

CANADA / JUDGMENT

T.N. v. B.N.

2018 BCSC 201

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 201 T.N. v. B.N. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: T.N. v. B.N., 2018 BCSC 201 Date: 20180213 Docket: E080058 Registry: Victoria Between: T.N. also known as T.M.N Claimant And B.N. Respondent Before: The Honourable Madam Justice Young Reasons for Judgment Counsel for the Claimant: B. MacLeod Counsel for the Respondent: C. Gordon Place and Date of Hearing: Victoria, B.C. January 9, 2018 Place and Date of Judgment: Victoria, B.C. February 13, 2018 Table of Contents Background Facts. 3 The Separation Agreement. 4 The Mediated Agreement in 2014. 5 The 2016 Review.. 5 The Claimant's Position. 6 Respondent's Position. 8 Analysis. 10 Spousal Support Overpayment 13 Parties' Incomes. 13 Range of Spousal Support 14 Calculation of Overpayment of Spousal Support 15 Effect of Overpayment 16 Property Reapportionment 16 Relative Means of the Parties. 16 Self Sufficiency. 17 Health Concerns. 18 Conclusion.. 19 Retroactive Spousal Support. 20 General principles. 20 Costs. 22

- [1] The claimant filed a notice of application on August 31, 2017 applying for an order that the respondent pay her monthly spousal support pursuant to the Spousal Support Advisory Guidelines ("SSAG") retroactive to and including June 2016 and ongoing support. The claimant seeks further orders that there be a review of spousal support with respect to quantum two years from the date of any order made.
- [2] The respondent opposes the order on the basis that he has satisfied his obligation to support the claimant by paying support to her from 2007 through to June 2016 and by virtue of the fact that he front-loaded his support payments by making \$1,000 per month higher payments than the high range for SSAG for seven years and by re-apportioning family property in the claimant's favour. Background Facts
- [3] The parties dispute when they first started dating but I find that it was either 1982 or 1983. By 1983 they were cohabiting. They were married in 1987.
- [4] The claimant worked as a registered nurse and in the early years of their marriage the respondent pursued his education, receiving his PhD. The parties moved residences to various locations until the respondent had finished his education. In 2003, the respondent obtained a position in Victoria, British Columbia as the director of a research centre. He has remained in that position ever since.

- [5] The parties have two children together namely S. who is now 24 and M. who is now 20 (the "Children").
- [6] The parties separated in 2004 but lived in the same home separate and apart until 2005. The Children were in the claimant's primary care until 2015 when M. moved out. S had moved out earlier.
- [7] Prior to the birth of the Children, the claimant worked full-time holding several prominent well-paying nursing positions from 1985 to 1993. From 1993 to the date of separation she worked part-time at several nursing positions. The Separation Agreement
- [8] The parties entered into a separation agreement on April 1, 2007 (the "Separation Agreement").
- [9] In the Separation Agreement, the parties settled all issues of parenting, child and spousal support, and the division of assets. At the time the Separation Agreement was entered into, the claimant agreed to estimate her income at \$28,000 per year and the respondent's income was \$126,620 per year. The respondent agreed to pay \$1,777 per month in child support and \$3,400 per month in spousal support. The Separation Agreement was entered into before the SSAG were published in final form, however, the parties were aware of the SSAG in draft form. The spousal support amounts were intentionally set at a higher amount than what the parties predicted the SSAG would recommend.
- [10] The parties predicted what the SSAG would recommend in clause 18(2)(b) of the Separation Agreement which says:
- (b) Based on [B.N.] and [T.N.]'s current Guideline Incomes, this would equal \$1,728 to \$2,378 per month;
- [11] The respondent agreed to pay \$3,400 per month in spousal support for at least one year from the date of the Separation Agreement.
- [12] Clause 18(2)(d) and (e) of the Separation Agreement says:
- (d) This excessive amount of Spousal Support reflects [B.N.'s] desire for [T.N.] and the children to continue living in the family home;
- (e) The parties both acknowledge the need to adjust, within a reasonable period of time, to a level of Spousal Support that fits within national guidelines and standard customs and practices in British Columbia and Canada.
- [13] According to the Separation Agreement, the \$3,400 payments did not start for a period of time until the respondent adjusted withholding taxes on his paycheque.
- [14] It is agreed that the respondent continued to pay \$3,400 per month in spousal support to the claimant until 2014.

- [15] The Separation Agreement provides for an annual review of spousal support on the anniversary of the agreement. Clause 21(2) says:
- (2) If the parties do not review Spousal Support as provided under subclause (1), or review Spousal Support and do not vary it in writing, both parties are deemed to consider that the Spousal Support remains adequate in the circumstances.
- [16] The claimant says the parties never did review the spousal support and so it remained "adequate in the circumstances". The Mediated Agreement in 2014
- [17] The respondent deposed that he made numerous requests to review the spousal support from February 2008 onward and that the claimant was not willing to discuss it. It was not until he commenced a court application in October 2013 that the parties finally did review and vary the spousal support.
- [18] The parties entered into a mediated agreement on April 17, 2014 (the "Mediated Agreement") wherein they agreed that the respondent agreed to pay the claimant \$2,700 per month in spousal support from June 1, 2014 to May 2016. The Mediated Agreement does not provide for any support after May 1, 2016. It was the intention of the parties that entitlement and amount (if any) would be the subject of review after May 1, 2016 without the requirement of a material change in circumstance. The 2016 Review
- [19] The respondent requested financial disclosure from the claimant in April 2016 so that spousal support could be reviewed pursuant to the Mediated Agreement. He deposed that the claimant refused to provide any financial disclosure for nine months. He stopped paying spousal support after June 2016. He deposed that it was impossible for him to determine what his spousal support obligation was given that he could not get financial disclosure from the claimant.
- [20] The Children are now adults. B. is independent. M. is now attending school and the respondent is paying tuition at her school and contributing \$1,000 per month toward her living expenses. Claimant's Position
- [21] The claimant agrees that she did receive spousal support in excess of what the SSAG recommended.
- [22] The claimant deposed that the reason for the breakdown of the marriage came as a shock to both she and the Children. Grounds for marriage breakdown may not be relevant to a spousal support application but the emotional reaction of the Children in this case is relevant because it placed an added strain on the claimant and negatively impacted her ability to become self-sufficient.
- [23] The claimant deposed that the Children had a hard time accepting the respondent's choice and did not want to see him very often.

- [24] During their adolescent and teenage years, the Children's behaviour became defiant and potentially self-harming. The cause of this behaviour is not relevant and likely not easy to determine. By the time M. was in middle school, she was threatening to cut herself and suffered from depression, anxiety, and eating disorders. By the time she was in high school, she was not functioning in school and ended up not completing high school. Within a few years of the respondent leaving the family home, S. started to smoke marijuana and drink alcohol. He was getting into serious trouble with the police. This was so frequent that the claimant's neighbour wondered if she was dating a police officer because she had a squad car in her driveway so often.
- [25] During this time when the Children were in high school, the claimant could not work as she was dealing with their emotions and trying to keep them on track. She did not work from December 2007 until June 2010.
- [26] From June 2010 to February 2012, the claimant worked at a travel medicine and vaccination centre part-time and attended some distance education classes online to train in the area of labour and delivery.
- [27] The Children's behaviour continued to get worse. For a couple of years, S. was coming and going whenever he wanted. He did not want to live with his mother's rules. When he left the house, the respondent decreased child support. During Grade 10, S. went to live with the respondent for three months and then came back to live with the claimant.
- [28] In the summer of 2012 after doing a preceptorship in labour and delivery, the claimant realized that she could not be away from home for 12 hour shifts. She deposed at para. 30 of her 4th affidavit:
30. ... I would come home and my home would be trashed, there would be all sorts of teenagers there, broken household items, drug and alcohol use and children who had skipped school. When I would get home and kick all the teenagers out the front door I would often find them again in the basement, having come back in through the basement door. I could not rely on the Respondent to help me with the children. By this time, the Respondent and the children had a fairly estranged relationship.
- [29] The claimant took a job in a nursing home where she was underpaid for her skills, she was not paid benefits or pension, and she was not working at her level of nursing. She did this solely because she could not be away from the home for long periods of time. The nursing home job provided her with five to eight hour shifts and it was 12 blocks away from her residence.
- [30] In 2015, M. left home. At that stage the claimant applied for a job with her current employer and again started making more money, contributing to a pension plan, and received benefits.

- [31] As the claimant's childcare responsibilities were decreasing, freeing her time to maximize her earnings, she unfortunately started to suffer from health problems.
- [32] In June or July 2015, she lost her hearing and had to go to Vancouver for hyperbaric treatments for six weeks.
- [33] She has since been diagnosed with rheumatoid arthritis and suffers from intermittent pain in her feet and hands and numbness in her hands with loss of fine motor skills. She has completely lost hearing in her left ear and the hearing in her right ear is compromised. She has constant ringing in her left ear. It affects her sleep. She has also lost her sense of smell and taste. It is believed that the hearing and smell loss is part of her autoimmune disorder.
- [34] The claimant expresses concern in her affidavit that she will not be able to continue working full-time in the future because of her medical problems.
- [35] In November 2017, she was diagnosed with Morton's Neuroma and plantar fasciitis which causes her severe pain in her foot and a lack of mobility. She had to take a week off work. Although not in the sworn evidence, I was advised at the hearing that the claimant was off work again.
- [36] The claimant relies primarily on *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge] in support of her argument that she is still suffering the consequences arising from both the role she played in the marriage and the breakdown of the marriage. She submits that she is still entitled to compensatory spousal support even though her current income meets her present needs.
- Respondent's Position
- [37] The respondent takes the position that he has overpaid spousal support by \$85,000 - \$119,000 over the years and that the claimant received a reapportionment of family assets in her favour in the amount of \$277,000.
- [38] The amount of the asset overpayment is not agreed. The claimant says that the overpayment was \$138,900. At the hearing before me, the respondent accepted that number.
- [39] The respondent says this was an asset overpayment in addition to a spousal support overpayment. The claimant says the asset redistribution was because of retroactive support to the date of separation.
- [40] There is no indication in the Separation Agreement that there was a claim for retroactive support.
- [41] There is an unusually worded paragraph in the Separation Agreement at clause 43 which states:
- (k) recognises that [TN] is receiving more than 50% of the assets (over \$100,000 extra) but that is in compensation and equalization for her past support.

- [42] The respondent's position is that clause 43(k) is an acknowledgment of the reapportionment of assets in the claimant's favour and not a payment of retroactive support. On a plain reading, the respondent's interpretation makes more sense. Given that it is such unusual phrasing and in a peculiar location, I am fairly certain that clause was not drafted by an experienced family law practitioner. I suspect the respondent was the author.
- [43] The respondent's position is that the claimant has been fully compensated for any financial disadvantage arising from the breakdown of a 22-year marriage.
- [44] In response to the claimant's evidence that he was not involved in the Children's lives, the respondent blames the claimant for parental alienation suggesting that he was ready, willing, and able to care for the Children but the claimant prevented him from doing so. He deposed at para. 10 of his 5th affidavit that the claimant made disparaging comments about him to friends, family, and the Children and he experienced a serious and painful period of parental alienation for the duration of the Children's schooling.
- [45] The claimant deposed that the respondent was not a regular part of the Children's lives but denies that she prevented him from seeing them. She denies any allegation of alienation and says that the Children reacted to the respondent's conduct. She says that the respondent was busy with work and his new social life and did not make a great effort when it came to the Children.
- [46] The respondent primarily relies on two authorities. In *McEachern v. McEachern*, 2006 BCCA 508, the Court of Appeal of British Columbia said at para. 62 that the fact of reapportionment should be taken into account in applying the SSAG.
- [47] In *Mercel v. Boullion*, 2012 ON SC 6557, the Ontario Superior Court of Justice considered the fact that the payor had paid spousal support at a range higher than the high range of recommended spousal support under the SSAG for 15 years in a spousal support variation application. The court considered this another factor which influenced the termination of spousal support. There were some distinguishing facts in that case but the principles are applicable to the case at bar.
- [48] I agree that a reapportionment of assets and an overpayment of spousal support are factors to be considered in determining the overall range of spousal support.

Analysis

- [49] In an application to vary spousal support order or agreement, the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) directs the court to consider the objectives of the spousal support order. I have a set out s. 17(7) of the Divorce Act below.
- (7) A variation order varying a spousal support order should
- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;

- (b) apportion between the former 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 former spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.
- [50] While it is clear that the claimant has a strong compensatory support claim under s. (7)(a) and (c), the respondent takes the position that he has adequately compensated her.
- [51] I find that the claimant's compensatory claim under s. 7(b) is equally as strong. She says that the Children wanted little to do with the respondent. The reasons are irrelevant. I accept the claimant's evidence that she had to manage the Children on her own for the most part. The Children were struggling to such an extent that she could not work for three years and then had to work at marginal employment for several more years so that she could be present in the household to supervise the Children.
- [52] There is some evidence that the respondent was aware that the Children's behaviour was having a negative impact on the claimant's earnings. In 2013, there was an email exchange about M. skipping school and the claimant having to quit her job. In the Mediated Agreement the respondent agreed to spend more time with M. and on months that he could not, he agreed to pay higher spousal support. The respondent currently has a relationship with M. but S. does not speak to him.
- [53] Justice L'Heureux-Dubé discussed the consequences arising from childcare responsibilities in *Moge* at para. 72: 72 Often difficulties are exacerbated by the enduring responsibility for children of the marriage. The spouse who has made economic sacrifices in the marriage also generally becomes the custodial parent, as custody is awarded to the wife 75 percent of the time, to both parents jointly in 13 percent of cases, and to the husband alone in less than 8 percent of divorces (see *Evaluation of the Divorce Act -- Phase II: Monitoring and Evaluation*, supra, at p. 101). The diminished earning capacity with which an ex-wife enters the labour force after years of reduced or non-participation will be even more difficult to overcome when economic choice is reduced, unlike that of her ex-husband, due to the necessity of remaining within proximity to schools, not working late, remaining at home when the child is ill, etc. The other spouse encounters none of these impediments and is generally free to [page864] live virtually wherever he wants and work whenever he wants. [Emphasis added]
- [54] I find that the claimant suffered significant negative consequences arising from the care of the Children post-separation that exceeded any obligation to pay child support.

- [55] Furthermore, during the marriage, the claimant stayed home or worked part-time while raising the Children. As a result, her employment played a secondary role in the marriage and she had to make sacrifices for the sake of domestic considerations. Justice L'Heureaux-Dubé refers to this phenomenon in para. 70 of *Moge*: 70 Women have tended to suffer economic disadvantages and hardships from marriage or its breakdown because of the traditional division of labour within that institution. Historically, or at least in recent history, the contributions made by women to the marital partnership were non-monetary and came in the form of work at home, such as taking care of the household, raising children, and so on. Today, though more and more women are working outside the home, such employment continues to play a secondary role and sacrifices continue to be made for the sake of domestic considerations. These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals. This eventually may result in inequities. ... Hence, while the union survives, such division of labour, at least from an economic perspective, may be unobjectionable if such an arrangement reflects the wishes of the parties. However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities. The sacrifices she has made at home catch up with her and the balance shifts in favour of the husband who has remained in the work force and focused his attention outside the home. In effect, she is left with a diminished earning capacity and may have conferred upon her husband an embellished one.
- [56] These excerpts are relevant to the case at bar. The claimant not only took time off work but when she did return to work she continued to make sacrifices. She was not in a position to enhance her earning potential by taking promotions. While she was working below her ability and not advancing in her career, she was also creating a situation where the respondent was free to do so. His career and income earning potential was enhanced by virtue of the claimant taking over the domestic responsibilities. His income increased and her income decreased. I anticipate that he now faces retirement in ten years with a fairly healthy municipal pension. I assume the claimant's employment pension is meagre given that for many post-separation years she has worked in jobs that did not offer pensions. On the other hand, I have not lost sight of the fact that the claimant owns more equity in her larger home which could be an income earning asset. Spousal Support Overpayment The Parties' Incomes
- [57] Certainly the respondent should be given credit for frontloading spousal support and overpaying spousal support for seven years. The respondent's assertion of the amount that he overpaid is based on assumptions about what the claimant's income was during those years.

- [58] I do not have financial disclosure from either party for the years 2007 to 2013. I have attempted to reconstruct those years with the evidence I do have to determine what the SSAG spousal support would have been so that I can estimate the overpayment.
- [59] The respondent's income is easy to determine. He is currently earning \$159,100 a year. When the parties separated, he earned \$126,620 a year. Since he stayed at the same job throughout those years, I assume he has enjoyed a gradual increase in his income and no periods of unemployment. His income increased by \$32,480 over ten years. I have divided that amount by ten and added \$3,248 for each year.
- [60] I accept the claimant's evidence that she was unable to work for three years after the parties' separation and I assume her income was zero from 2007 to June 2010. This contradicts the income the parties agreed she was capable of earning in the Separation Agreement. The reality is that she did not earn anything close to the agreed to income until 2011.
- [61] In the Mediated Agreement, she acknowledges having a 2013 income of \$33,000 per year. She was working at a travel medicine vaccination centre part-time from June 2010 to February 2012. In 2012, she worked at the nursing home being underpaid. For my estimate, I have assumed that she made a half year income in 2010 in the amount of \$15,000 and that she earned \$33,000 in 2011, 2012 and 2013. I rely on the income she declared in the Mediated Agreement.
- [62] In 2014, her income increased to \$50,075 from all sources (except spousal and child support) minus her union dues when she returned to full-time nursing.
- [63] In 2015, the claimant's income dropped to \$35,179 from all sources (except spousal and child support) minus union dues. During this time, she missed work after her loss of hearing.
- [64] In 2016, the claimant's income was the highest it has ever been at \$84,326 from all sources (except spousal support) minus union dues.
- [65] In 2017, for the first 23 pay periods, the claimant earned \$54,622. If I extrapolate that same amount over 26 pay periods and subtract union dues, I come up with an income of \$59,877. I relied on the figure for union dues from the previous year in the amount of \$1,869. Range of Spousal Support
- [66] Relying on these assumptions, I have calculated what the respondent should have paid at the high and of the SSAG. Both counsel have made submissions assuming that the mid-range is the appropriate range. It is my view, with a very strong compensatory support, especially in a case like this where the compensatory claim continued post-separation, that the high end of support would be appropriate.
- [67] I refer to C. Rogerson and R. Thompson, *The Spousal Support Advisory Guidelines: The Revised User's Guide*, April 2016, Faculty of Law, University of Toronto, and Schulich School of Law, Dalhousie University at pp. 45 and 46: If anything, the with child support cases should more often resolve in the upper half of the range, as the formula already adjusts for

"average" ability to pay. Most of these cases are strongly compensatory and there is great "need" in the home of the primary carer for the Children, which should push amounts higher in the range. In shared custody cases, by contrast, the default outcome in bi-nuclear cases (no new partners, no new children) should be the spousal support which generates a 50/50 split of net disposable income (NDI), explained in more detail above under "The With Child Support Formula". ... Chapter 9 of the SSAG provides considerable guidance on location within the range, setting out a non-exclusive list of factors to assist in determining location within the range for both amount and duration: · strength of any compensatory claim · recipient's needs · age, number, needs and standard of living of children (if any) · needs and ability to pay of payor · work incentives for payor · property division and debts · self-sufficiency incentives

- [68] It is my view that the claimant's compensatory claim remained strong right up until 2015 and the high end of the range should be used for calculating what the claimant should have received. Calculation of Overpayment of Spousal Support
- [69] I have prepared calculations for child support and spousal support in the table attached as Schedule "A". The total spousal support which should have been paid at the high range of the SSAG from April 2007 to May 2016 is \$328,119 and up to the end of 2017, it is \$390,045. The respondent paid \$3,400 per month from April 2007 to May 2014 and \$2,700 for two further years for a total of \$350,400 in spousal support payments.
- [70] By my calculation, the respondent overpaid \$22,281 of spousal support by the time he stopped paying it after the May 1, 2016 payment.
- [71] If the respondent were responsible for continuing to pay spousal support to the present, then he would have underpaid close to \$40,000 if he were ordered to pay support at the high end. Effect of Overpayment
- [72] If overpayment were the only circumstance, I do not think this overpayment should lead to a shortened duration of spousal support. Property Reapportionment
- [73] I will, however, look at the impact of the property reapportionment on the range and duration of support. In this case, there was a reapportionment of assets in the claimant's favour in the amount \$138,900 in the value of the former family home.
- [74] The parties did not divide their employment pensions or CPP benefits. At the time of separation, the respondent had only been working in his position for two years earning in excess of \$100,000 a year. The claimant was not working. From the time the parties returned to British Columbia in 2003 until the date of separation, the respondent contributed far more to his CPP benefits than the claimant did. She did not divide that pension either. These factors reduce the reapportionment but I cannot determine by how much. Relative Means of the Parties

- [75] The parties are each 56 years of age. Their asset holdings are similar in value. The claimant has more equity in her home and fewer financial assets. She will have lower pension benefits than the respondent upon retirement. The claimant has a larger home which could become an income earning asset if she chooses.
- [76] The respondent has purchased a condominium in Victoria and has equity of \$329,000. He has financial assets worth \$338,000. I assume his municipal pension benefits are considerably higher than that of the claimant given his much higher income with no gaps in his employment since 2003. I assume that his condominium is not income earning.
- [77] The parties both face the last decade of employment with a similar net worth if accrued pension is not considered. There is disparity in their income earning ability. If accrued pension is considered, then their means are not similar and the respondent is in a superior financial position. Self Sufficiency
- [78] One might think that a person earning \$60,000 to \$85,000 a year has reached self-sufficiency but a closer look needs to be taken. The claimant was able to earn \$84,326 for only one year. She no longer had childcare responsibilities which freed her to maximize her income earning potential in the last decade of her employment to prepare for her retirement. Unfortunately, her health has started to deteriorate. This may prevent her from maximizing her income.
- [79] As a result of the disadvantages she suffered on the marriage breakdown, she is not in a management or supervisory role but works as a bedside nurse which is a labour-intensive job.
- [80] She has rheumatoid arthritis which is a progressive autoimmune disorder. At present, her rheumatoid arthritis is under control but not remitted. She takes methotrexate on a weekly basis. This medication causes her to feel lethargic, fatigued, and nauseous for three or four days following the weekly injection. She has impaired hearing and tinnitus which interrupts her sleep and makes it difficult for her to hear patients at work. She has a neuroma and plantar fasciitis on her foot that affects her mobility in a job where she needs to be on her feet.
- [81] Self-sufficiency is discussed at some length in *Brown v. Brown*, 2013 NBQB 369 [Brown] at para. 16: 16 The Supreme Court has characterized marriage as "a joint endeavor, a socio-economic partnership" (*Bracklow v. Bracklow* [1999] 1 S.C.R. 420, at para. 49). This has meaning upon breakup of a marriage, particularly a long marriage (see: *Moge v. Moge* [1992] 3 S.C.R. 813 at p. 870). I am guided by the following generalizations of law as I find they are applicable here:

1. Spousal support is warranted where there is a significant income disparity between the parties after separation: ... entitlement to spousal support is found in the majority of cases in which there is a significant disparity between the parties' incomes after separation. An income disparity will often demonstrate a basis for compensation [compensatory support]. Even if it does not, an income disparity is likely to establish the support applicant's need for support [non-compensatory support]. (Spousal Support in Canada, supra, at p. 1)
 2. "Financial self-sufficiency" is measured against the marital standard of living: Self-sufficiency, with its connotation of economic independence, is a relative concept. It is not achieved simply because a former spouse can meet basic expenses on a particular amount of income; rather, self-sufficiency relates to the ability to support a reasonable standard of living. It is to be assessed in relation to the economic partnership the parties enjoyed and could sustain during cohabitation, and that they can reasonably anticipate after separation ... (Fisher v. Fisher, 2008 ONCA 11 at para. 5; see also: Bockhold v. Bockhold 2010 BCSC 214 at para. 26)
 3. One proxy for the marital standard of living is the income of the parties at the time of separation (see e.g. Scott v. Scott 2011 NBCA 7 at para. 37).
 4. A later claim by a payor for termination of spousal support on the grounds the payee is now financially self-sufficient can be viewed as an issue of continuing entitlement: Applications to terminate spousal support based upon the recipient's remarriage or employment or simply by the passage of time will often require an analysis of whether the initial basis of entitlement continues to exist. Although the issue on termination is often framed in terms of whether the recipient has become "self-sufficient", the issue can also be seen as one of whether there is a continuing entitlement to support ...
- [82] As this is an application to terminate support, I am guided by the comment in Brown that, although the issue on spousal support termination is often framed in terms of whether the recipient has become "self-sufficient", the issue can also be seen as one of whether there is a continuing entitlement to support. Health Concerns
- [83] The claimant is not disabled from working but she has a legitimate concern that she may become so. Her job is physically demanding. Had the claimant continued to work at full capacity over the years (as the respondent was able to do), then she would have very likely been in a senior management position by now. If she had a supervisory "desk job" she might have been able to continue to work longer with the affects of rheumatoid arthritis than she will as a bedside nurse.
- [84] Her low seniority is a consequence of the marriage breakdown.
- [85] The claimant is missing work because of health concerns. She does not have short term disability benefits but earns sick time which she can use. She does have a long term disability plan from work. Little is known about the terms of the coverage. At the time of the hearing she was off work due to health concerns.

- [86] The claimant's health is a factor I must consider when I look at the condition, means, and circumstances of the claimant.

Conclusion

- [87] I find that the claimant's entitlement to spousal support still exists now 12 years after separation because the disadvantages the claimant suffered on the marriage breakdown have not been fully compensated despite the front-end loading of additional support and the reapportionment of assets. The claimant has had three years of improved income. Her current situation is somewhat precarious because of health concerns. Although not disclosed, I believe there is a large disparity in the parties' pension entitlements.
- [88] The parties both are in the last decade of employment and both need to maximize their earnings now to save for retirement. The respondent is well positioned to do so given the senior position he has been able to maintain without interruption. The claimant is not in as secure a position.
- [89] Recognizing the respondent's need to prepare for his retirement and the need to find a balance between the parties and recognizing that the respondent has made a generous contribution to the claimant's self-sufficiency, I find that the scale of support should now drop to the low end of the range to provide the respondent with additional net disposable income.
- [90] The respondent shall continue to pay spousal support after May 2016 at the low end of the range in the amount of \$1,967 per month until the next review which will be in May 2018 based on actual income figures for 2017. The quantum of support should be recalculated in June of each year based on the claimant's actual income for the previous year and fixed at the low end of the range recommended in the SSAG.
- [91] Based on this order, the respondent should have paid \$41,307 from June 1, 2016 to the date of the release of this decision if I were to order retroactive spousal support.
- [92] A further review of entitlement and quantum of support should be scheduled for the fall of 2020. If the parties have not reached an agreement by September 1, 2020, the claimant is ordered to file a notice of application and deliver it to the respondent together with her sworn financial statement and attachments. At that review, I would expect that the claimant will provide a full explanation of her disability coverage and an estimate of the value of all her pension entitlements and the respondent will do the same. Retroactive Spousal Support General principles
- [93] In *Kerr v. Baranow*, 2011 SCC 10 [Kerr] at para. 207, the Supreme Court of Canada ruled that with some modifications, the retroactive child support analysis of *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.], applied to the determination of retroactive spousal support.
- [94] The D.B.S. factors are:

- (i) the reasonable excuse for any delay in seeking support by the recipient; (ii) the presence or absence of blameworthy conduct by the payor; (iii) the circumstances of the support recipient; and (iv) any hardship to the payor occasioned by a retroactive award.
- [95] Unlike child support, there is no legal obligation to look out for a separated spouse's legal interests, so at para. 208 of Kerr, Justice Cromwell said that concerns about notice, delay, and misconduct carry more weight.
- [96] In this case, notice of the review date for spousal support was agreed to by the parties in the Mediated Agreement. The respondent prepared for that event and sent a letter in April 2016 anticipating the review. There was a great delay in dealing with this application. The claimant's lawyer says that she attempted to negotiate with the respondent for months. It often took him weeks to respond as he was travelling and working. She took the position that financial disclosure would be provided once the materials were filed in court. I think that position contributed to the delay. The respondent was entitled to see the claimant's financial material earlier than he did.
- [97] The claimant said she was attending medical appointments to obtain affidavits from her physicians regarding her medical condition. She also had difficulty providing funding to her counsel which is why this matter did not proceed quickly. For this reason, her financial statement was not prepared for some time.
- [98] I find these are reasonable excuses for the delay in bringing this matter to hearing.
- [99] On these facts, I cannot find blameworthy conduct by either party.
- [100] When I evaluate hardship, I find that the claimant has earned good income during the delay period and that she was the recipient of excess spousal support. A retroactive award in the amount of \$41,307 is not fair on these facts because of the overpayment of spousal support. If I give the respondent credit for the overpayment he has made over the years, it would reduce the spousal support arrears to \$19,026.
- [101] I find the parties should share responsibility for the delay in bringing this matter to court. Therefore, I order that the respondent receive credit for his overpayment over the years and that he pay one half of the balance outstanding in the amount of \$9,513 which he can pay in installments of \$1,000 a month commencing March 1, 2018 until paid in full. This payment will be in addition to the ongoing support ordered.
- [102] Since the arrears includes support up to and including February 2018, the ongoing support will continue at the rate of \$1,967 on March 1, 2018 and will continue until the review of support in May 2018. The new amount will be payable commencing June 1, 2018. If an agreement is not reached, the respondent is ordered to continue to pay \$1,967 until an agreement is reached or an order arrived at. Costs

[103] The claimant has been substantially successful and is entitled to her costs of this application on the scale of ordinary difficulty. "Young J." Schedule "A" Taxation Year Claimant's Estimated Income Respondent's Estimated Income Child Support Payable Spousal Support Mid-range SSAG Spousal Support High-range SSAG Total Annual Spousal Support From April 1, 2007 0 \$126,620 \$1,777 Two children \$2,613 \$2,996 \$26,964 2008 0 \$129,868 \$1,817 Two children \$2,709 \$3,109 \$37,308 2009 0 \$133,116 \$1,856 Two children \$2,811 \$3,223 \$38,676 2010 \$15,000 \$136,364 \$1,896 Two children \$2,552 \$2,930 \$35,160 2011 \$33,000 \$139,612 \$1,935 Two children for four months \$1,221 One child for eight months \$2,159 Two children for four months \$2,453 One child for eight months \$2,550 Two children for four months \$2,888 One child for eight months \$10,200 Two children for four months \$23,104 One child for either months 2012 \$33,000 \$142,860 \$1,268 \$2,316 \$2,960 \$35,520 2013 \$33,000 \$146,108 \$1,293 \$2,609 \$3,060 \$36,720 2014 \$50,075 \$149,356 \$1,319 \$2,044 \$2,544 \$30,528 2015 \$35,179 \$152,604 \$1,342 \$2,952 \$3,402 \$40,824 2016 \$84,326 \$155,852 0 \$2,295 Mid-range \$1,967 Low-range \$2,623* \$31,476 2017 \$60,120 \$159,100 0 \$3,183 Mid-range \$2,729 Low-range \$3,629 \$43,565 Total \$390,045 *By May 2016 when the respondent stopped paying support, the total spousal support payable at the high end of the range would have been \$328,119.

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