
CANADA / JUDGMENT

Pilon v. Pilon

2010 BCSC 1335

COURT

Supreme Court of British Columbia

DECIDED

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2010 BCSC 1335 Pilon v. Pilon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pilon v. Pilon,

2010 BCSC 1335

Date: 20100921

Docket: 43704

Registry: Vernon

Between:

Lorraine Cecile Pilon

Plaintiff

And

Pierre Paul Pilon

Defendant

Before: The Honourable Madam Justice Ross

Reasons for Judgment

The Plaintiff:

Self-represented

The Defendant:

Self-represented

Place and Date of Trial:

Vernon, B.C.

July 26-28 and 30, 2010

Place and Date of Judgment:

Vernon, B.C.

September 21, 2010

Introduction

- [1] This is a family law proceeding. The parties married in 1986 and separated in January 2008. I granted a divorce at the conclusion of the trial. The remaining issues are the plaintiff wife's claim for retroactive child support, spousal support and relief with respect to family debt.

Facts

- [2] The parties met in 1981 and married on September 12, 1986. They have four children: Nicholas, who was born August 19, 1987; Anthony, who was born January 15, 1989; and twins Madelyn and Alphonse, who were born May 31, 1993.
- [3] The plaintiff, Lorraine Pilon, was born on July 27, 1963. The defendant, Pierre Pilon, was born on October 2, 1948. When the parties married Ms. Pilon had graduated from high school. She was employed and testified that she had plans to go back to school for additional training as a veterinary technician with the hope of ultimately qualifying as a veterinarian.
- [4] Mr. Pilon has little formal education. During the marriage, Mr. Pilon worked at a number of different jobs. He has worked as a long distance truck driver since the mid-1990's.
- [5] The parties struggled in the early years of the marriage. Mr. Pilon was frequently unemployed. At times, the family was in receipt of social assistance. The parties moved frequently, residing in Cornwall and Prescott, Ontario, then in Winnipeg, then Whitehorse, and also Beaver Creek, Haines Junction and Canyon Creek in the Yukon. Ms. Pilon worked intermittently, tended the home and children, and home-schooled the children.
- [6] In the mid-1990's, the parties moved to British Columbia. At first they lived in a suite in the home of an elderly acquaintance, receiving accommodation in return for providing some home care and looking after the animals on the property. They then moved to the south side of Salmon Arm, living in a mobile home trailer. Mr. Pilon was driving a truck, working for two companies. Ms. Pilon was still home-schooling the children.
- [7] In 1999, Mr. Pilon leased a truck and started work as an owner-operator. The parties formed Pilon Trucking and worked together to develop the business. Mr. Pilon drove and looked after the equipment. Ms. Pilon looked after the bookkeeping and managed the business side of the operation.

- [8] Ms. Pilon had taken some further education over the years including college courses in computers and business machines, bookkeeping, and short seminars in marketing and motivation. She joined the local "women in business" groups.
- [9] The parties' financial circumstances improved somewhat. The children were enrolled in private school. In 2004, the parties purchased the matrimonial home by way of a lease purchase agreement. The matrimonial home is a 10-acre hobby farm which includes a barn with paddocks and a workshop. The home has five bedrooms and a large games room. Ms. Pilon kept horses and at some point started a horse training business under the name Tranquil Farms that she operated out of the matrimonial home property.
- [10] One major issue at trial concerned the parties' financial circumstances shortly before they separated and in the period between separation and trial. As noted, Ms. Pilon managed the finances, both of the family and for the business. She acknowledged that the affairs were complex involving several different bank accounts and lines of credit. It was her evidence that despite high gross revenue, the income from the business was not sufficient to maintain the family and pay the business expenses. Accordingly, the parties were incurring substantial debt.
- [11] Mr. Pilon asserts that Ms. Pilon diverted funds from the business to accounts to which he had no access and that she has not accounted for these funds. Ms. Pilon acknowledged that she diverted funds to accounts to which Mr. Pilon had no access, and in one instance no knowledge. However, it was her testimony that all revenue from the business went to meet family or business expenses.
- [12] One account that was the subject of considerable focus at trial was a line of credit in the name of Marianne Pelletier, Ms. Pilon's mother. It was Ms. Pilon's evidence that this line of credit was established because the parties' credit rating was low. She stated that she used the account for business and family expenses as a revolving line of credit. It is not clear from the evidence when the account was opened or first utilized, although it appears from Exhibit 2, that use pre-dated 2006. Mr. Pilon was concerned about substantial transfers from Pilon Trucking to Ms. Pelletier's line of credit. Ms. Pilon's evidence was that this line of credit was used for business expense and family purposes and that the advances from Pilon Trucking to the line of credit were a repayment of those expenses. It is evident that the account was used as Ms. Pilon described, however the documentary evidence is not sufficient to resolve whether this was the only use.
- [13] Ms. Pilon testified that she re-mortgaged the matrimonial home in December 2007 in order to consolidate debt. This transaction was undertaken on the eve of the separation and the disposition of the funds was one of the contentious issues in this litigation. The difficulty is compounded by the fact that until sometime in 2009, Ms. Pilon continued to be responsible for the financial management of Pilon Trucking. In addition, unfortunately Ms. Pilon did not produce all of the documents necessary to resolve this issue of the disposition of the proceeds.

- [14] It is clear that at the end of December 2006 the amount outstanding on the mortgage was \$281,238.06. The new mortgage was issued on December 17, 2007 in the amount of \$414,000 at 5.79362%. The disbursement information for the proceeds shows \$275,470 and \$33,727 being disbursed to discharge the first and second mortgages on the property leaving a balance of \$90,801. Mr. Pilon questioned what had become of the balance.
- [15] It was Ms. Pilon's testimony that all but \$30,000 was used to discharge other debt. There was a joint line of credit that was paid out in the amount of \$33,817.45. \$10,000 was deposited to Ms. Pelletier's line of credit, essentially paying off the outstanding balance as at that date. However, no other documents were produced that would account for the balance except for the funds used to create the ING account described below.
- [16] Ms. Pilon used \$30,000 of the funds to open a savings account in her name with ING Bank. She did not tell Mr. Pilon about the existence of this account. It was her evidence that this account was opened as a strategy to institute a program of savings for the family. Since the deposits were earning a high of 3.75% interest dropping down to 1.2%, substantially less than the interest that was accruing on the mortgage, this was perhaps not the soundest approach to savings. It is also somewhat suspect as a transaction occurring without the knowledge of the other party, on the eve of separation. In any event, commencing in April 2008, Ms. Pilon used the funds for what she describes as family purposes and for Pilon Trucking expenses, eventually exhausting the account in June 2009.
- [17] Ms. Pilon and Ms. Pelletier had another joint account, the use of which was very contentious in these proceedings. It was their evidence at trial that this account was used to make payments on Ms. Pilon's car loan. Ms. Pilon produced a document showing that loan in the amount of \$6,800 granted August 25, 2006 together with a document showing the account being closed in 2009, which was when the loan was satisfied. However, in cross-examination, Ms. Pilon acknowledged that there had been transfers between this account and the Pilon Trucking account that did not relate to her car loan. Thus, she acknowledged that the account was not used solely for the purpose of securing the car loan. It was her evidence that these transfers related somehow to the refinancing. However, Exhibit 17 reflects transfers from the Pilon Trucking account to this account in the period August 2006 to December 2007 of more than \$10,000 that could not be related to the re-financing. Exhibit 5 records transfers from the parties' revolving line of credit into this account that likewise are clearly not related to the re-financing. Unfortunately, despite what the parties describe as an earlier direction to produce documents with respect to this account, no documents were produced showing the activity in the account between 2006 and 2009.
- [18] In the end, the court is left with a question concerning the disposition of approximately \$30,000 of the advances from the 2007 re-financing. With respect to the joint account that Ms. Pilon maintained with her mother, it is clear that the account was not used solely to fund car loan payments, as Ms. Pilon originally contended. It is clear that there were transfers from the Pilon Trucking account into this account. It was within Ms. Pilon's power to produce the bank statements that would have documented the transactions. She was aware

prior to trial that this was a contentious issue. I draw an adverse inference against Ms. Pilon with respect to this issue.

- [19] After the parties separated in January 2008, Ms. Pilon continued to live at the matrimonial home. Mr. Pilon lived in his truck. As noted, Ms. Pilon continued to manage the business and deal with the family finances. She used the revenue from the business to pay business and family expenses and to fund this litigation in 2008.
- [20] At the time of separation, Nicholas was attending college in Surrey financed by student loans and grants. Anthony had finished school and was living at home and working part-time. Madelyn and Alphonse were still in school and living at home.
- [21] The parties attended a Judicial Case Conference on May 19, 2009. A consent order was made that provided that the parties would share joint custody and guardianship of the children on the Joyce model with primary residence with Ms. Pilon. Mr. Pilon was to have reasonable access. The matrimonial home was to be listed for sale with Ms. Pilon to have sole conduct of sale, but to use her best efforts to obtain Mr. Pilon's consent. Mr. Pilon was to continue to deposit his pay into the joint account until further order or consent of the parties. Neither party was to sell, dispose of, or encumber any family assets without consent.
- [22] When Alphonse turned 16 on May 31, 2009, he moved out of the family home and went to live with friends. Anthony and Madelyn were at home. Anthony was working part-time in the fall and waiting to commence college in January 2010. Madelyn completed high school and went to Australia with a mission group in January 2010.
- [23] Ms. Pilon testified that subsequent to the consent order Mr. Pilon ceased contributing to the family expenses. In about July 2009 he closed the bank account that had been used for utilities and disconnected the home telephone without notice to Ms. Pilon. He opened an account with Bank of Montreal and stopped making deposits into the joint account. This was all without Ms. Pilon's consent. Ms. Pilon for her part had not disclosed the existence of the ING account to Mr. Pilon and did not secure his consent with respect to her use of the funds in that account following the consent order.
- [24] At some point in 2009, Mr. Pilon sold a trailer without Ms. Pilon's consent and used part of the proceeds to move to Manitoba. He provided \$2,000 to Ms. Pilon as undifferentiated support in September of that year. Mr. Pilon was not able to secure work in Manitoba during 2009. He eventually moved in with Natalie Armstrong, his new partner, and her children. She supported him with her social assistance allowance.
- [25] In December 2009, Mr. Pilon was in British Columbia. Alphonse told him that he had been evicted from the friend's house where he had been living and asked to go back to Manitoba with Mr. Pilon. Mr. Pilon took him back to Manitoba. Ms. Pilon was upset at the move which had been undertaken without notice to her and without her consent. Alphonse moved in with Mr. Pilon and Ms. Armstrong. He returned to school and completed Grade 11 in Manitoba.

- [26] By the end of December 2009, the family's financial situation had become catastrophic. On December 14, 2009, the truck that was used to operate the Pilon Trucking business was seized pursuant to the leasing agreement. Pilon Trucking was dissolved on December 20, 2009. On January 25, 2010, Petro-Canada registered a judgment against the matrimonial home in the amount of \$12,500. On February 4, 2010, an order of foreclosure was made with respect to the matrimonial home with a six month redemption period.
- [27] Ms. Pilon sought employment counselling and took a series of temporary positions. She decided to pursue her dream of training horses, and to that end, she undertook a series of courses with Monty Roberts in California to upgrade her credentials in that field. She has not yet completed that series of courses. She also attained certification through the Equine Canada Western Coaching Certification Program. She continued to operate a horse training business at the matrimonial home property. Ms. Pilon also had two of her own horses on the property. It was her evidence that she could not recall who paid for upkeep of the horses during 2009. She testified that she also could not recall what horses were on the property for training.
- [28] At some point Ms. Pilon started working with two other people with the goal of establishing an equestrian centre on property owned by Nadine Westgate, one of her colleagues. Ms. Pilon has moved her horses to Ms. Westgate's property and is operating her Tranquil Farms training program from this facility. She is renting a home on the property.
- [29] The third colleague in the new venture is Phil Graham. Ms. Pilon describes Mr. Graham as her friend. He is living at the home Ms. Pilon is renting, but it was her testimony that they are not in an intimate relationship. Mr. Graham is a realtor. Ms. Pilon testified that he pays \$200 month rent which is applied to Ms. Pilon's \$1,000 rent. This would not appear to be market rent, but there was no evidence given to explain why Ms. Pilon would apparently be subsidizing Mr. Graham's accommodation expenses.
- [30] It was Ms. Pilon's testimony that the three colleagues have not worked out a business plan or decided on a business model for the equestrian centre venture. Thus, she could not say whether they would operate as partners, whether she would be employed, whether they would incorporate. There were no financial projections and the venture had not yet received financing. Ms. Pilon stated that there were at present eight horses on the property, but she did not initially respond when asked which were hers. She did not respond when asked what fees were being charged for these horses, or to when she moved her horses to the property. She later stated that two of the horses were hers, four were Mr. Graham's and two were in training.

- [31] Ms. Pilon filed a financial statement dated May 8, 2009 in which she reports annual income of \$15,896 and annual expenses of \$65,000. She filed another financial statement dated June 7, 2010 in which she reports no income and expenses of \$56,400. Ms. Pilon filed an exhibit at trial that reports actual income from her Tranquil Farms endeavours for the months of January to June 2010 of \$6,335, projecting \$11,135 for the year. Mr. Pilon's financial statement dated May 10, 2010 reports no income and \$20,292 expense.
- [32] Alphonse continued to live with Ms. Armstrong and Mr. Pilon until the end of May of this year. At that point, he started work and moved into an apartment with a roommate. At about the same time Mr. Pilon secured employment as a truck driver earning \$3,200 a month.
- [33] Mr. Pilon filed an assignment into bankruptcy on July 16, 2010. He lists \$607,512 debt of which \$462,000 is secured. The matrimonial home has not been sold. It appears that there is no equity in the property. There are no other family assets of any moment.

Retroactive Child Support

- [34] Neither party seeks an order for prospective child support. Ms. Pilon seeks an order for retroactive child support from the date of separation to mid-2009 when all the children were independent. There is no previous order for child support.
- [35] Both parties acknowledge that none of the four children remain a child of the marriage for support purposes. This is an obstacle to the making of the order sought. In the oft quoted decision of *D.B.S. v. S.R.G.*, 2006 SCC 37, [2006] 2 S.C.R. 231, Mr. Justice Bastarache said this at paras. 88 to 90 inclusive:

. . . The question then arises when the "material time" is for retroactive child support awards. If the "material time" is the time of the application, a retroactive child support award will only be available so long as the child in question is a "child of the marriage" when the application is made. On the other hand, if the "material time" is the time to which the support order would correspond, a court would be able to make a retroactive award so long as the child in question was a "child of the marriage" when increased support should have been due.

In their analysis of the Guidelines, J.D. Payne and M.A. Payne conclude that the "material time" is the time of the application: *Child Support Guidelines in Canada* (2004), at p. 44. I would agree. While the determination of whether persons stand "in the place of . . . parent[s]" is to be examined with regard to a past time, i.e., the time when the family functioned as a unit, this is because a textual and purposive analysis of the Divorce Act leads to this conclusion; but the same cannot be said about the "material time" for child support applications: see *Chartier v. Chartier*, [1999] 1 S.C.R. 242, at paras. 33-37. An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status.

Under both the Parentage and Maintenance Act and the Divorce Act, therefore, it will not always be possible for a court to enforce an unfulfilled child support obligation by the payor parent because of the limited enforcement jurisdiction of courts as conferred by statute.

- [36] In any event, it is my view that on the merits of the application, this is not an appropriate case for an order for retroactive support. There is no doubt that both parents have an obligation to support their children whether or not there is an order in place. However, in my view, this is not an appropriate situation for such an order because I am satisfied that when viewed in context, Mr. Pilon's child support obligations have been met.
- [37] As noted earlier, from the time of separation until approximately June 2009, Ms. Pilon remained in control of the financial affairs of Pilon Trucking. Pilon Trucking was the sole source of income for the family. Thus, while it is the case that Mr. Pilon did not pay child support during this period, in fact Ms. Pilon had effective control of the entire income of Pilon Trucking which she continued to use to pay both business and family expenses. In effect, she received child support since she exercised control over the family's entire finances. There is no evidence that Mr. Pilon had income from any other source.
- [38] During this time, Mr. Pilon was living in his truck. There is no evidence that he was diverting income from the accounts used by the business. Ms. Pilon argues he should have been working harder, taking on more jobs, but has not provided evidence that would justify an imputation of additional income.
- [39] Mr. Pilon changed the banking arrangements in about June 2009. By that time, there was only one dependent child at home since Alphonse had moved out and was living with friends. Mr. Pilon should have paid child support during this period if he had income or should have had income. His evidence is that he was not employed and could not obtain work.
- [40] It is difficult to determine what Mr. Pilon's Guideline income would have been had he been employed. His line 150 income was \$12,516.90 for 2006, \$21,016.68 for 2007 and negative \$28,097.55 for 2008. There is no tax return for 2009. Arguably, business expenses should be added back, but there has been no suggestion of an appropriate quantum and no evidence led on this point. Assuming a Guideline income of \$25,000, the Table Amount for one child would be \$230 amounting to \$1,380 for six months. The Table Amount would be \$280 for a Guideline Income of \$30,000 amounting to \$1,680 for six months. If one assumes a Guideline Income of \$40,000, the Table Amount would be \$370, which would total \$2,220 for six months.

[41] Mr. Pilon paid \$2,000 to Ms. Pilon in September 2009 and contributed \$800 in each of July and August and a further \$700 in January 2010. Ms. Pilon has not credited these to child support because they were not noted as such. However, I think it is appropriate to characterize these advances as in the nature of child support. Moreover, from December 2009 to May 2010, Alphonse was living with Mr. Pilon. Ms. Pilon did not pay any support to Mr. Pilon during this period.

[42] In the result, I make no order for retroactive child support.

Family Debt

[43] Ms. Pilon seeks an order relieving her of responsibility for some portion of what she characterizes as family debt. However, there is no order that can be made in the circumstances presented by this case. While the Family Relations Act, R.S.B.C. 1996, c. 128, permits the court to divide family assets between the spouses and to order the payment of support, it does not refer specifically to the allocation of debts between the spouses. In *Young v. Young*, [1993] 4 S.C.R. 3, 108 D.L.R. (4th) 193, McLachlin J. (as she then was) agreed with Southin J.A.'s statement in the court below at (1990), 29 R.F.L. (3d) 113 at 150, (B.C.C.A.):

...The court cannot make a spouse jointly liable to a creditor for a debt of the other spouse, no matter for what purpose it was incurred, or, in the absence of some contractual foundation, make one spouse liable to indemnify the other, either in whole or in part, for a liability of the latter. ...

The court cannot make an order with respect to debts that would affect the interests of third parties, see *Ellis v. Ellis* (1983), 37 R.F.L. (2d) 13 (B.C.S.C.).

[44] The court may consider the existence of current debts in determining the value of the family assets or reappportioning the assets pursuant to s. 65., see for example, *Williams v. Follack* (1986), 2 B.C.L.R. (2d) 298, (S.C.). However, in the present case, it is common ground that there are no family assets of substance to re-apportion. The only significant remaining asset is the matrimonial home and it is not likely to satisfy the outstanding mortgage and judgments registered against title.

Spousal Support

[45] Ms. Pilon seeks an order for spousal support. Section 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), provides:

Spousal Support Order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

- (2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

- (3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

Spousal misconduct

- (5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse 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.

[46] The Supreme Court of Canada has identified three grounds for entitlement to spousal support: compensatory, non-compensatory and contractual. See *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal ref'd [2009] S.C.C.A. No. 41, at para. 47.

[47] With respect to compensatory support, speaking for the court in *Chutter*, Rowles J.A. noted at para. 50:

Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise. ... The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success. ...

[Internal citations omitted]

[48] In considering compensatory claims, particularly in the case of long marriages, standards of living of the parties are a relevant consideration with the parties being presumptively entitled to equal standards of living on the dissolution of the marriage: see *Moge v. Moge*, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456; and *W. v. W.*, 2005 BCSC 1010, 47 B.C.L.R. (4th) 348.

[49] Economic disadvantage arising from the marriage or its breakdown may be addressed by spousal maintenance, asset reapportionment or both: see *Moge*; *Toth v. Toth* (1995), 13 B.C.L.R. (3d) 1, 64 B.C.A.C. 81; and *Tedham v. Tedham*, 2005 BCCA 502, 47 B.C.L.R. (4th) 254.

[50] The aim of non-compensatory support was described as follows in *Chutter* at para. 54.

Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[51] While financial need alone may establish entitlement to support, it does not follow that the quantum or duration of the support must fully satisfy the needs; see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577; and *Pederson v. Pederson*, 2004 BCSC 1627.

[52] As Groves J. noted in *Bockhold v. Bockhold*, 2010 BCSC 214 at para. 23:

In addition to the specific factors enumerated in the Divorce Act, the court must consider "the condition, means, needs and other circumstances of each spouse". In *Metz v. Metz*, 2004 ABQB 528 at para. 23, 34 Alta. L.R. (4th) 252, the court held "[t]he 'condition' of the spouses has been defined to include their age, health, needs, obligations, dependants and the station in life of the parties". The means of a spouse includes capital, income and the ability to earn income: *Muirhead v. Muirhead* (1995), 59 B.C.A.C. 144, 14 R.F.L. (4th) 276. The needs of a spouse are assessed relative to the circumstances of the parties, and are based on the standard of living

enjoyed during the marriage. In a lengthy marriage, the payee is entitled to a roughly equal standard of living, assessed against his or her marital standard of living: *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453; *Marinangeli v. Marinangeli* (2002), 66 O.R. (3d) 40 at para.

- [53] This was a lengthy marriage. During the course of the marriage, Ms. Pilon moved frequently as Mr. Pilon sought employment. She was a homemaker and home-schooled the children for many years. She was out of the workforce and, with the exception of a few continuing education courses, not able to pursue her aspirations for further education in the field of veterinary medicine. It is clear that she is entitled to compensatory spousal support; see *Chutter*, *supra*.
- [54] With respect to non-compensatory support, both parties have been left in difficult financial circumstances. There appear to be no remaining assets. Mr. Pilon is approaching the time when he might otherwise be wishing to retire. He is bankrupt and has only recently found new employment. Ms. Pilon is younger, but starting out in a new venture whose future is uncertain. The standard of living enjoyed by the parties during the last years of the marriage is not a helpful guide in this case, as it appears evident that the parties were living well beyond their means.
- [55] Entitlement to spousal support being established, quantum should in the normal course be determined with reference to the Spousal Support Advisory Guidelines ("SSAG"). Although the SSAG do not have the force of law, the Court of Appeal has accepted the SSAG; see *Yemchuk v. Yemchuk*, 2005 BCCA 406, 257 D.L.R. (4th) 476. Moreover, in *Redpath v. Redpath*, 2006 BCCA 338, 62 B.C.L.R. (4th) 233, the Court of Appeal stated that an order of spousal support which falls substantially above or below the suggested range could give rise to an error in law, unless a reasonable explanation was provided for the discrepancy.
- [56] The spousal support calculation based upon the SSAG that Ms. Pilon has submitted, is based upon an imputed \$48,000 income for Mr. Pilon and a projected income for Ms. Pilon of just over \$11,000. In my view, a more appropriate figure for Mr. Pilon's income is \$40,000, a number that reflects his actual present income. There is no evidence that Mr. Pilon has ever earned an annual income of \$48,000.
- [57] With respect to an appropriate amount for Ms. Pilon, it is not at all clear given the paucity of evidence with respect to the earnings to date and prospective earnings of Ms. Pilon's business what income she will likely receive from her business. However, \$11,000 does not, in my view, reflect what Ms. Pilon could reasonably be expected to earn. She is obliged to use her best efforts to achieve self-sufficiency and to the extent to which she fails to do so, income can be imputed to her; see *McEachern v. McEachern*, 2006 BCCA 508, 62 B.C.L.R. (4th) 95. In the present case, it is my view that \$20,000 is a more appropriate figure to use for Ms. Pilon's income. Ms. Pilon is entitled to pursue whatever employment she finds fulfilling; however, she has training and experience as a bookkeeper and \$20,000 is in my view a more accurate estimate of what she reasonably ought to be able to earn.

- [58] An SSAG calculation based upon earnings of \$40,000 and \$20,000 for Mr. and Ms. Pilon, respectively, produces a range of support of \$600 to \$800 per month. Several factors cause me to conclude that in this case the order ought to be at the lower end of the range. First, while there were effectively no assets to divide by the time of trial, I drew an adverse inference against Ms. Pilon with respect to the disposition of the proceeds of the re-financing undertaken on the eve of separation and the transfers from the Pilon Trucking account into the joint account that Ms. Pilon maintained with her mother. I infer that Ms. Pilon took a financial benefit from these transactions that amounted to a de-facto re-apportionment of family assets in her favour. Mr. Pilon is considerably older than Ms. Pilon and approaching retirement age. He needs to be able to provide for his future. Ms. Pilon will have a longer period to establish herself in the work force.
- [59] In all the circumstances, I make an order requiring Mr. Pilon to pay spousal support to Ms. Pilon in the amount of \$650 per month commencing October 1, 2010. The economic future is quite uncertain for both these parties. In the circumstances, the issue will be subject to a review in two years.
- [60] Success has been divided. Each party will bear his or her own costs. Responsibility for payment of court fees will also be shared equally.

"Ross J."

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