
CANADA / JUDGMENT

Loschiavo v. Loschiavo

2016 BCSC 2072

COURT

Supreme Court of British Columbia

DECIDED

9 November 2016

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2016 BCSC 2072 Loschiavo v. Loschiavo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Loschiavo v. Loschiavo,

2016 BCSC 2072

Date: 20161109

Docket: 50156

Registry: Kamloops

Between:

Silvia Adriana Loschiavo

Claimant

And

Antonio Loschiavo

Respondent

Before: Master R.W. McDiarmid

Reasons for Judgment

Counsel for the Claimant:

A.N. Goundar

Counsel for the Respondent:

C.E. Le Beau

Place and Date of Hearing:

Kamloops, B.C.

October 24, 2016

Place and Date of Judgment:

Kamloops, B.C.

November 9, 2016

- [1] There are two applications before me. On August 17, 2016, the claimant filed an Application seeking an Interim Order that the Respondent pays to the claimant the sum of \$3,152.00 each month for support of the children of the marriage, and an Interim Order that the respondent pays to the claimant the sum of \$2,788.00 each month for the support of the claimant, together with costs. Both Orders were sought to be made retroactive to February 1, 2016 and to continue on the first day of each and every month thereafter until further Court Order.
- [2] By Application Response filed September 30, 2016, the respondent opposed all of those Orders.
- [3] By Notice of Application filed October 5, 2016, the respondent sought an Order setting aside an Order I made for alternative service, with costs summarily assessed on September 12, 2016, sought an Order imputing income to the claimant and sought costs.
- [4] The parties were married on August 26, 1995 and separated on January 5, 2014. They have three children: Adriana, born August 12, 1998 (18 years of age); Katerina, born June 17, 2002 (16 years of age); and Francesca, born May 19, 2004 (12 years of age).
- [5] Since separation, the children have remained primarily parented by the claimant.

THE RESPONDENT'S APPLICATION TO SET ASIDE MY ORDER OF SEPTEMBER 12, 2016

- [6] On September 8, 2016, the claimant filed a Notice of Application seeking the following Orders:
 - 1. An Order that the Notice of Application filed August 17, 2016 along with all of the Claimant's supporting materials may be served on the Respondent by personally serving those documents on the Respondent's mother, Angelina Loschiavo.
 - 2. Costs.
- [7] No response was filed to the respondent's Notice of Application brought October 5, 2016. He swore and filed an Affidavit on September 30, 2016 (his fourth Affidavit), dealing with both Notices of Application.

- [8] The Factual Basis sets out that the claimant provided her counsel with all of the contact information she had and gave other information with respect to efforts to effect personal service of the August 17, 2016 Notice of Application and supporting materials on the respondent. The material to be relied on included an Affidavit of Jaspreet Bains, process server, sworn August 31, 2016. That Affidavit detailed efforts by the process server to serve the respondent at the address where he resides in Burnaby, British Columbia, on McKay Avenue.
- [9] Paragraphs 5, 6 and 7 of the Bains' Affidavit are as follows:
5. I attended at the McKay Avenue address on August 29th, 2016 at 7:55 p.m. at which time I was unable to gain access into the building. I paged Unit 201 from the tenant intercom board to which there was no answer after several rings. I could see the messages I had left on the building door on the mailbox inside the lobby. I went to the underground parking lot and could see his vehicle there described by my client as a black Toyota Tacoma with the license plate CJ 9445, the actual truck was license CJ9443. I spoke with my client to advise them that the license plate is different from the one they provided to me, they advised me that their client was guessing the license plate and they believe that CJ 9443 is ANTONIO LOSCHIAVO's vehicle's plate. I called the phone number for ANTONIO LOSCHIAVO at 604-230-6312, provided by my client, at which time I told him that I have legal documents for him to which he said he is out of the country. When I asked him when he would be back, he did not respond and hung up the phone.
 6. To date I have not received any further response from ANTONIO LOSCHIAVO with regards to the messages that I left for him to contact me.
 7. I believe that ANTONIO LOSCHIAVO is aware of my attempts to serve him and is evading service.
- [10] Rule 6-1(1) and (2) and Rule 6-2(1), (2), (4), (5) and (6) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Family Rules] are as follows:

Party must have address for service

(1) Each party to a family law case must,

- (a) if the party is represented by a lawyer in the family law case, have, as the party's address for service, an accessible address that is the office address of that lawyer, or
- (b) if the party is not represented by a lawyer in the family law case,
 - (i) have, as the party's address for service, an accessible address within 30 kilometres of the registry, or
 - (ii) if the party does not have an accessible address within 30 kilometres of the registry, have, as the party's addresses for service, both

- (A) an accessible address, and
- (B) a postal address in British Columbia, a fax number or an e-mail address.

Additional addresses for service

(2)A party may have, in addition to the address or addresses for service the party is required to have under subrule (1), one or more of the following as addresses for service:

- (a) a postal address;
- (b) a fax number;
- (c) an e-mail address.

Documents normally to be served by ordinary service

(1)Subject to Rule 6-3 (1) and unless the court otherwise orders, documents to be served by a party under these Supreme Court Family Rules may be served by ordinary service.

How to serve documents by ordinary service

(2)Unless the court otherwise orders, ordinary service of a document is to be effected

- (a) on a person, other than the FMEP Director, in any of the following ways:
 - (i) by leaving the document at the person's address for service;
 - (ii) by mailing the document by ordinary mail to the person's address for service;
 - (iii) subject to subrule (5) of this rule, if a fax number is provided as one of the person's addresses for service, by faxing the document to that fax number together with a fax cover sheet;
 - (iv) if an e-mail address is provided as one of the person's addresses for service, by e-mailing the document to that e-mail address, or
- (b) on the FMEP Director by
 - (i) mailing it to the post office box number provided by the FMEP Director, or
 - (ii) faxing it to the fax number provided by the FMEP Director.

When service by mail is deemed to be completed

(4)A document sent for service by ordinary mail under this rule is deemed to be served one week later on the same day of the week as the day of mailing or, if that deemed day of service is a Saturday or holiday, on the next day that is not a Saturday or holiday.

When documents may be served by fax

(5)A document may be served by fax as follows:

- (a) if the document, including the fax cover sheet, is less than 30 pages, the document may be served by fax at any time;
- (b) if the document, including the fax cover sheet, is 30 pages or more, the document may be served by fax if it is transmitted
 - (i) between 5 p.m. and the following 8 a.m., or
 - (ii) at another time if the person receiving the document agreed to that time before service.

When service by fax or e-mail is deemed to be completed

(6)A document transmitted for service by fax or e-mail under this rule is deemed to be served as follows:

- (a) if the document is transmitted before 4 p.m. on a day that is not a Saturday or holiday, the document is deemed to be served on the day of transmission;
- (b) if the document is transmitted on a Saturday or holiday or after 4 p.m. on any other day, the document is deemed to be served on the next day that is not a Saturday or holiday.

[Sunday is a holiday for the purposes of this Rule.]

[11] The Application filed September 8, 2016 and brought before me on September 12, 2016 was one for which short leave was granted and was brought without notice.

[12] It is trite law that on a without notice application, all relevant facts must be brought to the attention of the presider, failing which the Order may be set aside.

[13] Paragraphs 20-22 of the respondent's fourth Affidavit are as follows:

- 20. The Claimant's counsel and I have been corresponding since March 2016 by email. He is well aware of my email address. In any event, when I filed the Notice of Intention to Act in Person on May 2, 2016, I provided my email address as an address for service, and it is the same email address as that which I have been corresponding with Mr. Soil. As such, I do not understand why I was not originally served with the Claimant's application by email.
- 21. In any event the Claimant's counsel could have sent me an email advising me that he needed to serve me with documents. In or about late August 2016, I received a call from a process server, and I was advised that he needed to serve me documents. I advised the process server that I was not in the country, and that I would call him when I returned to BC. When I returned to BC approximately four or five days later, I found a note on my mailbox from who I believe was a process server (there was no company name or other identifying information on the note). I called the number on the note, and spoke to who I believe was a process server. He told me he'd have to get back to me, as he no longer had the documents with him. The individual I spoke to never called me back.

22. I believe the Order made against me, without notice to me, when notice could easily have been given to me, is unfair. I do not believe that the costs Order of \$650.00 should have been ordered against me, as the Claimant could have served me by email, as set out in the Notice of Intention to Act in Person.

[14] On May 2, 2016, the respondent filed a Notice of Intention to Act in Person in Form F88, which was signed April 13, 2016. It set out the following:

My address for service is:

Unit 1, 6788 McKay Avenue

Burnaby, BC V5H 2X2

Fax number for service (if any):

Email address for service (if any):

tloschi@hotmail.com

[15] That is the same email address set out in paragraph 1(e) of my September 12, 2016 Order.

[16] During submissions, Ms. Le Beau advised that on or around May 2, 2016 she had sent an email to claimant's counsel attaching the Notice of Intention to Act in Person.

[17] At the time, claimant's counsel was Mr. C. Soll; at the hearing before me Ms. Goundar attended as counsel. For obvious reasons she was unable to confirm the receipt of the email. I discussed the obligation on counsel making a without notice application to present all relevant facts and advised that I would wait two weeks to see if Mr. Soll wished to make submissions on the matter.

[18] It is apparent that the address for service of Mr. Loschiavo does not fully comply with the Family Rules in that it is not an accessible address within 30 kilometres of the registry. On the other hand, had I been aware that he had provided two addresses for service, I would not have granted the alternative service order. It would not have been necessary to bring the application for alternative service.

[19] In the circumstances here, through obvious inadvertence (there is no suggestion that Mr. Soll was intending to mislead the court), that Order is set aside.

APPLICABLE LAW

[20] This is a divorce action. Section 15.1(2) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) [DA] gives the court authority to make an Interim Order for child support.

[21] Subsection (6) requires reasons if an amount is ordered that is different from the amount that would be determined in accordance with the applicable Guidelines. I propose making an Order that the respondent pay child support determined in accordance with the Guidelines once I have determined the respondent's income.

- [22] Section 15.2(2) provides for an Interim Order for spousal support.
- [23] Section 21 provides for information to be provided by the claimant. Subsections (1) and (2) requires the respondent to provide the information set out in subsection (1). Section 23 permits the court to draw an adverse inference against a spouse who has failed to comply with the requirements of, in this case, s. 21(2) and to impute income to that spouse in such an amount as the court considers appropriate.
- [24] Section 19(1) of the DA sets out some of the circumstances in which income may be imputed, including intentional under-employment and, in particular, when a spouse has failed to provide income information when under a legal obligation to do so.
- [25] In making my determinations, I am bound by these provisions and have applied them.
- [26] I am assisted in assessing the financial disclosure of both parties by the decision of Mr. Justice Macaulay in *Thompson v. Brown*, 1997 CanLII 1237 (BCSC), where at para. 23 he writes:
- [23] In my view, the requirement of complete financial disclosure is necessary to ensure that child support awards are based on the payor's true ability to pay. Accordingly, the information must be complete quantitatively and qualitatively.
- [27] I was also assisted in determining appropriate income to impute to the parties what the evidence discloses about their lifestyle, claimed monthly living expenses and the range of income that was earned during the marriage.
- [28] At para. 16 of *Motyka v. Motyka*, 2001 BCCA 18, Mr. Justice Finch, as he then was, writes:
- [16] In imputing to Mr. Motyka an income of \$60,000 per year, the learned chambers judge relied on "his present lifestyle, his monthly living expenses... and the range of income that he was earning during their marriage". According to his Property and Financial Statement his household expenses prior to 1999 totalled about \$73,000 per year. The judge reasoned that he must have had more income than he disclosed in order to meet those expenses.
- [29] In *Mitchell v. Mitchell*, 2010 BCSC 1404, Master Bouck, at para. 29, recites the synopsis of relevant considerations set out by Master Keighley in the oft-cited case of *Robles v. Kuhn*, 2009 BCSC 1163:
- [29] In *Robles v. Kuhn*, 2009 BCSC 1163, Master Keighley provides a helpful synopsis of the relevant considerations on an interim application. Some of the factors relevant to this application are as follows:
- *1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);

*2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);

*3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 1082; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);

*4. The courts should not unduly emphasize any one of the statutory considerations above others;

*5. On interim applications the need to achieve economic self-sufficiency is often of less significance;

*6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.).

[30] I have also reviewed the financial disclosure requirements set out in Rule 5-1 of the Family Rules.

[31] In *MacCarthy v. MacCarthy*, 2015 BCCA 496, Mr. Justice Savage considered spousal support issues. In citing with approval the Chamber's Judge whose decision was under appeal, Justice Savage writes:

[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.

[Emphasis added.]

[32] At para. 34, Justice Savage writes:

[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.

[33] In *Regan v. Regan*, 2011 BCSC 766, Mr. Justice Powers dealt with a situation where, as he put it in para. 17, "The parties' present circumstances are not something that either of them anticipated "

[34] The evidence before me appears to be consistent with that sort of situation, at least at present.

[35] Sections 222-228 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] deal with Conduct Orders.

- [36] That statute, similar to the DA, requires the court to consider in the strongest possible terms the best interests of the children. Incorporated in the Orders I propose making are some Orders made pursuant to the FLA. I am of the view that the conduct of the parties, in particular the claimant, is a matter which has arisen in the course of these proceedings, and pursuant to Rule 10-3(7)(a) of the Family Rules, I am entitled to make these sorts of Orders.

NOTICE OF APPLICATION FOR CHILD AND SPOUSAL SUPPORT

- [37] The third Affidavit of the claimant sets out the particulars of marriage, separation and the dates of birth of the children in the first four paragraphs. Paragraphs 5-17 are as follows:
5. Francesca suffers from a number of disabilities. She has a neuro-muscular condition. She is developmentally delayed. She has scoliosis. She suffers from seizures.
 6. The children have remained in my primary care since separation.

PARTIES' RESPECTIVE INCOMES

7. I have a Human Services Certificate. I work as a Community Inclusion Worker at the Chris Rose Centre for Autism. Owing to the demands of Francesca's care, I am only able to work part-time. My Guideline income is \$17,666.14.
8. The Respondent is trained as a Professional Mining Engineer and runs his own business. The Respondent also operates a property management company. The Respondent has a diploma in Computer Aided Design and Drafting. On February 24, 2015, the Respondent swore to a Guideline income of \$176,000. This income is consistent with what the Respondent earned during the relationship and I believe that the Respondent is still capable of earning this Guideline income. The Respondent also receives half of the rental income from a property we co-own in the net amount of \$864.42 annually.

ROLES DURING THE RELATIONSHIP

9. At the time that the Respondent and I were married, I was working as a customer service representative at the Royal Bank of Canada. I continued to work in that capacity until 2002. I earned roughly \$15.00 an hour at this job and worked only part-time. I left this job at the Respondent's request to focus more on the care of the home and the care of the children.
10. During the relationship, the Respondent strongly discouraged me from working outside of the home. The Respondent emphasized repeatedly that he wanted me to stay at home so that I could take care of the home and the children. Whenever I suggested that I might find a part-time job outside of the home, or work from home, the Respondent would tell me that I was only worth \$15 to \$20 an hour. The Respondent would schedule counselling appointments for me if I didn't listen to him and pressed the issue.

11. The Respondent worked consistently and supported our family financially throughout the relationship, first as an employee for private companies and then on his own behalf when he started his own business.

SUPPORT SINCE SEPARATION

12. After separation, the Respondent began paying to me \$3,000 on the first and the last day of each month for my support and the support of the children. These payments were not consistent and the Respondent occasionally missed his support payments.
13. Sometime in late 2014, the Respondent unilaterally decreased his support payments to \$4,000 each month. These payments did not take place on a consistent day each month and the Respondent occasionally missed his support payments.
14. Sometime in 2015, the Respondent unilaterally decreased his support payments to \$3,000 each month. These payments did not take place on a consistent day each month and the Respondent occasionally missed his support payments.
15. The Respondent did not pay any support in February, 2016 and has not paid any support since.
16. The children and I have asked the Respondent to resume his support payments. Attached as EXHIBIT "A" to this Affidavit are emails and text messages between the Respondent and I or the Respondent and the children on this issue.

MY PRESENT FINANCIAL CIRCUMSTANCES

17. I cannot meet my needs and the needs of the children without some support from the Respondent. The Bank of Nova Scotia is foreclosing on the former family residence and the children and I face eviction. I cannot afford to make several critical repairs on the family home. I cannot afford the counselling my children require to address their emotional upset arising from separation. I have been forced to redeem all of my RRSPs and the children's small GIC accounts in order to make ends meet. I have no savings to draw on for Adrianna's university education and I'm not sure whether we'll be able to afford the costs of her tuition. Adrianna has already missed several days of school so that she might work and help support her sisters. Most of the household bills are in various states of default.
- [38] Exhibit A" are some emails. An email on April 8, 2016 from the claimant to the respondent points out that April was the fourth month where, in the view of the claimant, the respondent had not fulfilled his financial obligations. She writes "Your children need to eat and live. You are jeopardizing [their] home and mental well being as well as their physical well being." The respondent responds, "When I get paid you'll get paid. You seem to have no problem paying for a lawyer!"

- [39] An earlier email on February 25, 2016, from the claimant to the respondent, states "I've exhausted all income. Francescas, mine and my mileage money all for groceries. Its up to you now to explain why the girls don't have groceries." The response is "Borrow from your sister." There are also text messages attached as part of the exhibit from the oldest child, Adriana, describing her father utilizing expletives and from Katerina, many of them appropriate, but others which appear to me show, if not alienation efforts by the claimant, then at least discussion of court matters between the claimant and the older children. Some of the texting from Katerina also contains expletives.
- [40] The responses from the respondent are also at times less than helpful and appear to engage Katerina in issues in the litigation.
- [41] The September 30, 2016 Affidavit #4 of the respondent disputes the separation date. He says the separation date was in November of 2012. In late October 2012, the respondent had been living part-time, for work purposes, in Vancouver and asked the claimant to move to Vancouver. He deposes the claimant refused and he says "As a result, I told her the marriage was over."
- [42] Paragraphs 6-10 and 12-13 of the respondent's Affidavit are as follows:
6. In response to paragraph 7, I'm unaware of where the Claimant works. The Claimant also receives rental income in the approximate amount of \$900.00 per month from the basement suite at her [principal] residence, 908 Renfrew Ave, Kamloops, BC, as well as rental income from 1104 Pleasant Street, Kamloops, BC in the amount of \$2,100.00 per month. I have read the Claimant's Financial Statement, sworn August 16, 2016, and do not agree that the Claimant is only netting \$864.42 annually from the gross rental income. I note also that the Claimant has not claimed the rental income from the Pleasant Street property.
 7. In further response to paragraph 7 of the Affidavit, the Claimant is capable of working more than part-time. As indicated above, Francesca attends school full-time. If the Claimant was working, Francesca could attend day care. The Claimant has a diploma as a Care Aide. She is capable of earning much more than \$17,666.14. In addition, the Claimant spends much of her time working out at the gym, and, in fact, has recently won a fitness title. Attached hereto, to this, my Affidavit, and marked EXHIBIT "A" are copies from the Claimant's Facebook page, showing the Claimant competing in a INFB body-building competition.
 8. In response to paragraph 8 of the Affidavit, the Claimant is correct that I am a Professional Mining [Engineer] that runs my own consulting business. My income has decreased considerably in the last two years due to the decline in the metal market [that] started in 2013, and continued throughout 2014, 2015, and which is continuing in 2016. My income for 2015 was \$61,360.00 (through dividends). I also received an unexpected payment from Rio Algom, my previous employer, in the amount of \$13,111.14. This amount was a non-recurring payment, and I anticipate my income to be approximately \$60,000.00. Currently I am just making ends meet. In response to the Claimant's assertion that I receive one-half of the rental income, I do not receive any rental income from any of our homes.

9. In response to paragraph 9 of the Affidavit, I agree that the Claimant worked both in insurance and banking during our time while married. I did not request that she leave her job. The Claimant unilaterally decided that it was best for the children if she stayed at home to raise them. Never have I asked her to stop working.
10. In response to paragraph 10 of the Affidavit, I deny the Claimant's assertions. The Claimant told me that she no longer wanted to work, and that she wanted to pursue a physical fitness life style. She began to spend three to four hours every day at the gym. With respect to the value of working, I encouraged the Claimant to pursue a business opportunity either in internet marketing or real estate investing and property management, rather than having a regular job. In February 2012 I spent approximately \$12,000 so that the Claimant could go to Los Angeles for a course on internet marketing, and also spent approximately \$5,000 in June 2012 so that the Claimant could attend a Real Estate investment and Property Management course. I attended both courses with the Claimant.
12. In response to paragraph 12 of the Affidavit, I agree I paid \$6,000.00 per month as child and spousal support to the Claimant after separation in 2012, and continued to pay that amount until 2014. In 2014, I reduced the support to \$4,000.00 per month, as I could no longer afford to pay \$6,000.00 per month, due to the downturn in the mining industry. I agree that I further reduced my support payments to the Claimant in 2015 to \$3,000.00 per month, for the same economic reasons. Attached hereto, to this, my Affidavit, and marked EXHIBIT "B" is a copy of a printout prepared by my bookkeeper, Richard McBride, showing all monies paid to the Claimant from October 2011 to January 2015. I have not maintained this list or my books since approximately January 2015, as I cannot afford to pay my bookkeeper. I also cannot afford to pay my accountant, and have not had my corporate Financial Statements prepared for 2015.
13. In response to paragraph 15 of the Affidavit, I agree I haven't paid any spousal support to the Claimant since February 2016. As indicated above, the mining industry has taken a sharp decline over the past few years, and there is little consultancy work for me. I had no work in November, December, January or February 2016. I found consultancy work in March 2016. Since then, work has been slow, and I am barely making ends meet. On average, I am earning \$5,000.00 per month. I am hoping the industry picks up in the near future. I have also been consistently looking for work as an employee in the mining industry, but have had no luck. Attached hereto, to this, my Affidavit, and marked EXHIBIT "C" are copies of four inquiries I made to various employers seeking work, but to no avail.
14. In further response to paragraph 15 of the Affidavit, as I have earned money, I have assisted the Claimant financially. Because I have been unable to pay the support payments to the Claimant, she has not paid the mortgage payments on her principal residence (908 Renfrew Avenue, Kamloops, BC). When I have received payment for work, I paid the delinquent mortgage amounts owing. Attached hereto, to this, my Affidavit, and marked EXHIBIT "D" is a copy of a letter dated April 29, 2016 from Aron P. Hochhauser of Fulton & Company with respect to the state of the mortgage payments. Attached hereto, to this, my Affidavit, and

marked EXHIBIT "E" is proof of my payments on May14, June 28 and September 10, 2016 for the mortgage payments owing in the Renfrew property. The total of those payments is \$12,752.40.

[43] The respondent has committed to paying Francesca's tuition and has also provided some funds directly to the children; these, of course, do not get credited to child support which the respondent should have been paying to the claimant.

[44] Paragraph 16 of the respondent's Affidavit is as follows:

16. In response to paragraph 16 of the Affidavit, as indicated above in this Affidavit, I had no work whatsoever from December 2015 until March 2016. As a result, I had no money. My mother, Angelina Loschiavo, was assisting me financially by giving me money to buy groceries. As set out in Exhibit "A" of the Affidavit, I told the Claimant that I would pay her money when I could. I received no understanding or empathy from the Claimant in relation to my work situation. She was fully aware that I was not working, that I had not worked for several months, and that I was struggling financially. Conversely, she simply verbally abused me, as is evident in the emails and messages. In addition, I believe the Claimant turned our older daughters against me, and coached them into believing the worst about me. In addition to the emails and text messages the Claimant has set out in the Affidavit, Adriana and Katerina sent me terribly hateful messages, that I am certain were coached and/or influenced by the Claimant. Attached hereto, to this, my Affidavit and marked EXHIBIT "H" are copies of two emails, one dated April 10, 2016 from Adriana, and the other dated April 11, 2016 from Katerina.

[45] I have reviewed Exhibit "H". I would not disagree with characterizing these as "terribly hateful messages". They are full of expletives and derogatory references to the respondent. They are completely inappropriate, even considering the ages of the two older daughters. They appear to me to result, in part, from significant communication between the claimant and her older two daughters respecting matters at issue in this litigation.

[46] Attached to the same Affidavit as Exhibit "J" is an email string commencing September 6, 2016, commencing with the claimant using a derogatory term in the "subject" line of the email, and using derogatory terms in reference to the respondent. The respondent's emails, on the other hand, appear measured and attempting to resolve matters, although I appreciate that they are largely self-serving.

[47] In reply to the respondent's fourth Affidavit, the claimant has sworn her fifth Affidavit made and filed October 18, 2016. She states in paragraph 3 that she receives roughly \$2,200.00 each month in rental income from property situate at 1104 Pleasant Street, Kamloops, B.C. She then says:

After the payment of expenses associated with the Pleasant Property, I estimate that the Respondent and I each net roughly \$864.42 annually in rental income. These net rental monies are accounted for in my Financial Statement, but are not accounted for in the Respondent's Financial Statement.

[48] In paragraph 4 of her Affidavit, the claimant states that she mistakenly omitted gross rental income she receives from a basement suite in the family residence. She deposes that she does not receive any net rental income, deposes she receives \$500.00 each month for the basement suite, the bulk of which, she says, is paid towards liabilities registered against the title "to try to stave off foreclosure, and the balance of which is paid towards various expenses associated with the Pleasant Property."

[49] Paragraph 5 of her Affidavit is as follows:

5. In response to paragraph 7 of the Affidavit, I do not have a diploma as a Care Aide. I am not capable of working as a Care Aide. I have a Human Service Worker Certificate. Pursuant to that certificate, I am employed as a Community Inclusion Worker at the Chris Rose Centre for Autism. Community Inclusion Worker and Care Aide are two distinct positions. Notably, Community Inclusion Workers are paid substantially less than Care Aides.

[50] In further reply to the respondent's fourth Affidavit, the claimant deposes as follows:

7. In further response to paragraph 7 of the Affidavit, I attend the gym only 3 to 4 hours each week. I go one or two times during the week in the mornings or the evenings if I can find a family member to watch Francesca. If I can't find a family member to watch Francesca, and I often can't, then I don't go to the gym. If I have finished all my work at Heavy Metal Gym, my employer permits me to train for an hour during my shifts on the weekend. I do not have the ample time to train that the Respondent supposes.

[51] The evidence marked as Exhibit "A" by the respondent shows photographs of the claimant apparently posted in May of 2016, showing the claimant with two trophies for first place in certain body building categories.

[52] The respondent's first Affidavit, sworn/affirmed February 20, 2015 and filed February 24, 2015, deposes to Federal Child Support Guideline income for basic child support and income for a spousal support claim of \$176,000.00. The sources of income are employment income at \$3,000.00 paid monthly and \$140,000.00 annual dividends from taxable Canadian corporations. His annual expenses include \$5,000.00 support payments to others. His total annual expenses are approximately equal to his total income as set out in that document. That Form F8 Financial Statement contains his 2013 tax return and some Canada Revenue Agency ("CRA") notices dated in December of 2014, but nothing more recent. He filed a subsequent Form F8 Financial Statement made September 29, 2016 and filed September 30, 2016. It sets out the total income to be used for basic child support and spousal support at \$74,471.00 annually, comprised of \$61,360.00 in dividends from his corporation and \$13,111.00 in other income stated to be a differed payment owing by Rio Algom. In that

Financial Statement he deposes to child support payments to the claimant in the amount of \$1,500.00 monthly. He attaches his T1 General Income Tax and Benefit return for 2015, which sets out Line 150 income at \$74,471.14. He lists no rental income in other sources of income.

- [53] The sixth Affidavit of the claimant is a Form F8 Financial Statement made and filed October 18, 2016. She deposes to \$34,984.14 total income to be used for a spousal support claim consisting of a child tax benefit and B.C. family bonus of \$10,818.00 and \$23,301.72 employment income and other income of \$864.42, which has been clarified as net rental income, although she deposes to receiving gross rental income of \$19,200.00. Her monthly expense compulsory deductions include CPP contributions of \$640.81 monthly and employment insurance premiums of \$311.81 monthly. Under food, dry cleaning/laundry and household supplies, she claims \$1,750.00 monthly. Under childcare, she includes Francesca's tuition of \$300.00. Total childcare monthly expenses are claimed at \$1,295.00. Her total annual expenses exceed \$100,000.00, according to her sixth Affidavit.
- [54] Attached to her Form F8 Financial Statement is a 2014 tax return summary which shows gross rental income at \$28,600.00 and net \$4,434.76. That same document states that CPP or QPP contributions through employment are a maximum of \$2,436.50 annually; that 2014 tax return shows a contribution of \$205.97 for the year. Her 2015 T1 General Form claims gross rental income of \$19,350.00 and net of \$3,008.01, together with employment income of \$14,080.04.
- [55] She has not been cross-examined on her Affidavits. Neither has the respondent.
- [56] However, her Form F8 Financial Statement, a document taken under oath, sworn or affirmed before her counsel, appears to me to contain substantial inaccuracies.
- [57] I have often commented that it is difficult to ascertain credibility from competing Affidavits, when there has been no cross-examination on the Affidavits.
- [58] In this case, while there may be inaccuracies in the respondent's Affidavit material, there are obvious errors in the claimant's Affidavits as it pertains to financial disclosure. As well, it seems highly unlikely that a person could achieve such singular and commendable success in body building while devoting only a few hours a week to that endeavour. The assertion of the respondent, through his counsel, that the claimant is deliberately under-employed may ultimately be borne out. However, I do not need to make that decision at this point and do not do so.
- [59] It is apparent that the respondent has in the past earned substantial monies and probably has the capability of earning substantial monies in the future. On the other hand, his evidence of current earnings (by which I mean earnings in taxation year 2015) appears corroborated by the Income Tax and Benefit return he has filed with CRA. The document was prepared by BDO Canada and is noted as being filed on September 29, 2016.

- [60] I note as well that his Affidavit material attaches emails showing inquiries made to various employers seeking work. He deposes that on average at present he is earning \$5,000.00 per month.
- [61] I conclude that he has the ability to earn at least what he sets out in his most recent Form F8 Financial Statement. I appreciate that the income set out therein includes a possible one-time payment, but I also note that that income is substantially lower than the income he earned, for example, in 2013.
- [62] In submissions, counsel for the respondent provided me with a printout of a Spousal Support Advisory Guidelines [SSAG] calculation based on the respondent having income of \$72,405.00 and the claimant having employment income imputed to her of \$40,000.00. The sixth Affidavit of the claimant sets out total income for a spousal support claim of \$34,984.14. Included in this amount is \$864.42 being net rental income. The gross rental income is shown as \$19,200.00. As noted above, the claimant receives roughly \$2,200.00 each month from the Pleasant Street property, and has admitted that she omitted gross rental income from a basement suite in the family residence. If her employment income is indeed determined at \$40,000.00, then there is no spousal support payable if the respondent's income is determined at \$72,405.00. There is no spousal support payable even at the high end of the SSAG calculations.
- [63] In attempting to determine the respondent's income, the evidence appears uncontradicted that he is having difficulty making ends meet.
- [64] What monies he has appears to be used firstly to attempt to stave off foreclosure proceedings and, secondly, to pay for Francesca's schooling. The monies he pays for the schooling are not part of either child or spousal support. I conclude that the present lifestyle of the respondent is not that of a person earning what he formerly earned, substantially more than \$100,000.00 annually.
- [65] I make the following Orders:
1. Commencing November 1, 2016 and payable on the first day of each month thereafter, the respondent shall pay to the claimant child support in the amount of \$1,500.00 per month based on an annual income of \$75,900.00;
 2. The claimant is entitled to all of the rental income from 1104 Pleasant Street, Kamloops, B.C. and all of the rental income from the basement suite at 908 Renfrew Avenue, Kamloops, B.C.;
 3. On December 31, 2016 and thereafter on the last day of each next succeeding third month (March 31, 2017), the claimant is to provide an accounting of all rental receipts received and monies expended, such accounting to be provided within 14 days of the end of the three-month period;

4. The parties will (a) put the best interests of the children before their own interests; (b) encourage the children to have a good relationship with the other parent's partner in a positive and respectful manner; and (c) make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of the children;
5. The parties will not (a) question the children about the other parent or time spent with the other parent beyond simple conversational questions (b) discuss with the children any inappropriate adult, court or legal matters; or (c) blame, criticize or disparage the other parent to the children;
6. The parties will encourage their respective families to refrain from any negative comments about the other parent and his or her extended family, and from discussions in front of the children concerning family issues or litigation;
7. By April 30, 2017, the respondent must provide an updated Form F8 Financial Statement to include his 2016 Income Tax Return and all information required to be provided by s. 21(1) of the DA and by Rule 5-1 of the Family Rules;
8. The application of the claimant for spousal support is dismissed, with liberty to re-apply after June 30, 2017 or at trial, whichever is earliest;
9. The claimant is directed to forthwith set this matter down for a five-day trial at the earliest date mutually convenient to the parties; any filing fees associated are ordered waived;
10. The application of the respondent to set aside my Order of September 12, 2016 is granted; the respondent is entitled to the costs of his Notice of Application to set aside, limited to disbursements which I summarily assess at \$100.00;
11. The claimant is to bear all costs of the process server and disbursements and costs respecting the Notice of Application heard without notice in front of me on September 12, 2016;
- [66] The respondent, in his response, opposed all of the Orders sought by the claimant, but in submissions agreed to pay child support based on his income which he submitted should be \$72,405.00. He has been largely successful on this application. He is entitled to the costs of this application, not payable forthwith.

"Master R.W. McDiarmid"

MASTER McDIARMID

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