
CANADA / JUDGMENT

Kennett v. Kennett

2021 BCSC 2265

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 2265 Kennett v. Kennett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kennett v. Kennett,

2021 BCSC 2265

Date: 20211122

Docket: E103381

Registry: Vancouver

Between:

Donald Jeffrey Emil Kennett

Claimant

And

Rita Ursula Kennett

Respondent

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Claimant

L. Spencer

Counsel for the Respondent

K.V. Belani

Place and Date of Hearing:

Vancouver, B.C.

September 24, 2021

Place and Date of Judgment:

Registry, B.C.

November 22, 2021

- [1] The parties were husband and wife, and were divorced from each other effective April 6, 2012, by the order of Justice Kelleher dated March 6, 2012.
- [2] In his oral reasons for judgment, dated March 6, 2012, Vancouver Registry Number E103381, Kelleher J. dealt not only with the divorce, but also with custody and guardianship, child and spousal maintenance and the division of property.
- [3] For the purposes of applying the Federal Child Support Guidelines, Kelleher J. assessed the income of the claimant at \$103,526, and that of the respondent at \$17,812. Based upon those incomes, the claimant was ordered to pay to the respondent, the sum of \$1,600 per month in spousal support.
- [4] Justice Kelleher also ordered that there should be a review of spousal support three years after the date of his order.
- [5] The claimant was also ordered to irrevocably name the respondent as the sole beneficiary of his Manulife Financial life insurance policy number 7339730 to the maximum of its current coverage, so long as he was required to pay spousal support to the respondent, and Manulife was willing to renew the policy.
- [6] The claimant was also ordered to irrevocably name the parties' two children as the beneficiaries of his Manulife Financial life insurance policy number L203988 to the maximum of its current coverage, so long as they were entitled to receive child support pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) and Manulife was willing to renew the policy.

Positions of the Parties

- [7] The claimant has paid spousal support to the respondent for ten years. Pursuant to an order made in April 2011, the claimant paid the respondent spousal support of \$2,003 per month and this amount was reduced by consent to \$1,665 per month commencing November 1, 2011. The claimant has paid \$1,600 per month to the respondent since March of 2012, and now seeks what he describes as a review of spousal support, and the cancellation of his obligations to pay spousal support and to continue to provide life insurance pursuant to the Manulife policies 7339730 and L203988.

- [8] The respondent opposes the relief sought by the claimant on the basis that what the claimant is seeking is a variation of the order of spousal support, which she maintains should not be granted.
- [9] If any spousal support is to continue, the respondent contends that there is no basis for the termination of Manulife policy 7339730, but while opposing the termination of Manulife policy L203988, offered no reason for that opposition.

Background

- [10] The employment histories of the parties were described by Kelleher J. at paras. 7-12 of his reasons for judgment as follows:
7. Mr. Kennett's background was in the retail grocery business. He worked for Canada Safeway starting in 1980 and later for H.Y. Louie after it acquired some Safeway stores. Mr. Kennett then worked for Washington Marine Group from 1997 to 2007.
 8. His employment income is quite consistent. There is no dispute that his Guideline income is \$103,526.
 9. The respondent, Rita Kennett, grew up in Richmond. Her parents divorced when she was 12 years old and she lived with her mother in the family home. Her mother still lives in Richmond. Her father lives on a farm in Mission, which is discussed below. Ms. Kennett finished school in 1980. She worked for many years for C.P. Hotels, an airline caterer in Richmond. She attained a senior position, flight co-ordinator, then considered a management position but returned to the bargaining unit. Ms. Kennett left her job when Jeffrey was born in 1994.
 10. She returned to work in 2005, performing work in a high school cafeteria. She accepted a position at Acro-Helipro, but after two months found it too physically demanding.
 11. In February 2009, Ms. Kennett began working for Riverside Banquet Halls. Her hours have recently been reduced to 3 days per week from 10:00 a.m. to 4:00 p.m.
 12. Ms. Kennett is interested in training for a better paying job. She has had some training at BCIT. Her interests include possibly working in a law firm.
- [11] In his reasons for judgment at paras. 22, 86 and 87, Kelleher J. wrote:
22. There is also no dispute that Ms. Kennett is entitled to spousal support. This has been a long (approximately 19 and one-half years) relationship and has been traditional in the sense that Ms. Kennett has been home with the children for a substantial period of time. Spousal support is justified on both compensatory and needs-based grounds.
 86. As I stated above, this is an appropriate case for spousal support. Given the length of the relationship, spousal support will be for an indefinite duration. An appropriate award is \$1,600 per month.

87. In the usual case, an award of spousal support ought to be permanent, subject only to proof of a subsequent change of circumstances: See *Leskun v. Leskun*, 2006 SCC 25 at para. 39. But where, as here, there is real certainty about the respondent's future employment, a review is appropriate. Spousal support is subject to review by the Court after three years from today's date.
- [12] Neither of the parties' two children are now children of the marriage as defined by s. 2(1) the Divorce Act.
- [13] The claimant's application was initially set for hearing on June 29, 2021, but on the application of the respondent was adjourned by Justice Forth to July 27, 2021, peremptory upon the respondent.
- [14] On July 27, 2021, the matter was again adjourned until September 24, 2021, this time at the instance of the claimant.

Legal Principles

Spousal Support

- [15] In *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal refused [2009] S.C.C.A. No. 41 [Chutter], at paras. 45-47, 98 and 100, the Court of Appeal set out the general principles and factors in determining entitlement to and quantum of spousal support as follows:

45 Section 15.2 of the Divorce Act is the main provision governing entitlement to spousal support. Subsection 15.2(6) provides that a spousal support order should meet the following objectives:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

46 In order to achieve a fair and equitable distribution of resources, all four of these objectives should be examined: *Moge v. Moge*, [1992] 3 S.C.R. 813, at 850-853, 43 R.F.L. (3d) 345 (S.C.C.). Having regard to these policy objectives, courts must consider the condition, means, needs and other circumstances of each spouse, including the factors set out in s. 15.2(4):

- (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.

47 Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act, (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 R.F.L. (4th) 1 (S.C.C.)).

98 It is only after entitlement to spousal support has been established that the Spousal Support Advisory Guidelines (Ottawa: Dept. of Justice, 2008) (the "Guidelines") become relevant (*Yemchuk*, at para. 63). Once entitlement is established, it is necessary to go on to consider the quantum and duration of an award.

100 The Guidelines are advisory only; they are not legislated. Nevertheless, they have been endorsed by the courts in British Columbia as a "useful tool" in determining issues of quantum and duration of spousal support and have been deemed consistent with the law in British Columbia (*Yemchuk*, at para. 64). In *Dunnigan v. Park*, 2007 BCCA 329, 38 R.F.L. (6th) 241 (B.C. C.A.), this Court reiterated that the Guidelines were properly to be used as "a guide to a range of awards, rather than as a set figure which must be applied or awarded" (para. 16). Similarly, in *Fisher*, the Ontario Court of Appeal endorsed the application of the Guidelines, and stated that "with experience, the Guidelines will become accepted as a reliable tool for the resolution of many cases" (para. 101).

[16] In *McEachern v. McEachern*, 2006 BCCA 508 at para. 41, Justice Prowse, for the Court wrote:

41 The trial judge's adverse comments concerning Ms. McEachern's efforts to become self-sufficient appear to arise, in part, because Ms. McEachern also took several holidays following the separation, including a two month trip to Thailand in December 2003. As will become clear later in these reasons, I conclude that the appropriate manner to deal with the finding that Ms. McEachern's efforts to obtain self-sufficiency were less than whole-hearted is to impute income to her for a portion of the period in issue.

[17] In *Rogers v. Rogers*, 1999 BCCA 238 [Rogers] at para. 46, Justice Esson, for the Court, wrote:

46 The circumstances of this case fall between those of *Liang* and those of *Moge*. The circumstances of Mr. Rogers might be said to be comfortable but not wealthy. That being so, this is not a case in which the plaintiff should be exempted from making efforts to be self-sufficient. On the other hand, having regard to the difficulties of her situation, to impose upon her an absolute duty to become even partially self-sufficient would not be in accord with the law in the cases and the statute. The plaintiff's obligation is not to become self-sufficient, it is to make reasonable efforts to achieve that goal. Section 96 of the Family Relations Act, dealing with variation proceedings, provides in s.-s. (4) and (5) (formerly 62(2) and 62(3)):

- (4) A spouse or former spouse receiving maintenance under an order must make reasonable efforts to become self sufficient as required by section 89(2) without prejudice to the continuing application, if any, of section 89(1).
- (5) If the court finds that a spouse or former spouse is not making reasonable efforts under subsection (4), the court may reduce the amount of maintenance payable on behalf of the spouse or former spouse under a maintenance order.

Review of Support Obligations

[18] In *Domirti v. Domirti*, 2010 BCCA 472, Justice Smith, writing for the Court, set out the relevant legal principles for a review hearing at paras. 33-34:

33 The nature of a review hearing was described by Madam Justice Prowse in *Schmidt v. Schmidt*, 1999 BCCA 701 (B.C. C.A.):

[9] ... [Review orders] are considered particularly useful in circumstances where there is some doubt as to whether spousal maintenance should be continued and, if so, in what amount. Rather than force the parties to go through a variation proceeding with its strict threshold test of change in circumstances, the court provides that proceedings will be conducted and the nature of the evidence to be called. Pending review, the order remains in effect.

34 Later, the Supreme Court of Canada examined the nature and scope of a review order in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 (S.C.C.). Before citing the above passage from *Schmidt*, Mr. Justice Binnie, for the Court, described a review provision in a spousal support order as "a condition [attached to a s. 15.2 order] pursuant to s. 15.2(3) of the Divorce Act, that entitles one or other or both of the parties to return to court for a reconsideration of a specified aspect of the original order": (para. 36). He stated:

[36] ... This will properly occur when the judge does not think it appropriate that at the subsequent hearing one or other of the parties need show that a change in the condition, means, needs or other circumstances of either former spouse has occurred, as required by s. 17(4.1) of the Divorce Act.

[37] Review orders, where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances: *Choquette v. Choquette* (1998), 39 R.F.L. (4th) 384 (Ont. C.A.). Otherwise, as the amicus curiae fairly points out, the applicant may have his or her application dismissed on the basis that the circumstances at the time of the variation application were contemplated at the time of the original order and, therefore, that there had been no material change in circumstances. The test for variation is a strict one: *Willick v. Willick* [1994] 3 S.C.R. 670, at pp. 688-90.

Discussion

- [19] As set out above, Kelleher J. awarded the respondent spousal support on both compensatory and needs-based grounds.
- [20] The claimant contends that there is an error in para. 87 of the reasons for judgment of Kelleher J., in that the word "certainty" in the second sentence was intended to be "uncertainty". I agree, as otherwise there would have been no basis to revisit spousal support, absent a change in circumstances.
- [21] On a review application, the parties are not required to establish a material change in circumstances since the making of the review order. This distinguishes a review application from a variation application, which requires a strict threshold test of a change in circumstances; see *P. (L.M.) v. S. (L.)*, 2011 SCC 64.
- [22] A review application, is not, however, an opportunity for a party to reargue their position. The issues identified in the order permitting the review are the only issues the court ought to consider on the review. The only issue that Kelleher J. intended to be reviewed, was the respondent's income from future employment, and whether that might affect her spousal support with respect to quantum. I find that Kelleher J. did not intend for the review to include a reconsideration of entitlement.
- [23] I therefore find that the claimant's application with respect to spousal support and the termination of Manulife policy 7339730, should be determined on the basis that this is a review that does not oblige the claimant to show a change in circumstances. However, it is not open to me to reconsider the respondent's entitlement to spousal support on this review.
- [24] In *MacCarthy v. MacCarthy*, 2015 BCCA 496, at paras. 28 to 35 Justice Savage, writing for the Court determined:
- [28] In determining the amount of spousal support payable to Mrs. MacCarthy the chambers judge first reviewed the objectives of spousal support. He said:
- [105] Section 15.2(6) [of the Divorce Act] sets out the objectives of a spousal support order. Under s. 15.2(6), an order for spousal support 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 practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [106] All four of these statutory objectives must be taken into account and none of them takes precedence over any other: see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at 440; *Moge v. Moge*, [1992] 3 S.C.R. 813 at 852.
- [29] With respect to the reliance by Mr. MacCarthy on s. 15.2(6)(d) of the DA he said:
- [107] Mr. MacCarthy relies on the fourth objective in s. 15.2(6), arguing that Mrs. MacCarthy has failed to make reasonable efforts to achieve economic self-sufficiency. However, failure to achieve self-sufficiency is not a breach of a duty and is simply one factor among others to be taken into account: see *Leskun* at para. 27. In that regard, the following passage from *Tedham v. Tedham*, 2005 BCCA 502 at para. 33 is instructive:
- ... s. 15.2(6)(d) of the Act does not require self-sufficiency, but simply seeks to promote self-sufficiency "in so far as practicable". In determining what is practicable, regard must be had to all of the circumstances, including the age and gender of the spouse, her/his skills and education, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self-sufficient, which may be quite a different matter.
- [108] Moreover, Mrs. MacCarthy does not bear a burden to establish that she has met a "duty" to make reasonable efforts, as neither party bears an onus on a review to show changed circumstances: see *Leskun* at para. 39. However, a failure to make reasonable efforts to obtain self-sufficiency may amount to a material change in circumstances justifying an application to vary an existing order pursuant to s. 17 of the DA: see *Andrews v. Andrews* (1999), 50 R.F.L. (4th) 1 at para. 37 (O.N.C.A.); *Tsurugida v. Romero*, 2006 BCSC 1754 at para. 86.
- [30] Mr. MacCarthy argues that the chambers judge erred in this passage by confusing "... the burden upon the respondent to prove on a balance of probabilities that she was making reasonable efforts to become self-sufficient with an onus to show changed circumstances, which latter issue was not before the Court". He says that the confusion of these concepts "distorts the further reasoning", as the chambers judge does not then consider whether the evidence of the respondent is sufficient to meet the burden of showing reasonable efforts.
- [31] In my opinion the passage referred to, considered in context, shows no such error. The chambers judge noted two negatives on the review application, namely, (1) that there is no burden upon the respondent to prove on a balance of probabilities that she has satisfied a "duty" to make reasonable efforts to become self-sufficient, and (2) that there is no onus on either party to show changed circumstances. In my view the first of these propositions is a reference to the discussion in *Leskun*, that there is no "duty" to become self-sufficient, although court orders should promote self-sufficiency. The second of these propositions flows from the nature of a review application. As the Court said in *Leskun*:

[39] Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change of circumstances. If the s. 15.2 court considers it essential (as here) to identify an issue for future review, the issue should be tightly delimited in the s. 15.2 order. This is because on a "review" nobody bears an onus to show changed circumstances.

[Emphasis added.]

[32] The failure to achieve self-sufficiency is not breach of a duty. As this Court said in *Tedham v. Tedham*, 2005 BCCA 502:

[33] As already stated, however, s. 15.2(6)(d) of the Act does not require self-sufficiency, but simply seeks to promote self-sufficiency "in so far as practicable". In determining what is practicable, regard must be had to all of the circumstances, including the age and gender of the spouse, her/his skills and education, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self-sufficient, which may be quite a different matter.

[Emphasis added.]

[33] The chambers judge, by contrasting a review application with a s. 17 change of circumstances application, did not, ipso facto, conflate a s. 17 application with a review application. Rather, his reasons, considered as a whole, indicate he recognized the differences. Nor, in my opinion, did contrasting these applications taint his view of what had to be proven. The order he made recognized the statutory objective in s. 15(1)(d) of the DA, the promotion of self-sufficiency.

[34] Of course, the court has a broad discretion to impute income to either or both spouses for the purposes of determining child and spousal support. The ability of a court to impute income recognizes that, insofar as it is practicable, and having regard to all the circumstances, spouses seeking support must also make reasonable efforts to support themselves. That requirement should not be confused with the burden of proof. There is no burden of proof on the party seeking support to prove a negative: that they could not become self-sufficient.

[35] The party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for the imputation of income: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36; *Jendruck v. Jendruck*, 2014 BCCA 320 at para. 23. Reference to the burden of proof is particularly apposite here: (1) Mrs. MacCarthy had limited education, (2) Mrs. MacCarthy, as the primary caregiver, had been absent from the workforce for many years, (3) it was only with determined effort that she qualified herself for a new career, and (4) she worked full-time. Those are facts found by the chambers judge and are not in dispute.

[25] The claimant's declared gross income for 2020 was \$124,820.41.

[26] In his affidavit dated June 10, 2021, the claimant swore that:

9. At the time the divorce was granted, I was working as an Occupational health and safety professional and my Guideline income was \$103,526. The Respondent was working for a banquet hall and she expressed interest in training for a better paying job, specifically working in a law firm. She was earning a Guideline income of \$17,812.
10. A review of the spousal support never took place.
14. I believe that the Respondent has pre-inherited, equally with her brother, their mother's house at 4540 Granville Ave. Richmond, BC which has a tax assessed value of \$1,564,500. Ursula Busch the Respondent's mother is still alive mother has dementia and is in care. Title to this property changed some point after our divorce and the Respondent's mother is no longer on title and she and her brother now own the property. In addition, the Respondent and her brother also own a farm property 8418 Eagle Rd. Mission, BC with a tax assessed value of \$105,800. The Respondent and her brother had been claiming farm status for tax purposes for years and that significantly reduces their property tax if they produce a certain income each year and also as a result, she has a higher income due to the fact that she can use farming losses on her income tax returns.
15. I believe that the Respondent has had ample opportunity to become self-sufficient and I have no evidence she has made any effort to do so. I specifically recall a judge in a hearing before our trial advising the Respondent in Court that she would have to make efforts to increase her income and work towards becoming self-sufficient. I distinctly recall the Respondent acknowledging this to the judge and indicating that this is what she would do.
18. I have reason to believe that the Respondent may have inherited a substantial amount of money from her half-brother Walter who passed away a few years ago and the Respondent may be simply choosing not to work. My son indicated this to me a few years ago that Walter had died and that his mother, the Respondent, was going to receive a large inheritance as the Respondent and the Respondents brother Martin Busch were Walter's only surviving family.

[27] The claimant's beliefs set out in paragraphs 14, 15, and 18 are, of course, not evidence that can be relied upon on his application.

[28] For reasons that were not explained, the respondent did not file a Form 8 confirming her assets, income or expenses. When asked if she wished to adjourn to file more material, the respondent said that she was prepared to proceed on the information that was in the application binder.

[29] That information included her affidavit sworn July 23, 2021, in which she did depose that:

3. The Honourable Mr. Justice Kelleher's final order does not specify an end date for spousal support as the claimant specifies. The Honourable Mr. Justice Kelleher stated in paragraph (22) in the Oral Reasons for Judgment: There is also no dispute that Ms. Kennett is entitled to

spousal support. This has been a long (approximately 19 and one-half years) relationship and has been traditional in the sense that Ms. Kennett has been home with the children for a substantial period of time. Spousal support is justified on both compensatory and needs-based grounds. The Reasons for Judgment further state that the obligation to pay spousal support is for an indefinite period. Over the years, Mr. Kennett's Income has increased and not decreased therefore there is no prejudice to him if he continues to pay support which is in fact at a lower amount compared to this present income.

6 Since the divorce on April 6, 2012, I have had the loss of my dear father and my oldest brother who passed suddenly. Our mother was diagnosed with Dementia, Alzheimer's and Cancer. Mom was given approximately two years to live and she's still with us. I call her the living miracle and appreciate and honor her every day.

8. I started my career at the airport when I was 16 years old in 1979-1994. I had worked my way up to a Flight Coordinator. I had 2 miscarriages before our son was born. After both miscarriages I had surgery each time. I developed varicose veins that required surgery a couple of times. I also developed an ulcer on my left ankle that required emergency surgery because blood was streaming out. It took months to heal, I had to go to a specialist to wrap the ankle with special bandages, it was extremely painful. I have been told by the surgeon not to stand for long periods of time. I was told after the birth of our daughter not to have any more children. I had surgery to have my tubes tied. All of these medical issues have put a strain on body. Which is why I am so grateful for the Spousal Support from Mr. Kennett.

9 My current income is the Spousal Support which is \$19,200. My basic Living expenses are \$1100 per month. There are other personal expenses such as food, clothing, personal care, gas for the car etc. The Claimant's income is 124,819 for 2020.

14 The claimant makes a claim that I have a higher income due to the fact that I use farming losses on my income tax returns, I have not done this. I do pay the taxes on the spousal support that I receive from the claimant. I did move into my mother's home in 2014. After being laid off from Riverside Banquet Halls in 2013. I was looking for work and a cheaper place to rent I was paying \$1,680 per month at the townhouse that I rented. My mother called me up one day and asked me to come over. When I came to see my mom she asked me if we would move in with her. My mom told me that she was having a hard time keeping up with everything to do with her home and that she wanted to transfer her home to my brother, Martin and I. The transfer has not resulted in any cash benefit to me with my daily living expenses. Before moving in to my mother's home our son and I spent months de-cluttering, donating, recycling and making trips to the dump. This was a huge undertaking. I have no regrets moving in with my mother, it was a blessing we got to spend precious time with her. We had no idea that she would be diagnosed with Dementia and Alzheimer's in December 2015 and in 2016 she was diagnosed with Cancer. While living with mom and our son who had started going to Kwantlen University, I was still looking for a job and attending school and volunteering for the City of Richmond. I was doing the cooking, cleaning and shopping and spending time with mom. Mom broke her hip in 2016 and had surgery. After surgery she forgot how to walk. She was then diagnosed with Cancer. After a

family meeting with Health Care Professional's it was determined that it would be best for mom to be placed in Long term care. Mom has been in care coming up 5 years in December. Before Covid I was visiting my mom once or twice a week, I had been volunteering for bingo, Mother's and Father's day lunches. Mom has had a number of falls since she has been in care she has broke her arm, shoulder, pelvic bone and has had several episodes of her blood pressure being extremely high and being unresponsive. Each of these incidents are ones that we all think is going to be her last Mom is an amazing woman and I don't regret the time that I have spent with her and the traveling time which is approximately 4 hours round trip. I love my mom.

15 After being laid off from my position at Riverside Banquet Halls were I worked from 2009-2013 I was looking for employment I was first on EI benefits from the end of September 2013 and receiving \$136 per week. I attended Avia Employment Services, and took all the courses that they had available. I was applying for all the jobs that I could find. I did receive an interview at Community Living but was not hired. I did inquire to the Human Resources Manager what I could do differently. The Human Resources Manager suggested that I work on my typing skills. I then enrolled at BIS Computer Center were I successfully completed a number of courses. I continued to apply for jobs on a daily basis. I did receive a call back from the RCMP a position in the mail room. I attended an exam at the RCMP Headquarters in Surrey unfortunately I was not hired. I continued to apply for jobs for the Government, the City of Richmond and many others. I would either hear back from them that another candidate that was more suitable was chosen or I would not hear anything. I was at the time willing, eager and able to work. Being rejected that many times did take a toll on me. Then when my mother was diagnosed that took up all of my time. When the doctor told us that she would only live for 2-3 years I spent as much time as I could with my mom. After my surgery in 2020 I have not been feeling well and I'm waiting to have another surgery. I am so grateful to Mr. Kennett for the spousal support especially during Covid and my health not being good. Thank you Mr. Kennett.

[30] It is apparent from the exhibits to the respondent's affidavit that her efforts to obtain any form of remunerative employment had ceased by September of 2014, not long after she moved into her mother's home.

[31] While the respondent did not mention the farm property referred to by the claimant, it is clear from the exhibits to his affidavit that the respondent and Martin Peter Busch are owners as joint tenants of a property at 4540 Granville Avenue, in Richmond British Columbia, with an assessed value of \$1,564,500 and a property at 8418 Eagle Road in Mission British Columbia, with an assessed value of \$105,863. I note the respondent's interest in the property in Mission was found to be family property by Kelleher J. and formed part of the division of property ordered in 2012. At the time, the respondent's father and brother resided in the property but the respondent's father has since passed. It is not clear on the evidence if her brother still resides in the property.

- [32] The respondent states that the transfer of her mother's home did not result in any "cash benefit" to her with respect to her daily expenses but it appears they have reduced the respondent's living expenses. The respondent also acknowledges that the current amount of spousal support of \$1,600 per month is lower than what would be owing based on the claimant's current income. However, she is not seeking an increase in spousal support.
- [33] In *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge], the majority reasoned that under the Divorce Act, the "means and needs" test was no longer the exclusive criterion for support, and all four of the objectives defined in ss. 15(7) and 17(7) of the Act had to be taken into account when spousal support was claimed or an order for spousal support was sought to be varied, with no single objective having paramountcy.
- [34] The respondent contends that Moge identified principles that courts must be realistic about self-sufficiency and must not underestimate the labour market disadvantages faced by recipients returning to work; and courts should not be too quick to "deem" or "predict" that recipients will achieve self-sufficiency in future.
- [35] The majority in *Moge* held that the wife was entitled to continuing support since the four objectives set out in s. 17(7) had been met:
- (1) the wife had sustained a substantial economic disadvantage "from the marriage or its breakdown" as set out in s. 17(7)(a) of the Act;
 - (2) the wife's long-term responsibility for the upbringing of the children of the marriage after the spousal separation in 1973 had an impact on her ability to earn an income as set out in s. 17(7)(b) of the Act;
 - (3) the wife continued to suffer economic hardship as a result of the "breakdown of her marriage" as set out in s. 17(7)(c) of the Act; and
 - (4) the wife had failed to become economically self-sufficient notwithstanding her conscientious efforts as set out in s. 17(7)(d) of the Act.
- [36] The respondent further argues that appellate decisions have demonstrated a flexible approach towards self-sufficiency. She referred to the Manitoba decision in *Remillard v. Remillard*, 2014 MBCA 304, where the trial judge had set a five year time limit and imputed income after 11-year marriage with special needs child. The decision was overturned on appeal on the basis that the trial judge had over-emphasized self-sufficiency, and employed an unrealistic expectation that the wife could work to or achieve self-sufficiency in five years.
- [37] In *Reisman v. Reisman*, 2014 ONCA109 the parties had been married for 20 years. The trial judge found that the wife had made insufficient efforts to earn income and imputed income to her, and awarded spousal support at the low end of range, with a 10-year time limit. That time limit was overturned on appeal, and indefinite support was awarded at the high end of range for the first ten years, and at the low end thereafter.

- [38] In *Jendruck v. Jendruck*, 2014 BCCA 320 [Jendruck], the parties separated after a 34-year marriage, by that time, their children were no longer dependants. During the marriage, the wife had earned some income from operating a daycare. After separation, she failed to re-establish herself in this line of work, claiming she was precluded from doing so because she did not regain possession of the family home right away, and was mentally and physically exhausted. The judge refused to impute any income to the wife because the husband's conduct had effectively prevented her from re-establishing her daycare. And awarded monthly spousal support of \$3,849, reviewable after the husband turned 65.
- [39] The Court of Appeal allowed the appeal of the former husband, on the basis that the trial judge erred in failing to impute any income to the wife, given the lack of evidence to support her claim that she was incapable of working. Given that she had in the past collected a minimum of \$50 per day from providing daycare services, she was imputed with a monthly income of \$1,000. The review date for support was confirmed, acknowledging that the husband was at liberty to return to court to seek a variation if his income declined further or in the event of some other material change in circumstances.
- [40] With respect to the objectives defined in what is now ss. 15.2(6) and 17(7) of the Divorce Act, discussed in *Moge*, Kelleher J. found that the respondent sustained an economic disadvantage "from the marriage or its breakdown", and his finding is not open to be reconsidered by me.
- [41] It is clear that the respondent had the long-term responsibility for the upbringing of the two children of the marriage during the marriage and for a number of years after the separation in late 2007 or early 2008, which had an impact on her ability to earn an income.
- [42] It is also clear that the respondent continues to suffer economic hardship as a result of the "breakdown of her marriage", although this circumstance was addressed by the award of spousal support to her.
- [43] The real issue on this application is the fourth objective; whether the respondent has failed to become economically self-sufficient notwithstanding conscientious efforts to do so.
- [44] The claimant contends that the respondent has made no efforts to become self-sufficient or retrain. He argues that she is no longer required to assist in the care of their children as those children are adults and financially self-sufficient.
- [45] He contends that the respondent now has assets and income that make her self-sufficient.
- [46] He contends that the length of time and the amount that he has paid in spousal support satisfies the principles of spousal support to compensate the respondent from the effects of the breakdown of their marriage.

[47] A spousal support award based on compensatory entitlement, such as this one, should continue until compensation is achieved even if the recipient spouse has achieved a degree of self-sufficiency. The relationship between self-sufficiency and compensatory support is discussed in *Tedham v. Tedham*, 2005 BCCA 502:

58 An interesting discussion of the relationship between self-sufficiency (taking into account the marital standard of living) and time-limited orders is found in *Allaire v. Allaire* (2003), 35 R.F.L. (5th) 256 (Ont. C.A.). There, the court upheld an award of support of unlimited duration in relation to a 24-year marriage in which the parties had raised three children and both parties worked outside the home. The wife had suffered economic disadvantages flowing from the marriage by delaying her education and giving the husband's employment priority over her own. The husband argued that because the wife was earning \$68,000 at the time of the hearing (as compared with the husband's income of approximately \$190,000), she was self-sufficient and that support should be either terminated or limited in duration.

59 The Ontario Court of Appeal noted that the award of support in that case was made not only to redress the economic consequences of the breakdown of the marriage, but also to compensate the wife for "the likely" permanent economic consequences of having had to postpone her post-secondary education. At paras. 21-22 of the judgment, the court stated:

Mr. Allaire's [sic] submits that any disadvantages flowing from the marriage must defer to the fact that Ms. Allaire now earns a reasonable income that makes her "self-sufficient". This ignores the reality that self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.

For the same reason, the trial judge did not err in failing to apply a time limit to the spousal support award. As the Supreme Court of Canada stated in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 57, a result of the need to balance the objectives set out in the Divorce Act is that there is no obvious or inevitable cut-off date for a spousal support order. It is recognized that in situations such as this, "where a former spouse will continue to suffer the economic disadvantages of the marriage and its dissolution while the other spouse reaps its economic advantages", long-term compensatory support is appropriate regardless of the self-sufficiency of the disadvantaged spouse: *Moge v. Moge* (1992), 43 R.F.L. (3d) 345 (S.C.C.), at 383. Where, as here, the award is crafted to compensate Ms. Allaire for the long-term impact of the marriage on her career advancement and earning capacity, the trial judge was within her discretion in declining to limit her support to a defined period.

[Emphasis added.]

[48] In this case, the award of spousal support granted by Kelleher J. was intended to compensate the respondent for the long-term impact of the marriage on her career advancement and earning capacity taking into consideration the length of the marriage

(almost 20 years) and that this was a traditional marriage where the respondent stayed home with the children for a lengthy period of time while the claimant worked and continued to advance his career. At the time of his order, while the expectation was for the respondent to obtain some training and higher paying employment, her education and skills were limited.

- [49] Given the respondent's failure to file a Form 8, I am left with little insight into her present expenses. I am also left with an absence of evidence from her of any effort to secure remunerative employment, and infer that this is at least, in part, the result of the reduction in her expenses due to her move to her mother's home.
- [50] As in Jendruck, I find that the evidence before me does not establish the respondent's claim that she has been incapable of working since 2014, with the exception of the short period of time when she underwent a daycare operative procedure in 2020, which I find to be a period of only two weeks at most.
- [51] In the past, the respondent had earnings of \$17,812 per year, working only part time. I am prepared to impute present income of double that amount to her. However, even with that imputed income, the spousal support payable under the Spousal Support Advisory Guidelines (SSAG), under the without child support formula, would result in an amount of spousal support payable that is greater than the current amount of \$1,600 per month. The respondent recognizes that the spousal support award should be greater than \$1,600 but is not seeking an increase in support.
- [52] I therefore find it appropriate in these circumstances that the spousal support payments continue pursuant to the order of Kelleher J. in the amount of \$1,600 per month.
- [53] The respondent referred to the "rule of 65" as the basis for spousal support to continue on an indefinite basis. She asserted that the without child support formula provides that indefinite support will be available even in cases where the marriage is shorter than 20 years if the years of marriage plus the age of the support recipient at the time of separation equals or exceeds 65.
- [54] Kelleher J. did not address the rule of 65 in his reasons for judgment and it is not clear if the rule of 65 should apply in this case. If the rule of 65 does not apply the SSAG recommends a minimum duration of 9.75 years and a maximum duration of 19.5 years under the without child support formula. The claimant has been paying spousal support for 10 years, which is the minimum duration that spousal support would be payable. While Kelleher J. did not address the SSAG in his reasons for judgment I note that \$1,600 per month would have been slightly above the mid range provided by the SSAG at the time using the with child support formula.
- [55] This is a case of a strong compensatory claim involving a lengthy traditional marriage with children. While support has been paid slightly above the mid-range for the minimum duration provided by the SSAG, I find that these payments have not fully compensated the respondent for the economic consequences of the breakdown of the marriage.

- [56] Even if the rule of 65 did not apply in this case, I am not prepared to set an expiry date taking into consideration the circumstances of this case including the claimant's ability to pay and that ongoing payments will be under the SSAG range.
- [57] Accordingly, I dismiss the claimant's application to terminate spousal support. I note that an order for indefinite support does not mean permanent support and can still be varied on a material change in circumstances.

Orders Granted

- [58] As neither of the parties' children remain children of the marriage, I grant the order sought for the termination of the claimant's obligation to maintain and fund Manulife policy L203988.
- [59] I dismiss the claimant's application to terminate spousal support. The claimant shall continue to pay spousal support to the respondent in the amount of \$1,600 per month on an indefinite basis.
- [60] I also order that the claimant must continue his Manulife Financial life insurance coverage under policy number 7339730, with the respondent to remain as the sole beneficiary thereof.

Costs

- [61] In *W. (S.D.) v. W. (C.W.)*, at para. 27, Justice Martinson wrote:

27 As family law litigants usually have a wide range of resources available to them, where a party pursues litigation and seeks a judicial determination of the issues in the face of these other avenues, there should be a risk of costs: *Cutaia-Mahler v. Mahler* (2001), 20 R.F.L. (5th) 324 at [paragraph] 2 (Ont. S.C.J.).

- [62] The respondent relied on Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg 169/2009 that costs of a family law case must be awarded to the successful party unless the court orders otherwise. She also relied on Rule 16-1(14) for the provision that the court may award lump sum costs or, in the alternative, Appendix B of the Rules for the provision that costs be assessed according to the Schedule.
- [63] I find that the claimant has enjoyed only partial success on his application, but as did Forth J., I award him lump sum costs of \$750, in addition the costs awarded by Forth J.

"The Honourable Chief Justice Hinkson"

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