

CANADA / JUDGMENT

Wallis v. Wallis

2017 BCSC 93

COURT

Supreme Court of British Columbia

DECIDED

23 January 2017

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2017 BCSC 93 Wallis v. Wallis

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wallis v. Wallis,

2017 BCSC 93

Date: 20170123

Docket: 52209

Registry: Kamloops

Between:

Tracie Kim Wallis

Claimant

And

David Anthony Wallis

Respondent

Before: The Honourable Madam Justice Hyslop

Reasons for Judgment

Tracie Kim Wallis appeared on her own behalf:

David Anthony Wallis appeared on his own behalf:

Place and Date of Trial:

Kamloops, B.C.

December 13, 2016

Place and Date of Judgment:

Kamloops, B.C.

January 23, 2017

INTRODUCTION

[1] The claimant seeks the following:

1. The Separation Agreement dated September 24, 2010, filed in Kamloops Court Registry November 10, 2015, be enforced such that:
 - a) the Respondent be required to put the Claimant as beneficiary on his Sunlife insurance policy no. LI-F771, 824-2; and
 - b) his life insurance policy through his employment with Volkswagen Kamloops at Manufacturer's Life Insurance Company.
2. The Respondent continue to pay the spousal support attached as Schedule D, Clauses 8 and 10, to the Separation Agreement;
3. The Respondent pay the arrears of spousal support forthwith;
4. The quantum of spousal support be increased; and
5. Costs.

[2] The claimant is seeking a mandatory review of spousal support contained in the agreement, described above, which states:

8. THAT David Anthony Wallis shall pay to Tracie Kim Wallis for her support the amount of \$1,700.00 per month, payable in two equal payments of \$850.00 on the 1st and the 15th day of every month, commencing April 1, 2010.
10. THAT spousal support will be reviewed when David Anthony Wallis stops paying to Tracie Kim Wallis child support for the child, Cara-Calleigh Aryn Wallis, born March 3, 1996, because she is no longer a child as defined in the Family Relations Act, and the Spousal Support Advisory Guidelines will form the basis for calculating a revised spousal support payment (as with the spousal support set out in this Agreement). The high range of the Spousal Support Advisory Guidelines will apply.

[3] The respondent opposes any increase. He will name the claimant as beneficiary of his life insurance policies forthwith and will continue to pay \$1,700.00 per month in spousal support until further agreement between the parties or until a further Court Order.

- [4] On October 24, 2016, I ordered, amongst other matters, that the child, Ciara, born March 3, 1996, was no longer a child of the marriage as of March 3, 2014 and the respondent was no longer required to pay child support.

BACKGROUND

- [5] The claimant and respondent began living together in 1987 and were married on August 25, 1995. They had two children, both of whom are now adults and no longer financially dependent on the parties.
- [6] The parties separated August 5, 2010. Despite their separation, they have not divorced. The respondent stated in his submissions that he and the claimant agreed not to divorce. In his submissions he added that he would like to be divorced. However, if a divorce were granted, I am told that the respondent can no longer maintain the claimant on his medical, dental and other benefits. The claimant alleges that her medical expenses, particularly her prescription expenses, are considerable.
- [7] After their separation, the parties entered into two agreements. One is dated August 16, 2010 (the "Support Agreement") and the second one is dated September 24, 2010 (the "Property Division Agreement"). The Support Agreement dealt with matters relating to custody, support of their children and spousal support for the claimant. The Property Division Agreement dealt with property division.

EMPLOYMENT BACKGROUND AND ANNUAL EARNINGS

Claimant

- [8] The claimant has a grade 10 education. She has little employment history. Prior to meeting the respondent, she worked in a clothing store. In about 2005 to 2006, the claimant worked in a family-owned garden nursery. The claimant quit that employment because their son, who had learning disabilities, required home schooling by her. In 2012, the claimant worked at Sears Canada department store one to one and a half days per week in the portrait studio department. She quit this employment because she had difficulty with the bending and lifting that accompanied the position. She states that she has not worked since.
- [9] However, the claimant's father and brother each operate a car dealership. The evidence confirms that the claimant has from time to time, during the summer months, worked at each of the dealerships performing landscaping and gardening duties.
- [10] The respondent filed six Affidavits; one sworn by Kirsten Byette; one by J. Paul Bargery; one by Shawn Curtis; one by Cody Ross; one by Vince Torzzo; and one by Trevor Richard Lusk. These Affidavits were all sworn on December 5, 2016. Kirsten Byette swears that:

I have witnessed [Tracie] Wallis working at Volkswagen of Kamloops doing landscaping & yard maintenance various times each year since I started working here in 2013.

[11] J. Paul Bargery, who is also an employee of Volkswagen in Kamloops, swears he too has witnessed the claimant performing gardening and landscaping duties at Volkswagen Kamloops "numerous times over the last few summers." Shawn Curtis swears that he has seen the claimant "performing landscaping work at the VW dealership and Rivershore dealership over the past 3 years". Cody Ross swears that he witnessed the claimant:

perform manual labor, including gardening, bending, lifting of potted plants, bags of soil etc., shovelling, and raking on numerous occasions during my near 4 years of employment at Volkswagen of Kamloops."

[12] Vince Trozzo swears that he has seen the claimant at Volkswagen of Kamloops "do gardening and landscaping duties since I have been working here of the last three years during the summer months." Trevor Richard Lusk swears that he has observed the claimant working "at our dealership in numerous positions including gardening and social event setup and teardown."

[13] The extent of these duties at these dealerships, other than the T4s issued by her father's dealership, are unknown. There are no T4s issued by her brother's dealership for the work she performed for the dealership. The respondent claims that the claimant stopped working for the dealership after 2015, when the claimant was observed and photographed by the respondent performing this work.

[14] The claimant's earnings are as follows:

Year

Income

Amount

Line 150 Income

2015

Spousal support

\$20,400.00

Father's dealership

\$982.50

Interest income

\$85.30

Total:

\$21,467.80

2014

Spousal support

\$20,400.00

Other income

\$1,756.50

Father's dealership

\$3,063.75

Interest income

\$203.34

Total:

\$25,423.59

2013

Spousal support

\$20,400.00

Interest income

\$286.40

Workers' Compensation income

\$970.20

Other income (no T4s attached)

\$\$6,226.00

Total:

\$27,882.00

2012

Breakdown unknown

Total:

\$23,869.00

[15] The respondent is a motor vehicle mechanic. He has worked for the claimant's brother's dealership since 1986 when it was a Saturn dealership. Since 2010 it has been a Volkswagen dealership.

[16] The respondent lives alone. Despite his separation from the claimant, he has helped the claimant with various household tasks and renovations described by him as follows:

- a. I have helped with the Claimant's yard, undertaking such tasks as cutting grass, trimming trees, removing turf, installing paving slabs, installing and setting up sprinkler heads and taking waste to the dump on numerous occasions;
- b. I assembled and put up a garage on the Claimant's property in 2011, a job that included leveling the ground, putting up the frame and canvas and installing a fence and gate to secure the backyard;
- c. I attended at the Claimant's property later in 2011 to better secure her garage;
- d. I attended at the Claimant's property in 2014 to build a deck in the front of her house;
- e. I attended at the Claimant's residence on several occasions to repair her hot tub;
- f. I installed cable television in the Claimant's home shortly after she moved in;
- g. I have repaired plumbing leaks at the Claimant's home on several occasions;
- h. I completely redid the downstairs bathroom in the Claimant's home in 2011 when her sewer backed up; and
- i. I helped clean up the Claimant's home after a bad flood.

[17] As a result of the Property Division Agreement, the respondent received the following at "SCHEDULE B":

1. RRSPs held by Sun Life Financial in the approximate amount of \$17,672.00.
2. Life Insurance Policy with Sun Life Financial, account number LI-F771, 824-2, Term insurance with a benefit of \$150,000.00.
3. 1998 Jeep TJ.
4. \$10,000 from the sale proceeds of the Family Residence.

[18] The claimant received, as a result of the Property Division Agreement, approximately \$189,130.91, a 2001 PT Cruiser, a savings account with a balance of \$5,064.37 and a CIBC Premium Growth Account of \$3,995.82 and \$4,495.82.

Respondent

[19] The respondent's earnings are as follows:

Year

Deduction

Line 150 Income

2015

\$94,863.21

2014

\$93,719.36

2013

RRSP (\$9,273.76) - \$95,464.65

\$86,190.84

2012

\$95,455.00

[20] The respondent estimates his income for 2016 to be approximately \$82,000.00. The respondent produced his last pay stub as of December 15, 2016, which shows his gross income at \$78,617.76. On his pay stub, it states his net pay was \$3,759.04. The actual amount he received is \$2,679.97. J. Paul Bargery of the Volkswagen dealership explains the difference in a letter dated December 15, 2016:

To whom it may concern,

I would just like to clarify something on the December 15th paystub of Dave Wallis. His gross earnings for the pay period were \$3759.04. Once a year the technicians who complete all of their mandatory VW training are paid \$1000 which goes to cover the cost for all the tools they have to buy for the year in order to conduct their work. As Dave completed his training in early December the one-time \$1000 payment was made on his December 15th cheque. If you need any further clarification on this matter, please let me know.

[21] Given that there is one more pay cheque in December, I conclude that the respondent's 2016 income is likely to be \$81,290.73. This is in keeping with the respondent's estimate that his income in 2016 is \$82,000.00.

[22] In his submissions, the respondent explained that he is paid a flat rate whether or not the job takes the time specified or not. This means that the amount of hours shown on his pay stub does not reflect the actual number of hours he is at work. The respondent states that he works at least 40 hours per week.

[23] At the time the parties entered into the Spousal Support Agreement, the agreement states that the respondent earned \$74,353.00. No income is attributed to the claimant.

The Claimant's Health

[24] Dr. Pretorius, the claimant's family doctor provided a medical opinion in a letter dated June 16, 2016, in which he describes the claimant's health problems. He writes as follows:

Tracie suffers from various medical issues, most of which had been ongoing and persistent since she started seeing me as her family physician in May of 2011. These issues include chronic neck and back pain related to cervical radiculopathy as well as a motor vehicle accident that she suffered prior to seeing myself. She also suffers from chronic recurrent migraines, significant gastroesophageal reflux disease, psoriasis with psoriatic arthritis, fibromyalgia, hypothyroidism, and depression.

These concerns interfere with Tracie's ability to be employed and to function on a day-to-day basis in various ways. Most significantly, she does have severe chronic generalised pain. This affects especially the arms as well as the neck and back but does at times affect the legs and hips significantly as well. This limits her mobility and ability to perform any manual tasks, specifically being employed in positions requiring manual labor, standing, prolonged sitting, lifting, and carrying.

As mentioned above, she also suffers recurrent severe migraines and, when these do happen, she is not able to function for the most part, often for up to a day. She also has psoriasis and occasional flares of psoriatic arthritis causing further limitation in her physical abilities when and if this is active as well as severe chronic fatigue.

These problems are being managed in various ways including medication as well as interventions. Medications include various pain medications as well as medication for the management of her hypothyroidism, depression, and ongoing joint pain are aimed at alleviating and controlling these symptoms. Unfortunately, these medications are unlikely to result in any resolution of these ongoing symptoms. And Tracie is likely to deal with some degree of pain indefinitely.

She had undergone a number of procedures in the years that she had been seeing myself and, in an attempt to alleviate specifically the neck and arm pain. This includes various rhizotomies having been performed by Dr. Faridi prior to seeing myself and since then. She had also been seeing Dr. Richard Brownlee and had bilateral percutaneous cervical facet joint rhizotomies done in April of 2016. These do give her some symptomatic relief but do not resolve her symptoms.

In terms of Tracie's employability, at this point I feel that due to significant impairment as a result of ongoing medical issues as described above, it would be very hard and likely not possible for Tracie to be gainfully employed in a full-time position requiring her to attend work on a daily basis and be physically active and functioning. More often than not, she is not able to do so due to her severe generalised and specific pain as mentioned above, as well as recurrent migraines and depression, which results in decreased concentration, judgment and memory at times as well as chronic fatigue.

[25] The claimant, in her Affidavit #2, refers to Dr. Pretorius' report. As well, she provides more detail relating to her health problems and their treatment. She swears to the following:

21. Tests have recently shown changes to nodules in my thyroid tissue and I am waiting for a biopsy. At the same time, it was discovered that the hiatus hernia that I have had since I was in my early 20's has now become serious enough to require surgery called a Nissen Fundoplication. These became apparent after tests to find out why I have laryngitis, the results of which determined it is from acid damage and inflammation to my esophagus. I also have psoriatic arthritis that has recently become resistant to the medications I take. I have an appointment in December with a rheumatologist. I am in constant pain and need help with many daily activities.
22. I am expected to have up to 5 surgeries over the next 1-2 years, including the following:
- neurosurgery - c5 c6 cervical spinal stenosis with severe foraminal stenosis - possibly can be treated for now with injections and rhizotomy done in the hospital OR also SI joint rhizotomy and possible fusion both done by Dr. Brownlee;
 - Surgery on left shoulder to remove a calcification on tendon caused by an injury from several years ago (when Devan lost his temper);
 - Thyroid surgery to remove diseased tissue; and
 - Nissen Fundoplication - This surgery is not done in Kamloops as there are currently no doctors capable of doing this surgery here. I must travel to Vancouver, I believe the referral has been sent by the ENT on call at RIH to a Dr. Dong. The valve that opens to my stomach has gone, so the surgery involves wrapping the top part of my stomach around the esophagus and stapling it there.
- [26] These surgeries are not mentioned by Dr. Pretorius. There is no evidence when these surgeries are to take place. Dr. Pretorius does not mention the claimant's work at the dealerships.
- [27] I conclude that the claimant has health problems that may affect her from seeking full-time employment.

Motor Vehicle Accidents of Claimant

- [28] The claimant has been involved in car accidents, a slip and fall accident as well as Workers' Compensation claims. They are described in the claimant's Affidavits. They are summarized as follows:
- In or about 2005 or 2006, the claimant and her son were involved in a hit and run accident which she claims started "my autoimmune problems as well as fibromyalgia." She ruptured a disc in her back which causes her difficulties in her hands, arms and legs. There is no evidence before me as to whether the claimant received compensation as a result of this hit and run accident;

2. In September of 2007, the claimant was involved in a hit and run accident. At the time she was not working. The amount she received was paid to her in February of 2013. The amounts that she received are blacked out in her letter from her lawyer. However, upon her lawyer's comments as to his fees, I have calculated and expect that she received between \$6,000.00 and \$7,000.00;
3. In 2011, the claimant slipped and fell at the CIBC bank machine. She received a cheque from the bank's insurer. The amount is not disclosed. She said that she did not miss any work;
4. In 2012, the claimant was in another motor vehicle accident. She said that she suffered a whiplash injury and she hit her head causing a headache. She received a cheque from ICBC. She missed no work;
5. On August 13, 2013, the claimant had a WCB claim for which she received \$970.00, which is reflected in her 2013 tax return. The second claim was made in July of 2014, which was not allowed. Shortly after this claim, the claimant quit her job at Sears;
6. In 2014, the claimant was involved in another motor vehicle accident and she received a settlement of \$26,500.00 which she stated was for pain and suffering. She was not working at that time. She received this settlement in October of 2015 and, after legal fees and disbursements, the net amount that she received was \$17,323.50. There is only \$1,400.00 left.

Claimant's Mortgage on her Home on Douglas Street

- [29] After the parties separated and the family home was sold, the claimant purchased a home assisted by her father, who acted as a guarantor of the mortgage and helped with her down payment. The amount was not disclosed.
- [30] The claimant filed three Financial Statements for this application, sworn October 17, 2016, June 2, 2016 and November 26, 2015.
- [31] In the Financial Statement sworn November 26, 2015, the claimant swears to having a secured debt of \$100,852.21. That is the amount her father paid the bank to have the mortgage on the Douglas Street home discharged. In the other two Financial Statements, she swears that she has unsecured debt, due to her parents or parent "to pay out mortgage of \$100,852.21".
- [32] Attached to the claimant's Affidavit #5 is an undated statement made by the claimant's parents. They state:

AND WHEN THE MORTGAGE CAME UP FOR RENEWAL TRACIE WAS STRUGGLING TO MAKE ENDS MEET AND THE MORTGAGE WAS AMORTIZED OVER 35 YEARS WE DID NOT WANT TO SEE HER STRUGGLE FOR EVER SO WE PAID OFF THE MORTGAGE ON THE JUNE 3RD 2013 AND CURRENTLY HOLD THE MORTGAGE ON THE PROPERTY AT DOUGLAS STREET TRACIE'S MORTGAGE PAYMENT IS \$458.00 MONTHLY.

[33] There is no evidence before me that the claimant's parents hold the mortgage on the claimant's home. This is confirmed by the claimant herself in the same Affidavit described above. The claimant swears to the following:

9. As my father did not want to concern himself with small monthly payments, he informed me that he paid the amount in a lump sum and that he wanted it back in a lump sum. In order to arrange this, I utilized a tax free savings account ("TFSA") through CIBC that I had previously deposited the funds received on account of the various accidents that I have been involved in. The TFSA only allowed me to make a maximum deposit of \$458 per month, so that is the amount I deposited monthly. By December 31, 2014 I had \$29,318.50 in the TFSA. Attached as Exhibit "C" is a copy of a handwritten letter from my father confirming I would make payments of \$458 monthly. Attached as Exhibit "D" is a copy of my December 31, 2014 TFSA investment details.
10. On January 14, 2015 I transferred the entire balance of \$29,687.56 from the TFSA into an investment account at Edward Jones. Attached as Exhibit "E" is a copy of the Transaction Confirmation for the transfer of those funds. Attached as Exhibit "F" is a copy of the Edward Jones Confirmation Notice, for the investment of the sum of \$29,635.06.
11. I continued to make payments towards this account throughout the 2015 calendar year. Attached as Exhibit "G" are copies of my statements from February, 2015, April, 2015 and December, 2015. By the end of 2015 I had deposited an additional \$4,122, for a total of \$33,601.89. All these statements also show that the primary beneficiary of the investment was Denis Lowe.
12. During 2016, I was unable to continue to deposit funds into the investment account and, therefore, the balance has only grown to \$34,137.23 due to natural growth. Once I am in a position to do so, I will continue to deposit funds into this investment account. Attached as Exhibit "H" is a copy of my account statement for the period from July 1 to September 30, 2016.

[34] The account at Edward Jones is still a Tax Free Savings Account ("TFSA"). According to the documents exhibited to the claimant's Affidavit, and since the TFSA has been located at Edward Jones, the claimant has made only seven \$458.00 payments to this account. The payment of \$458.00 per month over a period of a year is all at law that an individual in Canada can contribute to a TFSA.

[35] I have concluded that the claimant does not owe her parents the money they paid to discharge the mortgage on the claimant's home on Douglas Street. Rather, her parents have encouraged her to pay the mortgage amount that she used to pay into a TFSA. Her parents have no interest in the TFSA other than her father is a named beneficiary of that account.

The Boarder

[36] In the claimant's Financial Statements filed June 2, 2016 and November 26, 2015, the claimant declares income earnings of \$800.00 per month from her boarder named Barry Wells. She claims \$800.00 per month gross, giving the claimant a net income of \$3,600.00 per year.

[37] The claimant, over a period of about three years, earned \$800.00 per month gross from her boarder, Mr. Wells. The respondent suggested in his submissions that Mr. Wells is more than a tenant, which the claimant denied. The claimant swore in her Affidavit #2:

My only source of income is the spousal support payments made by the Respondent. I have a boarder named Barry Wells ("Barry") on and off for the past 3 years and, as I declared on my financial statement, he paid \$800.00 per month in addition to helping with house and yard maintenance that I am unable to do myself. Barry most recently paid rent from May 21, 2015, to August 21, 2016. He has recently gone back to Nova Scotia.

[38] The hearing of this application took the better part of the day. After lunch, the claimant provided the court with a copy of a Cohabitation Agreement dated September 9, 2013 between herself and Mr. Wells and signed by both of them.

[39] This agreement purports to opt out of any legislation or common law principles that would presume the claimant and Mr. Wells as married. The agreement calls for each of them to keep their own assets. The agreement contemplates them purchasing assets together. The agreement states that the claimant and Mr. Wells would share equally "the necessary and jointly agreed living expenses". There is no evidence before the court as to those expenses.

[40] Mr. Wells lost his driver's license. He is a plumber. The claimant drove Mr. Wells in her vehicle to his various plumbing appointments and stayed with him during the appointments due to an anxiety disorder that he suffers. Attached to her car was a sign related to Mr. Wells' business.

[41] I conclude that Mr. Wells was more than a boarder. He was the claimant's boyfriend.

CPP Disability

[42] The claimant has made two applications for CPP disability benefits. Both have been turned down. The claimant has launched an appeal, which will be heard in May of 2017.

ISSUES

[43] As a result of the facts and this application, the following issues arise:

1. Is this a review or a variation of spousal support under the Divorce Act, R.S.C. 1995, c. 3 (2nd Supp) [DA] or the Family Law Act, S.B.C. 2011, c. 25 [FLA]?
2. Should income be imputed to the claimant?

3. As a result of clause 10 of the Support Agreement, is the court required to award an amount of spousal support at the high end of the Spousal Support Advisory Guidelines [SSAG]?
 4. What amount of spousal support should the respondent pay to the claimant?
 1. Is this a review or a variation of spousal support under the Divorce Act, R.S.C. 1995, c. 3 (2nd Supp) [DA] or the Family Law Act, S.B.C. 2011, c. 25 [FLA]?
- [44] Both the claimant and the respondent acknowledge that the claimant has properly sought a review. The claimant seeks a review under the DA. The respondent argues that it should be under the FLA. The court's jurisdiction to conduct a review is not pursuant to the DA as no claim is made for divorce by either party in this action. The review is pursuant to the FLA. A review is statutorily described under the FLA as:

Review of spousal support

168 (1) An agreement or order respecting spousal support may provide for a review of spousal support, and for this purpose may provide for

- (a) the review to occur on or after a specified date, after a specified period of time or after a specified event has occurred,
- (b) the type of family dispute resolution by which the review will take place,
- (c) the grounds on which a review will be permitted, and
- (d) the matters to be considered for the purposes of a review.

(2) On review, a court, on application, may do one or more of the following:

- (a) confirm an agreement or order respecting spousal support;
- (b) set aside all or part of an agreement, or terminate an order, respecting spousal support;
- (c) make an order under section 165 [orders respecting spousal support].

[45] The distinction between a variation and a review is found in *Morck v. Morck*, 2013 BCCA 186:

[16] The appellant is correct in drawing a distinction between a variation and a review of an order for spousal support. The former is governed by s. 17 of the Divorce Act. The existing order is assumed to be correct and, to justify a change, s. 17(4.1) requires the applicant spouse to establish that there has been a material change in the "condition, means, needs or other circumstances" of either party, which was unknown and unforeseen when the earlier order was made and, if known at that time, would likely have resulted in a different order: *P. (R.) v. C.(R.)*, 2011 SCC 65 at para. 25, [2011] 3 S.C.R. 819. If such a change is established, the court will consider the objectives set out in s. 17(7) to determine what an appropriate variation would be.

[17] By contrast, on an application to review an earlier order of spousal support, the applicant need not establish a material change in circumstances. Instead, the review is a hearing de novo, and treated as an initial application for support under s. 15.2 of the Divorce Act. This permits the court to adjust support in a manner that takes into account changes that may have been contemplated by the parties at the time the order was made, but were nevertheless uncertain. Because the issues on review are similar to those on an initial application, the Spousal Support Advisory Guidelines may be used for guidance: *Domirti v. Domirti*, 2010 BCCA 472 at paras. 32-36, 10 B.C.L.R. (5th) 281; and *Tedham v. Tedham*, 2005 BCCA 502 at paras. 22, 47 B.C.L.R. (4th) 254.

[46] A review is a hearing de novo and the manner in which it proceeds is best described in *Morneau v. Morneau*, 2014 BCSC 2269 at para. 1:

This is therefore a hearing de novo and the reviewing court must make findings of fact and credibility (*Morck v. Morck*, 2013 BCCA 186 at para. 23).

[47] Pursuant to s. 168 of the FLA, the court may order any of the acts set out in s. 168(2).

[48] The courts have applied the principles of review under the DA to reviews under the Family Relations Act, R.S.B.C. 1996, c. 128, as stated in *Westergard v. Buttress*, 2012 BCCA 38:

[20] In general, review provisions of support orders should be tightly circumscribed, to indicate the precise issue that is being reviewed - *Leskun v. Leskun*, [2006] 1 S.C.R. 920, 2006 SCC 25. While *Leskun* arose under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), it's dicta concerning review orders have been applied by this court to review orders under the Family Relations Act, as well: *Uren v. Reambeault*, 2010 BCCA 332.

[49] Principles of review have been codified in s. 168 of the FLA.

[50] I conclude the claimant has properly brought this application for a review, but it is pursuant to the FLA.

[51] As a review is de novo, the following sections relating to spousal support in the FLA apply:

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;

- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[52] In a review, s. 162(c) is the relevant provision dealing with the effect of clause 10 of the Support Agreement. Despite clause 10 of the Support Agreement, s. 162(c) is but one section to consider. All sections, ss. 160, 161 and 162 of the FLA, must be considered.

[53] The spousal support provisions of the FLA replicate those provisions relating to spousal support under the DA.

[54] *Miglin v. Miglin*, 2003 SCC 24 dealt with an initial application for spousal support which was "inconsistent with a pre-existing agreement": para. 64.

[55] In reviewing matters pursuant to s. 15.2(4)(c) of the DA, whose wording is the same as s. 162(c) of the FLA, requires a two-stage test.

[56] In the application before me, a Miglin analysis need not be considered because the respondent does not dispute that he should pay spousal support to the claimant. His dispute is to the amount of support which the claimant seeks at the higher end of the SSAG.

[57] The respondent ends his written submissions as follows:

CONCLUSION

1. There shall be orders that:

- a. the Respondent shall name the Claimant as beneficiary of his life insurance policies forthwith;
- b. the Respondent shall pay to the Claimant for her own support the sum of \$1,700 each month payable in two equal installments of \$850 on the 1st and 15th of each month until further agreement between the parties or until further court order.

[58] As a result, this review is directed at any increase the claimant is seeking. Sections 160, 161 and 162 of the FLA are the basis for the determination of entitlement and amount of spousal support. In determining spousal support, "the condition, means, needs and other circumstances of each spouse is considered".

2. Should income be imputed to the claimant?

[59] Within a week of signing the Spousal Support Agreement, the claimant and respondent signed the Property Division Agreement. The claimant received substantially more of the family assets than did the respondent. This agreement does not state the reasons why this reapportionment of family assets occurred.

[60] There is no mention in the Spousal Support Agreement of the parties' intention to reapportion family assets. The respondent, in his Affidavit #2, describes the circumstances of signing the Property Division Agreement as follows:

7. A week after the Claimant and I negotiated the First Agreement, the Claimant presented me with another agreement prepared by a lawyer hired by her father (the "Second Agreement"). The Second Agreement dealt with the division of family property. I was not involved in negotiating the terms of the Second Agreement. The Claimant presented the Second Agreement to me as a fait accompli. The Claimant advised me that, if I did not sign the Second Agreement, this matter would have to go through the very expensive court process. I could not afford a lawyer at that time. I knew that the Claimant's father would assist her in hiring a lawyer. I felt intimidated and pressured to sign. I ultimately signed the Second Agreement on or about September 24, 2010. I did not have any legal advice at the time that I signed the Second Agreement. I was not given a copy of the Second Agreement after signing and I didn't see that agreement again until the Claimant commenced these court proceedings.

[61] With the receipt of the substantial amount of the sale proceeds from the former matrimonial home (less \$10,000.00 paid to the respondent), afforded the claimant with an opportunity to purchase a home, with some assistance from her parents and a mortgage. Eventually her parents paid off the mortgage in the amount of a little over \$100,000.00.

[62] As a result of the generosity of her parents, the claimant has been saving, until recently, the maximum amount that she is entitled to contribute to a TFSA.

[63] The claimant rented out accommodation in her home to Mr. Wells for \$800.00 per month. Mr. Wells no longer resides with the claimant. However, this demonstrates that she can earn income from her home for at least \$800.00 per month.

[64] In addition, the claimant has worked in the summer months providing gardening and landscaping services to her father and her brother's automobile dealerships. The claimant's tax returns show income from her father's dealership in 2014 and 2015 in the respective amounts of \$982.50 and \$3,063.70. The evidence is clear that the claimant provided gardening services to her brother's dealership. There is no record or evidence of compensation received by the claimant. I can only conclude that the claimant receives payments "off the books" or compensation in some other manner.

- [65] Section 6.1 of the SSAG recommends, when imputing gross income of spouses, the use of s. 19 of the Federal Child Support Guidelines as appropriate.
- [66] Section 168(2) expressly permits the court in a review to confirm the agreement, set aside any part of the agreement or terminate it.
- [67] I impute income to the claimant from rental accommodation in her home in the amount of \$9,600.00 per year and \$8,000.00 for each year for gardening services that she provides to her brother and father's car dealerships. The imputed income is \$17,600.00 each year.
3. As a result of clause 10 of the Support Agreement, is the court required to award an amount of spousal support at the high end of the Spousal Support Advisory Guidelines [SSAG]?
- [68] Section 10 of the agreement states that upon review the higher range for the amount of spousal support should apply.
- [69] At the time the parties entered into the Spousal Support Agreement, they used the SSAG to determine spousal support. The results of a DivorceMate program is attached as a Schedule to the Spousal Support Agreement. The DivorceMate printout provides the following ranges for spousal support: low - \$1,534.00; mid - \$1,700.00 and high - \$1,872.00. This is based on the respondent having an income of \$74,359.00, no income attributed to the claimant and one dependent child.
- [70] An award of spousal support at the high end of the SSAG does not take into consideration the unequal division of the family assets. By agreeing to the upper range, it is assumed that at the time of the review nothing would change other than the respondent's obligation to pay child support. Events did change. The claimant received all of the sale proceeds from the family home, except for \$10,000.00. The amount the claimant received from the sale of the family home was \$189,130.91. This unequal division of the family assets goes towards ameliorating the disadvantages to the claimant arising from the relationship, the financial consequences of childcare and the economic hardship arising from the breakdown of the relationship.
- [71] Section 12.6.1 of the SSAG allows "an exception available where a sufficiently large reapportionment order has been made on these 'spousal support' grounds." I recognize that the Property Division Agreement provides no basis for the reapportionment of family assets, but in this case, it is unusual for spousal support to be determined before property division.
- [72] I take into consideration the reapportionment of family assets in determining spousal support claimed in this review. Because this is a de novo hearing pursuant to s. 168 of the FLA, the court can exercise its discretion judicially and is not bound to order spousal support at the high range of the SSAG.
4. What amount of spousal support should the respondent pay to the claimant?

- [73] Given the respondent's annual income of \$82,000.00 and the amount of annual income imputed to the claimant of \$17,600.00, the SSAG provides the following ranges: low - \$1,852.00; mid - \$2,160.00; and high - \$2,469.00.
- [74] In accordance with the advice from the SSAG as it relates to reapportionment of the family assets and the incomes of the parties, estimated or imputed, I order, pursuant to the FLA, that respondent pay to the claimant spousal support in the amount of \$1,852.00 (low range) each month starting January 1, 2017, until further Order of the court.
- [75] The claimant seeks that the spousal support that I ordered be retroactive to October 2015, when child support was last paid. This is described in the claimant's Notice of Application as "arrears of spousal support". At the time of filing her application on September 28, 2016, there were no arrears. I am not prepared to make the increase in spousal support retroactive to October 2015. The claimant could have launched this application earlier. She chose not to do so.

LIFE INSURANCE

- [76] The respondent has provided to the court some proof of remedying his obligation to designate the claimant as beneficiary to his life insurance policies set out in the Notice of Application.
- [77] The respondent shall provide to the claimant proof from each of the life insurance companies that she is the beneficiary of the Sunlife insurance policy no. LI-F771, 824-2 and his Manufacturer's Life Insurance Company insurance policy.

THE RESPONDENT'S COUNTERCLAIM

- [78] The respondent filed an Amended Counterclaim on March 21, 2016 in which he seeks; equal division of family property and family debt

I am asking that all agreements be set aside under section 164 b and c in the family law act

- [79] I suggest the respondent seek legal advice as to the adequacy of his pleadings and the effect, if he were successful, of setting aside the agreement would have on spousal support.

COSTS

- [80] The claimant has had modest success in increasing her spousal support payment from the respondent. The amount that the claimant was seeking is not the amount that I awarded. She sought the higher amount of the SSAG. The respondent has been successful in persuading the court to impute income to the claimant, as well as to take into consideration the reapportionment of the family assets. This is divided success. I order each party bear their own costs.

"H.C. Hyslop J."

HYSLOP J.

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