
CANADA / JUDGMENT

K.A.M. v. P.K.M.

2008 BCSC 93

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 93 K.A.M. v. P.K.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.A.M. v. P.K.M.,

2008 BCSC 93

Date: 20080124

Docket: 36496

Registry: Vernon

Between:

K.A.M.

Plaintiff

And

P.K.M.

Defendant

Before: The Honourable Mr. Justice Barrow

Reasons for Judgment

Counsel for the Plaintiff:

K.P. Jensen

Appearing on his own behalf:

P.K.M.

Date and Place of Hearing:

October 26, 2007

Vernon, B.C.

- [1] Mr. and Ms. M married on July 24, 1982 and separated on August 31, 2003. They have two daughters: J.J., who was born on May 10, 1990, and is now 17; and J.K., who was born on September 8, 1993, and is now 14. Both of the girls live with their mother and have done so since the parties' separation. Following their separation, and with the assistance of a family law mediator, the parties settled their differences and recorded that settlement in a separation agreement, which they signed on February 23, 2005. The agreement provides for a division of their assets, gives the parties joint custody and guardianship of the children, requires Mr. M to pay child support, and purports to finally release him from any obligation to pay spousal support to Ms. M.
- [2] Ms. M, by her motion, seeks a divorce; an order that she have sole custody of the children; an order that certain funds currently held in trust by her lawyer be paid to her; an order that Mr. M pay her spousal support; an order that Mr. M pay child support retroactive to the date of separation; and costs. Mr. M opposes all of the relief sought except for the divorce. In general terms, he argues that the separation agreement was fair when it was signed and is fair today and should continue to bind the parties. In addition to opposing the relief sought by Ms. M, Mr. M seeks various orders of his own. In particular, he seeks orders relating to custody and access of the children and other orders which, for the most part, are intended to enforce the terms of the separation agreement.
- [3] I will first address the general circumstances of the parties' marriage and their separation, including the negotiation of their separation agreement before turning to an analysis of the law as it applies to this situation.

The Facts

- [4] As noted, the parties married in 1982 and separated 21 years later in 2003. Prior to the birth of their first child in 1990, Ms. M worked for a time with RJR Tobacco, a company to which she has recently returned. At some point during the marriage, she operated her own business, although what kind of business it was is not disclosed in the evidence. For the most part, since 1990, Ms. M devoted her time and efforts to raising the parties' children.
- [5] Mr. M works for a pharmaceutical company and has done so for some time. He is a salesperson.
- [6] The parties were living in Lillooet when they notionally separated. Mr. M's work required him to travel extensively, such that he was away during the week and only home on weekends. After briefly moving to Armstrong where her parents lived, Ms. M returned to the family home in October 2003. During the week, she and the children had the home to themselves; on the weekends, Mr. M would stay in one room and Ms. M would stay in

another. At the end of January 2004, Ms. M moved back to Armstrong and took up residence with Mr. Schell, her current common-law partner. Mr. M remained in the family home until May 2004, when he too moved to Armstrong and into a room in the basement of his father's home where he remained until December 2004.

- [7] In terms of assets, at the time of their separation the parties owned their home and a revenue property that they rented out as a vacation home through an unincorporated business known as Top Notch Enterprises. Their other assets consisted of a 1994 Jeep Grand Cherokee; two RRSPs, one worth \$3,500 and the other worth \$2,000; Mr. M's pension plan; RESPs for their children; some horses; and a variety of household and personal possessions.
- [8] They had significant debts. There was a mortgage on the family home, outstanding at \$197,197 in August 2004, and a mortgage on the revenue property outstanding at \$93,500. They had the following other debts: a line of credit with Interior Savings Credit Union on which they owed \$13,000; two lines of credit at the Royal Bank, one outstanding at \$1,669 and the other (which they used for the rental house business) at \$8,500; a Royal Bank Visa with a balance owing of \$11,668; two Royal Bank Avion Visas with outstanding balances of \$13,600 and \$9,400; an MBNA MasterCard on which they owed \$10,650; and a Capital One credit card on which they owed \$12,255.
- [9] For the first year following their separation, Mr. M paid all amounts necessary to keep the parties' debts in good standing. He looked after the ongoing rental of the revenue property and the family home after the parties moved out of it, and he paid the expenses associated with those properties. When those expenses exceeded the rental income, he covered them from his income.
- [10] In August 2004, the parties retained Ms. Djordjevich, a lawyer and family law mediator, to assist them in resolving their differences. Mr. M paid her a retainer of \$1,000. As a result of meeting with her, they decided to increase the mortgage on the family home to \$237,760 and secure a line of credit from the CIBC for \$30,000. From these funds, they paid off all of their other indebtedness, except for the indebtedness relating to the rental property, that is, the line of credit (\$8,500) and the mortgage (\$93,000). According to the recitals in the separation agreement, the parties agreed to this refinancing arrangement in order that Mr. M could pay monthly child support, something he had not been doing prior up to that point.
- [11] After the refinancing was complete, Mr. M made the payments on both lines of credit and the mortgages. The rental income was insufficient to cover these payments, and Mr. M made up the shortfall from his income.
- [12] Ms. M began a common-law relationship with Mr. Schell shortly after her separation from Mr. M. Although precisely when they began living together is unclear, it was near the end of 2003 or early in 2004. She continues to live with Mr. Schell today. Since the beginning of 2007, she has been working full time with her former employer, the tobacco company.

- [13] The parties concluded a separation agreement with Ms. Djordjevich's assistance in February 2005. When the agreement was reached, both the family home and the rental property were listed for sale for the asking prices of \$269,000 and \$149,000 respectively.
- [14] In relation to the children, the agreement provides that the parties are to have joint custody and guardianship of them, with their primary residence being with Ms. M. Mr. M is to have generous access. Mr. M agreed to maintain the children on his extended health and dental insurance and to pay support based on \$1,173 commencing November 1, 2004. The agreement records that his income was anticipated to be \$95,000 and that is the income they used to calculate his child support obligation. As to extraordinary expenses, the parties agreed to contribute to them equally, although Mr. M's obligation was capped at \$1,000 per year. In addition, Mr. M agreed to contribute \$2,000 for each of the children to an RESP from his share of the proceeds of sale of the family home and to pay \$5,000 "in acknowledgement and full satisfaction" of any claim that Ms. M may have for retroactive child support.
- [15] The agreement provides for an equal division of the parties' CPP credits and Mr. M's company pension plan. Each party was to keep any horses in their respective possession, and Ms. M retained the 1994 Jeep Grand Cherokee. No values are assigned to these assets in the agreement.
- [16] In terms of the real property, the agreement provides that both are to be sold, and pending sale, Mr. M was to be responsible for keeping them rented and in proper repair. He was to receive the rents from which he was to pay the mortgage, insurance, and other expenses. The parties anticipated that there would be a shortfall and the agreement obliges Mr. M to cover any deficit from his personal funds. On sale of the family home, the proceeds were to be used to retire the mortgage, taxes, and the other usual adjustments, with the balance to be divided equally after payment to Mr. M of any costs he incurred over and above the rental income. Further, from his share, he was to make the RESP contributions noted above. Once the sale completed, he was to pay the \$5,000 in satisfaction of retroactive child support. On sale of the rental property, the mortgage was to be retired, as well as the CIBC line of credit (the loan taken out to refinance their debt) and the \$8,500 line of credit that remained outstanding after the refinancing.
- [17] The agreement also provides that Mr. M is to be responsible for any personal income tax due for 2003 for either party (there is no evidence as to whether there was an income tax liability for that year). In addition, he was to pay for Ms. Djordjevich's services (which amounted to \$1,704) with Ms. M repaying him half of that cost from her portion of the sale of the properties.
- [18] After the parties settled their differences, they agreed to instruct Ms. Djordjevich to bring a joint action for divorce with each party to pay half of her account estimated to be \$800. She prepared the materials and sent them to Ms. M for her signature. Ms. M did not sign them, and ultimately Ms. Djordjevich rendered an account in the amount of \$586 for the services she provided and advised Mr. M that, if he wished to continue, he would have to withdraw

from the joint proceeding and pursue the matter on his own or with the assistance of another lawyer. Mr. M paid this account.

- [19] The family home sold in September 2006 for \$235,000, significantly less than the list price of \$269,000. After payment of the mortgage and adjustments, the net proceeds were \$10,608. The rental property sold in late November 2006 for \$110,000 (also less than the list price of \$139,000). After payment of the mortgage and other adjustments, the net proceeds were \$18,828. These funds are currently held in Ms. M's lawyers' trust account. The line of credit for the rental property remains outstanding in the sum of \$8,500, and the line of credit which was used to refinance the parties' credit card debt remains outstanding in the sum of approximately \$19,500 as of September 2007.

Position of the Parties

- [20] Ms. M argues that the separation agreement is unfair in two respects. First, it makes no provision for spousal support, and second, it does not make adequate provision for retroactive child support. As for child support, according to her calculations (about which I will say more in what follows), Mr. M should have paid \$26,768 more than he has. Ms. M wants this amount paid from Mr. M's share in the remaining proceeds of sale of the real property and, to the extent there is a shortfall, she wants it to be offset by him assuming exclusive responsibility for the remaining family debt. As to spousal support, she argues that she had no income until 2007, and given his income of approximately \$100,000 in the years since their separation, his spousal support obligation for the years 2004, 2005 and 2006, based on the Spousal Support Advisory Guidelines: A Draft Proposal (Ottawa, Dept. of Justice: 2005) (the "SSAG") was between \$1,650 and \$2,221. For the year 2007, and indefinitely into the future, the SSAG suggest a range of \$1,372 to \$2,058 per month, assuming his income is \$120,000 and hers is \$31,000.
- [21] Mr. M takes the position that the separation agreement was fair when negotiated and is fair today. He maintains that he has fulfilled all of his obligations under it, something which he argues cannot be said of Ms. M. He argues that Ms. M agreed to accept no spousal support because she was then, and is now, in a common-law relationship with a man who has substantial means, and she neither needs nor is entitled to support. He argues that his income is \$100,000 and that based on that income he has paid all the child support he is required to pay.
- [22] In addition to the monetary matters, the parties disagree as to custody of and access to the children. Ms. M seeks sole custody and Mr. M opposes that portion of her application. He seeks an order that Ms. M take a parenting after separation course and that he have specified access with his daughters one weekend per month.

Analysis

[23] I will deal first with custody, access and child support before turning to the more troublesome issue of spousal support.

a) Custody and Access

[24] Following the separation and until July 2005, Mr. M enjoyed frequent and happy visits with his daughters. Since then, his relationship with J.K. has deteriorated to the point where he has not seen her at all for many months. He continues to see J.J. albeit intermittently. Mr. M believes this all started because Ms. M was upset that his girlfriend moved to Armstrong to live with him. He believes that Ms. M has been actively alienating his daughter, J.K., from him.

[25] There is no doubt that relations between Mr. and Ms. M took a rather sharp turn for the worse in early July 2005. Several things have likely contributed to this. First, there was an angry confrontation between Ms. M and her common-law husband, on the one hand, and Mr. M, on the other. The result was that Mr. M was barred from coming onto their property. Whatever the merits of that decision, Mr. M's response was not helpful. Among other things, he rented a bull horn and used it while parked at the end of the driveway to page his daughters. He has deposed that he did this as a joke. I suspect the humor was lost on both Ms. M and the girls. In spite of this, access continued throughout the summer and into the fall of 2005. Second, early in the school year, an issue arose about J.K.'s schooling. The details are not important, but Mr. M approached J.K.'s teacher to ask if she had said things attributed to her by Ms. M. She responded abruptly saying that she was not going to get involved in the parties family dispute. I have little doubt that J.K. became aware of this and even less doubt that she found it embarrassing. Third, in the fall of 2005, Mr. M filed a motion to have conduct of sale of the former matrimonial home. It was served on Ms. M, and during that process, for some reason the police were called and attended her home. J.K. became aware of this and expressed anger to her father because he was taking her mother to court. Mr. M wrote to his daughters explaining why he was doing what he was doing. J.K. remained angry and since then has refused to see her father. Finally, it is apparent that J.K. has been of the view that her father was not honoring his child support obligations and that she was being deprived as a result. In the spring of 2006, according to Mr. M, J.K. was being rude to him and told him that, if he did not pay money to Ms. M, she would not see him any more. In July 2006, Mr. M sent J.K. a card telling her he missed her. She responded with a note saying that she did not miss him and that he should leave her alone. The note contains a rude drawing directed towards Mr. M. Anticipating that his response would be to blame her decision on her mother, J.K. explained that her mother had nothing to do with it, that it was her decision. She was then just shy of her 13th birthday. In November 2006, J.K. gave her father a note demanding \$2,500. I suspect this represents half of the \$5,000 in retroactive child support that Mr. M agreed to pay upon sale of the family home. The home had sold in September 2006.

- [26] I am not persuaded that this is a situation in which Ms. M is attempting to turn her daughters away from their father, although I suspect that she has inappropriately involved them in the financial issues between her and their father. There are several reasons for my conclusion in this regard. First, J.J. continues to see her father albeit intermittently. She continues to speak to him when he telephones. There is nothing to suggest that Ms. M has attempted to influence J.J.'s relationship with her father. Second, there are other possible, perhaps even likely, reasons for J.K. taking the view she does. The interaction between Mr. M and her teacher and the events surrounding the use of the bull horn fall into that category. As noted, it is apparent that Ms. M has inappropriately exposed J.K. to the financial issues in this litigation, but there is nothing to suggest that she did this for the purpose or with the intention of alienating J.K. from her father. I am left with the impression that J.K. is a somewhat willful young lady who has made her own decision as to the relationship she wishes to have with her father.
- [27] It is for Ms. M to establish that it is in the best interests of her daughters that she have sole custody and guardianship of them. I am not satisfied she has done that. There is nothing to support that conclusion with respect to J.J. In terms of J.K., it is only her decision not to have a relationship with her father that might be said to support that conclusion and that is not a basis, without more and particularly in light of some of the likely reasons she has come to that decision, to change the joint custody and guardianship regime established by the separation agreement. Ms. M's application for sole custody and guardianship is accordingly dismissed.
- [28] What Mr. M seeks, through his application, is to salvage his relationship with J.K. Requiring Ms. M to take a parenting after separation course will not accomplish that. While it may be advisable that she take the course for the benefit of her daughters, I am not prepared to order that she do so. Further, ordering specified access would be pointless in these circumstances. J.J. is now 17 years old and quite capable of making her own decisions about when and on what terms she will see her father; J.K. is 13 years old and has made her decision, at least for the time being. Ordering her to see her father would likely be ineffective and may well prove counter productive to repairing their relationship. If that is to happen, it will have to await the passage of time, the maturation of J.K., and then likely be dependent on the patience and good judgment of Mr. M.
- [29] It follows that the portion of Mr. M's application relating to the parenting after separation course and specified access is dismissed.
- b) Retroactive and Future Child Support
- [30] There are three issues relating to this aspect of the parties' dispute. The first is whether Mr. M should be ordered to pay retroactive support for the period from the parties' separation in August 2003 until he started paying support in the latter part of 2004. The second is whether the support he has paid since 2004 is in accordance with the Guidelines, and if not, whether it should be adjusted to reflect his Guideline obligation. This involves a determination of his

income for support purposes over the years since separation. The third issue relates to a period of several months in the spring of 2006, when Mr. M paid an amount equal to his monthly support obligation towards a debt incurred by Ms. M in his name.

[31] The first two of these issues raise three subsidiary issues: the first is whether retroactive child support should be ordered; the second is, if so, as of when should the obligation arise; and the third involves a determination of the amount of the obligation.

[32] Only two cases dealing with whether to order retroactive child support need be mentioned. The first is *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231; 2006 SCC 37. There the Supreme Court of Canada affirmed the jurisdiction of the court to award retroactive child support. In determining whether to make such an award, Bastarache J. said this at para. 133:

a court will need to look at all the relevant circumstances of the case in front of it. The payor parent's interest in certainty must be balanced with the need for fairness and for flexibility. In doing so, a court should consider whether the recipient parent has supplied a reasonable excuse for his/her delay, the conduct of the payor parent, the circumstances of the child, and the hardship the retroactive award might entail.

The second is *L.S. v. E.P.*, [1999] B.C.J. No. 1451; 1999 BCCA 393. There Rowles J.A. summarized the factors to be considered in matters in assessing whether to make a retroactive order. At paras. 66 and 67, she wrote:

A review of the case law reveals that there are a number of factors which have been regarded as significant in determining whether to order or not to order retroactive child maintenance.

Factors militating in favour of ordering retroactive maintenance include: (1) the need on the part of the child and a corresponding ability to pay on the part of the non-custodial parent; (2) some blameworthy conduct on the part of the non-custodial parent such as incomplete or misleading financial disclosure at the time of the original order; (3) necessity on the part of the custodial parent to encroach on his or her capital or incur debt to meet child rearing expenses; (4) an excuse for a delay in bringing the application where the delay is significant; and (5) notice to the non-custodial parent of an intention to pursue maintenance followed by negotiations to that end.

Factors which have militated against ordering retroactive maintenance include: (1) the order would cause an unreasonable or unfair burden to the non-custodial parent, especially to the extent that such a burden would interfere with ongoing support obligations; (2) the only purpose of the award would be to redistribute capital or award spousal support in the guise of child support; and (3) a significant, unexplained delay in bringing the application.

[33] The only statutory provision to which reference need be made is s. 15.1(5) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp). It provides in part as follows:

(5) Notwithstanding subsection (3), a court may award an amount that is different from the amount that would be determined in accordance with the applicable guidelines if the court is satisfied

- (a) that special provisions in an order, a judgment or a written agreement respecting the financial obligations of the spouses, or the division or transfer of their property, directly or indirectly benefit a child, or that special provisions have otherwise been made for the benefit of a child; and
- (b) that the application of the applicable guidelines would result in an amount of child support that is inequitable given those special provisions.

- [34] Dealing first with the issue of whether an order should be made, although there is no particular evidence of a need on the part of the children arising from the period to which an award, if made, might relate, I will assume that there is or was such a need. All of the other factors mentioned in *L.S. v. E.P.*, however, militate against making a retroactive award. Specifically, there is no suggestion of any misleading financial disclosure or other blameworthy conduct on the part of Mr. M. It appears that he took the lead in moving the settlement of the parties' differences forward following their separation. He arranged for a mediator and paid her account. Further, he began paying support several months before the parties reached an agreement on the issue. During the period in question, he assumed sole responsibility for servicing all the family debt. In addition, he agreed to pay \$5,000 towards any notional arrears when the family home sold. Although not directly relevant, since the separation agreement was signed, he has paid as required, he has disclosed his income without being asked, and he has increased his support to reflect increases in his income.
- [35] To the extent that delay is a factor, it militates against the making of an order. The order sought seeks support for a period beginning four years before the application was brought. Moreover, this is not a case in which Ms. M gave notice of her intention to pursue retroactive support and then embarked on a course of negotiations to that end. To the contrary, in correspondence from her lawyer to Mr. M's lawyer in October 2006, the issue of retroactive child support was raised but only to the extent of seeking compliance with the negotiated settlement the parties has reached. No mention was made of any desire or intention to seek support beyond that to which the parties had agreed.
- [36] Finally, I am satisfied that to order retroactive support for the year following the parties' separation would create an unfair burden on Mr. M, and would do nothing other than effect a redistribution of property under the guise of child support. The parties reached a settlement of the issues outstanding between them, including the issue of retroactive child support. Mr. M has structured his affairs over the past three and a half years on the strength of that agreement. He does not have cash or near cash assets from which he could pay a significant retroactive award other than the funds that remain from the sale of the former family assets. To now compel the transfer of his interest in those funds to satisfy a retroactive child support obligation would be, as I have already noted, to redistribute capital under the guise of child support.

- [37] Even if I were persuaded that a retroactive award of child support should be made, I am satisfied that what was paid, and is to be paid, under the terms of the separation agreement is sufficient to discharge that obligation. The parties' agreement contains "special provisions" respecting their financial obligations that "directly or indirectly" benefit their children. The lump sum payment and the assumption of the debt servicing by Mr. M during the year following separation fall into that category. By operation of s. 15.1(5) of the Divorce Act, if, in view of those provisions, it would be "inequitable" to order an amount of child support that strictly accords with the Guidelines, the court is not obliged to do so. I am satisfied that it would be inequitable to order that Mr. M pay anything more than he is obliged to pay under the agreement for the period in question.
- [38] Mr. M did not pay any money specifically earmarked as child support for the year following the parties' separation. The recitals to the parties' separation agreement explain how the parties' viewed what was happening during that time. Recital Q records that, during that year, Mr. M assumed responsibility for the family debts and the expenses relating to the family home and the revenue property. Recital R explains that, during the same period, Ms. M assumed financial responsibility for the day-to-day care of the children and upkeep of their horses. Finally, Recital T recounts that the refinancing of the family debt was undertaken so that Mr. M could pay monthly child support. Paragraph 17(a) provides that upon sale of the family home, Mr. M is to pay the sum of \$5,000 to Ms. M "in acknowledgement and full satisfaction of her claims to retroactive child support".
- [39] While there is no direct evidence as to the cost of servicing the parties' credit card and other liabilities during the year in question, it is beyond dispute that it would have been substantial. They owed over \$50,000 on their various credit cards and a further \$23,000 on several lines of credit. Mr. M serviced these debts alone. That was not an unreasonable interim arrangement given the parties financial circumstances. Refinancing the debt was also a sensible thing to do. As soon as that was accomplished, and Mr. M was no longer saddled with those high debt servicing costs, he began to pay child support. There is something approaching a conflict in the evidence as to precisely when he started making payments, but I am satisfied that it was at least in August 2004. First, he has deposed that that is when he began doing so. Second, he has exhibited his cheque register in which he has recorded monthly cheques payable to Ms. M in the amount he eventually agreed to pay as child support. Third, Ms. M does not deny receiving payments in that period; rather, she deposes only that she does not remember receiving them. Thus, at issue is a period of 11 months during which Mr. M's obligation, on a strict application of the Guidelines, would have been something in the order of \$1,173 per month. I am satisfied that what he paid in debt servicing coupled with what he is obliged to pay under the separation agreement is sufficient to satisfy any obligation he has.
- [40] I pause here to note that Mr. M appears to now take the position that his obligation to pay the \$5,000 arises only if there is money available from his share of the sale proceeds of the former family home. He argues that because there is no money available, he need not pay

the amount. I disagree. The separation agreement provides that the obligation to pay the amount is triggered by the sale of the home (para. 17(b)). To the extent that there are funds available to pay the amount from the sale proceeds they are to be used, but the agreement does not limit the obligation to those funds. The amount is therefore due and payable.

- [41] The next issue relates to the period from November 2004 until today. The issue is whether Mr. M has been paying an appropriate amount of child support having regard to his income, and if not, whether his obligation should be retroactively adjusted.
- [42] Paragraph 14 of the separation agreement requires Mr. M to pay Guideline support of \$1,173 per month beginning on November 1, 2004. The recitals reveal that his income for 2004 was anticipated to be \$95,000. Paragraph 16 provides that Mr. M is to provide Ms. M with a copy of his income tax return by May 15th each year "so that the parties may review the amount of child support being paid, and make adjustments necessary to bring the amount of support in line with the Federal Child Support Guidelines".
- [43] With the exception of three months in the spring of 2006 and the time since May of 2007, there is no dispute but that Mr. M paid monthly support in accordance with the agreement. He paid \$1,173 per month until September 2005 when he received and sent to Ms. M his 2004 income tax assessment. His line 150 income for 2004 was \$99,062 on which Guideline support for two children was \$1,213. Mr. M made up the \$40 difference for the months of May through to August by a cheque that he sent along with his income tax assessment. He thereafter paid \$1,213 in support until and including May of 2006. On May 10, 2006, he forwarded his 2005 income tax assessment which revealed his 2005 line 150 income to be \$88,885. In accordance with the tables that came into effect on May 1, 2006, he began paying \$1,302 as of June 1, 2006. He has made payments of \$1,302 at least until October, 2007. His line 150 income for 2006 was \$121,050, but there are some irregular features to that amount about which I will say more below.
- [44] The plaintiff argues, at least implicitly, that Mr. M's income for child support purposes should be calculated otherwise than in accordance with s. 16 of the Guidelines, which provides that a payor's line 150 income from the T1 General return is the basis for determining child support obligations. She argues that his income should be taken from line 101 of that form as opposed to line 150 (for most but not all of the years in question) and if that is done, his income for 2003 and 2004 would be \$95,000; for 2005, it would be \$97,000; and for 2006 and 2007, it would be \$120,000. Arguably, s. 17 of the Guidelines permits the approach advocated by Ms. M, if "the court is of the opinion that the determination of income under s. 16 would not be the fairest" way of determining a payor's income. Ms. M's argument is that including the losses, and presumably the gains, realized by the parties on their rental activities is unfair.
- [45] In summary, Mr. M's income for the years in question was as follows: in 2004, his line 101 income was \$95,346 while his line 150 income was \$99,062; in 2005, his line 101 income was \$96,954 and his line 150 income was \$88,885; in 2006, his line 101 income was \$112,288 and

his line 150 income was \$121,050. His year-to-date income in 2007 as of September 15th was \$77,389 which, when extrapolated to the year end, will yield a line 101 income of \$109,255. Because the last of the rental properties was sold in November 2006, I assume there will be no difference between his line 101 and line 150 income for 2007.

- [46] The difference between the line 101 amounts and the line 150 amounts is, with one exception, explained by the losses (and more rarely the profits) from the parties' rental activities. For 2004, because only Mr. M's T4 from his employer and his Notice of Assessment are in evidence, it is impossible to know exactly how the differences between the amounts is accounted for, but I assume it was due to a profit realized by Top Notch Enterprises. In 2005, there was a loss on rental of the family home of \$3,363 and on the rental property of \$4,843; in 2006, the loss on the family home was \$4,876 and on Top Notch had net income of \$1,396.
- [47] There are two aspects to the evidence which are relevant to the issue of whether the s. 16 approach to determining income is "the fairest" method. The first is the separation agreement and the parties' conduct in the years since then. The second is the nature of the losses and income which give rise to the difference between the two line items.
- [48] As to the first aspect of the evidence, it is likely that Mr. M did not know his income for 2004 when, in February of 2005, the parties concluded their agreement. His income from employment was no doubt known (and it turned out to be \$95,346), but the rental income from Top Notch was likely not known. As it turned out, there was a profit from that business. I do not think it can be argued that the parties made a considered decision to use Mr. M's line 101 income rather than his line 150 income when they agreed on his income for child support purposes in their separation agreement; rather, I suspect they used the figure they knew and simply agreed to use it. In subsequent years, Mr. M has paid in accordance with his line 150 income. He has made adjustments based on that amount, and Ms. M has accepted those payments without question or protest ever since. The agreement is silent on precisely how Mr. M's income would be determined following 2005. It simply requires that he provide his income tax return to Ms. M "so that the parties may review the amount of support being paid, and make any adjustments necessary to bring the amount of support in line with the Federal Child Support Guidelines". To the extent it is probative one way or the other, I consider that this aspect of the evidence supports the conclusion that the line 150 income of Mr. M is the appropriate measure.
- [49] The second aspect of the evidence relates to the rental income and losses. This is not a situation in which the losses are the product of accounting entries such as depreciation and the like; rather, the losses appear to be largely the result of actual expenses. To the extent that is the case, there is no reason not to treat the losses as anything other than just that.
- [50] For the foregoing reasons, I conclude that there is no basis for not applying the presumptive rule in determining Mr. M's income. It follows that I am satisfied that, at least until May 1, 2007, he has paid that which he ought to have paid.

- [51] As noted above, there is an anomaly in Mr. M's 2006 income. In fact, there are two anomalies - one arising from the redemption of some RRSPs and the other from an extraordinary payment of vacation entitlement. The latter was the result of Mr. M's employer changing the way it accrued holiday pay entitlement for the former employees of a company with whom it had merged. Mr. M was one of those employees. This resulted in a one-time payment to him of \$9,842 which is included in his line 101 income. Although this is a one-time payment and although it might be argued that it relates to income or benefits earned some years ago, I consider it appropriate to include that amount in determining Mr. M's child support obligation. It is, after all, income he received during the year and thus increased his ability to pay support. It is income earned while the children were dependent on him and thus, in theory, there is no reason why they should not share in it. I do not think that his RRSP income should be included for purposes of calculating his child support obligation. He used the money to repay a debt that Ms. M had incurred in their joint names and about which I will say more below. The only other significant adjustments to Mr. M's income are a loss on rental income in the amount of \$4,876 which, I assume, was in relation to the former family home, and a gain of \$1,396 which, I infer, was in relation to Top Notch Enterprises. For the reasons already given, I consider it appropriate to take account of these amounts in determining his child support obligation. Thus, I conclude his income for child support purposes for 2006 is \$109,050. The corresponding child support obligation is \$1,559.
- [52] The final issue relates to the period in the spring of 2006 when Mr. M paid down a debt that Ms. M incurred in his name, rather than pay her child support for three months. The issue arises in the following way. The parties had a joint line of credit with a credit union prior to their separation. Mr. M used it for his own purposes and agreed to repay it. Either because he could not or chose not to, the debt remained outstanding into 2006. As of January 31st of that year, he owed \$4,321. There is nothing to suggest that Mr. M was not making payments on the debt as required, but he had not paid it off. In February 2006, Ms. M charged \$8,000 against this account. Mr. M learned of this when he received the next monthly statement. He wrote to Ms. M and demanded that she repay the loan, failing which he would apply his child support payments against it. When he did not receive a response, he paid that which he owed on the loan and applied the child support payments for April, May and June towards the balance. Ms. M, in response, enrolled Mr. M in the Family Maintenance Enforcement Program.
- [53] While child support obligations are to be strictly observed, in the circumstances of this case, I think it fair to credit Ms. M with the payments Mr. M made to the line of credit. First, before he did that, he wrote to her advising that was what he was going to do unless she repaid the loan. Second, there is no dispute but that she was not entitled to the funds she withdrew against the line of credit. Third, she received the money and thus was not out of pocket as a result of Mr. M's actions.

[54] The result of the foregoing is that Ms. M's application for retroactive child support is dismissed, except to the extent that it relates to the period after May 1, 2007. The interest and other charges that have accumulated on the FMEP accounting are canceled as are the arrears to the extent they are based on the three payments made to the line of credit in the spring of 2006. Ongoing child support from May 1, 2007, in the amount of \$1,559 is payable and by Mr. M is notionally in arrears as of January 1, 2008, in the amount of \$2,313 (9 x (\$1,559 less \$1,302)). As to the \$8,000 withdrawn by Ms. M from the line of credit, Mr. M incurred an interest expense of \$798. He has been paid back \$3,728 (2 x \$1,213 plus \$1,302). The result of all this is that Mr. M is current to the end of January 2008 on his child support obligation, and he is owed \$5,070 which is the balance of Ms. M's liability on the line of credit.

c) Spousal Support

[55] Given that this is an initial application for spousal support that, if ordered, would be inconsistent with the terms of a pre-existing agreement, the two-stage analysis outlined in *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24, is engaged. There are two aspects to the first stage of that analysis: the first involves an inquiry into the circumstances surrounding the execution of the agreement, and the second involves an assessment of the substance of the agreement to determine whether it reflects "substantial compliance" with the factors and objectives of the Divorce Act relating to spousal support. The aim of this stage of the analysis is to determine whether there is a basis to discount the agreement. To the extent there is, it will be less significant in the analysis of the ultimate issue. The second stage of the analysis involves an assessment of the agreement in the context of the parties' current situation and, in particular, an assessment of whether it continues to reflect their intentions and whether it continues to reflect the factors and objectives of the Divorce Act dealing with spousal support.

[56] The only evidence from Ms. M relating to the negotiation of the separation agreement is her assertion that she was "never particularly comfortable" with the mediation process and that she has felt "intimidated" by her husband and did not "really understand" the family finances. At the time the separation agreement was concluded, Ms. M was living with her common-law husband and had been for over a year. When she moved in with him, he purchased a 20-acre farm with an assessed value of just over \$345,000. According to the uncontradicted evidence of Mr. M, Ms. M and Mr. Schell replaced the floors in their new home, repainted the interior, constructed a hay barn, renovated a horse barn, built a riding and cutting ring, re-fenced the property, and re-seeded a hay field. From this, I conclude that whatever other pressures Ms. M may have felt to conclude an agreement, it cannot be contended that she was under any particular financial pressure.

[57] The mediator, Ms. Djordjevich, was engaged in August 2004. Within a month, the parties had agreed to refinance their debt and Mr. M began paying child support. Negotiations continued and after a draft agreement was prepared, each party was invited to consider it and indicate if they required any changes. Ms. M suggested one change, namely that Mr. M pay half of the children's extracurricular expenses. In requesting this change, she wrote to the mediator as follows:

That is all I need changed to the separation agreement, I do however need [Mr. M] to do his part as well, as I am not willing to wait any longer, I wish this to be done and over with. If is [sic] not finished by the end of this week, then I shall proceed on my own with own council [sic].

[58] Mr. M suggested only one uncontroversial change to the agreement and agreed to the change suggested by Ms. M, although he was only prepared to contribute to extracurricular expenses to a maximum of \$1,000 annually.

[59] Neither Mr. M nor Ms. M received independent legal advice before signing the separation agreement, although both were encouraged to do that both in August 2004 when they retained Ms. Djordjevich and again when they reviewed and signed the agreement itself. Ms. M signed the agreement and her signature was witnessed by her common-law spouse. Mr. M signed separately and his signature was witnessed by his mother.

[60] There is no suggestion that there was anything other than full disclosure by both parties of their assets and liabilities.

[61] I am not satisfied that there were any "vulnerabilities" present during the negotiation and execution of the agreement, never mind vulnerabilities that rise to a level that would warrant discounting of the agreement.

[62] I turn next to the substance of the agreement. At the time it was signed, both the former matrimonial home and the rental property were rented. The latter was rented as a "vacation home", although it appears that it was at times not rented at all. It was encumbered with a mortgage of \$93,000; the monthly payments for which are not indicated. The new mortgage on the family home required bi-weekly payments of \$740. The family home had been generating rent in the amount of \$700 per month until January 2005 when it was anticipated the rent would increase to \$800 per month. It did not; rather, it remained rented at \$700 until at least the end of 2005. The costs associated with the former family home were, on average, about \$1,000 per month over the income it generated. The rental home was losing money as well but not as much.

[63] The agreement makes no provision for spousal support for Ms. M, although it obligates Mr. M to maintain her on his extended health and dental insurance as long as he is entitled to under the terms of those plans. Instead, it provides as follows at para. 18 that:

Notwithstanding any change of circumstances no matter how unforeseen or radical:

(a) neither party will claim interim or permanent support from the other; and

(b) each party gives up forever any claim for support against the other.

In the recitals the following is found:

Y. The parties have considered

(i) The actual and anticipated needs of each other,

(ii) The actual and anticipated needs of the Children, and

(iii) The actual and anticipated ability of each of them to contribute to the support of the other and the Children;

Z. (i) The parties are aware that the law provides for judicial intervention if this Agreement is found to be unfair now or in the future;

(ii) That the parties wish to confirm that each relies on this Agreement to be enforced according to its terms and neither would have entered this Agreement if it had been anticipated that the other would apply to vary the Agreement at some future date;

(iii) The parties acknowledge that each is prepared to abide by the Agreement because each recognizes the importance to each of being able to rely on these terms without fear that the Agreement may in future be challenged and varied.

[64] Miglin directs that agreements be examined with a view to determining whether they are in substantial compliance with the factors and objectives of the Divorce Act, including those set out in s. 15.2(4) and (6). Those sections oblige the court to consider certain factors, and in particular the "condition, means, needs and other circumstances of each spouse", including the length of their cohabitation, the functions they performed during their cohabitation, and any agreement or order for support, when making a spousal support order which is to have as its objective, the recognition of "any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown", apportioning between them "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", relieving "any economic hardship of the spouses arising from the breakdown of the marriage" and "in so far as practicable, promot[ing] the economic self-sufficiency of each spouse within a reasonable period of time".

[65] Two things are worthy of note about this aspect of the inquiry. First, the agreement is to be measured not just against the factors and objectives in s. 15.2 of the Divorce Act, but rather the assessment is to include a consideration of the objectives of finality, certainty and the policy of the Act which encourages parties to fashion their own resolution of their differences (see para. 85). Moreover, the analysis is not to be undertaken by focussing exclusively on the spousal support aspects of the agreement; rather, the entire agreement is to be considered, especially where it is apparent that the provisions are inextricably linked to one another. Second, not any departure from the factors and objectives in the Act will warrant discounting the agreement; only a "significant departure" from the general

objectives will justify that finding.

- [66] Ms. M argues that the SSAG have something approaching the force of law in this province given cases such as *Redpath v. Redpath*, [2006] B.C.J. No. 1550, 2006 BCCA 338, and *Tedham v. Tedham* (2005), 47 B.C.L.R. (4th) 254 (C.A). She argues that given the length of their marriage, Mr. M's income of \$100,000 at the date of separation, and the fact that she had no income, she is and was entitled to support and the SSAG suggest that support would be payable indefinitely and in an amount of between \$1,650 and \$2,221 per month. The agreement, which provides for no support, represents a "significant departure" from the objectives and factors in s. 15.2 of the Act, and notwithstanding the other values the Act embraces, the agreement is unfair.
- [67] Mr. M argues that the agreement is fair. Implicit in his position is the fact that the agreement was entered into when Ms. M was in a common-law relationship with another man. She was, by virtue of that relationship and the child support that Mr. M was paying, enjoying a life style that was at least as comfortable as his. Further, he argues that by him assuming responsibility for servicing the significant family debt pending sale of the home and rental property, she was receiving, indirectly, significant support.
- [68] It seems to me that both positions are flawed. As to Ms. M's position, it ignores the limits on the application of the Spousal Support Advisory Guidelines when applied to situations in which the recipient spouse has "re-partnered". At s. 10.7, the authors of the SSAG write:

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.

For the moment, however, we have been unable to construct a formula with sufficient consensus or flexibility to adjust to these situations. This is a fertile area for further discussion in the next stage of the project, especially as people become comfortable with the basic concepts of the advisory guidelines. For now, we have to leave the issues surrounding the recipient's remarriage or re-partnering to individual case-by-case negotiation and decision making.

Given this limitation, it would be wrong to notionally apply the Guidelines and conclude, by virtue of a disparity between what they indicate ought to be paid and what the agreement provides, that the goals and objectives of the Divorce Act have not been sufficiently taken into account.

- [69] Mr. M's position is flawed in two respects. First, "re-partnering" does not necessarily terminate a spouse's entitlement to support and may not, at least initially, have much effect on the quantum of support. That is particularly so where, as here, the entitlement to support is conceptually based on the compensatory theory described in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 (see generally *Murphy v. Murphy*, 2007 BCCA 500). Moreover, his argument that his obligation is satisfied through his subsidization of the real property ignores the fact that the agreement provides that he is to be reimbursed for those expenses.
- [70] Does the agreement substantially comply with or reflect the values in the Divorce Act in relation to spousal support? To answer this question, it is first necessary to determine whether Ms. M is, or was at the time the agreement was entered into, entitled to spousal support. The parties were in a relationship for 21 years. Since the birth of their first child in 1990, Ms. M devoted herself primarily to raising their children and, as a result, severed her connection with the working world. She was 42 at the time the separation agreement was concluded and is 45 now. There is no evidence to suggest that Ms. M was or is entitled to spousal support on the basis of need. There is no evidence as to what Mr. Schell's income is, but given the fact that they were able to purchase a small ranch and undertake significant renovations while Ms. M was not working outside their home, I infer that his income is likely at least as much as that of Mr. M. I conclude that, having regard to the objectives of spousal support, Ms. M was entitled to support in February 2005. Using the conceptual models explained in *Bracklow*, her entitlement is based on compensatory principles.
- [71] Given the conceptual basis for her entitlement, and in view of the other circumstances, I conclude that she would have been entitled to support notwithstanding that she "re-partnered" shortly after the separation. Although the SSAG cannot be mechanically applied in this situation, some guidance may nevertheless be gleaned from the values they produce. Mr. M's income was estimated by the parties at \$95,000 for 2005; in fact, he earned \$100,000. Although Ms. M had no income, that is not determinative of the matter. As noted, she returned to her former employer in January 2007. She earns \$1,615 bi-weekly which equates

to approximately \$41,900 annually. There is no evidence that she made any effort to find employment prior to 2007. The children were 10 and 13 years old when the parties separated, and while it is unrealistic to conclude that she could have secured employment immediately, there is no reason to conclude she could not have done so by the beginning of 2005, some 18 months after she and Mr. M parted company. It may be that she felt no need to because of the income earned by her new common-law partner. Whatever the reason, I consider that, for purposes of this exercise, it is reasonable to impute an income to Ms. M of \$38,000 commencing in January 2005, which is about 10 percent less than her present income. Based on these incomes, the SSAG suggest a range of support of between \$671 and \$1,300 payable indefinitely.

- [72] What then of the effect of re-partnering? Although not free of doubt, I consider that the fact of re-partnering has no effect on entitlement and should have little effect on quantum at least initially, given the compensatory nature of the entitlement. As the recipient spouse's new relationship matures, however, the concept of "merger over time", which partially animates the determination of quantum and duration of support, would, if applied to the second union, suggest a growing obligation on the new spouse to support the former spouse of the first union. To the extent that is so, it would be reasonable to reduce the obligation of the first paying spouse over time. Given the ages of the parties, and assuming equal earnings by Mr. Schell and Mr. M, and frankly acknowledging the somewhat arbitrary nature of the exercise, I consider it appropriate for Mr. M's obligation to reduce by 10 percent per year for each year that the new relationship subsists. The result would be that Ms. M would receive support in declining amounts over the course of 10 years. In 10 years, Ms. M will be in her mid 50s. She will by then, assuming no change in her circumstances generally, have 10 years of current work experience to her credit, be in a longstanding relationship and have no dependent children. A declining award would serve all of the objectives of in s. 15.2(5) of the Divorce Act.
- [73] Applying this rough formula to the situation as it stood in February 2005, Ms. M would have been entitled to \$750 less 10 percent (the relationship with Mr. Schell was then a year old). I have chosen an amount near the bottom of the range suggested by the SSAG, in part, because there is no needs basis to her entitlement. Exclusive of the affect of income tax in 2006, she would have been entitled to \$750 less 20 percent; in 2007, her entitlement would be \$750 less 30 percent.
- [74] With these conclusions in mind, the issue is whether an agreement that provides for no spousal support be said to substantially comply with the objectives of the Divorce Act? The answer to that question must be "no", and it is necessary to address the question without regard to the agreement. I note that there are no other provisions of the agreement which have any relationship to spousal support; in other words, the spousal support provisions are stand-alone provisions and do not reflect a compromise of some other rights.

[75] I would notionally award support in accordance with the formula just described beginning in February 2005. Prior to that date, Mr. M had virtually no ability to pay and Ms. M made no request that he do so. While I am prepared to notionally award support retroactively, I consider it appropriate to do so only as far back as February 2005. This support, if paid periodically, would have been taxable in Ms. M's hands and deductible from Mr. M's income. There is no reason why Mr. M should not receive at least some credit for the income tax benefit he would otherwise have received. Ms. M chose not to press her claim for support when the agreement was settled. Nothing prevented her from doing that. Again, very roughly, I consider it appropriate to credit Mr. M with half of his estimated tax savings, had the support been paid periodically. I estimate his after tax cost of \$675 per month would be \$450. I will fix his obligation at \$550. Thus, his obligation for the 12 months from February 2005 to January 2006 is \$6,600. I fix his monthly obligation for the next 12 months at \$510 (\$750 less 20 percent, less 15 percent) (which is roughly 10 percent less than the year prior) or \$6,120. For the year beginning February 2007, his obligation is \$450 (\$750 less 30 percent, less 15 percent) per month or \$5,400. Up to January 2008, therefore, his total spousal support obligation is \$18,120.

[76] His obligation going forward, that is, from February 1, 2008, is \$750 less 40 percent or \$450 per month. His obligation commencing January 1, 2009, will be \$375 and so on.

d) The Divorce

[77] The evidence establishes the grounds necessary for a divorce, and there will be an order in the usual terms.

Conclusion and Costs

[78] It remains to deal with the monies in trust and to take account of the other issues arising from the evidence.

[79] Mr. M is owed, by the terms of the separation agreement, one half of the monies he paid to subsidize the properties that sold in the fall of 2006. The former family home lost \$12,758 in 2005 and \$12,396 in 2006. Ms. M's share of these losses is \$12,077. The rental property sold in November 2006. It lost \$4,211 in 2005 and \$6,730 in 2006. Ms. M's share of these losses is \$5,470. These amounts total \$17,547. The spousal support obligation is to be offset against this amount with the result that Mr. M's spousal support obligation will be current to January 1, 2008, upon payment of \$573.

[80] In addition, Mr. M owes Ms. M \$5,000 in satisfaction of his obligation for retroactive child support, and he is required to contribute \$2,000 for each child to an RESP.

[81] As against the foregoing, there is the line of credit that the parties used to consolidate their family debts which, as of February 2005 (the date of the separation agreement), was outstanding in the sum of \$25,540 and, by September 2007, had been paid down to \$19,585 by Mr. M. The separation agreement is silent on who is to pay this debt pending sale of the real property. Mr. M has made all the payments (both the interest and the principal). Those

payments total \$21,986 (\$7,453 for 2005, \$8,002 for 2006, and \$6,531 to October 1, 2007). There is no reason why Ms. M should not contribute half of this amount or \$10,993.

[82] Further, Mr. M paid the mediator's account which totaled \$1,700. By the terms of the separation agreement, Ms. M is responsible for one half of that account. Further, he paid \$1,000 in an unsuccessful attempt to obtain a divorce, a process that Ms. M agreed to but failed to honour. This cost is entirely for her account.

[83] I consider it appropriate and practical to address all these accounts by offsetting them to the extent possible and to deal with the remainder from the funds held in trust. To summarize, there is due to Mr. M: \$10,993, \$850 (one half of the mediator costs), \$1,000 (failed divorce attempt) and \$5,070 (the remainder of the \$8,000 line of credit withdrawal) for a total of \$17,913. He owes Ms. M \$5,573. The net result is that he is owed \$12,340.

[84] There is something in excess of \$29,500 in Ms. M's lawyer's trust account. There are debts outstanding of approximately \$28,000 (\$19,500 on the CIBC line of credit which was used to consolidate the family debt, and \$8,500, the Top Notch line of credit). The separation agreement provides that the proceeds from the sale of the properties are to be used to retire these debts. I see no reason not to order that to which the parties agreed. An order to that effect will go. The remaining funds are to be used to make the RESP contributions that Mr. M is obliged to make for the children. If there is a shortfall, it is to be offset against that which Ms. M owes to him. Assuming Ms. M does not pay Mr. M, he is entitled to credit his monthly support obligation against that debt.

[85] Unless there is something about which I am unaware touching on the issue of costs, I do not consider it appropriate to award costs to either party. Success has been divided.

"G.M. Barrow, J."

The Honourable Mr. Justice Barrow

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