
CANADA / JUDGMENT

Whatley v. Whatley

2014 BCSC 536

COURT

Supreme Court of British Columbia

DECIDED

28 March 2014

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2014 BCSC 536 Whatley v. Whatley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Whatley v. Whatley,

2014 BCSC 536

Date: 20140328

Docket: E43837

Registry: New Westminster

Between:

Liisa Gail Whatley

Claimant

And

Richard George Whatley

Respondent

Before: The Honourable Mr. Justice Greyell

Reasons for Judgment

Counsel for the Claimant:

S.A. Gaspar

Counsel for the Respondent:

M.A.J. Smyth

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 28, 2014

Place and Date of Judgment:

Vancouver, B.C.

March 28, 2014

- [1] This is an application by the claimant for interim spousal support, interim child support, an order imputing income to the respondent and an order pursuant to s. 89 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA") for release of one-half of the funds from the sale of the former matrimonial premises held in trust by the respondent's counsel.
- [2] The applications are opposed by the respondent.

Background

- [3] The parties were married June 20, 1990. They separated on April 23, 2013 but continued residing in the family home in Matsqui until November 2, 2013 when the claimant moved out.
- [4] The parties, then, were married for some 23 years.
- [5] They have three children: Kayla born in 1981, Tara born on February 4, 1995 and Noah born on August 31, 1997. The claim for child support was made on behalf of Tara and Noah who have continued to reside with the claimant. Noah remains a child of the marriage: Tara turned 19 on February 4, 2014 subsequent to the hearing. This decision is on the assumption Tara no longer is a "child of the marriage" after her 19th birthday as defined by the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). If I am incorrect, the claimant will have liberty to apply.
- [6] Prior to the marriage the claimant was employed as a radiographer. She stopped working once the parties had children and took on the traditional role of mother and homemaker for her family. She remained in that capacity up to the date of separation. She says the respondent looked after the family's finances.
- [7] Over the last several years and prior to separation the claimant has worked part time as a volunteer at two wildlife agencies. She has since taken steps to re-enter the workforce which I will discuss shortly.
- [8] Ms. Whatley resides in rented premises and has borrowed money from friends and family to pay for moving expenses, for a loan to purchase a second hand vehicle and to pay her legal fees. She has no source of income.

- [9] The respondent trained as a chemical engineer. Following his graduation from university, he worked as a sales engineer and for a consulting firm. He then returned to UBC where he studied bio-medical engineering and received a Master's degree. There was no work available in that field and Mr. Whatley became accredited as a professional engineer. While he has not worked as a professional engineer, Mr. Whatley says he retains his designation and pays the \$300 annual fee and does the minimal professional development required to remain registered for the possibility of employment "should an opportunity arise". He says the benefits of remaining registered far outweigh the two years it would require to requalify should he give up the designation.
- [10] For much of his married life Mr. Whatley worked as a consultant for Alpha Gold ("Alpha"), a gold mining company, the shares of which were solely owned by his father. He was paid consulting fees through a numbered company, 433440 B.C. Ltd., ("433") in which he and Ms. Whatley each own 50% of the shares.
- [11] The respondent's father died in December 2008 and the respondent assumed the position of President and CEO of Alpha. He retired from Alpha effective January 2011 at the request of the Board of Directors. He earned approximately \$7,000 a month during that period or \$84,000 a year.
- [12] Following his retirement from Alpha the respondent's mother gave him some \$6,000 per month (which he alleges were gifts) to assist him to pay for living expenses. Some of these payments and other amount of money received from the respondent's mother were used to pay family expenses including family debts.
- [13] The respondent (and he also alleges the claimant) have been the beneficiary of substantial advances of money from the respondent's mother over the course of their marriage and, after she died, through his sister who is the executor of his mother's estate.
- [14] It was apparently the mother's intention to deplete her estate before she died by way of gifts to the respondent and his sister.
- [15] The respondent says that in 2008 and 2009 the respondent's mother gave him a total of \$687,000 to "pay off his bills and clear the family debts". He says a large portion of this sum went to Revenue Canada to pay off an assessment made as a result of an audit into himself and 433.
- [16] In May and June 2011 the respondent's mother gave him \$252,000 to pay a further reassessment by Revenue Canada arising from an audit of both his income tax returns and 433's income tax returns being "processed incorrectly".

- [17] In January/February 2012 the respondent's mother provided him with an advance on his inheritance in the amount of \$1,000,000 which Mr. Whatley says he has spent. He says much of this money went into paying off family debts including Ms. Whatley's credit card debts and for tuition and living expenses for Kayla, who was attending a film school at the time and for an apartment for Tara, who was living away from home for a period of time.
- [18] He deposed he also paid off \$100,000 on the mortgage on the family residence, purchased a warehouse building, putting \$200,000 down as a down payment and that he put an additional \$100,000 into improvements and purchased "inventory" in the amount of approximately \$60,000 which is currently being stored in the warehouse. Mr. Whatley says the warehouse was purchased in the name of 433.
- [19] The respondent currently rents space in the warehouse (it is not clear whether the entire warehouse space is rented) to a friend for \$750 per month and, since August 2013 has been employed as a consultant by that friend's company, Euro Tek Sound and Lighting at a salary of \$1,000 per month. There is no evidence the rent being paid by the friend is market rent or of the nature of the "inventory" he purchased.
- [20] Mr. Whatley also purchased a condominium in Las Vegas for \$113,000 which he says is registered in his and the claimant's name and vehicles for his two daughters (he says he later had to sell the vehicles at a loss when his daughters refused to accept them). This latter assertion (and many others made by the respondent) is denied by the claimant and by Kayla, who filed an affidavit in these proceedings. The vehicles do not appear to be in the respondent's financial statement.
- [21] In November 2012 the respondent purchased a new Mercedes-Benz Sprinter and a new Ford Fiesta in California for \$43,910 and \$20,112 respectively. The respondent says he did so because he contemplated that he and the claimant would be spending a lot of their time in Las Vegas. He deposed he advised the claimant of the purchases and she had not objected. He says he has since sold the vehicles. His financial statement indicates he sold the Ford in February 2013 and received \$14,000 and the Mercedes in March 2013 for \$22,000 but that the funds for the Mercedes "were not yet paid".
- [22] The respondent's mother passed away in August 2013.
- [23] Ms. Ward, her daughter and the respondent's sister is the executrix of her estate.
- [24] In November 2013 Mr. Whatley and his sister each received \$100,000 as named beneficiaries of their mothers RIFF. Mr. Whatley says he has and will have to pay tax as a result of receipt of such funds. It is unclear from the material before me whether there are more funds available to him from his mother's RIFF.

- [25] Ms. Ward, also deposed in an affidavit that her mother held all the shares of a private holding company and that she and Mr. Whatley were equal beneficiaries of the company when it was wound up and the proceeds distributed. Ms. Ward says such winding up has not yet been done and deposed "I do not know the tax status of that asset, nor the amount that will be payable to my brother and myself, nor the timing of any such payout, as a result of the eventual wind up".
- [26] Ms. Ward also deposed she has "loaned" the respondent \$6,000 per month from September through December 2013 for personal and household expenses and has paid his legal fees on the understanding such amounts will be repaid upon receipt of any funds from the eventual wind up of the holding company.
- [27] The claimant deposes she spoke to Ms. Ward in September or October 2013 and was told Ms. Ward estimated the value of the mother's estate yet to be distributed was "approximately \$2,000,000" and that the respondent and Ms. Ward would split that amount equally. Ms. Ward acknowledged she had a conversation about the content of her mother's estate with the claimant, but says that she did not provide an accurate estimated value of the estate. She also says she told the claimant there would be a significant amount of tax owing in relation to any funds eventually to be paid out and that the estate would likely not be settled for some time.
- [28] The claimant says the respondent has been traveling in the United States making adult films and earning income which he has not disclosed. The respondent denies he has earned income in the United States and denies the claimant's allegations he has been involved in the production of films particularly a film entitled "Rik Knotty Boy", a film in which he says he acted at the last minute as a favor to a friend and that he has received no funds for his involvement in that or any other film project.
- [29] The claimant says the respondent has been hiding his assets and income in such a manner as to immunize himself from financial disclosure and his obligation to pay spousal and child support.
- [30] In support of this claim she has obtained copies of various messages written by the respondent on a "Fetlife" account he maintains and has annexed extracts to one of her affidavits. In an email to a person by the name of "Lauren" dated June 17, 2013 he says the following:

I had a friend here offer to do all of my forms related to my ex trying to sue me, and my financial profile is perfect, I own real estate and assets, but they can not be touched because of financing and mortgages and so on. My income can not be attacked either, because I draw on my deceased father's estate as monthly gifts that are not taxable income.

My ex is completely disgusting,

So anyways, moving along here, I am planning a drive to Las Vegas and likely Los Angeles from August the 23rd to the 31st or so. This is to be kept completely secret and not talked of or posted.

I may actually acquire a working Visa and green card for the USA, and be based in Las Vegas. There is some stuff I am working on,

[31] In another email written to a "Brandy" the respondent writes:

What is going to come to pass in my situation is a balance sheet that shows very little to no assets to take from me (it's the best thing I could have done borrowing money to buy assets), and my selling off vehicles to have cash to pay a high powered lawyer to defend me (which my ex can't match due to her available finances).

[32] The respondent has "strongly denied" that he has made a deliberate effort to dispose of or conceal assets and says the emails appear to have been tampered with and in any event says he embellished his comments and they were "completely made up by me".

[33] The claimant says the respondent has been working and earning income from making X-rated videos in the United States. The respondent denies this.

[34] Mr. Whatley was examined on discovery on October 29, 2013 (which has not been completed due to outstanding requests for documents) and had this to say about the assertion he was working in the United States:

612 Q I'm just noting I have a letter from your lawyer dated August 1st, 2013. And in that latter it stated that you had a part-time paid positions in Las Vegas.

A I have never been employed in the United States.

613 Q It also said that you were exploring business opportunities.

A I have evaluated opportunities, yes/

614 Q And which opportunities would those be?

A A variety of opportunities.

615 Q In mining?

A No, not in mining.

616 Q What industry?

A No industry. I've just evaluated opportunities.

617 Q Are you looking at opening some sort of a small business?

A No. I don't understand what questions you're asking.

618 Q Well I'm saying -- you said you were down there to look at opportunities. I would like to know a little bit more about that.

A Purchase of real estate. That's it.

619 Q How are you going to purchase real estate?

A I don't see the relevance of your question.

620 Q Well, right now -- what is your income right now?

A The point is, I'm not going to purchase real estate at this moment. I've got to evaluate the opportunity.

621 Q Well, don't you have to earn an income of some sort?

A I don't -- are you asking a question? Are you asking a question? I don't know what you're asking. What are you asking?

[35] I have before me a considerable number of affidavits which contain many conflicting assertions made by the parties. I am unable to resolve those conflicts on an interim application.

[36] Whether Mr. Whatley had been earning income, whether he has been searching for investment opportunities, the nature of such opportunities and how he intended to or did finance them, his actual inheritance under his mother's will (which will go to his means), the extent to which he is employable, what assets are family assets or family debts remain to be answered through what appear to be a significant number of outstanding document requests and a determination by the trial judge.

Child and Spousal Support

[37] The claimant relies on both the FLA and the Divorce Act for her claims of the interim child and spousal support.

[38] Both Acts and the case law interpreting them are clear that both parents have an obligation to support a child of the marriage as defined in the legislation.

[39] Section 147 of the FLA provides:

Child Support

147 (1) Each parent and guardian of a child has a duty to provide support for the child

[40] Both the FLA and Divorce Act provide the court with the power to make interim child and spousal support orders. In the case of child support, the amount ordered must be based on the Guidelines.

Spousal Support

[41] Both s. 161 of the FLA and 15.2(6) of the Divorce Act provide that in determining entitlement to spousal support 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.

[42] Both statutes provide that in determining the amount and duration of spousal support the court must take into consideration the conditions, means, needs and other circumstances of each spouse, including: the length of time the spouses lived together and the functions performed by each spouse during the period they lived together.

[43] Both statutes provide that the court must not consider misconduct by a spouse except if such conduct causes, prolongs or aggravates the need for spousal support, or affects the ability to provide spousal support.

[44] Section 170 of the FLA provides that in an order respecting child support or spousal support, the court may provide for one or more of the following:

- (a) that payments be made periodically, annually or otherwise, for an indefinite or limited period or until a specified event occurs;
- (b) that child support or spousal support be paid respecting any period of time before the date the application for the order is made;
- (d) that a charge be registered against specific property to secure payment;

Determination of Parties Guideline Income for Child support

- [45] It necessary to consider the income of the parties for the purposes of determining both child and spousal support. Each party asserts the other should be earning more than they currently are.
- [46] Mr. Whatley says Mrs. Whatley is able to enter the workforce: that she has been doing volunteer work for a number of years and has the skills and training to earn an income and become self-supporting.
- [47] Mr. Whatley says he is "severely limited" in his ability to work as a result of both emotional issues (as a cross-gendered person) and physical limitations. He says his emotional issues arise from experiences as a child and young adult (as a result of an abusive father) which resulted in acute depression and gender identity issues. He also says he has physical limitations which arise from two "serious" motor vehicle accidents which occurred in 1980 and 2006. He says he suffers from anxiety and depression, is taking Prozac and attending counselling.
- [48] In addition Mr. Whatley relied on a psychological evaluation done at the request of his counsel by Dr. Elterman, a clinical and forensic psychologist.
- [49] Dr. Elterman interviewed the respondent January 14, 2014 and provided a written opinion to his counsel dated February 15, 2014. Dr. Elterman administered a number of tests to test Mr. Whatley's intelligence and personality profile and recommended he be assessed by a psychiatrist for mood stabilizing medication and that he consider a neuropsychological assessment (to ascertain if there were continuing issues with injuries he sustained in the two motor vehicle accidents) and that he be evaluated for Bipolar 2 Disorder.
- [50] Dr. Elterman did not deal with the respondent's employability other than to relate what Mr. Whatley told him: that he does not believe he "is able to go out and get a job with his gender identity issues" and that "he will return to find employment but cannot now because of a lack of confidence and he is too easily upset to work with others or with the public".
- [51] As stated, Ms. Whatley says Mr. Whatley has substantial assets, that he is hiding his income and purposefully taking steps to insulate himself from his obligations to pay both child and spousal support. Ms. Whatley makes reference to the substantial sums of money received by the respondent from his mother and through his mother's estate and to which he will ultimately inherit.
- [52] In *Marquez v. Zapiola*, 2013 BCCA 433 the BC Court of Appeal recently summarized the law with respect to imputing income for child and spousal support purposes. At paras. 36-38 the court stated:

- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.
- [38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 29).
- [53] This is an interim application. The facts asserted by both parties as to their standard of living during the course of their marriage, their spending habits, their accumulated debt, whether the monies received from the respondent's mother over the course of the marriage by the respondent (as opposed to monies received by the claimant or received jointly) were intended as gifts are all vigorously an issue and can only be resolved following the trial.
- [54] In *Robles v. Kuhn*, 2009 BCSC 1163, Master Keighley summarized, at para. 12, the relevant considerations in setting an award of interim support:
1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
 2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
 3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);

4. The courts should not unduly emphasise any one of the statutory considerations above others;
 5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
 6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No.1930, 2006 BCSC 1280 (S.C.);
 7. Interim support should only be ordered where it can be said a prima facie case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No.2966, 2005 BCSC 1786 (S.C.);
 8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: *L.G.B.*
- [55] Section 19(1) of the Child Support Guidelines ("Guidelines") provides that the court may impute "such amount of income to a spouse at it considers appropriate in the circumstances, which circumstances include whether:
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
 - (e) the spouse's property is not reasonably utilized to generate income;
 - (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.
- [56] The exercise of the courts discretion to impute income is highly fact driven: *Maynard v. Maynard*, [1999] B.C.J. No. 325.
- [57] I am not able on this application to find the respondent has diverted income so as to affect the level of child (or for that matter spousal support). Such a finding, if any be made, must be made by the trial judge. I am, however able to make findings under s. 19(1)(e) and (i).
- [58] I return to the circumstances of the parties.
- [59] The claimant is currently unemployed. In October 2013 she attended a workshop dealing with career decision making and is following up with assistance in resume writing and other job search skills in hopes of finding work in the retail sector. She also hopes to attend a 10 month Veterinary Administrative Assistant program at the University of the Fraser Valley in September 2014 and ultimately to become a veterinary assistant.

- [60] The claimant has borrowed some \$25,000 from her extended family to assist her to secure new accommodation, to pay for legal fees and disbursements with respect to this matter, for moving expenses and to pay for a used vehicle. She has some \$19,000 in outstanding credit card and other debts and is attempting to make monthly payments.
- [61] The claimants only assets are her one-half interest (subject to this litigation) in the proceeds from the sale of the matrimonial premises currently held in trust by the respondent's counsel and a one-half interest in property in Las Vegas (the property is valued by the claimant at \$110,000 and by the respondent at \$100,000 and appears unencumbered) and 50% of the shares of 433. The asset value of these are not available to her at this time. She has an immediate need for both child and spousal support. Mr. Whatley's last financial statement dated July 18, 2013 indicated he had no income but monthly expenses of \$13,530 or \$162,360 annually with debts totalling \$195,000. The monthly expenses included \$1,806 payable monthly on the mortgage on the former family residence which has now been sold.
- [62] His notice of assessment for the 2011 tax year showed a negative \$200 Line 150 income. His 2010 tax summary showed line 150 income of \$8,419.
- [63] The respondent says he is not working and that he cannot work. While I am doubtful he could not be doing more to find gainful employment, again that is an issue that will need to be resolved by the trial judge as there is conflicting evidence which I cannot resolve on the material before me. The respondent says he has not been employed in or earned income from making videos or X-rated films. Again this is a matter to be determined by the trial judge.
- [64] There is sufficient information before me however to impute income to the respondent. He says he is currently earning \$21,000 per year from rental of the warehouse and from his job with EuroTek. He does not explain how he accounts for this sum as the warehouse is owned by 433 in which Ms. Whatley is an equal shareholder and presumably as such has an equal say in its affairs. He received \$100,000 in November 2013 as a beneficiary of his mother's RRIF and likely has a portion of those funds available to him or invested. I note in his evidence on his examination for discovery he is looking for investment opportunities in the United States. I find he would not be doing so if he did not have funds or access to funds to invest in those opportunities. He is a beneficiary under his mother's will which has not yet been wound up and he will receive funds from the estate which will include one-half of the assets of his mother's holding company. His sister loaned him \$6,000 per month on his agreement to repay her from funds owed to him on the windup of the company. Neither Mr. Whatley nor his sister have disclosed much about the value of their mother's estate, whether the estate funds are earning interest while sitting undistributed or any estimated value of the estate ultimately to be distributed to Mr. Whatley. Ms. Whaley's evidence as to the amount is not substantially refuted by Ms. Ward.

- [65] As stated, Mr. Whatley owns shares in 433 which owns the warehouse (the other 50% shareholder is Ms. Whatley) and he and Ms. Whatley own a condominium in Las Vegas which was purchased for in excess of \$100,000. I do not know if this property generates income. If not it should be sold. The claimant says she has learned the condominium has been used by the respondent to shoot X-rated videos. Mr. Whatley's interests in both these properties should be utilized as assets to provide both child and spousal support. In my view s. 19(1) (e) and (i) of the Guidelines are applicable to impute income to Mr. Whatley for the purposes of both child and spousal support.
- [66] Ms. Ward loaned or advanced the respondent \$6,000 per month for three months from his mother's inheritance up to December 2013. There is no evidence to suggest that the advance against his inheritance including the numbered company cannot continue. Mr. Whatley has funds in his counsel's trust account although both parties allege a claim against those funds. Mr. Whatley says they should be applied to pay family debts. These sources of funds qualify for consideration under s. 19(1)(i) as they are funds held in a trust to which Mr. Whatley will be entitled to "income or other benefits". I am also of the view that Guidelines s. 19 (1)(e) applies to the Las Vegas property (and likely to the warehouse). Continued joint ownership is not a reasonable use of those properties given Mr. Whatley's spousal and child support obligations. While the claimant would need to consent to a sale, this is an asset which could be sold to generate income: *Hama v. Werbes*, 2004 BCSC 463.
- [67] In my view it is not unreasonable to impute an income of \$50,000 annually to the respondent.
- [68] Based on that income the Guidelines provide for child support in the amount of \$758 per month to be paid retroactively for December 1, 2013 and January 1, 2014 and \$458 from February 1, 2014 monthly thereafter.
- [69] The respondent says Ms. Whatley should be working for income, not as a volunteer. He says he doubts she is not being paid for what she is currently doing. He says there are many veterinary assistant positions available that she would be qualified for without further training. Ms. Whatley responds by saying she is not volunteering with a veterinarian, but rather, volunteering with two wildlife organizations which do not have paid positions. She says she has not applied for a job for 30 years and needs job search skills which she is now obtaining. I consider her position to be a reasonable one. She had been out of the work force for a great number of years. Given she is required to ultimately become self-sufficient she is entitled to sufficient reasonable time to train for a career position which she has an interest in pursuing.

- [70] There is a strong basis for a claim for compensatory spousal support for Ms. Whatley. The parties' marriage was a long one. She performed the traditional role of a homemaker and mother to her children, giving up her job to raise the children and allow Mr. Whatley the ability to devote his time to his work. She is clearly economically disadvantaged by the breakdown of the marriage. She has parenting responsibilities with the two younger children. She currently has no income but is relying on relatives.
- [71] It is clear the parties are left with a very high level of debt. What is not clear on the affidavits is how such debt was accumulated and the circumstances under which some of the debt was paid off or down by funds given to either party or both by the respondent's mother. These again are matters to be resolved by the trial judge when he/she has had the advantage of hearing and weighing the evidence. I also add that this application has been brought at a time when there are many document requests outstanding.
- [72] I would not impute any income to Ms. Whatley because, as stated there is a strong compensatory element to her claim for spousal support. I do not view her position regarding her return to the workforce as unreasonable. She is undertaking skills training in order to position her to re-enter the workforce. Again, there is an obligation on her to move to becoming self-supporting. Whether she has taken reasonable steps to comply with her legal obligations will be up to the trial judge to determine.
- [73] In my view the claimant is entitled to spousal support based on the respondent having an income of \$50,000. I see no reason not to apply the same principles on the imputation of income to determining income for spousal support as I have for child support.
- [74] I fix spousal support under the Spousal Support Advisory Guidelines (SSAG) at the high amount for that income at \$1,211 per month.
- [75] Spousal support shall commence effective and be retroactive to December 1, 2013, the first of the month following the claimant's application and will continue until trial or a change in circumstances arising from the disclosure of further financial information relating to the respondent's income or assets, including any distribution from his mother's estate.
- [76] Both child support and spousal support will form a charge on the respondent's one-half interest in the proceeds held in his counsel's trust account and, should the respondent not pay spousal support and child support as set out in this order within 30 days of this order, arrears of and future payments are to be made from the respondent's one-half share of those trust funds.
- [77] Recognizing the claimant has a claim to the funds held in trust, should this Court ultimately determine this order has had or may have the result of encroachment on funds which otherwise belong to the claimant. The claimant will have a first claim for the payment of such support, and (subject to review by the trial judge) have a first charge for any outstanding child and spousal support and any amount lost to her reapportionment claim against the respondent's one-half interest in the Las Vegas condominium and his share in

433, the numbered company which owns the warehouse. This latter order is made pursuant to s. 170(d) of the FLA. Further s. 15.2(2) of the Divorce Act provides the court, when making an interim order, may make an order "to secure or pay, or to secure and pay" such periodic sums as the court "thinks reasonable for the support of the other spouse. This is a case where such an order should be made.

[78] The respondent claims the balance of the funds held in trust should be used to pay family debts. He says the family debts exceed the amount held in trust.

[79] In my view the respondent's obligations to pay child and spousal support take priority.

Claimant's Claim for Release of Funds Held in Trust

[80] Given the claimant's circumstances, I am of the view that an additional \$10,000 should be released to her to enable her to pay down those debts she has had to incur for legal expenses, moving, and the purchase of a second hand car. The claimant will recover her costs of this application.

"Greyell J."

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