
CANADA / JUDGMENT

Stober v. Stober

2015 BCSC 743

COURT

Supreme Court of British Columbia

DECIDED

6 May 2015

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2015 BCSC 743 Stober v. Stober

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Stober v. Stober,

2015 BCSC 743

Date: 20150506

Docket: 103768

Registry: Kelowna

Between:

Kimberly Stober

Claimant

And

Mark Stober and Al Stober Construction Ltd.

Respondent

Before: The Honourable Mr. Justice G.P. Weatherill

Reasons for Judgment

Counsel for Claimant:

D. R. Bloor

Counsel for Respondent, Mark Stober:

B. Hardwick

D. Rush, Q.C.

Counsel for Respondent, Al Stober Construction Ltd.:

D.R. Bailey

Place and Date of Hearing:

Kelowna, B.C.

March 25, 2015

Place and Date of Judgment:

Kelowna, B.C.

May 6, 2015

Introduction

[1] In this family law case the claimant applies for the following interim orders:

1. that the respondent Mark Stober ("Respondent") pay her spousal support in the amount of \$27,324 per month commencing April 1, 2015;
2. that the Respondent pay her interim child support in the amount of \$17,164 per month commencing April 1, 2015;
3. that she and the Respondent share special or extraordinary expenses relating to the children's education in proportion to their respective incomes under the Federal Child Support Guidelines, SOR/97-175 [FCSG];
4. that she have exclusive possession of the matrimonial home in Kelowna ("Matrimonial Home");
5. that the respondent Al Stober Construction Ltd. ("ASCL") provide access to the lawnmower used to maintain the Matrimonial Home and permit its caretaker to assist the claimant with lawn mowing and sprinkler maintenance at the Matrimonial Home;
6. that her name be added to all utility and other accounts respecting the Matrimonial Home or, alternatively, the Matrimonial Home's utility accounts be paid by ASCL;
7. that there be a \$200,000 interim distribution of family property to the claimant;
8. that the Respondent produce documents, including those related to his income, family trusts, shareholdings, Visa expenses, bank accounts and various corporate financial statements and records;
9. tracing of the Respondent's income for the past two years; and
10. costs.

- [2] At the conclusion of the hearing of the application, I made the following orders with reasons to follow:
1. The claimant is entitled to exclusive possession of the Matrimonial Home.
 2. The claimant's name will be added to all utility and other accounts respecting the Matrimonial Home.
 3. The claimant will be paid an interim distribution of family property of \$100,000 within 30 days.
- [3] As the application progressed, the parties agreed to a form of order respecting the production of financial and other records. That order will go by consent.
- [4] Further, the claimant is now content that education, school and other s. 7 expenses will continue to be paid through Stoher Holdings and the Family Trust, as defined below. The Respondent agrees. The s. 7 expense issue has, accordingly, been disposed of on an interim basis by consent.
- [5] Also, the claimant agreed to adjourn generally her application for a tracing order respecting the Respondent's income.
- [6] A 10-day trial of this proceeding is presently set to commence in February 2016.
- [7] The issues remaining on this application are the amount of interim spousal and child support the Respondent should pay to the claimant pending trial and the lawnmower and caretaker issue.

Background

- [8] The claimant is 45 years of age. The Respondent is 52 years of age. They were married on April 21, 1990, and separated on August 1, 2013.
- [9] There are six children of the marriage: Andrew, age 23; Brittani, age 22; Michael, age 21; David, age 19; Cole, age 17; and Harrison, age 14. Since separation the claimant has resided in the Matrimonial Home and the Respondent has resided in rental accommodation in West Kelowna. Cole and Harrison reside with the claimant. Brittani, Michael and David attend university away from Kelowna but are expected to reside with the claimant during the four summer months between semesters. Cole is expected to start university in September 2015. Andrew resides full-time with the Respondent.
- [10] The Respondent is a high income earner. He derives his income principally from various real estate holdings including commercial properties built, owned and managed by his father through various corporations ("Stoher Family Corporations"). The claimant did not work during the marriage and was primarily a homemaker.

- [11] Mr. Jolly, who provided affidavit evidence in this application, is a chartered professional accountant and comptroller of the Stober Family Corporations of which ASCL is one. Mr. Jolly's affidavit provided some insight into how the Respondent earns income.
- [12] The Respondent's sources of income are:
- a) Two commercial properties in Kelowna known as Landmark III and Landmark IV owned by LTC Holdings Ltd. ("LTC Holdings"). LTC Holdings is owned in equal parts by two discretionary family trusts. The Respondent is the sole trustee and one of eight beneficiaries (the claimant and the parties' children are the other beneficiaries) of one of those trusts. It is known as the Mark Stober Family Trust ("Family Trust"). The other 50% owner of LTC Holdings is a family trust whose beneficiaries are the claimant's brother, Ken Stober, and his family.
 - b) Income from apartment buildings located in the Okanagan in which the Respondent owns a minority interest and which are managed by another company controlled by ASCL.
 - c) Income from an investment portfolio, redemption of preferred shares in a family company and a minority interest in a campground and vineyard.
- [13] As comptroller of the Stober Family Corporations, Mr. Jolly is responsible for depositing money from various corporate sources into a bank account owned by Stober Holdings Ltd. ("Stober Holdings"), a company wholly owned by the Family Trust.
- [14] During the parties' cohabitation, Stober Holdings paid the parties' expenses including payment of their respective Visa bills, property tax, utilities, insurance, etc. From time to time and as needed, Stober Holdings also made cash distributions to the parties.
- [15] Historically, the parties charged nearly all of their day-to-day living expenses to their credit cards. Stober Holdings would pay the monthly credit card bills as and when required. That practice continued post separation and continues to the present.
- [16] Mr. Jolly prepared an analysis of the parties' annual expenses for 2014 and 2015 to date. He also prepared an analysis of the Respondent's taxable income for the years 2013 and 2014.
- [17] Payments made by Stober Holdings on behalf of either the claimant or Respondent are debited to the Respondent's loan account with Stober Holdings. Income is allocated to the Respondent for tax purposes based on accounting and tax advice and in consideration of the financial circumstances and needs of the Stober Family Corporations, including cash flow requirements, income tax minimization and capital reserves. In the result, the Respondent's income as reported for tax purposes has, in recent years, been greater than the cash or income that he or the claimant actually received.

- [18] There is no evidence of any family debt that the parties will be required to service pending trial. Nor is there evidence of financial hardship on the part of the claimant or the children. Since separation, the status quo has been maintained with the claimant continuing to charge her day-to-day living and other expenses to her credit card which, in turn, is paid by Mr. Jolly without investigation or question.
- [19] This arrangement notwithstanding, the claimant seeks to sever her ties with the Stober family and the Stober Family Corporations. She wants to be able to pay her own expenses as she sees fit and wants a formal interim order for spousal and child support in place.
- [20] There is no suggestion by the Respondent that the claimant is not entitled to support or that she will earn any income before the February 2016 trial date.
- [21] Although the matter is complex in terms of unravelling and valuing the family assets, the case has none of the hallmarks of a high conflict case. The parties have been civil, are cooperating and are working towards a resolution.

Interim Orders Generally

- [22] Interim proceedings are purposefully summary and intended to bridge the gap between the commencement of an action and trial. The goal is to provide "rough justice" in that gap: T.A.D. v. M.K.D., 2010 BCSC 898 at para. 14.

The Orders Pertaining to the Matrimonial Home

- [23] As mentioned above, at the conclusion of the hearing of this application, I ordered that the claimant is entitled to exclusive possession of the Matrimonial Home and that her name be added to all utility and other accounts respecting the Matrimonial Home. I now provide my reasons.

The Claimant's Position

- [24] The claimant seeks an order for exclusive possession of the Matrimonial Home until further order pursuant to s. 90 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The claimant seeks some measure of control over her circumstances. She wants to begin to live independently of the Respondent and the Stober family. Even though the Matrimonial Home is owned by a trust, the parties are the beneficial owners of the home. The order is sought as a legitimate desire for the claimant to have certainty and security for herself and the children in circumstances where the claimant has historically had little or no control over the parties' financial resources.
- [25] Further, save for one, the children reside with her at the Matrimonial Home and a change in that situation would be disruptive. She currently has no independent financial ability to find alternate accommodation for herself and the children.

- [26] In contrast, she says, the Respondent has significant financial resources and there would be no hardship for him to continue living in alternate accommodations.
- [27] She seeks a further order that her name be added to the Matrimonial Home's utility and other accounts. Even though she is currently paying these accounts, they are not in her name and it creates unnecessary difficulties for her in dealing with, modifying or changing these accounts.

The Respondent's Position

- [28] The Respondent submits that an order for exclusive occupancy of a matrimonial residence does not automatically flow because the claimant has resided there since separation. Such an order should be considered only when there are competing requests for occupancy or if there is shared occupancy. The Respondent argues that the pre-requisite for making an order for exclusive occupancy is that shared use is not possible.
- [29] He asserts that pre-requisite does not exist here. The claimant currently has exclusive occupancy of the Matrimonial Home and no one seeks to change that arrangement. The Respondent agrees that the claimant should be allowed to continue residing in the Matrimonial Home until all matters can be resolved at trial. He says, therefore, there is no need for the order sought by the claimant and her application is unnecessary and harmful to the parties' efforts to resolve the issues arising from their separation on an amicable basis.
- [30] Further, he argues that the Matrimonial Home is legally owned by ASCL as a bare trustee and ASCL was not served with the claimant's application.
- [31] The bare trust and agency agreement is in evidence and discloses that ASCL owns the Matrimonial Home for the benefit of the parties. The Respondent's parents have also entered into a co-ownership agreement regarding the Matrimonial Home.
- [32] Rule 10(6) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [Rules] requires an applicant must serve its application on all parties and every person or other person who may be affected by the order sought. Because the Respondent's parents have not been served, because they may be affected by any order that may be made and because there is no urgency that requires an order at this juncture, the Respondent submits that the application should be dismissed.

Analysis

- [33] I agree with the claimant's submissions that an order should be granted giving her exclusive occupancy of the Matrimonial Home. She has resided in the Matrimonial Home since the parties separated and the two youngest children reside there with her full time. Notwithstanding the able submissions by the Respondent's counsel that such an order is unnecessary, given the parties' background, the fact that the current arrangement does not give the claimant the level of control and independence she desires and will eventually have

in any event and given that, since separation, the Respondent has agreed to her staying in the Matrimonial Home with the children, has been paying all the expenses and has not presented evidence suggesting this status quo should not be maintained pending trial, I am satisfied that there should be an interim order in place respecting the Matrimonial Home. This will allow the claimant some level of comfort and security while the parties negotiate a resolution or, if need be, proceed to trial.

- [34] Notwithstanding that ASCL is the registered owner of the Matrimonial Home, it is clear on the evidence that the parties are its beneficial owners. I give no effect to the Respondent's argument that the claimant's application for exclusive possession should be dismissed because ASCL was not formally served with the application for two reasons: 1) the parties directly affected by the application have been served and were represented at the hearing; and 2) Rule 1-3 provides that the object of the Rules is to help the parties resolve their dispute, inter alia, by securing the just, speedy and inexpensive determination of the proceeding on its merits. To accede to the Respondent's argument would have meant an adjournment to allow ASCL to be formally served and the application brought back, resulting in additional time and expense to the parties. If ASCL takes the position that it is prejudiced by an order granting the Claimant exclusive possession, it has liberty to apply to set the order aside on two clear days' notice to the parties.
- [35] The claimant is entitled to an interim order for exclusive possession of the Matrimonial Home until such time as a final order or settlement is reached.
- [36] I further order that her name be added to all utility and other accounts related to the Matrimonial Home in order to dissipate any difficulties she may encounter when dealing with the accounts.

The Interim Distribution of Property Order

- [37] At the conclusion of the hearing I also ordered an interim distribution of property in the amount of \$100,000 to the claimant. I now provide my reasons.

The Law

- [38] The claimant applies for an interim distribution of property under s. 89 of the FLA which provides:

Orders for interim distribution of property

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or

(c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

[39] In essence, before an interim distribution order is appropriate, two factors must be considered: (a) the harm it would cause to the other spouse; and (b) whether, in all the circumstances, it is necessary for one of the listed purposes.

The Claimant's Position

[40] The claimant argues that the term "necessary" in s. 89 is satisfied in this case because she needs the interim distribution to deal with the difficult and complex issues of asset division, spousal support and child support on an equal basis with the claimant. She refers to *M.A.L. v. N.A.L.*, 2014 BCSC 203 at para. 15, as an example where such an order was found to be reasonable for similar reasons:

[15] The respondent's alternate application is for an interim distribution to her of family assets in the amount of \$200,000 so that she may fund her litigation expenses. On the evidence before me on this application, I am satisfied that is a reasonable request, both in terms of amount and its necessity for her to deal with the difficult issues of asset division and parenting issues on an equal basis with the claimant. Given the equity in the matrimonial home, the length of the marriage, and the assets to which the claimant has access, it is, even at this early stage, sufficiently clear for me to say that it would not be harmful to the claimant's interests for such an interim distribution to take place by March 31, 2014.

[41] The claimant submits that she needs money to fund this proceeding.

[42] She also submits that, given the Respondent's financial resources, an interim distribution would not be prejudicial to him.

The Respondent's Position

[43] The Respondent argues the claimant's application for interim distribution will harm him because he doesn't have ready access to the amount of funds she seeks.

[44] He also says it is unnecessary and excessive. He asserts there is no explanation by the claimant why \$200,000 is necessary. The claimant has not provided a budget or breakdown of her litigation expenses and there is no evidence of a need for \$200,000. The claimant has exclusive possession of the Matrimonial Home, has no debt servicing obligations and her expenses will be covered by spousal and child support payments. He asserts there is no reason that she cannot fund the litigation from the substantial spousal support she will be paid.

- [45] The Respondent further argues there is no basis on the evidence to conclude any interim distribution is necessary in light of the parties' agreement on a method for funding jointly retained experts. Expenses related to the claimant's business valuation and other experts are being funded pursuant to an agreement between the parties. Specifically, \$75,000 has been made available for jointly retained experts and a mediator.
- [46] He argues the court should either adjourn this part of the claimant's application pending further evidence regarding the claimant's need or order a lower amount.

Analysis

- [47] Given the control the Respondent has had over the family's assets, allowing the claimant to have an advance interim distribution of property would provide her with at least some independent ability to deal with the intricacies of the division of property and income determination issues in this case.
- [48] The complexity of untangling and dividing the family property in the circumstances of these parties is apparent on the evidence and I am satisfied, for the same reasons as in M.A.L., that an interim distribution of property to the claimant is necessary.
- [49] Although the claimant requests an interim distribution of \$200,000, I have determined the appropriate amount on an interim basis is \$100,000. I have used my discretion to select that arbitrary amount because the evidence is that the parties have jointly retained and funded a business valuation expert from other sources and there was no evidence before me to justify the need for \$200,000, at least at this juncture. The amount I have chosen should assist the claimant in dealing with the issues she is facing in this litigation on more equal footing with the Respondent.
- [50] I am satisfied that an interim distribution of \$100,000 at this juncture would not be harmful to the interests of the Respondent and that he can easily arrange for it to be paid.
- [51] I order that there be a \$100,000 interim distribution of family property to the claimant pursuant to s. 89 of the FLA.

The Respondent's Income for Support Purposes

- [52] The first step in determining interim spousal and child support is establishing the Respondent's income.

The Law

- [53] The Spousal Support Advisory Guidelines ("SSAG") use "income" as defined by the FCSG as the starting point for determining a payor spouse's income. Section 16 of the FCSG requires that a spouse's income be determined based on his or her line 150 income adjusted in accordance with any allowable adjustments as per Schedule III.

- [54] Section 17 of the FCSG provides discretion to the court in that, if the court is of the opinion that the determination of a spouse's annual income under s. 16 would not be the fairest determination of that income, the court may consider the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years. As stated by our Court of Appeal in *Grossi v. Grossi*, 2005 BCCA 47 at para. 25:
- [25] Under s. 17(1), a court follows a two-step approach to set the income of a spouse. First, the court must arrive at the opinion that s. 16 would not most fairly determine the spouse's annual income; then, after reaching that conclusion, the court may continue to set the income at an amount it views as fair in light of any pattern of income, fluctuation in income or receipt of non-recurring income.
- [55] Where applicable, the court can also consider the pre-tax income of a corporation where the spouse is a shareholder, director or officer of that corporation: FCSG, s. 18(1)(a).
- [56] Given the summary nature of interim support applications, the use of the FCSG wherever possible is appropriate: *T.A.D. v. M.K.D.*, 2010 BCSC 898 at para. 14. Furthermore, income should be fixed for FCSG purposes on the basis of amounts actually earned wherever possible: *Wallace v Wallace*, 2000 BCCA 81.

The Claimant's Position

- [57] The claimant argues the Respondent's income should be an average of the last three years of his line 150 income as follows:

2011 \$1,289,660

2012 \$1,093,803

2013 \$1,110,050

The average income over those three years is \$1,164,504.

- [58] She acknowledges the Respondent's income is derived from his interests in the Stober Family Corporations and his income is a function of how much the Respondent and his family choose he should draw from them.
- [59] The claimant argues that s. 17 of the FCSG directs the court to consider the previous three years of income where the evidence shows a pattern of income fluctuation or receipt of nonrecurring income. Further, she relies on s. 18(1)(a) which allows the court to consider the pre-tax income of the corporations in which the Respondent is a shareholder, director or officer.
- [60] She argues that the three year averaging principle is the correct approach to determining the Respondent's income because s. 17 of the FCSG requires it, relying on *Fuzi v. Fuzi*, [1999] B.C.J. No. 2263 (B.C.S.C.).

- [61] In effect she seeks to use the average line 150 income, \$1,164,504, as the respondent's income to calculate both spousal and child support.
- [62] The claimant says Mr. Jolly's affidavit and calculations are not reliable enough for the court to assess the Respondent's income other than at his three year line 150 average: *Cornelissen v. Cornelissen*, 2003 BCCA 666 at para. 28. She takes issue with Mr. Jolly's calculations of the Respondent's income. She says that Mr. Jolly's attempt to explain how the Respondent's income is derived for tax purposes is really an effort to make adjustments to reduce his income; however, such adjustments are not permitted under Schedule III of the FCSG.
- [63] The claimant says that the Respondent's position, as outlined below, is a novel argument, would be based on complex calculations and considerations, is entirely the wrong approach and has no basis in law. She argues that the concept of income versus actual cash received is not a recognized legal concept for the purposes of computing income under the FCSG for support purposes.

The Respondent's Position

- [64] The Respondent's argument is that this is a somewhat unique case and, for the reasons articulated in Mr. Jolly's affidavit, using the Respondent's line 150 income, or an average of his past three years of line 150 incomes, would be inappropriate. Instead, the court should ascertain the parties' means, needs and lifestyles.
- [65] The evidence led by the Respondent and Mr. Jolly suggests that the Respondent's situation is the reverse of the more common situation where a payor reports an artificially low line 150 income. The Respondent asserts that, for tax and other reasons, the Respondent's line 150 income has been reported at an arbitrarily high amount and bears no resemblance to the income actually earned and available to the Respondent. The actual income available is much less.
- [66] What is relevant, he submits, is the realistic available income for the purpose of paying support. The Respondent's taxable income varies each year due to the Stober Family Corporation's structure and other financial considerations.
- [67] The Respondent explains that the parties lived a relatively modest lifestyle which allowed them to accumulate significant assets. He submits that pattern should continue and, with the asset valuation date being the date of trial, it is to their mutual benefit to continue with that modest lifestyle.
- [68] In the circumstances, and on an interim basis, the court has discretion to determine his income, but, he asserts, it must reflect the realities of the financial arrangements and circumstances that exist.

- [69] He argues the court does not have to determine, with finite precision, his income or the SSAG amount of spousal support that should be paid. It should be a "means and needs" test at this juncture.
- [70] He submits that the court should not blindly apply and slavishly follow the FCSG or the SSAG in circumstances, as here, where:
- a. All financial needs of the parties' adult children have been met and continue to be provided through the Family Trust.
 - b. The Respondent's means are far less than that indicated in his line 150 tax return income.
 - c. The claimant's needs are far less than the amount of support indicated by a blind application of the FCSG and the SSAG.

Analysis

- [71] The claimant is correct that, subject to ss. 17 - 20, s. 16 of the FCSG dictates that, generally speaking, a spouse's annual income is to be determined using line 150 of the Respondent's T1 General form. However, this is subject to a number of adjustments available under Schedule III.
- [72] For the purpose of this application, I accept the facts set out in Mr. Jolly's affidavit and his analysis of the respondent's annual expenses and income. I accept that the line 150 income amount of the Respondent, even over a three year period, does not accurately reflect the monies available to him.
- [73] Mr. Jolly provided a comparison of the Respondent's taxable income and his actual cash income for 2013 and 2014. By his calculations, although the Respondent's income tax return showed an income of \$1,110,052 in 2013, the net amount the Respondent actually received was \$222,586. He deposes that the Respondent received \$362,803 of the \$826,745 income which will appear on his 2014 tax return.
- [74] Some of the adjustments made by Mr. Jolly accord with the Schedule III adjustments allowable under the FCSG. For example, the taxable amount of dividends from a taxable Canadian corporation received by a spouse can be replaced by the actual amount of those dividends received by the spouse. Carrying charges and interest expenses can be deducted, as well as some employment expenses such as CPP contributions.
- [75] It appears to me that some income amounts included in the line 150 income total were not, in fact, income at all, such as a large one-time loan in 2013 which was allocated to the Respondent but then donated to a charitable foundation. This arrangement was utilized solely for tax purposes.

- [76] Other adjustments in Mr. Jolly's analysis, while I believe them to be accurate, are not adjustments which should be made when determining income for support purposes. For example, income tax payable, payments on an insurance policy and TFSA contributions for the parties' children are not reasonable deductions at this stage.
- [77] It is not the actual cash income that matters when determining income for support purposes; it is the reasonably available income that is determinative.
- [78] For the purposes of this interim application, I cannot pursue a thorough analysis of the complex corporate arrangements between the Respondent and the Stober Family Corporations. I find that it is not possible on the evidence before me to determine the precise amount of the Respondent's income; however, I am satisfied that a reasonable amount of spousal and child support payable to the claimant can be determined on an interim basis.
- [79] I do not find that it is necessary to exercise my discretion under s. 17 of the FCSG to consider a pattern of income over the past three years. However, even if I found that a determination under s. 16 would not be the fairest determination of the Respondent's income, I accept Mr. Jolly's evidence that similar adjustments would need to be made to the line 150 income amounts of the past three years to accurately reflect the Respondent's actual available income.
- [80] Considering the evidence of Mr. Jolly and the adjustments allowed under the FCSG, and doing rough justice on an interim basis for the purpose of determining spousal and child support, I find that the Respondent's annual income is \$600,000.

Interim Child Support

- [81] The claimant seeks interim child support in relation to five of the parties' six children, two of whom live with her on a full time basis and three of whom intend to live with her during the four summer months.

The Law

- [82] Parents have a joint and ongoing legal obligation to support their children. The objectives of the FCSG, as set out in s. 1, are:
- (a) to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation;
 - (b) to reduce conflict and tension between spouses by making the calculation of child support orders more objective;
 - (c) to improve the efficiency of the legal process by giving courts and spouses guidance in setting the levels of child support orders and encouraging settlement; and
 - (d) to ensure consistent treatment of spouses and children who are in similar circumstances.

[83] The presumptive rule under s. 3 of the FCSG is that the amount of a child support order for children under the age of majority is the amount set out in the applicable table according to the number of children and the income of the payor spouse.

[84] Section 3(2) provides:

3(2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
- (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[85] When determining whether a child over the age of majority who is pursuing post-secondary education is still a child of the marriage for support purposes, the court considers factors such as the contribution of the child to their education, the reasonableness of career plans and the parents' plans for the education of their children before the breakdown of the marriage: *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.).

[86] Section 4 of the FCSG provides for the determination of child support when the payor's income exceeds \$150,000 per year:

- 4. Where the income of the spouse against whom a child support order is sought is over \$150,000, the amount of a child support order is
 - (a) the amount determined under s. 3; or
 - (b) if the court considers that amount to be inappropriate,
 - (i) in respect of the first \$150,000 of the spouse's income, the amount set out in the applicable table for the number of children under the age of majority to whom the order relates;
 - (ii) in respect of the balance of the spouse's income, the amount that the court considers appropriate, having regard to the condition, means, needs and other circumstances of the children who are entitled to support and the financial ability of each spouse to contribute to the support of the children; and

[87] Under s. 4(b), to the extent that the payor's income exceeds \$150,000, the court has discretion on how much child support should be ordered. *Francis v. Baker*, [1999] 3 S.C.R. 250 is the leading authority in Canada on this issue and provides the principles that go into the consideration of whether the applicable table amount of child support payable on income in excess of \$150,000 is "inappropriate". In exercising its discretion, the court should be guided by the principles recently re-articulated by the Court of Appeal in *Hathaway v. Hathaway*, 2014 BCCA 310 at paras. 26 - 39, leave to appeal ref'd [2014] S.C.C.A. No. 412:

- [26] In cases where a payor earns more than \$150,000, s. 4 of the Federal Child Support Guidelines, SOR/97-175 [FCSG], authorizes the court to deviate from them if it considers the prescribed amount to be "inappropriate", having regard to the condition, means, needs and other circumstances of the children.
- [27] Whether a court should depart from the FCSG is a matter of discretion. This Court will only interfere with such an exercise of discretion where the judge "acted on a wrong principle, or failed to give sufficient weight to all relevant considerations": *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 at para. 38, citing *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Harekin v. University of Regina*, [1979] 2 S.C.R. 561; and *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2.
- [28] The leading authority on the principles governing a judge's discretion under s. 4 of the FCSG is *Francis v. Baker*, [1999] 3 S.C.R. 250. Madam Justice Newbury provided a concise summary of these principles in *Metzner v. Metzner*, 2000 BCCA 474 at para. 30:
- 1) It was Parliament's intention that there be a presumption in favour of the Table amounts in all cases (para.42);
 - 2) The Guidelines figures can only be increased or reduced under s. 4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate (para.42);
 - 3) There must be clear and compelling evidence for departing from the Guidelines figures (para.43);
 - 4) Parliament expressly listed in s. 4(b)(ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation therefrom (para.44);
 - 5) Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining all circumstances including the factors expressly set out in s. 4(b)(ii) (para.44);
 - 6) Section 4(b)(ii) emphasizes the "centrality" of the actual situation of the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section (para.39). A proper construction of s. 4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual "condition, means, needs and other circumstances of the children" on the other. (para.40)

- 7) While child support payments unquestionably result in some kind of wealth transfer to the children which results in an indirect benefit to the non-paying parent, the objectives of child support payments must be kept in mind. The Guidelines have not displaced the Divorce Act which has as its objective the maintenance of children rather than household equalization or spousal support (para.41).
- 8) The court must have all necessary information before it in order to determine inappropriateness under s. 4. If the evidence provided is a child expense budget, then "the unique economic situation of high income earners" must be considered.
- 9) The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high "as to exceed the generous ambit within which reasonable disagreement is possible": *Bellenden v. Satterthwaite*, [1948] 1 All E.R. 343 at 345.
- [29] I would add to this list the comment from *Hollenbach v. Hollenbach*, 2000 BCCA 620 at para. 45, in which this Court interpreted *Francis* as creating a "formidable onus" for wealthy payors seeking to establish that the FCSG amount is inappropriate.
- [88] In deciding whether the payor has rebutted the presumption that the table amount applies on his or her income in excess of \$150,000, clear and convincing evidence must be presented, including a consideration of the parties' lifestyles pre and post separation, the claimant's budget and the values and aspirations of the family when it was a unit. What weight is to be attached to each of these considerations is a matter of judgment in each case: *Macdonald v. Macdonald*, 2002 BCCA 46 at para. 18.
- [89] The task of the court on an interim application for child support is to put in place a reasonable arrangement which will serve the interests of the children and the parties until a thorough review of the family's circumstances can take place at trial. Any unfairness may be resolved by the trial judge: *Roche v. Chen*, 2012 BCSC 1290 at para. 32.

The Claimant's Position

- [90] Even though Brittani, Michael and David are adult children, the claimant submits that they continue to reside with the claimant during the summer months and continue to be children of the marriage, relying on *L.H.M.K. v. B.P.K.*, 2012 BCSC 435 at paras. 175 - 176. The claimant argues that the table amount is appropriate respecting them during the summer months while they reside with her.
- [91] Cole and Harrison live with the claimant full time and the claimant submits that the table amount is appropriate for them as well.
- [92] In accordance with the FCSG, she submits that the amount the Respondent is obliged to pay her for child support is \$17,164 monthly, based on the average of the Respondent's line 150 income for the past three years.

The Respondent's Position

- [93] The Respondent submits that the table amount is inappropriate because, as described above, using his line 150 income as the claimant suggests is more than seven times as large as the \$150,000 "ceiling" provided in the FCSG. Additionally, he asserts that the parties and the children have never lived on anything close to the amount of income allocated to the Respondent by Mr. Jolly for tax purposes. Further, the Respondent asserts that the claimant's actual and claimed expenses fall far short of the FCSG amount of support being claimed and that the children's needs can be met, as they were before the parties' separation, directly from the Family Trust and Stober Holdings.
- [94] The Respondent argues that on a needs basis, the claimant's financial requirements will be met with an interim global support order, which includes both child and spousal support, of \$15,000 per month.

Analysis

- [95] *Francis v. Baker* makes it clear that where the payor's income exceeds \$150,000, the court has the discretion to consider the facts and circumstances of each case, including the factors listed in s. 4 of the FCSG, to determine if the table amount is inappropriate in those circumstances. "Inappropriate", in this context, means "unsuitable", not "inadequate".
- [96] The evidence is clear that the children are not wanting in any respect. I am satisfied that the financial arrangements the Respondent has made to ensure their university, school, living and other expenses are paid through Stober Holdings and the Family Trust have been and will continue to be more than adequate during the school year.
- [97] For the purposes of this interim application, I have determined the Respondent's income to be \$600,000 per annum. Pursuant to s. 4(a) of the FCSG, the total monthly child support for five children is \$13,114 during the four summer months. During the other eight months of the year the child support payments for the two children living with the claimant is \$7,774 per month. Averaged over 12 months, the table amount payable would be \$9,554 per month.
- [98] However, the court has the discretion under s. 4(b) to consider the condition, means, needs and other circumstances of the children and the financial ability of each spouse to contribute to their support in relation to the amount of income over \$150,000. Additionally, respecting the three university-age children who are over the age of majority, s. 3(2)(b) of the FCSG allows the court to determine an appropriate amount for child support for those children having regard to the same factors.
- [99] For the purpose of this interim application, I do not have clear and convincing evidence to rebut the presumption that the table amount is appropriate for the full \$600,000 income of the Respondent. I also do not have sufficient evidence to undergo a full analysis of the Farden factors in relation to the three children over the age of majority who attend university or college; however, when I consider the evidence I do have pertaining to the

circumstances of the adult children and the Respondent's financial arrangements for their education and living expenses during the school year, I find that child support for the adult children is appropriate only for the four summer months during which they live with the claimant.

[100] Accordingly, the total interim child support the Respondent will pay the claimant commencing April 1, 2015 and on the first day of each month thereafter until further order is \$9,554 per month.

Interim Spousal Support

The Law

[101] Section 15.2(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) sets out what the court should consider in making interim spousal support orders:

15.2(4) In making 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.
- (6) 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;
 - (c) relieve any economic hardship of the spouse 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.

[102] Section 15.3(1) states that the court should give priority to child support where it is considering both an application for child support and an application for spousal support.

[103] Once entitlement for spousal support, based on either compensatory, non-compensatory (needs-based), or contractual grounds, is determined, the SSAG provide a "useful tool" to determine both the quantum and duration of spousal support based on either the with child or without child formula: *Yemchuk v. Yemchuk*, 2005 BCCA 406 at para. 64.

[104] In the same way that the FCSG applies an income "ceiling" after which the table formula gives way to judicial discretion, so does the SSAG.

- [105] Section 11.1 of the SSAG provides that after a payor's gross income reaches \$350,000, the formulas should not be automatically applied because the formulas are not designed for high income earners; however, they can be a starting point: *Fisher v. Fisher*, 2008 ONCA 11 at paras. 96 - 100.
- [106] Hathaway affirms that \$350,000 is not a hard ceiling or cap. Rather it is an income level above which the court can choose to apply the formulas or use a discretionary approach. At paras. 44 - 47, Harris J.A. stated:
- [44] I will deal first with the arguments regarding s. 11 of the SSAG. The appellant argues it is irrelevant that he did not make submissions on the applicability of s. 11 at trial for three reasons. First, he says the law is that the table amounts do not apply to an income of \$1 million and that the judge should have applied s. 11 regardless of the appellant's failure to urge such an analysis on the Court. Secondly, he contends, the judge was given the law on s. 11. He points to the authorities presented at trial, which included this Court's decision in *Loesch v. Walji*, 2008 BCCA 214. *Loesch* was a review of an interim order for spousal support on an income of \$1.6 million. Madam Justice Kirkpatrick commented that on an income so far in excess of \$350,000, the SSAG were "really of no assistance": para. 49. Finally, the appellant justifies taking the position at trial that the SSAG should apply to his income of \$688,000 by arguing that courts tend to award the table amount on incomes up to roughly \$700,000, but not beyond.
- [45] Section 11 describes a "ceiling" and a "floor", which is an "attempt to define the upper and lower bounds of the typical case, for which guideline formulas can generate acceptable results." In s. 11.1, the ceiling for a payor's income is set at \$350,000 gross annual income. This is not an "absolute" ceiling or a cap: *Smith v. Smith*, 2008 BCCA 245 at para. 31.
- [46] In s. 11.3, the SSAG suggest two approaches for circumstances where a payor earns more than \$350,000 and is also paying child support. The first is described as the "minimum plus" approach. Under this approach, the judge would first calculate the amount owed at the ceiling, and then adjust it "after taking into account the actual amount of child support being paid". This approach was suggested for circumstances where the payor's income is close to the ceiling.
- [47] The second approach is "one of pure discretion". Rather than calculating a minimum, the court would determine:

a dollar figure that would take into account the actual amount of child support paid, an amount which can be very large for high income cases. At some point, the large amounts of child support include a component that compensates the recipient spouse for the indirect costs of child-care responsibilities, leaving less need for spousal support to do so. This approach will become more important where the payor's income is well above the ceiling.

What is clear is that the larger stakes at these income levels and the complexities of the individual cases mean that the Advisory Guidelines will have less significance to the outcomes above the ceiling, whether negotiated or litigated.

[Emphasis added in Hathaway.]

[107] At para. 58, the court notes:

[58] Lastly, I have been unable to find support in the case law for the suggestion that courts will apply the SSAG tables on incomes ranging between \$350,000 and \$700,000, but depart from them above that range. In my view, the argument that the table amount should not be used to determine spousal support was equally available on an income of \$688,000 as one of \$1 million.

The Claimant's Position

[108] The claimant argues that, during the marriage, she was the primary caregiver to the six children and that she did not pursue a career due to the child care and homemaking demands placed upon her. Also, because of the Respondent's considerable financial resources, she did not have to work. She submits that she does not now have the means or resources to independently fund the very comfortable lifestyle enjoyed by the family during the marriage and needs the spousal support she seeks in order to do so, relying on *Chutter v. Chutter*, 2008 BCCA 507 at paras. 45 - 61, leave to appeal ref'd [2009] S.C.C.A. No. 41.

[109] Similar to her argument on child support, she seeks to use the average line 150 income, \$1,164,504, as the Respondent's income to calculate spousal support. Using that amount, the SSAG provide for monthly spousal support in the mid-range of \$27,324 per month.

The Respondent's Position

[110] The Respondent agrees the claimant is entitled to an order for interim spousal support and asserts she can use that support to fund this proceeding.

[111] The Respondent submits that the underlying theme of the claimant's application for significant spousal support is that the Respondent was a high income earner. She claims that she needs the spousal support she seeks in order to "fund the very comfortable lifestyle enjoyed by the family during the marriage."

[112] The Respondent asserts that the onus is on the claimant to lead some evidence of the parties' lifestyle during the marriage before the court can justify such an order. He says the material filed by the claimant lacks any particulars of their lifestyle and on an application such as this, there should have been volumes of it.

- [113] Instead, the Respondent submits, the claimant seeks to have this court blindly apply the mid-range of the SSAG to the average of the Respondent's last three years of line 150 income with no regard to the tax efficient nature of the Stober Family Corporation's structure. She also fails to take into account the fact that the Respondent is paying significant expenses for life insurance and loan repayments.
- [114] The Respondent submits that the evidence filed by the claimant in support of spousal and child support misses the purpose behind the SSAG. The parties, he argues, have always lived a lifestyle that is relatively frugal compared to the income that the Respondent has been allocated for tax purposes in recent years. The SSAG, he argues, should not be applied in this case because, just as his income exceeds the \$150,000 threshold for the FCSG, so also it exceeds the \$350,000 threshold for the SSAG.
- [115] He asserts that by combining Mr. Jolly's evidence and the claimant's reasonable needs, the objectives of spousal support can be met. The factors the courts needs to consider include the restrictions of cash currently available to the Respondent, the pre-separation financial arrangements and the means and needs of both parties.
- [116] The claimant's Form 8 dated August 5, 2014 confirms that her monthly expenses are in the \$15,000 range for both her and the children. Her Form 8 confirms that she does not anticipate any significant changes. She has not filed an updated Form 8. Further, her expenses are not "bare bones" and include discretionary spending for her and the children. Her monthly expenses of \$15,000 dovetail with the history of the parties' living expenses pre and post separation and would adequately meet the claimant's reasonable needs pending trial. He argues that the claimant's Form 8 is the best evidence of the parties' lifestyle pre and post separation and that all of the claimant's expenses post-separation have been paid without scrutiny.

Discussion

- [117] The Respondent does not dispute the claimant is entitled to spousal support. She was the primary care giver for the parties' six children and was a homemaker throughout their 23 year marriage. She does not now have the financial resources to carry on the comfortable lifestyle she enjoyed during the marriage.
- [118] These are interim proceedings, the goal of which is to provide "rough justice" to the parties pending trial.
- [119] However appropriate the SSAG may be at an interim stage for payors earning less than \$350,000 per year, the claimant's argument fails to appreciate that they are not designed for higher income earners such as the Respondent. They are not presumptive, especially in circumstances involving a high income earner: Hathaway at para. 48.

- [120] As required by s. 15.2(4) of the Divorce Act, I have considered the condition, means, needs and other circumstances of each spouse, the claimant's Form 8, the fact that the university and other expenses of the parties' university children are being completely funded by the Family Trust, the nature of the corporate structure of the Stober Family Corporations and the resultant difficulty in determining the Respondent's means and ability to pay interim spousal support.
- [121] On this interim application, I have found the Respondent's annual income for support purposes to be \$600,000. Applying spousal support calculations to the circumstances of the parties, I find that the with child formula results in a range for spousal support of \$11,842 (low) to \$13,013 (mid) to \$14,199 (high) for an indefinite, or unspecified, duration.
- [122] Following the "minimum plus" approach in Hathaway, spousal support for the first \$350,000 would be in the range of \$6,595 (low) to \$7,290 (mid) to \$8,027 (high) per month. After taking into account the \$9,554 per month of child support being paid by the Respondent to the claimant, I find that an adjustment to the formula amount roughly between the high range for \$350,000 and the low range for \$600,000 is appropriate. I note that I would have come to a similar conclusion employing the "pure discretionary" approach in Hathaway.
- [123] The total interim spousal support the Respondent will pay the claimant commencing April 1, 2015, and on the first day of every month thereafter until further order, is \$10,446 per month. This results in a total interim child and spousal support payment of \$20,000 per month.
5. Claimant's Use of ASCL's Lawn Mower and Caretaker
- [124] Given the orders I have made regarding spousal support, child support and exclusive occupancy of the Matrimonial Home, I do not agree that the claimant should be entitled to an order that ASCL provide access to the lawn mower used to maintain the Matrimonial Home and permit its caretaker to assist the claimant with lawn mowing and sprinkler maintenance at the Matrimonial Home.
- [125] She sought and obtained an order for exclusive occupancy of the Matrimonial Home on the basis that she wanted to be independent from the Stober family and its corporations. The Respondent has been ordered to pay the claimant a significant amount for spousal and child support on a monthly basis. I see no reason she cannot either purchase a lawn mower and maintain the lawns on her own (with the assistance of the children) or hire a lawn care service to maintain the lawns for her. I also see no reason she cannot hire a service to maintain the Matrimonial Home's irrigations system.
- [126] The claimant's application for this order is, therefore, dismissed.

Costs

[127] It was at the hearing of this application that the claimant conceded, for the first time, to allow s. 7 expenses for the children to be paid, as has historically been the case, through the Family Trust.

[128] Similarly, the first time the claimant was made aware of how the Stober family calculated the Respondent's income was when she received and reviewed Mr. Jolly's affidavit. It is evident from his affidavit that the Stober family corporate organization will be difficult and expensive to unwind.

[129] In the circumstances, I order that both parties bear their own costs of this application.

Summary

[130] At the conclusion of the application, I made the following orders:

1. The claimant is entitled to exclusive possession of the Matrimonial Home.
2. The claimant's name will be added to all utility and other accounts respecting the Matrimonial Home.
3. The claimant will be paid an interim distribution of family property of \$100,000 within 30 days.

[131] I make the following interim orders in relation to the outstanding issues between the parties:

1. The Respondent's annual income, on an interim basis, is \$600,000 for support purposes.
2. The total interim child support the Respondent will pay the claimant commencing April 1, 2015 is \$9,554 per month.
3. The total interim spousal support the Respondent will pay the claimant commencing April 1, 2015 is \$10,446 per month.
4. The claimant's application for use of ASCL's lawn mower and caretaker is dismissed.
5. Because of lack of service, ASCL will have liberty to apply to review my order granting the claimant exclusive possession of the Matrimonial Home on two clear days' notice.
5. The parties will bear their own costs of this application.

"G.P. Weatherill J."

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