
CANADA / JUDGMENT

Yerex v. Yerex

2012 BCSC 1181

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1181 Yerex v. Yerex

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Yerex v. Yerex,

2012 BCSC 1181

Date: 20120803

Docket: 28249

Registry: Vernon

Between:

Patricia Ann Yerex

Claimant

And

Richard Lyle Yerex

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

(In Chambers)

The Claimant:

Appeared on her own behalf

The Respondent:

Appeared on his own behalf

Place and Date of Hearing:

Vernon, B.C.

July 23, 2012

Place and Date of Judgment:

Vernon, B.C.

August 3, 2012

INTRODUCTION

[1] The respondent, Richard Lyle Yerex, applies for:

1. an order that the order of the Honourable Mr. Justice Cole pronounced February 21, 2002, requiring the respondent to pay the sum of \$500 per month as spousal support to the claimant retroactive to October 1, 2011, be varied so that the respondent's spousal support obligation to the claimant be terminated as of June 1, 2012;
2. An order cancelling all arrears that have accrued from October 1, 2011 until the present, or in the alternative, reducing arrears of spousal support payable by the respondent to the claimant;
3. an order cancelling all default fees set by the Family Maintenance Enforcement Program which have accrued from October 1, 2001 until the present;
4. an order cancelling interest as accrued on arrears from October 1, 2001 until the present; or an order that interest not accrue on the reduced amount of arrears;
5. an order that the Family Maintenance Enforcement Program cease all enforcement of spousal support payments and arrears; and
6. costs.

[2] The claimant and the respondent were married in 1975. There were no children of the marriage. Mr. and Ms. Yerex separated in 2001 and were divorced on February 26, 2003.

[3] On February 21, 2002, the claimant and the respondent entered into a consent order pronounced by the Honourable Mr. Justice Cole, which included the following provision:

1. The defendant shall pay spousal support to the plaintiff in the amount of \$500 per month commencing October 1, 2001 and continuing on the first day of each month thereafter, reviewable upon application by either party after April 1, 2002.

- [4] Neither party has ever applied for a review of spousal support. From July 2004 until November 2011, Mr. Yerex paid no spousal support, and Ms. Yerex took no steps to enforce the consent order of February 21, 2002.

BACKGROUND FACTS

- [5] Ms. Yerex, who is 62 years old, is currently unemployed. Her employment as a short order cook was terminated in November 2011. Her sole source of income at the time of the hearing was a monthly Canada Pension Plan benefit in the amount of \$301. Her employment insurance ceased in June 2012 and she is living with family because she is unable to pay rent.
- [6] Mr. Yerex is 65 years old. He retired from his employment as a computer consultant on May 31, 2012. Mr. Yerex receives Canada Pension Plan and Old Age Pension benefits totalling \$1,000 per month.
- [7] Neither party owns real property, has savings, a registered retirement savings plan, or any pension plan other than their respective entitlements to Canada Pension Plan and Old Age pension benefits.
- [8] During the marriage, the claimant and the respondent both worked, and struggled to make financial ends meet. Between 1975 and 1987, Mr. Yerex held a variety of positions. He worked as an assistant manager for car rental agencies in Penticton and Kamloops, was employed at a sawmill in Mara, British Columbia, was laid off from that position and later found work with a car rental agency in Kelowna. After that rental agency shut down, he found employment in Calgary at a heavy truck rental and leasing firm.
- [9] At various times during the marriage, Ms. Yerex was employed as a short order cook, a waitress, a provincial civil servant, an airport pre-board security officer and as a building/security reception agent as she followed her husband from one city to another. There were times when Mr. Yerex was unemployed. In 1981, the claimant and the respondent lived on Mr. Yerex's unemployment insurance benefits, and later his welfare payments. In 1982, the claimant and the respondent declared bankruptcy.
- [10] The claimant and the respondent never enjoyed more than a very modest standard of living during the marriage, and at times coped with significant financial hardship.
- [11] In 1987, Mr. Yerex became self employed as a computer software instructor, and in 1991, he and Ms. Yerex returned to British Columbia from Calgary. In 1992, Mr. Yerex found part-time work teaching computer courses, but was laid off from that position in 1995. In 1995, Mr. Yerex started up a computer consulting proprietorship, which he operated through 2006. That year, Ms. Yerex, who was working as a flag person, was injured at work, underwent back surgery, and was unable to work for several months.

- [12] From 1996 until 2001, Ms. Yerex held a variety of part-time jobs. When the parties separated in 2001, she was working as a cashier at a gas station.
- [13] When Mr. Justice Cole pronounced the consent order on February 21, 2002, the claimant was unemployed. Mr. Yerex had relocated to New Westminster to pursue contract work for his computer consulting business, but continued to struggle financially. Each party declared bankruptcy again later in 2002.
- [14] Mr. Yerex contends that despite his financial difficulties, he continued to make spousal support payments to Ms. Yerex pursuant to the consent order until early July 2004, at which time the parties agreed that spousal support would cease.
- [15] Mr. Yerex made no further payment of spousal support to Ms. Yerex until November 2011. At that time, Ms. Yerex contacted him, explained that she was out of work and financially desperate, and requested that Mr. Yerex pay her \$500 per month. Mr. Yerex says that he was prepared to provide temporary financial assistance to Ms. Yerex and that when he did so, he did not intend to reinstate his spousal support obligation to the claimant, which he understood had come to an end in July 2004 by mutual agreement.
- [16] In November 2011, without prior notice to the respondent, Ms. Yerex registered the consent order with the Family Maintenance Enforcement Program ("FMEP").
- [17] On January 3, 2012, Mr. Yerex notified his employer of his decision to retire, effective May 31, 2012, the day after he turned 65.
- [18] Mr. Yerex did not receive notice of the filing with FMEP, or his former wife's claim for arrears until mid-February 2012. Mr. Yerex paid Ms. Yerex \$500 per month for the months of November and December 2011 and January 2012. He has continued paying Ms. Yerex \$500 per month since he received notice of registration of the consent order with FMEP in February.
- [19] As of June 1, 2012, the arrears of spousal support, inclusive of interest, totalled \$49,882.24.
- [20] In 2006, Mr. Yerex remarried. His wife, who is also 65 years old, is employed as a receptionist and earns an annual income of \$48,000.
- [21] Mr. Yerex found full-time employment as a computer consultant with Robertson Telecom Inc. in 2006, and remained with that company until his retirement on May 31, 2012. Mr. Yerex reported line 150 total income for the years 2006 through 2011 in the following amounts:

2006 \$24,001

2007 \$46,739

2008 \$47,892

2009 \$52,394

2010 \$57,253

2011 \$57,680

POSITIONS OF THE PARTIES

- [22] Mr. Yerex submits that as a 65-year-old retiree with no retirement savings and no assets he has no ability to pay ongoing spousal support to Ms. Yerex, or to pay the outstanding arrears. The respondent also submits that he relied upon the agreement he made with the claimant in July 2004, and understood that his obligation to pay support had terminated, even though he had not applied for or obtained a variation of the consent order.
- [23] For her part, Ms. Yerex denies that she and Mr. Yerex made an agreement to terminate spousal support in July 2004. She contends that on several occasions between 2004 and November 2011 she asked Mr. Yerex for spousal support but that he always gave her an excuse about why he was unable to pay her. Ms. Yerex argues that she remains in need of spousal support and that notwithstanding his retirement, Mr. Yerex retains the capacity to perform some part-time computer consulting work. Ms. Yerex opposes both the cancellation of the arrears of spousal support or any reduction in ongoing spousal support.

ISSUES

- [24] The issues to be determined on this application are as follows:
- (a) What is the legal test for variation of the consent order regarding spousal support?
 - (b) What were the circumstances of the parties at the time of the consent order?
 - (c) Has there been a material change in circumstances?
 - (d) If so, what is the appropriate order?

DISCUSSION AND ANALYSIS

- (a) The test for variation of the spousal support order
- [25] Although s. 17 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) does not expressly provide for the cancellation or reduction of arrears of spousal support, it does provide for the variation, rescission or suspension of a support order. The relevant provisions of s. 17 are as follows:
17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
- (a) a support order or any provision thereof on application by either or both former spouses;
- ...

(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

...

- (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.

[26] Here, where arrears have accrued over a period of almost eight years before the claimant initiated proceedings to enforce the arrears, it is also necessary to consider the "rule against hoarding". In *Hulbert v. Hulbert*, 2011 BCSC 199, Boyd J. discussed the applicable principles at paras. 34-36:

[34] ... In *Lewis v. Lewis* (1999), 2 R.F.L. (5th) 417, Warren J. set out a useful review of the law, including the "factors" to be considered in those cases where arrears have been allowed to accumulate over a period of years. The factors include the following:

- While there is no "one year rule" which prohibits the payee spouse from recovering arrears which have accrued for a period beyond one year, this is nevertheless the "rule of thumb" often applied by the Court. Each case must be decided on its own merits (*Bains v. Bains*, (15 March 1989), Vancouver A883267 (S.C.));
- It will be unjust to cancel arrears where the payor spouse has not been induced to believe he would not have to pay; where his refusal to pay the support was deliberate and not caused in any way by a financial inability; and where he had, in the meantime, acquired substantial assets while disregarding his first obligation (*Bains*);
- The rule against hoarding is based on a principle of public policy--that is to "refuse to impose on a delinquent husband a crippling burden to meet a purpose (the maintenance of a wife or child) which has already been met by other means" (*Patton v. Reed* (1972), 8 R.F.L. 350 (B.C.S.C.)). Warren J. notes that the "other means" or "other source" are all too often the spouse or children going without.

- [35] The recovery of arrears is important not only to compensate the receiving spouse for that improperly withheld, but also to demonstrate that the orders of the Courts are to be obeyed, absent some feature delineated by the statute or the common law (Lewis at para. 14).
- [36] In Lewis, Warren J. held that "the rule against hoarding" should be considered with the statutory provisions of s. 17 of the Divorce Act and if the above-mentioned factors exist, then the Court may exercise its discretion and not enforce arrears over one year.
- [27] On an application to vary a prior order, the court takes the previously ordered amount of support as correct at the time the order was made. The court must then consider whether there has been a change in the condition, means, needs or other circumstances of either former spouse occurring since the previous order was made. Here, Mr. Yerex, as the applicant for a variation bears the onus of showing a material change in circumstances. The extent of the change must be such that the continuation of the existing order would be unjust: *Walker v. Walker*, [1992] B.C.J. No. 893, 39 R.F.L. (3d) 305 (B.C.C.A.).
- [28] A material change in circumstances is a change that is "substantial, unforeseen and continuing": *Turpin v. Clark*, 2009 BCCA 530 at para. 46.
- (b) The circumstances of the parties at the time of the consent order
- [29] As we have seen, the consent order of February 21, 2002 provided for Mr. Yerex to pay Ms. Yerex spousal support in the amount of \$500 per month commencing October 1, 2001 and continuing on the first day of each month thereafter, reviewable upon application by either party after April 1, 2002. That order also provided for the division of the parties' very modest family assets. Following the breakdown of the 27-year marriage, Ms. Yerex retained the deep freeze, some furniture and her automobile. Ms. Yerex transferred her half interest in the mobile home the parties had acquired to Mr. Yerex, who assumed sole responsibility for the loan against the mobile home, as well as sole liability for repayment of various credit account and credit card debts incurred by the parties during their marriage. Mr. Yerex also retained his motor vehicle and motorcycle, as well as the assets he used in connection with his computer consulting business, Pry Software Services.
- [30] Neither party derived any lasting advantage from the division of family assets. Mr. Yerex was unable to service the debts he assumed, and declared bankruptcy before the first anniversary of the consent order, as did Ms. Yerex.
- [31] Ms. Yerex's annual income for 2001, exclusive of spousal support paid pursuant to the consent order, consisted of \$2,500 in wages and \$3,477 in Employment Insurance. For 2002, she reported annual income of \$8,994.
- [32] Mr. Yerex reported income of only \$4,847 from his consulting business in 2001. For 2002, he reported line 150 income of \$28,824.

- [33] In light of Ms. Yerex's very limited earnings in 2001 and 2002, and the fact that she was unemployed at the time the consent order was pronounced, I conclude the primary basis for spousal support under the consent order was non-compensatory; that is, she was in need of support. The consent order also fulfilled a compensatory purpose. This was not a case where a spouse gave up or postponed her career in order to stay home and care for children. However, throughout the marriage, Ms. Yerex did from time to time give up employment she had acquired, including, at one point, a position with the British Columbia Provincial Government, in order to accompany Mr. Yerex as he moved from town to town in search of employment. I am satisfied that Ms. Yerex suffered some economic disadvantage as a result of the marriage, and that the consent order, while intended primarily to reflect her need for support at the time it was pronounced, also served a compensatory purpose.
- [34] In short, at the time of the consent order, Ms. Yerex, who had worked throughout the marriage in a variety of unskilled or semi-skilled positions, and was 51 years old, was unemployed and had no savings or assets of significant value. Mr. Yerex, who was then 54 years old, had no savings, and was struggling to find work as a computer consultant. I infer from the fact that the consent order of February 21, 2002 provided for review on the application of either party less than two months after it was made that the parties and the court contemplated that the financial prospects of each party were uncertain, and might be subject to significant fluctuation.
- (c) Has there been a material change in circumstances?
- [35] Since 2001, when the parties separated, Mr. Yerex's income has varied substantially. The respondent's Notices of Assessment for the years 2001 indicate the following earnings from his self-employment as a computer consultant: 2001 - \$4,847; 2002 - \$28,824; 2003 - \$10,314; 2004 - \$4,266; 2005 - \$4,237.
- [36] From 2006 until his retirement on May 31, 2012, Mr. Yerex's sole source of income was from his employment with Robertson Telecom Inc. As we have seen, during that time his annual income increased from \$24,001 in 2006 to \$57,680 in 2011.
- [37] In his Form 8 Financial Statement sworn June 11, 2012, Mr. Yerex reported employment income to May 31, 2012 of \$25,335.05 together with expected pension income of \$9,334.08. Thus, he anticipated that his total income for 2012 would be \$34,669.13.
- [38] Mr. Yerex has also deposed that he has the opportunity to perform some computer consulting work as a contractor to his former employer at a per diem rate of \$220. In June 2012, following his retirement, he performed five days of per diem work.
- [39] Mr. Yerex and his wife will have a combined household income for 2012 of \$82,684.13. The expenses of \$2,571.33 a month or \$30,855 per year that Mr. Yerex records in his Financial Statement are reasonable, and include his share of rent, food, utilities and other household expenses, as well as \$500 per month for support payments to the claimant. Mr. Yerex pays 42 per cent of the shared living expenses of his household.

- [40] For 2013, Mr. Yerex's income will be limited to his Canada Pension Plan and Old Age Pension payments which total \$1,000 per month, together with any additional income he earns from computer consulting work for Robertson Telecom Inc. Mr. Yerex has demonstrated his capacity to earn \$1,100 per month from this source. Accordingly, I find that Mr. Yerex's post-retirement income will be approximately \$2,100 per month, and that his total income for 2013 will likely be \$25,000. From that amount, the respondent will have to continue to pay his monthly expenses. Those expenses, excluding the \$500 per month spousal support payments, total \$2,071.33 per month, an amount roughly equivalent to his monthly post-retirement income.
- [41] Mr. Yerex's only financial assets consist of savings of \$550 in two bank accounts. He has credit card debt of \$4,800 for which his wife is jointly liable, and is also indebted to his bank for an additional \$6,800, for a total of \$11,600 in unsecured debts. Neither Mr. Yerex nor his wife own real property. Mr. Yerex does not own a motor vehicle.
- [42] For her part, Ms. Yerex has been compelled to take up temporary residence with relatives since she lost her employment as a cook at an A&W restaurant in November 2011. At age 62, her prospects of finding new employment are limited. Ms. Yerex has deposed that she has been living on her line of credit since she lost her employment and that while living with her family, she pays one third of all household expenses. The claimant has not filed a financial statement and therefore there is no evidence before the court of the amount of her expenses, the amount of Employment Insurance she received following the termination of her employment, or the outstanding balance on her line of credit. However, during submissions, Ms. Yerex advised the court that at present her sole source of income is her monthly Canada Pension Plan benefit of \$301.
- [43] Ms. Yerex's financial circumstances have also changed over the time between the making of the consent order and the present. She also declared bankruptcy in 2002. Her Notice of Assessment for 2003 shows her total income for that year of \$12,838.
- [44] The claimant's Notices of Assessment for the years 2004 through 2011 indicate the following earnings: 2004 - \$23,795; 2005 - \$24,802; 2006 - \$21,822; 2007 - \$17,202; 2008 - \$16,453; 2009 - \$23,729; 2010 - 21,706; and 2011 - \$19,825.
- [45] Ms. Yerex has made reasonable efforts to become self-sufficient through the unskilled or semi-skilled employment available to her, but has been unable to accumulate any savings or assets that might have provided a cushion against her recent loss of employment. She had attained a very modest level of self-sufficiency before the loss of her job in November 2011. Her present financial circumstances are not materially different from those which obtained at the time of the consent order. She is unemployed and in financial need. Later in these Reasons, I will consider whether Ms. Yerex's current financial hardship is attributable to the marriage, or its breakdown.

[46] Since 2006, Mr. Yerex has fared better than Ms. Yerex in his efforts to attain economic self-sufficiency, although he too, at age 65 has not accumulated any assets of value.

Arrears of Spousal Support

[47] Before turning to the question of whether Mr. Yerex's retirement constitutes a material change in circumstances, I will examine the circumstances in which the arrears of spousal support have accrued in this case to determine whether they amount to a change in the condition, means, needs or other circumstances of either spouse since the making of the consent order warranting a variation under s. 17(4.1) of the Divorce Act.

[48] As previously noted, in 2002 Mr. Yerex declared bankruptcy. Mr. Yerex continued to make payments of spousal support until April 1, 2004. He paid \$500 per month for the period October 1, 2001 through February 2002. From March 1, 2002 through April 1, 2004 Mr. Yerex failed to make all of the payments due under the consent order. He made no payments for October and November 2003, or for January and February 2004. For the remainder of that period, his payments varied from \$150 to \$250 or \$500 per month.

[49] In early June 2004, Mr. Yerex first sought the claimant's agreement to the termination of spousal support. Ms. Yerex responded by e-mail to Mr. Yerex on June 2, 2004. She disagreed with Mr. Yerex's request, pointed out she was only earning the minimum wage, and requested that he either continue to pay her \$500 per month, or at least pay a minimum of \$250 per month.

[50] On June 25, 2004, Mr. Yerex wrote to the claimant enclosing his cheque for \$250 for July 2004. After referring to his continuing financial difficulties, Mr. Yerex continued:

As expressed before, I need to end the support payments. I intend to process the necessary legal documents to take this back to the court in Vernon. There are two different documents/processes, one if you plan to contest the order I am seeking and another if it is non-contested. Simply, I will be requesting the court to cancel the existing support order as of July/04. The grounds will be that both of our financial situations have changed dramatically, most specifically mine, since the original order.

If you intend to not contest it, then it is a relatively simple process of filing the necessary signed documents. If you do contest it, then we both have to provide financial information, etc. and appear in court.

Please let me know asap whether you will be contesting the request or not and I will process the appropriate documents and provide you with copies as required.

[51] On July 5, 2004, Ms. Yerex responded:

Thank you for sending a cheque. I have read your letter dated the 25 June. I see you too are having a tough time and I am sorry for that, I thought that you had been working a lot more because you were up North for quite a while. I too wish things could have been different. I guess we both will survive this and hopefully things will get better soon for both of us.

So go ahead and file the papers in the court. I will not contest them.

- [52] Mr. Yerex did not apply to vary the consent order. He has deposed that he was living in the Lower Mainland at the time and lacked the financial means to retain a solicitor. However, he made no further payment of spousal support after July 2004. Mr. Yerex says he relied upon Ms. Yerex's agreement that spousal support payments would cease, and understood that his obligation to pay spousal support had come to an end in July 2004.
- [53] Ms. Yerex denies that she agreed to the termination of spousal support payments.
- [54] Ms. Yerex has also deposed that she does not remember the e-mail of July 5, 2004. She says that she would not have sent an e-mail to Mr. Yerex at the e-mail address at telus.net noted in that document. She says that at that time she would have sent e-mail for Mr. Yerex to either of two e-mail addresses he then maintained with hotmail.com for his software consulting proprietorship.
- [55] Mr. Yerex acknowledges that the latter e-mail addresses were the ones he used for business purposes, but says he has also maintained his e-mail account with telus.net as a personal e-mail address since 1998.
- [56] This conflict in the affidavit evidence may be resolved by reference to other documents in evidence. These documents show that between the time of the separation and November 2011, Ms. Yerex, at various times, communicated with Mr. Yerex at his telus.net e-mail address, or through one of his hotmail e-mail addresses. In particular, Exhibit C to Mr. Yerex's affidavit number four is an e-mail dated December 2, 2004 sent by Ms. Yerex to Mr. Yerex's e-mail address at telus.net.
- [57] On the balance of probabilities, I am satisfied that Ms. Yerex sent the e-mail of June 25, 2004 to Mr. Yerex at the e-mail address indicated on that document.
- [58] Ms. Yerex also deposes that after July 2004 she asked Mr. Yerex several times for money but he always gave her an excuse about why he was unable to pay her. Ms. Yerex has produced no documentary evidence to support her assertion that she made claims for financial support from Mr. Yerex before November 2011. The few pieces of e-mail correspondence produced by the parties for the period between July 2004 and November 2011 indicate that Mr. and Ms. Yerex continued to communicate cordially with each other, exchanging news about family members and acquaintances. It is noteworthy that when Ms. Yerex did request financial assistance from Mr. Yerex following the loss of her employment in November 2011, he immediately agreed to provide that assistance. I accept Mr. Yerex's evidence on this point and find that after July 5, 2004, Ms. Yerex did not request spousal support payments from the respondent or take any steps to enforce the consent order until November of 2011.

- [59] When Mr. Yerex first sought the claimant's agreement to the termination of spousal support payments in early June 2004, she disagreed and responded by requesting that he either continue to pay the agreed amount of \$500 per month, or pay at least \$250 every month.
- [60] By July 5, 2004, Mr. Yerex persuaded Ms. Yerex that his financial circumstances at that time precluded him from continuing to pay support. Mr. Yerex explained that he intended to ask the court to cancel the existing support order on the grounds that both parties' financial situations had changed since the consent order. At that point, Mr. Yerex was struggling to find computer consulting work, had outstanding tax liabilities, and was earning substantially less than Ms. Yerex. She informed Mr. Yerex that she would not contest his intended application to terminate the payment of spousal support.
- [61] Mr. Yerex maintains that the claimant, by her e-mail of July 5, 2004 and her subsequent failure to take any action to pursue spousal support, waived or abandoned her right to enforce the consent order. For a waiver to be effective, the waiving party must have both full knowledge of her rights and an unequivocal and conscious intention to abandon those rights: *Dunn v. Vicars*, 2009 BCCA 477 at para. 45. Mr. Yerex has not established that Ms. Yerex agreed to his intended application to terminate spousal support with full knowledge of her legal rights to enforce payment of such support, or that she unequivocally intended to abandon those rights. Mr. Yerex was already in arrears of support payments when he notified Ms. Yerex of his intention to apply to vary the consent order so as to terminate the payment of support effective July 2004. The claimant only learned of her right to enforce the consent order through FMEP in October of 2011.
- [62] Mr. Yerex made no further payments after June 25, 2004 and took no steps to vary the consent order. For her part, Ms. Yerex took no action to enforce the consent order until November 2011.
- [63] One way of addressing the issue of arrears is to attempt to determine what a court would have done had Mr. Yerex applied for variation of the consent order in July 2004: *Cawker v. Cawker* (1995), 67 B.C.A.C. 305 (C.A.); *Hulbert v. Hulbert* at para. 42. Had Ms. Yerex been fully informed of her rights to enforce payment of arrears, it is likely that she would have opposed Mr. Yerex's application to terminate spousal support. Had Mr. Yerex made his intended application in 2004, a court would likely have found that he then lacked the financial ability to pay monthly spousal support of \$500. However, rather than cancelling the support obligation outright, in my view it is more likely that the court would have either reduced the monthly payments, or perhaps suspended them for some period. Because the consent order provided for review, it is also likely that when Mr. Yerex's financial position improved, Ms. Yerex would later have applied for an increase of spousal support. A court hearing that application would have considered the Spousal Support Advisory Guidelines, which came into effect in 2005. The result might well have been an order for payment of spousal support in excess of \$500 per month. For example, in 2007, Mr. Yerex earned \$46,736 and Ms. Yerex earned \$17,202. While the SSAG are not binding on the court, they would have been a factor for the court to consider respecting both entitlement and quantum of spousal

support. For a marriage of over 20 years, and based on the parties' 2007 incomes, the "without child support" formula under the Spousal Support Advisory Guidelines would have resulted a range of spousal support between of \$923 at the low end to \$1,077 at the mid-point and \$1,146 at the high end, payable for an indefinite period, but subject to variation or review. I provide this example to make the point that had Mr. Yerex made an application to vary spousal support in July 2004, the order he obtained would likely have been subject to further review. Ultimately, the result might well have been an order for support payable in an amount in excess of \$500 per month.

- [64] In the result, Ms. Yerex did nothing to enforce her rights until November 2011. Her response of July 5, 2004 and her subsequent silence led Mr. Yerex to believe that he would not be required to pay further spousal support. I have found that when Mr. Yerex sought Ms. Yerex's agreement to the cessation of spousal support he lacked the financial ability to pay support in the amount required under the consent order. I also bear in mind that, as a result of not paying spousal support pursuant to the consent order since July 2004, Mr. Yerex's financial position has been enhanced to the extent that he has enjoyed the use of income for his own purposes that otherwise would have been committed to meet his obligation to pay support under the consent order. However this is not a case where the payor spouse has acquired substantial assets while intentionally disregarding his obligation to pay spousal support. Mr. Yerex thought that his obligation had come to an end in July 2004.
- [65] The respondent lacks the means to pay arrears in excess of \$49,000. He made his decision to retire without knowledge that Ms. Yerex was seeking to enforce payment of those arrears. An order for payment of all of the accumulated arrears would cause real hardship to Mr. Yerex, and would be unjust in the circumstances of this case.
- [66] I am satisfied on the unfortunate facts of this case that the accrual of arrears since the making of the consent order constitutes a change of circumstances sufficient to warrant a variation of that order.

The Respondent's Retirement

- [67] The law on the question of whether a voluntary retirement constitutes a material change of circumstances was succinctly summarized by Gray J. in *J.R.G.-S. v. J.A.S.*, 2011 BCSC 1612 at para. 52:
- [52] Generally, a supporting spouse cannot be required to continue working. However, where the payor ex-spouse is acting in bad faith in order to frustrate the right of support, the Court should look behind the decision to retire, and may impute income to the payor. Self-induced impecuniosity implies deceit: *Vennels v. Vennels* (1993), 76 B.C.L.R. (2d) 69 at para. 31, 45 R.F.L. (3d) 165 (S.C.). The analysis should focus on whether a voluntary decision to retire is reasonable in all the circumstances: *Hoar v. Toner*, 2010 NBQB 167 at para. 20. Where the decision to retire was voluntary, and the payor has the capacity to continue earning more than his retirement income, such additional income may be imputed to him or her: *Gadzik*

v. Gadzik, 2008 BCSC 160 at para. 55.

[68] Mr. Yerex made his decision to retire before he learned the claimant had registered the consent order with FMEP and was seeking to enforce the payment of arrears in excess of \$49,000. On January 3, 2012, the respondent informed his employer of his decision to retire and his intended retirement date of May 31, 2012. I accept Mr. Yerex's evidence that he decided to retire because he was approaching the age of 65, and after 25 years in the field of computer technology he was finding it increasingly difficult to keep abreast of new developments. This is not a case where a former spouse has chosen early retirement in order to frustrate his spousal support obligations.

[69] Even though I have imputed to Mr. Yerex a post-retirement annual income of \$25,000, which includes anticipated earnings from computer consulting contract work, his retirement has resulted in a material change in circumstances from his pre-retirement earning capacity. At age 65, and with no accumulated financial assets, Mr. Yerex does not have the means to pay the accrued arrears of \$49,882 and to pay ongoing spousal support of \$500 per month indefinitely.

(d) Relief

[70] An order varying spousal support should meet the objectives set out in s. 17(7) of the Divorce Act. Here, the applicable objectives are those set out in s. 17(7)(a), (c) and (d), which I now consider:

(a) Recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown

[71] I have found that during the marriage both spouses struggled to maintain a very modest standard of living. They experienced periods of financial hardship throughout the marriage, including periods of unemployment when they were dependent upon Employment Insurance and welfare benefits. As Mr. Yerex relocated from one city to another in pursuit of opportunities for employment, Ms. Yerex often gave up her unemployment to follow him, and then had to secure whatever new employment was available to her. She suffered an economic disadvantage arising from the marriage. Following the breakdown of the marriage, Ms. Yerex was able to find employment and to support herself. She attained a very modest standard of living which was probably equivalent, if not slightly superior to what she experienced during much of the marriage.

[72] Ms. Yerex's current financial distress results from the recent termination of her employment. That loss of employment, which occurred more than 10 years after the parties separated and followed eight years during which Ms. Yerex was able to support herself, is not the result or consequence of an economic disadvantage to Ms. Yerex arising from the marriage or its breakdown.

- (c) Relieve any economic hardship of the former spouses arising from the breakdown of the marriage
- [73] Again, Ms. Yerex's financial hardship results from the termination of her employment and the difficulties she faces at age 62 in finding new employment, rather than from the breakdown of the marriage.
- [74] Mr. Yerex will experience financial hardship if the court does not provide some relief from payment of the arrears of spousal support which have accrued since July 2004.
- (d) In so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time
- [75] Following the breakdown of the marriage, and with some difficulty, Mr. and Ms. Yerex each achieved economic self-sufficiency, particularly during the years 2006 through 2011, although Mr. Yerex has fared better than the claimant.
- [76] Ms. Yerex has not had the benefit of any spousal support to assist her in achieving or maintaining economic self-sufficiency since July 2004.
- [77] Here, the arrears have accumulated for almost eight years, a period substantially in excess of the one year "rule of thumb" discussed in *Lewis v. Lewis*. Ms. Yerex, albeit without full knowledge of her rights to enforce payment of spousal support, led Mr. Yerex to believe that his support obligations had come to an end. Although Mr. Yerex lacked the financial ability to pay spousal support due under the consent order at the time he ceased making payments, his financial circumstances later improved.
- [78] Finally, while the consent order provided for the payment of spousal support for an indefinite term, subject to review, if the parties had considered the matter in February 2002, after the breakdown of a marriage during which they had both struggled financially, had acquired few assets, and had accumulated no savings, it is unlikely they would have contemplated that Mr. Yerex would continue to pay spousal support following his retirement.
- [79] Taking these circumstances into consideration, and exercising my discretion under s. 17, I make the following orders.
- [80] The order of the Honourable Mr. Justice Cole pronounced on February 21, 2002 requiring Mr. Yerex to pay the sum of \$500 per month as spousal support to Ms. Yerex retroactive to October 1, 2011 is varied so that the respondent's obligation to pay ongoing spousal support to the claimant is terminated as of June 1, 2012. The arrears which have accrued under the order of the Honourable Mr. Justice Cole pronounced February 21, 2002 are reduced to \$6,000. The respondent will pay the reduced arrears as follows:

- (a) Commencing July 1, 2012 and continuing on the first day of each and every month thereafter up to and including December 1, 2012, the respondent will pay the claimant the sum of \$500 per month;
- (b) Commencing on January 1, 2013 and continuing on the first day in each and every month thereafter up to and including December 1, 2013, the respondent will pay to the claimant the sum of \$250.
- [81] All default fees set by the Family Maintenance Enforcement Program which have accrued from October 1, 2001 to the date of this order are cancelled. Interest that has accrued on the arrears from October 1, 2001 until the date of this order is cancelled.
- [82] The Family Maintenance Enforcement Program will cease all enforcement of spousal support payments and arrears, other than the payment of the reduced arrears in the amount of \$6,000 pursuant to this order.
- [83] Each party will bear their own costs of this application.

"PEARLMAN J."

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