in the month of June.
- [13] The wife had no independent legal representation or advice. The husband obtained legal advice before signing the agreement.

- [14] As noted, the parties began cohabiting in August 1988, and were married November 3, 1990. At the time the relationship began the wife was working at ICBC, handling telephone claims. The husband was a welder. In June 1998 he began working as a gantry crane operator and driver at Deltaport. In January 2006 he changed employers. He began working for Westshore Terminals as a welder. He continues to work there.
- [15] The wife returned to work part-time with ICBC for approximately six months after their first child was born in 1993. She then resigned, she says, to stay home as a full-time mother and homemaker. As I will explain, the husband takes a somewhat different view of this. What is clear is that she did not return to paid employment during the course of the marriage.
- [16] The wife began suffering from chronic lower back pain in or around August 1999, approximately 6 months after the birth of their third child, Teanna. She had two surgeries to her spine in 2002. In November 2003 she began receiving CPP disability benefits. She continues to have chronic back pain and takes medication daily. Further surgery to her spine may be required.
- [17] The separation agreement recites that she is "disabled from working and receives a Canada Pension Plan long term disability pension in the current annual amount of \$14,856." In the agreement the parties agreed that the recitals to the agreement were correct.
- [18] The wife characterizes the marriage as "traditional" in the sense that she stayed home and raised their three daughters and was primarily responsible for their care, while the husband worked many different shifts including days, evenings and graveyards as a longshoreman. She says that the decision to leave her work at ICBC in order to be a stay-at-home mother was mutually agreed upon. The husband says it was her decision. It is not necessary to resolve this question.
- [19] The husband disputes that the marriage was "traditional". He says his work hours and schedule allowed him to share parenting responsibilities equally. He acknowledges that there was a division of labour in the marriage.
- [20] In the agreement the parties agreed to stipulate that the husband's income "for purposes of" the agreement was \$100,000, though the parties were aware that the husband's income was well in excess of that amount. The husband's 2010 income was \$149,000. Mr. Stilling is deceased, but for these applications the parties agreed that his mediation notes are admissible evidence. The parties agree that the sum of \$100,000 was used as the husband's Guideline income for purposes of the agreement, though his actual income was much higher. The mediator's notes plainly show that the husband's 2010 income was \$149,000 but he sought to utilize \$100,000 for the purposes of child and spousal support. This was done. The husband contended that his base pay was \$90,000 and that if he worked less overtime he could spend more time with the children. The agreement includes some restrictions on the husband's shifts when the children are in his care, subject to consent of the wife.

[21] The wife's actual disability income of \$14,856 was used in the agreement. Her income has remained low. Her income was below \$14,856 in each year since 2011. Her 2017 income was \$10,170.

[22] The husband's income has steadily been well in excess of the \$100,000 amount utilized for purposes of the agreement. His income has been as follows:

2010 - \$149,564.79

2011 - \$138,740.60

2012 - \$174,499.20

2013 - \$167,068.05

2014 - \$179,342.00

2015 - \$196,501.75

2016 - \$150,270.46

2017 - \$211,834.90

[23] His average income for the years 2015-2017 was \$186,202.

[24] There is no evidence as to his projected 2018 earnings.

[25] In early 2013 the wife began cohabiting with Mr. Westley McGeorge. They were married in April 2014. The husband stopped making the payments of \$700 per month spousal support effective May 2013, relying on paragraph 11(a)(iii) of the separation agreement.

[26] In July 2014 the husband ceased making the child support payments of \$1,600 per month under the separation agreement.

[27] In August 2014, the husband brought this action, contending that the children were no longer residing with the mother, they were residing with him, and seeking to have the child support provisions of the separation agreement set aside and replaced with an order of the court, pursuant to s. 150 of the FLA. He sought payment of Guideline child support and s. 7 expenses from the wife. The wife, then self-represented, filed a Response to Family Claim disputing that the children resided with the husband full time and opposing any change in the terms of the separation agreement. She filed a Counterclaim August 26, 2014.

[28] The wife filed the separation agreement with the court July 2, 2014, and registered with FMEP. Via garnishment of the husband's assets, FMEP enforced payment of the \$1,600 per month in child support until February 2018, when the youngest child of the parties turned 19. At that point, FMEP continued to collect \$1,600 per month from the husband, but did not disburse the monies to the wife, for a period of several months. As I understand it, as of September, 2018, FMEP has resumed payments to the wife from previously garnisheed funds.

- [29] On January 25, 2016 the wife filed an Amended Counterclaim in these proceedings, through counsel, seeking continued payment of child support of \$1,600 per month pursuant to the separation agreement, or alternatively child support and spousal support pursuant to the Federal Child Support Guidelines, SOR/97-175 [FCSG] and the Spousal Support Advisory Guidelines [SSAG] retroactive to July 1, 2011.
- [30] However, the proceedings languished. A two day trial scheduled for August 4, 2015 did not proceed. There has been no trial, and no applications to court were made until the present applications were filed in June 2018.
- [31] The wife's present application was filed June 21, 2018. In her application she seeks spousal support in accordance with the SSAG commencing March 1, 2018, or alternative spousal support orders.
- [32] The husband's application was filed June 27, 2018. In his application he seeks a declaration that his obligation to pay child support ended as of April 2014 in accordance with the terms of the separation agreement, or setting aside the child support provisions of the separation agreement and a declaration that his obligation to pay child support ended February 5, 2018.

III. Submissions of the parties

- [33] Both parties urge the court to decide the issues under the summary trial rule. Neither seeks a conventional trial.
- [34] I adopt my comments from *Villeneuve v. Agnew*, 2018 BCSC 546 at para. 38:
- [38] I adopt my comments regarding principles applicable to determining suitability of summary trial determination in family cases set out in *MacCarthy v. MacCarthy* 2014 BCSC 2229 (CanLII); varied 2015 BCCA 496 (CanLII) (on the appeal, no issue was taken with the question of suitability):

75 Supreme Court Family Rule 11-3 permits a party to apply for judgment on summary trial. Rule 11-3(15) states that the court may grant judgment after a summary trial unless:

- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application.

76 Both of these conditions must be satisfied for the court to grant judgment after a summary trial. In determining whether the court ought to grant judgment, the test set out in relation to Rule 18A of the former Rules of Court, 1990 in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 1989 CanLII 229 (BC CA), 36 B.C.L.R. (2d) 202 (C.A.) is instructive. The test is stated by Chief Justice McEachern, at p. 215, as follows:

The test for R. 18A, in my view, is the same as on a trial. Upon the facts being found the chambers judge must apply the law and all appropriate legal principles. If then satisfied that the claim or defence has been established according to the appropriate onus of proof he must give judgment according to law unless he has the opinion that it will be unjust to give such judgment.

77 McEachern C.J.B.C. listed the following factors, at p. 214, a court is entitled to consider in determining whether it would be unjust to grant judgment:

...the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

78 To this list has been added other factors, including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: see *Gichuru v. Pallai*, 2013 BCCA 60 (CanLII) at para. 31.

79 The court must also consider the objectives of the SCFR, codified in Rule 1-3. Rule 1-3(1)(b) provides that an object of the SCFR is to "secure the just, speedy and inexpensive determination of every family law case on its merits." Rule 1-3(2) provides that securing that object includes conducting the family law case in ways that are proportionate to: (a) the interests of any child affected, (b) the importance of the issues in dispute, and (c) the complexity of the family law case.

80 The Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 (CanLII) recently called for a shift in litigation culture to utilize alternative tools for dispute resolution to improve access to justice. Summary trial is one such tool.

81 While *Hryniak* emphasizes the importance of proportionality and the balancing a judge must undertake when determining a matter's suitability for summary trial, it does not alter the former approach that had developed in the case law in British Columbia: see *N.H. v. Aitken Estate*, 2014 BCSC 419 (CanLII) at para. 33. In *Ghavim v. Jamali*, 2014 BCCA 21 (CanLII) at para. 32, Mr. Justice Willcock cautioned that, when proceeding summarily, the court must "recognize the preeminent objective of determining cases fairly on their merits".

[35] In her Application Response and on the hearing of the application, the wife agrees with the husband that all of the children including the youngest, Teanna, are no longer children of the marriage or children within the meaning of s. 146 of the FLA, and therefore child support should be terminated effective February 5, 2018, provided that the question of whether child support should resume for Teanna may be reviewed if Teanna should return to school or otherwise resume the status of a child or child of the marriage. The husband agrees to this.

- [36] The husband contends that, if calculated by reference to his actual income and the actual residency of the children (on his evidence) he has overpaid child support, by \$62,049. He does not seek repayment of the alleged overpayment.
- [37] In effect, then, the husband seeks "review" of his child support obligation pursuant to para. 10(e)(iii) of the agreement, (remarriage of Susanne), as that is the only ground upon which his child support can be ended, in the circumstances. Otherwise, his obligation to pay child support at \$1,600 per month continues for 10 years from the date of the agreement, which would extend his obligation to pay child support to June 2021.
- [38] However, the wife's position on cessation of child support is contingent upon spousal support being paid effective March 1, 2018. The husband argues that no spousal support is payable, pursuant to the terms of the separation agreement.
- [39] The wife seeks spousal support retroactive to March 1, 2018.

IV. Analysis

- [40] A question arises as to which legislation should be applied, the FLA or the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. Both applications reference both statutes. The parties argue that the principles are very similar under both statutes and therefore the outcome would be the same under either statute. I agree that in this case at least, as I view the matter, the outcome would not differ.
- [41] Generally, if the parties seek relief under both legislative schemes of the DA and the FLA, the federal DA is considered paramount: see *Venables v. Venables*, 2018 BCSC 1736 at para. 141.
- [42] However, as the issues here essentially relate to the separation agreement, which expressly references the FRA, the predecessor family legislation in B.C., and stipulates that the law of B.C. applies to interpretation of the agreement, it seems reasonable to apply the provisions of the FLA, in this case. Notwithstanding principles of paramountcy, it may be appropriate to apply a pragmatic approach in determining which legislation should govern: *S.L.D. v. W.A.D.*, 2016 BCSC 616 at para. 308, citing *A.K. v. M.K.*, 2013 BCSC 1275; *B.D.M. v. A.E.M.*, 2014 BCSC 453.
- [43] Sections 160-165 of the FLA are relevant. Section 164 is as follows:

Setting aside agreements respecting spousal support

- 164 (1) This section applies if spouses have a written agreement respecting spousal support, with the signature of each spouse witnessed by at least one person.
- (2) For the purposes of subsection (1), the same person may witness each signature.

- (3) On application by a spouse, the court may set aside or replace with an order made under this Division all or part of an agreement described in subsection (1) only if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:
- (a) a spouse failed to disclose income, significant property or debts, or other information relevant to the negotiation of the agreement;
 - (b) a spouse took improper advantage of the other spouse's vulnerability, including the other party's ignorance, need or distress;
 - (c) a spouse did not understand the nature or consequences of the agreement;
 - (d) other circumstances that would under the common law cause all or part of a contract to be voidable.
- (4) The court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the agreement with an order that is substantially different from that set out in the agreement.
- (5) Despite subsection (3), the court may set aside or replace with an order made under this Division all or part of an agreement if satisfied that none of the circumstances described in that subsection existed when the parties entered into the agreement but that the agreement is significantly unfair on consideration of the following:
- (a) the length of time that has passed since the agreement was made;
 - (b) any changes, since the agreement was made, in the condition, means, needs or other circumstances of a spouse;
 - (c) the intention of the spouses, in making the agreement, to achieve certainty;
 - (d) the degree to which the spouses relied on the terms of the agreement;
 - (e) the degree to which the agreement meets the objectives set out in section 161 [objectives of spousal support].
- (6) Despite subsection (1), the court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.
- [44] The parties make arguments that engage s. 164(3) of the FLA, or the equivalent principles of law under the DA.
- [45] For example, the wife argues that she did not have legal advice, due to impecuniosity, and believed that the husband's obligation to pay \$2,300 per month (or at least \$1,600 per month; her evidence is somewhat ambiguous on this) would simply continue for 10 years. She says that she agreed to use \$100,000 as his income only because she wanted the security of receiving at least \$1,600 per month for 10 years. She says she so understood the agreement.

She says in addition that she was under pressure in that she had agreed to purchase a townhouse, and she needed the funds to close the purchase agreement by June 30. She says that:

16. We had four mediation sessions with Mr. Stilling on April 19, April 21, April 27 and June 3, 2011.

[]

17. The mediation sessions were getting increasingly difficult to come to an agreement as Tom knew I was on a tight time constraint with respect to a townhouse I had made an offer on and I needed the agreement finalized as the completion and possession dates were at the end of June 2011.

18. On May 20, 2011, I emailed Mr. Stilling asking for his assistance in coming to a fair deal with the Claimant. I told him about how I was under a lot of stress, as well as having anxiety attacks and not being able to sleep well.

- [46] The husband states that he was unaware of the fact that the wife had bought or made an offer on a townhouse until the final mediation session of June 3, 2011. He says he was unaware that she did not obtain independent legal advice, and assumed that she did, in line with the recommendation of Mr. Stilling. He states that he was unaware that she was not able to afford legal advice. He argues that she was to receive \$137,000 from him under the separation agreement, and she apparently could afford to purchase a townhouse.

- [47] The wife's evidence potentially engages FLA s. 164(3) (b) and/or (c). In my view it is difficult to resolve these kinds of questions on a summary trial application.

- [48] However, in my view, it is not necessary that I do so in the circumstances of this case. In my view, FLA s. 164(5) applies. In relation to spousal support, the agreement is significantly unfair, having regard to the factors set out in s. 164(5), and in particular, s. 164(5)(e), which references s. 161.

- [49] The objectives of spousal support are set out in s. 161, which is as follows:

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;

- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [50] Section 164 "essentially codifies the analysis in *Miglin v. Miglin*, 2003 SCC 24" which provides for the framework for assessing contractual arrangements for spousal support: *Ashton v. Ashton*, 2015 BCSC 790, at para. 43 [Ashton].
- [51] In my view, at the time of the separation agreement, the wife very clearly was entitled to spousal support, on both compensatory and non-compensatory grounds, which the relevant provisions of the separation agreement almost entirely failed to address.
- [52] Although one may quibble with the application of the word "traditional", the fact is that within this marriage, the wife left her employment and devoted herself primarily to the raising of the children and domestic matters. It was a long marriage, with three children. She became disabled, and when the marriage ended she was unemployed. She had not worked outside the home for many years, and had no career. By contrast, the husband had a stable, highly remunerative career, with no real money concerns.
- [53] I do not mean to denigrate or belittle the husband's evidence about his degree of involvement with raising the children and maintaining the household. However even if all he says in that regard is true, the wife still had a strong compensatory claim. His career continued to flourish, while hers was abandoned in favour of family life. It is reasonable to infer as I do that because she was always available to look after the children and their needs, he had flexibility and freedom to work whatever shifts or jobs that were available to him. I find that she contributed at least indirectly to the husband's career success.
- [54] Support for this is found in Mr. Goldstone's affidavit. In justifying the \$100,000 figure, he says:
21. During the April 21, 2011 mediation session with Mr. Stilling, I recall that we had discussed my 2010 Line 150 income being approximately \$149,000. However, this amount was not realistic as during the marriage, I was able to work substantial overtime hours and my base salary at the time was approximately \$90,000. With the separation and the fact that Ms. Clarke and I had agreed to a week on/week off schedule for parenting the Children, I was uncertain at that time whether I would continue to work the same amount of overtime hours and graveyard shifts while concurrently parenting the Children on an equal basis.
- [55] At separation, her needs claim was also clear. She had no income and no prospects. This has not changed.

- [56] In effect, the wife argues that the child support was at least potentially a form of spousal support in the guise of child support, that is, even if the children's residency were to change, the combined total payable monthly was to remain payable. The language of the agreement, while peculiar, gives some support for this interpretation. Consistent with this, as noted, she does not seek retroactive spousal support prior to March 1, 2018, the same date that she says child support should end.
- [57] The inadequacy of the spousal support provisions of the agreement is even more glaring if, as the husband asserts, he was entitled to discontinue child support in the event the children resided primarily with him. The agreement had no such terms.
- [58] The agreement provided for spousal support of \$700 per month. The husband paid spousal support for 23 months. His total spousal support payment has been \$16,100. Even standing alone, this amount is shockingly low, after a marriage or marriage-like relationship of 22.5 years, and in all of the circumstances. To put this in perspective, even at \$100,000, mid-point lump sum spousal support pursuant to SSAG would have required an after tax (that is, non deductible) payment of \$368,627 from the husband.
- [59] He argues that at \$100,000, with child support of \$1,597, the low end SSAG amount in 2011 was \$797; therefore, the spousal support was somewhat close to the SSAG low range. However, this ignores several things.
- [60] First, at \$100,000, the SSAG ranges were from \$797 (low) to \$1,682 (high). The midpoint was \$1,404. He does not point to any facts which would justify the lowest amount. Therefore, pursuant to the agreement, spousal support was payable at less than one-half of the midpoint, for no identified reason.
- [61] Second, his actual income in the 2010 was approximately \$150,000, thus 50% higher than the sum used in the agreement. There could have been no uncertainty about his prior year's income. The wife argues that at his actual 2011 income of \$138,741, mid range spousal support would have been \$2,041, with child support of \$2,624. On this basis, spousal support was 34% of the mid-range, even assuming that the husband was paying much more in child support.
- [62] Third, the agreement provided for outright termination of any spousal support upon re-partnering. This is inconsistent with the SSAG. Section 14.7 of the SSAG provides as follows:

14.7 The Recipient's Remarriage or Re-partnering

The remarriage or re-partnering of the support recipient does have an effect on spousal support under the current law, but how much and when and why are less certain. There is little consensus in the decided cases. Remarriage does not mean automatic termination of spousal support, but support is often reduced or suspended or sometimes even terminated.

Compensatory support is often treated differently from non-compensatory support. Much depends upon the standard of living in the recipient's new household. The length of the first marriage seems to make a difference, consistent with concepts of merger over time. The age of

the recipient spouse also influences outcomes.

In particular fact situations, usually at the extremes of these sorts of factors, we can predict outcomes. For example, after a short-to-medium first marriage, where the recipient spouse is younger and the support is non-compensatory and for transitional purposes, remarriage by the recipient is likely to result in termination of support. At the other extreme, where spousal support is being paid to an older spouse after a long traditional marriage, remarriage is unlikely to terminate spousal support, although the amount may be reduced.

An ability to predict in some cases, however, is not sufficient to underpin a formula for adjustment to the new spouse's or partner's income. Ideally, a formula would provide a means of incorporating some amount of gross income from the new spouse or partner, to reduce the income disparity under either formula. Any such incorporation could increase with each year of the new marriage or relationship. Where the recipient remarries or re-partners with someone who has a similar or higher income than the previous spouse, eventually--faster or slower, depending upon the formula adopted--spousal support would be extinguished. Where the recipient remarries or re-partners with a lower income spouse, support might continue under such a formula until the maximum durational limit, unless terminated earlier.

We have been unable to construct a formula with sufficient consensus or flexibility to adjust to these situations, despite considerable feedback that a formula would be desirable. In this final version, we still have to leave the issues surrounding the recipient's remarriage or re-partnering to individual case-by-case negotiation and decision making.

[Emphasis Added.]

[63] Section 14.7 quoted above is found in section 14 of the SSAG, headed "Variation, Review, Remarriage, Second Families." Since re-partnering does not automatically terminate spousal support, the agreement is fundamentally inconsistent with the SSAG, in the circumstances of this case. The agreement might have provided for a review in the event of re-partnering. Automatic termination is significantly unfair.

[64] When the parties separated, Ms. Clarke was just over 42 years of age. The relationship was about 22.5 years long. This means that under SSAG, on a without child support basis, the duration of support would be a minimum of one half the length of the marriage, or a maximum of the length of the marriage. It may be that the support would be indefinite under the rule of 65: SSAG s. 7.5. Under the with child support scenario, duration would likely have been indefinite, subject to review and variation: SSAG s. 8.5.

[65] Ms. Clarke states that the income of Mr. McGeorge was \$55,000 at the time of the agreement. No further information is provided about his income. On the basis of \$55,000, the combined household income of the wife has been far lower than that of the husband.

[66] I am satisfied, therefore, that the wife has established the grounds for the court to set aside or replace the spousal support provisions of the separation agreement with a court order, under FLA section 164(5).

[67] My analysis would be the same under the DA. I discussed the principles under the DA in *J.A.F. v. J.J.F.*, 2016 BCSC 300, at paras. 172, 176-177:

172 The leading decision with respect to the weight or deference given to a separation agreement in relation to an application for spousal support under the DA is *Miglin v. Miglin*, 2003 SCC 24 [Miglin]. That case dealt with, as here, an initial application for spousal support under s. 15.2(1) of the DA.

176 The approach prescribed in the majority judgment (Bastarache and Arbour JJ. in *Miglin* was summarized by Bastarache J. (for the majority) in *Hartshorne*, as follows:

41 At paras. 79 to 91, we set out a two-stage approach requiring that courts look first to the circumstances of the negotiation and execution of the agreement to determine if one party took advantage of the other's vulnerability, or if the substance of the agreement at formation failed to comply substantially with the general objectives of the Divorce Act. Second, viewed from the time the application is made, courts should inquire if the agreement still reflects the original intentions of the parties and if it is still in substantial compliance with the objectives of the Divorce Act.

177 In the first stage, then, there are two inquiries: (1) the court must examine the "the circumstances in which the agreement was negotiated and executed to determine whether there is any reason to discount it." (*Miglin*, para. 80.), and (2), if the court is satisfied that the conditions under which the agreement was negotiated are satisfactory it must examine the substance of the agreement, in order to determine the extent to which the agreement takes into account the factors and objectives listed in the DA, thereby reflecting an equitable sharing of the economic consequences of marriage and its breakdown.

[68] At formation the separation agreement failed to comply substantially with the general objectives of the DA. When viewed from the time the application is made, the agreement is not in substantial compliance with the objectives of the DA.

[69] I am satisfied that the spousal support provisions of the separation agreement should be replaced with an order.

[70] However, I have inadequate submissions to properly decide upon the terms of a final order for spousal support payable by the husband commencing March 1, 2018. The parties did not address this question on the one-day application that I heard. I may also lack relevant information, such as the income of Mr. McGeorge.

[71] I therefore adjourn that aspect of Ms. Clarke's application. The parties are at liberty to set the continuation of the application before me, should they be unable to resolve the remaining issue by agreement.

[72] Ms. Clarke is dependant on the payment of \$1,600 per month which in effect has been relied upon by her as spousal support. I am satisfied that Ms. Clarke remains entitled to spousal support at this time.

[73] I therefore order that Mr. Goldstone pay spousal support in the amount of \$1,600 per month, on an interim basis. The spousal support payments are payable retroactively to March 1, 2018, to coincide with the termination of his child support obligations, and with the youngest child Teanna having ceased to be a child or child of the marriage in February 2018. The spousal support payments will continue until further order of the court. Mr. Goldstone's child support obligations under the agreement are varied so that they terminate February 28, 2018.

V. Conclusion

[74] Orders are made in accordance with these reasons.

[75] Ms. Clarke has been substantially successful on these applications and is awarded costs, subject to relevant offers to settle under SCFR, R. 11-1.

[76] The matter of costs of the further or continued application (if required) for determination of the final spousal support order will be the subject of a separate costs order.

"Verhoeven J."

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