
CANADA / JUDGMENT

J.W.J. McC. v. T.E.R.

2007 BCSC 252

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 252 J.W.J. McC. v. T.E.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.W.J. McC. v. T.E.R.,

2007 BCSC 252

Date: 20070223

Docket: E031794

Registry: Vancouver

Between:

J.W.J. McC.

Plaintiff

And

T.E.R.

Defendant

Before: The Honourable Madam Justice Sinclair Prowse

Reasons for Judgment

Counsel for the Plaintiff:

P.M. Daykin

Counsel for the Defendant:

P. Daltrop

Date and Place of Hearing:

December 21, 2006

Vancouver, B.C.

- [1] On February 13, 2007, I advised the parties as to my decision on their applications. Moreover, because much of the decision pertains to mathematical calculations, I advised them that I would provide them with written Reasons for Judgment. These are those Reasons.
- [2] In the course of preparing these written Reasons I discovered a mathematical mistake. In particular, rather than the quantum of the spousal maintenance being \$3,857 per month, it should be \$3,772 per month.

(I) NATURE OF THE PROCEEDING AND RELIEF SOUGHT

- [3] This hearing pertains to the review, pursuant to the terms of a Separation Agreement (the "Agreement"), of the payment of spousal maintenance. The parties separated in 2000 after 19 years of marriage. During the following year, they entered into the Agreement. The Agreement included a term that the Husband would pay the Wife spousal support, and a further term that the Wife's entitlement to, and the quantum of, that support "shall be reviewed on the fifth anniversary of the date of this Agreement" - namely, on August 9, 2006.
- [4] As the parties were unable to reach an agreement as to whether spousal maintenance should continue, pursuant to the terms of the Agreement they applied to the Court to resolve this dispute.
- [5] In this hearing, the Husband seeks a termination of the spousal maintenance payment, and a termination of his corresponding obligation to provide life insurance as security for that spousal maintenance. Alternatively, he seeks a reduction in the amount of spousal maintenance. Lastly, he seeks an order that whichever relief is granted, that it be made effective as of August 1, 2006.
- [6] The Wife, on the other hand, seeks an order that the quantum of the spousal maintenance be increased.
- [7] Initially, the Wife had also included an application for the payment of arrears of spousal maintenance. Since August 9, 2006, on the advice of counsel, the Husband has continued to make spousal maintenance payments to the Wife. Specifically, since that time he has forwarded all of these payments to his counsel who has held them in trust pending the outcome of this hearing. At the conclusion of this hearing, I ordered that these monies be paid to the Wife without prejudice to the Husband's argument that the spousal maintenance payments cease as of August 9, 2006.
- [8] The Wife also brought an application to increase child maintenance, but that application was adjourned generally by consent at the beginning of this hearing.

II. ISSUES

- [9] As is set out subsequently in these Reasons, I have concluded that the Wife suffered an economic disadvantage that arose as the result of the parties' marriage and its breakdown, and that she is entitled to be compensated for that loss.
- [10] The issue, therefore, was whether, having regard to the full extent of this disadvantage, the Wife had been fully compensated for this disadvantage through the reapportionment of the parties' family assets and the payments of spousal maintenance made over the last 5½ years.
- [11] For reasons which follow, I have concluded that she has not been fully compensated for this loss, and that she is entitled to spousal maintenance in the amount of \$3,772 per month for an indefinite period. I have also ordered a review of that entitlement and quantum to occur after she turns 60 years old - that is, after March 6, 2020.
- [12] This decision was based solely on a compensatory (as opposed to a non-compensatory or need) analysis.

(III) BACKGROUND CIRCUMSTANCES

- [13] The parties were married for 19 years before they separated in 2000, and for about 21½ years before they divorced in January 2002. They were both very young when they married, the Husband being almost 22 years old, and the Wife being 21 years old.
- [14] When the parties met, the Wife had been going to Langara College, taking courses with the intention of becoming a nurse. She subsequently withdrew from these studies, and the parties went travelling for 4 months. Upon their return, rather than going back to school, she started working at MacMillan Bloedel in corporate purchasing as a data entry clerk earning minimum wage.
- [15] When the parties married, which was a year or so later, she continued to work at this job; the Husband had just finished his undergraduate degree and was starting law school.
- [16] During their first few years of marriage, while the Husband was at law school, the parties supported themselves through the Wife's earnings, student loans, and the Husband's earnings from summertime employment.
- [17] After the Husband graduated from law school and began to work as a lawyer, the parties began their family. Their oldest child (a daughter) was born in 1985. The Wife was 24, almost 25 years old, and the Husband was 25 years old. Over the next 4 years, the parties completed their family with a son who was born in 1986, and a second daughter who was born in 1989.
- [18] By agreement, the Wife withdrew from employment outside the home after the birth of their first child (which was in 1985). From then on until the time that the parties separated (that is, the next 15 years), her role was to manage the household and be the primary caregiver to their children. In the meantime, the Husband worked long hours and developed a very successful practice.

- [19] In 1986, the parties moved from their rental accommodation to a farm in the lower mainland area. This property was owned by the Wife's parents. The parties were able to live there rent-free in exchange for managing the farm. Additionally, the Wife was able to generate approximately \$3,000 annually in income from this property.
- [20] The parties lived on the farm for 9 years until 1995. In 1995, the Wife received an inheritance of approximately \$685,000 which the parties used to purchase a home in Vancouver (this became the matrimonial home) and a recreational property on Mudge Island. In addition, she received a $\frac{1}{4}$ interest in the farm property. The parties lived in the matrimonial home until they separated in November 2000.
- [21] At the time that they separated the Husband was just about 41 years old, and the Wife was 40 years old. The children were 15, 14, and 11 years old.
- [22] About 8 months after they separated, the parties entered into the Agreement. In it they set out the agreements that they had reached with respect to the care and maintenance of their children, the division of their family assets, and the payment of spousal maintenance.
- [23] As far as the children were concerned, the parties agreed that they be in their joint custody and guardianship, their primary residence being with the Wife. Based on an income for Guideline purposes of \$400,000 per year, the Husband agreed to pay child support in the amount of \$5,409 per month, plus an annual lump sum payment of \$10,000.
- [24] In addition, he agreed to make monthly contributions of \$160 to a scholarship trust fund. If the children attended post-secondary institutions, and if they continued to live with the Wife, he would continue to pay child support as well as any costs for that post-secondary education not covered by the scholarship fund.
- [25] If, on the other hand, the children did not reside with the Wife while attending post-secondary education, the Husband agreed that he would only pay child support to the Wife for the portion of the year that that child was living with the Wife, and that he would pay all post-secondary education expenses not met by the scholarship fund.
- [26] As far as their family assets are concerned, at the time that the parties separated they estimated their family assets to have a value of approximately \$2,251,500, comprised of: the estimated value of the family home valued at \$800,000; the Wife's $\frac{1}{4}$ interest in the Wife's family's former farm valued at \$687,500 (this being the average of the range of the value of this asset as valued between \$625,000 and \$750,000); the two vehicles valued at \$65,000 (one being valued at \$40,000 and the other being valued at \$25,000); the Husband's interest in his law firm valued at \$314,000; the Husband's interest in investments made with his law partners valued at \$50,000 (as a minimum; some of the investments were not valued); and the parties' two RRSPs totalling \$335,000 (being \$220,000 and \$115,000, respectively). They also had \$220,000 in debt which reduced the total value of their assets to \$2,031,500.

- [27] The division of these assets agreed on by the parties distributed approximately a 66% interest to the Wife and a 34% interest to the Husband.
- [28] Specifically, using the valuations at the time of the division of the family assets, the Wife received \$1,347,500 worth of the family assets, comprised of: a ½ interest in the family home valued at \$400,000; the ¼ interest in the farm property valued at \$687,500; a vehicle valued at \$40,000; and her RRSP valued at \$220,000.
- [29] The Husband received \$904,000 worth of family assets comprised of: a ½ interest in the family property valued at \$400,000; a vehicle valued at \$25,000; an RRSP valued at \$115,000; his interest in his law practice valued at \$314,000; and his interest in the investments made with his partners valued at \$50,000. However, he took full responsibility for the family debt of \$220,000, thus reducing the value of his interest to \$684,000.
- [30] No valuation was given for some of the family assets. For example, the furnishings in the family home and some of the investments which the Husband held jointly with his law partners (the furnishings were distributed to the Wife and the interest in these investments to the Husband). Given the fact that the parties did not include these valuations in the Agreement, I have assumed whatever the value of these assets, that value would not have materially changed the interests that they each received from their family assets.
- [31] The parties also had a recreational property on Mudge Island which was valued at \$250,000. I did not include it in the analysis of the division of the parties' family assets because they agreed that this property was to be distributed to their children, the Husband holding it in trust for them. Though he has the use of it, he has also the responsibility of financing its maintenance. I treated these factors as balancing each other out, giving this property no value for the purposes of this analysis.
- [32] With respect to spousal maintenance, the parties agreed that the Husband would pay the Wife \$2,841 per month, plus an additional annual payment of \$10,000 payable on November 30, totalling \$44,092 per year. Further, it was agreed that these payments would be taxable in the Wife's hands and deductible in the Husband's hands.
- [33] It was also agreed that the Wife's "entitlement to, and the quantum of, spousal maintenance shall be reviewed on the fifth anniversary of the date of this Agreement. During such review and pending either an agreement between the parties or a Court Order [the Husband] shall continue to pay [the Wife] the sums required by sub-paragraph 5.3 hereof" (namely, the \$2,841 per month and the annual \$10,000 lump sum payment).
- [34] In addition, as security for child support and spousal support, the Husband was to maintain and pay all premiums on a term life policy or policies having a total death benefit of no less than \$600,000, naming the Wife as the beneficiary. The requirement for, and the quantum of, this life insurance coverage shall be reviewed by the parties at the same time as the review of spousal maintenance.

- [35] Since the Agreement was made, the assets have been distributed in accordance with it and the spousal maintenance has been paid.
- [36] Both of the parties have remarried. They have also both purchased new homes which are located across the street from each other.
- [37] The Husband remarried in February 2002. His wife is a lawyer. They now have two young children. His new wife has withdrawn from the workforce indefinitely to look after them.
- [38] The Wife remarried in the summer of 2004, having lived together with her new husband for about a year before that. He is a businessman, operating his own business. He has two children who live with him and the Wife a couple of days each week.
- [39] As far as the present financial situation of the parties is concerned, the Husband's law practice has continued to do well. His income now fluctuates between \$600,000 and \$700,000 a year. In the last four years his assets have grown from \$684,000 to a present value of about \$2,077,944 - the assets having a total value of \$2,884,500 minus \$449,556 in debt, and minus \$357,000 for the Mudge Island property, which belongs to the children.
- [40] The total value of the Wife's asset is slightly higher than that of the Husband's, being about \$2,435,400 (that being the total value of the assets of \$2,859,400 minus \$424,000 of debt). Included in these assets are the net sale proceeds generated from the sale of the Wife's $\frac{1}{4}$ interest in the family farm. This asset had a much greater value than was estimated by the parties at the time of separation.
- [41] The parties became aware of the greater value of this asset when it was sold last year. The net proceeds of that sale were \$1.5 million, after the payment of capital gains and other expenses. The asset was worth \$812,500 more than the parties estimated it to be worth when they divided their family assets.
- [42] As was touched upon earlier in these Reasons, the Wife did not work outside of the home for most of the marriage. When they separated her only independent source of income was \$6,000 that was generated from the farm business.
- [43] In the year following their separation, she took several part-time university courses hoping that would eventually lead to entry into a nursing program. However, she abandoned that after finding that she could not manage that and tend to her childcare responsibilities. (The children were then 15, 14, and 11 years old. One of the children in particular was having difficulty adjusting to the changes in the family).
- [44] Two years after the parties separated, she worked for a short time on a part-time basis in a clerical position in a business owned by her present husband. Over a year later, she left that employment to enter a commercial photography program (the program extended from September 2003 until August 2004). At that time, the children were 18, 17, and 14 years old. The parties' oldest daughter was in her first year of university in Ontario; their son was in Grade 12; and their youngest daughter was in Grade 9.

[45] Since completing this course 2 years ago, the Wife has been operating a photography business from her home - coordinating this business to meet her childcare responsibilities. The business has gradually been growing. Though the

Wife is generating income from her photography business, presently it is modest. Specifically, although the gross income was \$15,850.00 in 2005, the net income was \$239. For this year, she estimates that her earnings will be \$21,000, with a similar level of expenses as were incurred in 2005. Therefore, her net earnings will be about \$6,000.

[46] Their children are now 21, 20, and 17 years old. Their oldest daughter is just finishing her undergraduate degree; their son is in his third year of university; and their youngest daughter is in Grade 12.

[47] Both of the two oldest children are attending university outside of the lower mainland. They do not reside with the Wife on a full-time basis except in the summer and on holidays. At this point, it is unclear where the youngest child will be residing next year.

(IV) ANALYSIS AND DECISION

[48] As the Agreement provides for a review (as opposed to a termination of spousal maintenance); as the respective applications of the parties are not inconsistent with the terms of that agreement; and as they do not constitute a variation or modification of it, the process set out by the Supreme Court of Canada in *Miglin v. Miglin*, [2003] 1 S.C.R. 303 is not applicable.

[49] Rather, as was set out in *McEachern v. McEachern*, 2006 BCCA 508, the process to be followed in this type of application is to firstly determine whether the

conditions precedent to a review under the Agreement have been satisfied and, if so, to do an analysis in accordance with s.15.2 of the Divorce Act, taking into account the Agreement as one of the relevant considerations. (In the present case, there is no dispute that the conditions precedent to the review in the Agreement have been satisfied. The only condition precedent was that the review not occur before August 9, 2006).

[50] In other words, "there is no threshold burden on either party of establishing a material change in circumstances (as there would be on an application to vary under s.17(1) of the [Divorce] Act)". The purpose of the review is "not simply to determine whether spousal support should be terminated ... but to determine the appropriate quantum and duration of support if he [the trial judge] concluded that support should continue": *Tedham v. Tedham*, 2005 BCCA 502.

[51] To do the analysis required under s.15.2 of the Divorce Act (that is, to determine the issue of entitlement to spousal maintenance and, if that entitlement is established, to determine the quantum and duration), the Court must, using the conceptual framework provided by the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 S.C.R. 813 and in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, consider the factors and objectives set out under that section of the statute: *W. v. W* (2005), 19 R.F.L. (6th) 453 (B.C.S.C.).

[52] The conceptual framework set out in *Bracklow* and *Moge* is that entitlement to spousal maintenance may arise on any of three grounds - that is, on contractual

grounds, compensatory grounds, and/or non-compensatory grounds. In determining whether any of these grounds have been established, the Court must consider the factors and objectives set out under s.15.2 of the Divorce Act:

Section 15.2(4) provides that the factors to be considered are:

... 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.

Section 15.2(6) provides that a spousal support order should:

- (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 is practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[53] Applying these principles to this case, I am satisfied that the Wife suffered an economic disadvantage arising from the marriage and its breakdown, and that she is entitled to be compensated for that loss.

[54] Through the joint efforts of the parties, they enjoyed a comfortable lifestyle during their marriage. Throughout their long marriage their lives were financially intertwined.

[55] The parties were very young when they married (the Wife was 21 years old, and the Husband was almost 22 years old). In the first few years of their marriage, rather than acquiring marketable skills through post-secondary education, the Wife worked at a minimum wage

job to support herself and the Husband while he attended law school. She continued with that employment until he finished articling and they decided to start their family. After their first child was born, she withdrew from the workforce and did not work outside the home again during their marriage. Rather, for the last 15 years of their marriage her role was to care for the children and manage the household.

- [56] Because she was managing their household and caring for the parties' three children, the Husband was able to devote himself to developing and maintaining a very successful law practice.
- [57] When the parties separated, the Wife was a 40 year-old woman who was unemployed; had minimal marketable skills; and had ongoing childcare responsibilities. (The Wife continued to have the primary care of the children after the parties separated. As was recognized in such decisions as *W. v. W.*, *supra*, and *Brockie v. Brockie* (1987), 5 R.F.L. (3d) 440 (Man. Q.B.) *aff'd on appeal* (1987), 8 R.F.L. (3d) 302, this responsibility requires the adoption of a lifestyle which, in turn, places limitations on employability).
- [58] The situation of the Husband when the parties separated, on the other hand, was somewhat different. He was almost 41 years old. He had a well-established and lucrative law practice. He was earning an income of \$400,000.
- [59] Given all of these circumstances, I am satisfied that as a result of their roles in their marriage, the Wife suffered an economic disadvantage while the Husband enjoyed an economic advantage and that, because the Wife continued to have primary care of the children after they separated (the children were then 15, 14, and 11 years old), her economic disadvantage and the Husband's economic advantage arising from their roles during the marriage continued after its breakdown.
- [60] Upon considering these conclusions in the context of s.15.2 of the Divorce Act and the concepts set out in *Bracklow and Moge*, I am satisfied that the Wife is entitled to be compensated for this economic disadvantage as it arose from the marriage and its breakdown.
- [61] As was set out earlier in these Reasons, since their separation the parties' assets have been reapportioned in the Wife's favour and she has received spousal maintenance. Assuming that the reapportionment was done solely to compensate her for the economic disadvantage that she had suffered as a result of the marriage and its breakdown, and applying the principles as set out in *Tedham*, the issue is whether, having regard to the full extent of the economic disadvantage suffered by the Wife as a result of the marriage and its breakdown, she has already been fully compensated for it through the reapportionment of the family assets and the spousal maintenance payments made over the last 5½ years.

- [62] In British Columbia, compensatory support as articulated in *Moge* has been interpreted to mean that "in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer the marriage lasts, the more intertwined the economic and non-economic lives of the spouses become": *W. v. W.*, *supra*.
- [63] Consequently, in cases in which the parties have been married a long time and their financial lives have been intertwined (that is, in cases such as the present one), the full extent of the economic disadvantage suffered by a spouse is the shortfall between the income that that spouse is able to generate through reasonable efforts to become and remain self-sufficient, and the income needed to sustain a standard of living commensurate with the standard of living that was enjoyed during the marriage.
- [64] Therefore, to decide whether the Wife has been fully compensated for this loss, a determination must be made as to the extent of that loss at the time of separation and the extent to which she has been compensated.
- [65] To decide the full extent of her economic disadvantage, a determination must be made as to the income that she could generate at the time of the separation and the shortfall between that amount and the amount needed to sustain a standard of living comparable to the marital standard of living.
- [66] Given that the intention of the Spousal Support Advisory Guidelines is to calculate the range of the shortfall in the income of the recipient spouse needed to sustain if not the same standard of living enjoyed during the marriage, at least a standard of living equal to the payor spouse, the Guidelines provide a reliable mechanism with which to make this calculation.
- [67] At the time of their separation, the only means that the Wife had to generate income was through the family farm and that farm income was \$6,000 per year. Given her lack of skills and childcare responsibilities, it would take time before she could acquire the skills that would enable her to generate a higher income.
- [68] The Husband was earning \$400,000 or more. Because the Guidelines do not provide for a payor income in excess of \$350,000, for the purposes of this calculation I set his income at \$350,000.
- [69] Using these amounts (that is, an annual income of \$6,000 for the Wife and of \$350,000 for the Husband) on a "with 3 children" basis, the amount needed by the Wife to supplement her income so that she could sustain a standard of living comparable to the marital standard of living (it is, in fact, slightly less than the marital standard of living as it is based on an income of \$350,000 rather than \$400,000) is \$78,168 to \$95,496.
- [70] As far as the appropriate amount within the range is concerned, I concluded that it should be at the highest end of the range because the Husband's income was more than \$350,000, and because the parties spent most of that income on their lifestyle. A review of their financial situation when they separated reveals that most of their major assets (that is, the

matrimonial home, the $\frac{1}{4}$ interest in the farm, and the recreational property on Mudge Island) were all acquired through the Wife's inheritance. Given this situation, the parties must have spent most of the income generated through the Husband's employment on their lifestyle.

- [71] To fully compensate her for the economic disadvantage that she suffered would require that the income generated from the additional assets that were reapportioned to her in the division of the family assets (assuming that that reapportionment was done solely to compensate her for the economic disadvantage that she suffered during the marriage and continued to suffer after its breakdown) and the spousal maintenance payments she received total \$95,496 annually. This is the shortfall between her income and the amount needed to sustain the marital lifestyle .
- [72] As was touched upon earlier in these Reasons, in the last year the parties' discovered that one of the family assets that had been distributed to the Wife had been significantly undervalued.
- [73] Because of this occurrence, to do the analysis of whether the Wife has been fully compensated for her loss I have divided it into two parts - namely, the years before this mistake was discovered and the present. To use the present values as if they had been known throughout, in my view, results in an unfairness. Rather, I concluded that the appropriate approach was to analyze whether the Wife was fully compensated for her loss in the initial years using the initial values and, if not, whether she is now fully compensated given the increased value of this one family asset.
- [74] The analysis of the compensation paid to her in the initial years reveals that the Wife was not adequately compensated for her loss. As a consequence, her situation worsened as she depleted family assets (that should have been available to her to generate income) to supplement that shortfall.
- [75] As was set out earlier, the Wife received \$44,092 per year in spousal maintenance.
- [76] To sustain a standard of living commensurate with the marital one (that is, to adequately compensate her for the economic disadvantage that she suffered), the portion of the family assets apportioned to her as compensation for her loss (namely 16%) would have to be sufficient to generate \$51,404 per year - this being the shortfall between \$95,496 (the amount needed in addition to her \$6,000 a year to sustain the marital lifestyle) and \$44,092 (the amount received in spousal maintenance).
- [77] Using the initial values, about \$325,040 of the family assets were reapportioned to her as compensation for the economic disadvantage that she suffered. (As was set out earlier, at 66% of the family assets, the Wife received 16% more of the family assets than her presumptive 50% interest. At 34%, the Husband received 16% less of than his presumptive 50% interest. I have valued that 16% reapportionment at \$325,040 - 16% of \$2,031,500. I have also assumed that that reapportionment was done solely to compensate the Wife for the

economic disadvantage that she suffered as a result of the marriage and its breakdown).

- [78] The amount generated from this reapportionment was not adequate to generate the \$51,404 in annual income required to compensate the Wife for her loss. (For example, invested at 5%, \$325,040 would only generate \$16,252 per year).
- [79] A review of the material shows that to meet this annual shortfall of approximately \$51,404, the Wife had to deplete assets. Though the Husband submitted that this depletion was the result of improvident spending, the evidence did not support that submission.
- [80] Rather, given that the evidence showed that the lifestyle that she has had since the parties separated does not exceed the marital lifestyle, and that the amounts that she has withdrawn are in keeping with the shortfall in the compensation as described above (for example, the evidence shows that in 2003 and 2002, she withdrew \$48,669 and \$52,654 from her RRSPs, respectively), I am satisfied that she depleted assets because the compensation that was paid to her for her economic disadvantage was inadequate. As of the date of this hearing, she had depleted her assets by at least \$220,000, which was the full value of the RRSPs that had been distributed to her upon separation.
- [81] The only extravagance of the Wife that was identified in this hearing was that she gave a gift of \$30,000 to each of the parties' children after she received the proceeds from the sale of the farm last year. In calculating the adequacy of her compensation, I have used the amounts that she has received which includes the amount of these gifts. In other words, the calculation is made as if she had not given this money away but still had it to use.
- [82] With respect to the present, as was touched upon earlier, one of the assets distributed to the Wife was worth \$812,500 more than the amount that the parties had valued it at when they separated.
- [83] In determining whether the full extent of the Wife's economic disadvantage has now been addressed because of this asset, two issues must also be addressed.
- [84] The first issue is the present income of the Wife and whether any income should be imputed to her. In other words, a finding has to be made as to whether she has made reasonable efforts to attain self-sufficiency. Once that determination is made, a calculation must be made as to the shortfall, if any, between that amount and the amount needed to sustain a standard of living comparable to the marital standard of living.
- [85] After that issue is addressed, I must then determine the quantum of the family assets that should be characterized as being distributed to the Wife to compensate her for her economic disadvantage; the annual income that can reasonably be generated from those assets; and the adequacy of that income to meet the shortfall between her income and the amount needed to sustain the marital lifestyle.

- [86] With respect to the Wife's income, for the last two years she has been working as a commercial photographer, having completed her training in August 2004. This year her gross earnings are about \$6,000 more than the previous year, having increased to about \$21,000 from about \$15,000. However, as her expenses are approximately \$15,000 a year, her present net earnings are modest.
- [87] Shortly after the parties separated, the Wife attempted to return to school in order to acquire the credentials necessary to qualify as a nurse. For a variety of reasons, not the least of which was her ongoing childcare responsibilities, she dropped out of this program. It was not until the fall of 2003 that she entered the photography course. During the intervening time, she worked part-time for a short time in a clerical position at a business owned by her present husband.
- [88] Though it would be unreasonable to expect that, given her childcare responsibilities and her minimal marketable skills, the Wife would immediately embark on retraining and/or full-time employment, I have concluded that the efforts that she has made have been less than reasonable. Given that it is now over 6 years since the parties separated, I am satisfied that an income of \$30,000 should be imputed to her. That is, an income comparable to a lower-end clerical worker. Whether the Wife derives this income from her photography business; from clerical work; from a combination of the two; or from other employment all together, I am satisfied that with reasonable efforts she would be earning this amount or close to it.
- [89] The fact that I have concluded that she has not made reasonable efforts to achieve self-sufficiency does not mean that she is not entitled to spousal maintenance. Rather, depending on the amount to be imputed, it may just affect the quantum of the spousal maintenance payable: McEachern, *supra*.
- [90] With respect to the Wife's future employment income, although it may increase over the years, it is unlikely to increase substantially above the imputed \$30,000, given her late entry into the workforce.
- [91] Having determined that an annual income of \$30,000 should be imputed to the Wife, using an annual income for the Husband of \$350,000, the Guidelines amount needed to sustain the marital lifestyle is between \$73,176 and \$91,140. Again, because the Husband's income during the marriage was higher than the \$350,000 used, and because the marital lifestyle was more in keeping with the higher end of the range than the lower end, I have concluded that the amount needed to sustain the marital lifestyle should be set at \$91,140.
- [92] In making this calculation, I used the amount of \$350,000 rather than an amount closer to the Husband's present income (which is significantly more than the amount that he was earning during the marriage) because his present income is irrelevant to this analysis. Rather, the compensatory loss is based on the lifestyle derived from the marital income: *Roberts v. Beresford*, 2006 BCCA 67. The amount of \$350,000 is closer to the quantum of the marital income.

- [93] Further, I did this calculation on a "with 3 children" basis because it was unclear to me as to the amount that the Wife is presently receiving in child maintenance. For at least 4 months of the year (namely May through August), she is receiving maintenance for all of the children because they are residing with her for that period.
- [94] As far as the quantum of the family assets that should be characterized as compensation to the Wife for the economic disadvantage, I have concluded that the amount of \$917,540 should be used, this amount being \$105,040 (\$325,040 - \$220,000) plus \$812,500. In other words, I deducted the amount that I had concluded she had to deplete from her asset base to supplement the shortfall in the maintenance paid.
- [95] Assuming that this amount (that is, \$917,540) could be invested at a rate of 5%, these assets could generate income of \$45,877 annually.
- [96] Given that the amount needed to fully compensate the Wife for her loss is \$91,140, the reapportionment of assets alone is not sufficient to redress this loss. Rather, compensatory spousal maintenance in the amount of \$45,263 annually (\$91,140 - \$45,877) or about \$3,772 per month is required.
- [97] Spousal maintenance is ordered in this amount. Though this amount falls below the range provided in the Guidelines, this departure is appropriate because of the reapportionment of the family assets.
- [98] The Husband argued that the Wife was no longer entitled to spousal maintenance because of her remarriage. This fact (that is, the remarriage of the Wife) is irrelevant to the analysis of her entitlement to spousal maintenance on compensatory grounds: *R.S.R. v. S.M.R.*, 2006 BCSC 1404. Because spousal maintenance is to compensate her for an economic disadvantage arising from the marriage and its breakdown, the fact that she is remarried is irrelevant.
- [99] It is for much the same reason that the Husband's argument that, because the value of their present assets are about the same, the Wife is no longer entitled to spousal maintenance also fails.
- [100] Assuming that she suffered an economic disadvantage arising from the marriage and its breakdown, the issue is whether she has been fully compensated for that loss. The fact that the asset base of the parties is now approximately the same does not address that issue. Given that she needs a significantly larger asset base than the Husband because she is dependent on it to generate income to supplement the shortfall between the income that she is able to generate and the marital standard of living; that a larger portion of the assets were distributed to her upon separation for that reason; and that since separation she has not lived a lifestyle that exceeds the marital lifestyle, the fact that her assets are now about equal to the Husband shows that the compensation paid to her to date is less than required and that the Husband is generating an income that enables him not only to live a lifestyle that is equal to the marital lifestyle, but also to acquire significant assets. In other words,

from a compensatory perspective, the fact that the asset base of the Husband and Wife is about equal supports her entitlement to spousal maintenance on a compensatory basis.

- [101] In my view, the situation in *Roberts* is distinguishable from the present case as the extent of the economic disadvantage of Ms. Roberts was less than the extent of the economic disadvantage suffered in the present case.
- [102] With respect to the commencement date for these payments, at the conclusion of this hearing I ordered that the payments required under the Agreement be made up to and including the December 2006 payment. Given that decision, this order will commence as of the 1st of January 2007, and will be payable on the 1st of each and every month thereafter unless otherwise agreed to by the parties in writing.
- [103] As far as the duration of this order is concerned, an order for spousal maintenance which is based on compensatory principles should continue until adequate compensation has been made, even if the spouse has achieved a degree of self-sufficiency: *Tedham*, supra. In some cases, a spouse may never be able to overcome the economic disadvantage arising from the marriage and its breakdown: *Story v. Story* (1993), 23 R.F.L.(3d) 225 (B.C.C.A.).
- [104] As is reflected in the Guidelines, though each case must be determined on its own facts, in long marriages in which the economic lives of the parties have been intertwined it is not uncommon for the support order to be indefinite, or for at least as long as the marriage.
- [105] As was touched upon earlier in these Reasons, I am satisfied that the Wife will probably never fully recover from the economic disadvantage she has suffered as a result of the role that she played during the marriage and its breakdown. As a consequence, I am satisfied that the duration of her entitlement to be compensated for this loss should be indefinite.
- [106] However, at some point the spousal maintenance payments should stop because the continuance of it will result in a double recovery. That is, some of the compensation that she receives for this economic disadvantage is from the income generated from the portion of the family assets that were reapportioned in her favour to compensate her for this loss. At some point, she should start to draw down on the capital of those reapportioned assets. Otherwise, to maintain these reapportioned assets forever and to continue to be paid spousal maintenance will result in double recovery.
- [107] To address that situation, unless the parties otherwise agree in writing, there will be a review of the Wife's entitlement to, and the quantum of, the spousal maintenance when the Wife is 60 years old (that is, after March 12, 2020). Barring exceptional circumstances, I anticipate that it will be terminated at that point. The compensation for her economic disadvantage will then be derived from the dissipation of the family assets that were reapportioned to her for that compensatory purpose.

[108] In the meantime, the Husband is to continue to provide security for the payment of this spousal maintenance through a term life insurance policy in which she is named as the beneficiary.

(V) COSTS

[109] If the parties are unable to reach an agreement with respect to costs, they are granted leave to arrange a hearing through the Registry at any mutually convenient time. If they anticipate that the application will take less than 1 hour, they may set it

at 9:00 a.m. If they anticipate that it will take more than 1 hour, it is to be set down during regular sitting hours.

"J. Sinclair Prowse, J."

The Honourable Madam Justice J. Sinclair Prowse

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