
CANADA / JUDGMENT

Zandbergen v. Craig

2017 BCSC 487

COURT

Supreme Court of British Columbia

DECIDED

27 March 2017

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2017 BCSC 487 Zandbergen v. Craig

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Zandbergen v. Craig,

2017 BCSC 487

Date: 20170327

Docket: E080945

Registry: Vancouver

Between:

Anthony Benjamin Zandbergen

Claimant

And:

Sandra Darlene Craig

Respondent

Before: The Honourable Mr. Justice Smith

Reasons for Judgment

Counsel for the Claimant:

S. Booth

Counsel for the Respondent:

F. Lowther

Place and Dates of Hearing:

Vancouver, B.C.

February 1 and 2, 2017

Place and Date of Judgment:

Vancouver, B.C.

March 27, 2017

- [1] The parties were divorced almost eight years ago, when they also consented to an order for child and spousal support. They now bring competing applications relating to ongoing and retroactive child and spousal support.
- [2] The claimant, the former husband, seeks a determination of prospective child support for the parties' daughter, who is now 20 and attending university in the United States. He also applies for discharge or postponement of a charge registered against his home pursuant to the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 ("FMEA") to secure spousal and child support.
- [3] The respondent seeks a review of child and spousal support, with variation retroactive to 2009. She argues that the respondent has consistently under-reported his income by methods that include excessive deductions for business expenses and income splitting with his current wife.

Background

- [4] The parties married in 1993, separated at the end of 2007 and were divorced in June 2009. They have a son and a daughter who, at the time of the divorce, were 14 and 12. Property division was settled shortly after separation, but child and spousal support remained in issue.
- [5] On June 26, 2008, Madam Justice Garson found the claimant's guideline income for child and spousal support purposes to be \$390,000 per year and ordered him to pay interim child support of \$4,989 per month and interim spousal support of \$8,000 per month. The order also provided that spousal support would increase to \$9,700 per month after the then-contemplated sale of the former family home.
- [6] The parties went to trial before Madam Justice Russell almost a year later, but on the sixth day of trial agreed to a consent order. Both parties had counsel at trial and the same counsel on these applications.
- [7] The consent order, dated June 9, 2009 (the "June 9, 2009 Order"), set the claimant's guideline income at \$300,000, but continued child support at \$5,000 a month, inclusive of special and extraordinary expenses under s. 7 of the Federal Child Support Guidelines ("FCSG"). It also continued spousal support at \$8,000 per month, but did not include the interim order's

provision for an increase upon sale of the former family home. The June 9, 2009 Order merely required the claimant to use his best efforts to obtain releases of the respondent's liability on mortgages. The home was never sold and continues to be the claimant's residence.

[8] The June 9, 2009 Order also provided that there would be no applications to vary child or spousal support before June 1, 2013. The relevant provisions read:

13) The Defendant and the Plaintiff shall not seek a variation of the amount of child support set out in paragraph 11 of this Order, and the Defendant shall not be entitled to more than the amount of \$5000 per month, prior to June 1, 2013, after which either party is at liberty to apply to vary the amount of child support pursuant to s. 17 of the Divorce Act of Canada; AND FURTHER PROVIDED THAT:

- (a) in any event the matter of the child support shall be subject to review as of July 2013; and
- (b) the Plaintiff may seek a variation if one or both children no longer has their primary residence with the Defendant.

...

17) That the Plaintiff shall pay to the Defendant the sum of \$8000 per month spousal support commencing July 1, 2009 and continuing each month thereafter; provided that the said amount shall be subject to review after June 1, 2013; the Defendant and the Plaintiff shall not seek a variation of this amount, and the Defendant shall not be entitled to more than this amount, prior to June 1, 2013; PROVIDED FURTHER that the said amount of \$8000 shall be paid unless and until there is a variation of that amount by agreement in writing between the parties or a variation order of the court on the review, or upon an application to vary brought after June 1, 2013;

[9] The claimant says that the effect of those provisions is that any change in child or spousal support as a result of these applications cannot be retroactive to any date earlier than June 1, 2013. The respondent says those restrictions only dealt with the date applications could be made and do not prevent orders retroactive to 2009.

[10] Counsel for the respondent now argues that the respondent was "pressured" to consent to something that "when looked at later, was not consistent with the objectives of the Divorce Act" and that the respondent agreed to the June 9, 2009 Order "under conditions of virtual duress". With respect, that submission is simply untenable coming from counsel who was there at the time and whose duties included protecting his client from any such pressure or duress and ensuring that the outcome was consistent with the objectives of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.).

[11] The claimant's present application was filed in August 2016 and came on for hearing on November 14, 2016. On that date, Mr. Justice Williams adjourned the matter by consent to February 1, 2017, when it came on for hearing before me. The order of Williams J. made the

new hearing date pre-emptory on the respondent and required her to deliver her own notice of application and any further affidavit material by November 30, 2016. Either party wishing to cross-examine the other on affidavit materials was at liberty to apply to do so, but cross-examination had to take place before January 20, 2017. The respondent's application was filed on December 2, 2016. There was no evidence before me of any cross-examination on affidavits.

- [12] The order of Williams J. also stated, by consent, that the parties' son had ceased to be a child of the marriage under the Divorce Act as of February 25, 2014 and reduced child support, on a without prejudice basis, to \$2,744 a month commencing March 1, 2014.

The Claimant's Income

- [13] The issue at the heart of these applications, as it appears to have been in the earlier proceedings, is the claimant's income for child and spousal support purposes. The claimant is a realtor and his income fluctuates. At the time of the June 9, 2009 Order, he was self-employed although associated with a larger ReMax Realty office. He has continued in that practice but since 2011 has received income and paid expenses through a personal real estate corporation.
- [14] The claimant heads a "team" of realtors that currently includes two other licenced realtors, one of whom is his wife Casey Zandbergen. Ms. Zandbergen receives 15% of the gross income of the team, while the other realtor, Mr. Mascarenhas, receives 20%. Ms. Zandbergen and Mr. Mascarenhas are paid directly by ReMax, not by the claimant or his corporation. They also pay certain expenses directly to ReMax that are not deducted from the income of the claimant. However, the claimant's corporation incurs substantial expenses on his behalf and on behalf of the team, including advertising and office expenses.
- [15] In addition to his real estate income, the claimant, in the years 2013 to 2015, received dividends totaling approximately \$220,000 from Zandbergen Estates Ltd. That was a company owned by his now deceased parents. The claimant says that the dividends he received are effectively an inheritance derived from liquidation of the company's assets.
- [16] The claimant is also a minority shareholder in a company called Bedwell Bay Contracting Ltd. which owns land on which it operates a trailer park. That business is operated by the claimant's brother and the claimant does not receive income from it.
- [17] The claimant's counsel has produced a summary of his income for the years 2010 through 2015. That document appears to accurately reflect the amounts shown on tax returns and corporate financial statements that were put into evidence and to properly consider both the claimant's personal income, as shown in his tax returns, and the net income of his corporation, as required by ss. 16 and 18 of the FCSG.

[18] For example, based on its financial statement, in 2015 the claimant's real estate corporation had gross revenue from real estate commissions of \$568,754. Its financial statement also showed expenses of \$305,987. From the resulting net income of \$262,767, it paid the claimant a dividend of \$130,000. However, the remaining balance in the company of \$132,767 must also be imputed to the claimant for purposes of determining his guideline income. The summary properly accounted for the residual corporate income.

[19] The claimant also conceded that a relatively small amount of corporate expenses should be added back to the claimant's income to reflect personal benefits received. Those additions, along with a dividend from Zandbergen Estates of \$69,614.40, bring the claimant's total guideline income for 2015 to \$342,336.

[20] Using the same method for the earlier years, the claimant says his guideline income was:

2010

\$243,774

2011

\$318,579

2012

\$294,031

2013

\$425,739

2014

\$300,010

2012 The final income figures for 2016 were not before the Court, but the claimant says it was a very good year and estimates the gross income for 2016 will be in the range of \$900,000 to \$975,000. If expenses remained similar to those in 2015, income should increase to a range of \$600,000 to \$675,000.

[21] I will deal with 2016 later in these Reasons, but for the years 2010 through 2015, the claimant's evidence shows an average annual income of approximately \$320,000. That is slightly more than the \$300,000 stated in the June 9, 2009 Order, but the child support and spousal support payments required by that order are the same as in the interim order of Garson J., which assumed an income of \$390,000. The June 9, 2009 Order, in effect, recognized the fluctuating nature of the claimant's income and the possibility of some increase.

- [22] The respondent argues that the claimant's evidence does not reflect the true income available for support payments, in part because it includes an excessive deduction of expenses. In the years 2010 through 2015, his real estate corporation's expenses ranged from approximately 42 to 54% of gross income. The respondent argues that a reasonable amount would be about 25% "at most".
- [23] That submission is based in part on evidence contained in a letter from an accountant dated January 26, 2017 and attached to the respondent's affidavit dated January 27, 2017. I have given no weight to any opinion contained in that letter, most importantly because it was filed in blatant non-compliance with the order of Williams J. That order required the respondent to serve her material by November 30, 2016. Orders of the court, including those made by consent, are to be complied with. They are not to be treated as mere recommendations that parties and counsel need respect only as long as it is convenient to do so. Further, the very late service denied the claimant any meaningful opportunity to respond.
- [24] Even if I were to consider the accountant's letter, it would be of little assistance to the respondent. The accountant, who says he acts for "dozens" of realtors, compares the claimant's level of expenses with six other unnamed realtors whose expenses as a percentage of gross income in 2015 ranged from 20 to 39%. He does not indicate the basis on which he selected those six from the "dozens" he works for.
- [25] The only evidence that provides some support for the claimant's assertion is that, according to material that was put before Garson J. in 2008, expenses of the claimant's real estate practice had generally been a little more than 30% of gross income. Clearly, a larger portion of gross income is now being declared as expenses, but that does not in itself prove that those expenses are excessive or not reasonably incurred as part of the claimant's business.
- [26] As the Court of Appeal stated in *Beninger v. Beninger*, 2007 BCCA 619 [Beninger] at para. 29: "Generally speaking, where there is a significant challenge to income or expenses claimed by one party, the evidence is tested through cross-examination of the party whose evidence is challenged". Indeed, the order of Williams J. specifically contemplated the possibility of cross-examination on affidavits.
- [27] The claimant's affidavits exhibit his general ledgers for at least the years 2014 and 2015. It was therefore open to counsel for the respondent to question the claimant about the detailed expenses shown on those ledgers in order to identify any that were arguably unreasonable. In the absence of any such evidence, I am not prepared to say the claimant's expenses are unreasonable based solely on conjecture and suspicion.

- [28] The respondent also argues that the claimant has artificially reduced his income by paying or directing money to his current wife whose income she says escalates "dramatically" while the income reported by the claimant "flat lines". In fact, Ms. Zandbergen has sworn an affidavit stating that her net income was \$139,871 in 2014 and \$145,313 in 2015. The increase of about 4% is less than the 14% increase in the claimant's reported guideline income between those two years.
- [29] Ms. Zandbergen's evidence is that she has been a licenced realtor since 2003 and had her own practice before she began working with and married the claimant. Her affidavit lists the work she does as part of the real estate team, including seeking listings, preparing and hosting open houses, preparing offers and contracts and doing various kinds of promotional work. She says she works between three or four and ten hours a day, depending on how busy the team is.
- [30] As said above, she receives 15% of the gross commissions of the team, which is paid directly by ReMax and not by the claimant's personal corporation. In my view, it is significant that Ms. Zandbergen is not the only realtor sharing in the revenue of the claimant's team. The claimant employs another, clearly arm's length realtor who is paid in the same manner but receives 20% of the commissions. An affidavit from the managing broker of the ReMax office states that such arrangements are common, with the typical commissions ranging from 20 to 30% of a team's revenue.
- [31] I am therefore not persuaded that Ms. Zandbergen's income represents income improperly diverted from the claimant or income the claimant would necessarily be able to earn on his own in her absence.
- [32] The respondent further argues that the claimant should be imputed income from his 23% shareholding in Bedwell Bay Contracting Ltd., which she describes as a "cash cow". The remaining shares in the company are divided among the claimant's three brothers, one of whom receives income as the manager of the company's trailer park business. There is no evidence of a history of dividend payments or of any rights the claimant, as a minority shareholder, may have to insist on dividends.
- [33] In the result, the evidence does not support the assertion that the claimant has inaccurately or incompletely reported his income for guideline purposes for the years 2010 to 2015.

Retroactive Support - 2009 Through 2015

- [34] The respondent's notice of application seeks:
1. Review: a review with regard to the spousal and child support payable by the Claimant to the Respondent, as follows:
 - (a) Review and determination of what ought to be have been paid and what ought to be paid by the claimant to the respondent as child and spouse support, from the time of June 2009 onwards.

2. Varying: orders pursuant to section 17 of the Divorce Act, varying the order herein dated June 9, 2009, retroactively , as to the provisions respecting child and spouse support payable by the claimant to the respondent from and since June 2009;

...

- [35] The application therefore refers to both review and variation, which are two different things. A party seeking a variation under s. 17 of the Divorce Act must show a material change of circumstances. The nature of a review was defined in *Leskun v. Leskun*, 2006 SCC 25 at para. 37:

37 Review orders, where justified by genuine and material uncertainty at the time of the original trial, permit parties to bring a motion to alter support awards without having to demonstrate a material change in circumstances ...

- [36] The court went on to say in para. 39 that the issues to be reviewed should be identified and tightly circumscribed so as not to be taken as an invitation to reargue the case.
- [37] It appears that the only uncertainty at the time of the June 9, 2009 Order in this case was the fluctuating nature of the claimant's income. That uncertainty was recognized, at least in respect of child support, by setting support at an amount that was clearly more than what was required on the basis of what was then agreed to be the claimant's guideline income of \$300,000. His income has indeed fluctuated during the intervening years, but I have found the average through 2015 to be within 10% of the amount stated in the June 9, 2009 Order.
- [38] Whether the matter is characterized as a review or as a variation application, I find there is no basis for a retroactive change to either child or spousal support for the years 2009 through 2015. There has been no material change of circumstances and any uncertainty contemplated at the time of the June 9, 2009 Order turns out to have been adequately addressed by the terms of the order. In view of that finding, I do not need to consider the question of whether paras. 13 and 17 of the June 9, 2009 Order preclude the respondent from seeking a retroactive award relating to the years prior to June 2013.

Child Support - 2016 and Ongoing

- [39] There was, however, a significant change in circumstances in 2016, when the claimant admits his income increased to an amount far outside the range within which it had previously fluctuated. That must be taken into account, at least for the purpose of child support.
- [40] Further significant changes in circumstances occurred in regard to the parties' children. Their son ceased to be a child of the marriage when he turned 19 on February 25, 2014, as recognized in the order of Williams J., and child support was reduced accordingly. Their daughter turned 19 in early 2016, but the parties agree she remains dependent while she continues her education and is therefore still a child of the marriage under the Divorce Act. In August 2016, she entered San Jose State University in San Jose, California, working

towards a bachelor's degree in aviation.

[41] Section 3(2) of the FCSG reads:

Child the age of majority or over

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

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

[42] For most of 2016, until she left for university, the daughter continued to live with her mother and, for the sake of simplicity, I find it appropriate to determine retroactive child support for 2016 on the basis of s. 3(2)(a) of the FCSG.

[43] The claimant says his income in 2016 was between \$600,000 and \$675,000. The mid-point between these two figures is \$637,500 and, doing the best I can with that evidence, I set his 2016 guideline income at the rounded up amount of \$640,000. When that income is applied to the support tables in the FCSG, the resulting monthly support amount is \$4,949. Although s.4 of the FCSG allows departure from the table amounts when income exceeds \$150,000, no basis for such a departure has been shown in this case.

[44] The claimant has, in fact, been paying \$2,744 per month since he began paying for one child instead of two. The difference between what the claimant paid in child support in 2016 and what was required based on his actual income that year is \$2,205 a month or \$26,460 for the year. I order that amount (\$26,460) to be paid as retroactive child support.

[45] Because the daughter is living away from home while attending university for most of the year, I must consider whether pure application of the table amount is appropriate for ongoing child support (for 2017 and onwards).

[46] The law on support for adult children attending university is summarized in *Catallo v. Catallo*, 2015 BCSC 1276 at paras. 38 and 39:

[38] The jurisprudence has dealt with the issue in the following manner. In *Neufeld v. Neufeld*, 2005 BCCA 7, the court said that for a child over the age of majority attending a post-secondary institution and living away from home, support should generally be determined under s. 3(2)(b) of the Guidelines. In general, it is inappropriate, for example, to award the table amount of support and then add a proportionate share of post-secondary expenses because this approach would not take into account a proper contribution to be made by the child through student loans and part-time work or the reduced financial burden on the custodial parent in maintaining the household.

- [39] In *L.H.M.K. v. B.P.K.*, 2012 BCSC 435, Mr. Justice Brown accepted the proposition that where s. 3(2)(b) of the Guidelines is applied to an adult child attending post-secondary schooling who is living away from home, courts generally suspend child support for that child when the child is away from home. In turn, courts order each party to pay their proportionate share of the child's education expenses. Children have an obligation to make a reasonable contribution to their education as well: *Wesemann v. Wesemann*, [1999] B.C.J. No 1387 (S.C.) at para. 39.
- [47] The respondent says the costs of the daughter's attendance in the U.S., including tuition, living expenses and travel, is about \$60,000 a year. The claimant says he was not consulted about the decision to attend an American university and argues that similar training is available at much less cost in British Columbia or elsewhere in Canada. However, I find that he has failed to demonstrate that the daughter's choice is unreasonable having regard to the specific educational programs offered and her career goals. The cost, while high, is also not unreasonable or unusual for a family of this income level. At the same time, there is no evidence about the daughter's ability or efforts to assist in the financing of her education through student loans, scholarships or part-time employment.
- [48] Although the situation is now one that should be assessed under s. 3(2)(b), the table amounts can still serve as a helpful reference point. Although the claimant had a much higher than normal income in 2016, there is no way of knowing if that will be repeated. For the purpose of ongoing support it is, in my view, appropriate to consider an average income for the last three years. That average is a little less than \$430,000.
- [49] If that average income of \$430,000 was to be applied to the support tables, the claimant would pay \$3,395 a month or \$40,740 a year. For comparison purposes, that is approximately two thirds of the daughter's annual education costs.
- [50] The respondent has no income other than what she receives from the claimant, so it is simply unrealistic to talk in terms of parents sharing educational costs in proportion to their incomes. However, as noted above, adult children pursuing higher education have a responsibility to contribute to the cost by pursuing available financial aid or part-time employment: *Catallo* at para. 39. This is particularly so when the child chooses to study outside the country, which may be a more advantageous educational choice but is also a costly one.
- [51] Considering all of the circumstances, I find that effective January 1, 2017 and for the nine months a year that the daughter is in university, the respondent must pay child support of \$5,000 a month. That equals \$45,000 a year or roughly 75% of the estimated annual education and associated living costs. Coincidentally, the monthly amount is the same as the claimant paid when he was paying support for both children.

- [52] During the three months a year when the daughter returns to Vancouver and lives with the respondent, the monthly child support payments will be reduced to the table amount of \$3,395.

Spousal Support

- [53] On the question of spousal support, the June 9, 2009 Order states at para. 17 that the amount is "subject to review after June 1, 2013". I have already said the circumstances do not justify any retroactive changes from 2009 to 2015. However, there remains a question of ongoing spousal support and, possibly, a retroactive amount to reflect the claimant's increased income in 2016.
- [54] The claimant submits that absent language specifically limiting the scope of review, a review is a hearing de novo with respect to the issues of entitlement, amount, and duration of support. While I agree with that as a general proposition, I note that the June 9, 2009 Order refers only to amount. The intention expressed in the June 9, 2009 Order is that the respondent would have an ongoing entitlement to spousal support, subject only to a material change of circumstances justifying variation.
- [55] I agree with the claimant that, with respect to amount, the review should be treated as a hearing de novo that considers the current means, needs and circumstances of the parties as well as the other factors specified in ss. 15.2(4) and (6) of the Divorce Act.

Factors

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

...

Objectives of spousal support order

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the 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 spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[56] Referring to those provisions, the Supreme Court of Canada in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [Bracklow] said at para. 40 that they invite an inquiry not only into compensation for what happened in the marriage and its breakdown but also "the actual situation of the parties at the time of the application". The court continued at paras. 41 and 42:

41 Section 15.2(6) of the Divorce Act, which sets out the objectives of support orders, also speaks to these non-compensatory factors. The first two objectives -- to recognize the economic consequences of the marriage or its breakdown and to apportion between the spouses financial consequences of child care over and above child support payments -- are primarily related to compensation. But the third and fourth objectives are difficult to confine to that goal.

"[E]conomic hardship . . . arising from the breakdown of the marriage" is capable of encompassing not only health or career disadvantages arising from the marriage breakdown properly the subject of compensation (perhaps more directly covered in s. 15.2(6)(a): see *Payne on Divorce*, supra, at pp. 251-53), but the mere fact that a person who formerly enjoyed intra-spousal entitlement to support now finds herself or himself without it. Looking only at compensation, one merely asks what loss the marriage or marriage breakup caused that would not have been suffered but for the marriage. But even where loss in this sense cannot be established, the breakup may cause economic hardship in a larger, non-compensatory sense. Such an interpretation supports the independent inclusion of s. 15.2(6)(c) as a separate consideration from s. 15.2(6)(a). Thus, Rogerson sees s. 15.2(6)(c), "the principle of compensation for the economic disadvantages of the marriage breakdown as distinct from the disadvantages of the marriage", as an explicit recognition of "non-compensatory" support ("*Spousal Support After Moge*", supra, at pp. 371-72 (emphasis in original)).

42 Similarly, the fourth objective of s. 15.2(6) of the Divorce Act -- to promote economic self-sufficiency -- may or may not be tied to compensation for disadvantages caused by the marriage or its breakup. A spouse's lack of self-sufficiency may be related to foregoing career and educational opportunities because of the marriage. But it may also arise from completely different sources, like the disappearance of the kind of work the spouse was trained to do (a career shift having nothing to do with the marriage or its breakdown) or, as in this case, ill-health.

[57] The means, needs and circumstances of the claimant are straightforward. He has continued in his successful real estate practice, with a particularly high income in the year that just ended.

[58] The circumstances of the respondent are more difficult to ascertain, in large part because her affidavits contain more argument than evidence. For example, on the question of spousal support, she states at one point in her affidavit sworn November 30, 2016 at para. 4(c):

- (c) ... I have no ability on my own to be "self-sufficient" and require ongoing and continuing spousal support. I believe that I am entitled to a very good standard of living, so as to have not less than the standard of living that I enjoyed while the claimant and I were together and that we had at the time we were separated, and to also benefit from increased spousal support after separation as the income of the claimant increases. ...

Such statements in an affidavit are not evidence; they are counsel's argument put in the mouth of the client.

[59] To be fair, the affidavits of the claimant are also not free from argument. For example, there is this exchange in sequential affidavits of the claimant and the respondent, sworn November 9, 2016 and November 30, 2016 respectively. The claimant said at para. 5(a):

- (a) The Respondent has provided virtually no evidence of efforts made to become employed since the date of separation. In addition, and as I have pointed out in previous Affidavit sworn August 19, 2016, she has not provided medical evidence with respect to how her health difficulties have impacted on her ability to become self-sufficient.

[60] The respondent responded at paras. 4(a) and (b):

- (a) As to paragraph 5(a): I do not agree with and deny the statement in paragraph 5(a) that I have (allegedly) "provided virtually no evidence of efforts to be come employed since the date of separation". I have provided extensive and substantial information and evidence about this. I am prepared to go on the witness stand and fully describe and explain all that I have done, including efforts to earn income, raise the children virtually on my own, deal with very significant health and financial and housing problems, and inform the court of my entire circumstances. I have tried to do this in my affidavits. How this sentence can be put in the paragraph 5(a) of the claimant's affidavit, I do not know.
- (b) I have provided "medical evidence" being my own description of my physical, psychological and health difficulties. I am advised that the phrase "medical evidence" in the affidavits of the claimant may be a reference to obtaining a "doctor's letter". To my knowledge, that has not been requested. I believe that I can inform the court under oath as to my various health conditions and the affect on me. I am fully prepared to testify in court as to this. I will also now request a letter from my doctor.

[61] Argumentative affidavits like these are unfortunately common in family litigation. Perhaps counsel who draft them will someday realize that they are not only improper, but of absolutely no assistance to the court.

- [62] I note in passing that if the respondent has in fact obtained the doctor's letter she referred to in her affidavit, it has not been drawn to my attention.
- [63] In any event, as difficult as it is to isolate evidence from argument in the respondent's affidavits, it is clear that she currently has no independent source of income and has had some health issues - most recently an ankle injury that required surgery. At one point after the divorce, she unsuccessfully tried to operate a business. It also appears she incurred considerable expenses and debt dealing with structural and other problems that appeared in the house she purchased with the money obtained in the property settlement. She says she is currently living in a basement suite.
- [64] The respondent is now 57 and long out of the work force. I do not find any reasonable prospect of her being able to obtain employment or becoming self-sufficient, nor any basis on which income can be imputed to her. I am satisfied that the compensatory and non-compensatory grounds for spousal support remain essentially as they were at the time of the June 9, 2009 Order with, if anything, a greater non-compensatory component.
- [65] The claimant accepts that he continues to have an obligation to pay spousal support, but seeks a time limit. Although the June 9, 2009 Order refers only to a review as to amount, he says duration of payments is directly linked to the total amount paid.
- [66] The claimant argues that the Spousal Support Advisory Guidelines ("SSAG") set a duration, based on the length of the relationship in this case, of between seven years, two months and 14 years, four months. The claimant submits that the appropriate duration is 12 years and six months, including all payments since separation, and therefore payments should terminate on December 1, 2020.
- [67] Although the SSAG formula calculates duration of support, termination of support in accordance with the formula does not flow automatically. As the court said in Bracklow in para. 57:
- 57 The respondent in effect seeks a judicially created "statute of limitations" on marriage. The Court has no power to impose such a limitation, nor should it. It would inject a rigidity into the system that Parliament and the legislatures have rejected. Marriage, while it may not prove to be "till death do us part", is a serious commitment not to be undertaken lightly. It involves the potential for lifelong obligation. There are no magical cut-off dates. [Emphasis in original]
- [68] In *Nataros v. Nataros*, 2000 BCCA 55 at para. 6, the court said that "time-limited orders for maintenance are not the usual rule".
- [69] I do not find it likely that the respondent's financial situation or her ability to become self-sufficient will improve between now and 2020 or any date that can be predicted. Circumstances may arise that justify a variation application, but the evidence does not support a pre-determined end date for spousal support.

- [70] As to the appropriate amount of spousal support, I find that it should be based on the average of the last three years' income, which I have found to be \$430,000, and retroactive to January 1, 2016.
- [71] In *Beninger*, the Court of Appeal noted at paras. 51 and 52 that the SSAG are an important guide on initial applications for spousal support, but should be approached with caution on variation applications. The same caution should obviously apply to a review application. However, I find that in this case the parties have given very little assistance other than offering SSAG calculations.
- [72] Having said that, it must be noted that the SSAG are not intended to necessarily apply directly to incomes over \$350,000. In *S.R. M. v. N.T.G.M.*, 2014 BCSC 442, Mr. Justice Butler said at para. 146:
- [146] Having determined the claimant is entitled to support, the next step is to determine the appropriate quantum and duration. The SSAG are intended to reflect the current state of the law and so are a useful tool to assist trial courts in establishing both quantum and duration of support. In *Redpath v. Redpath*, 2006 BCCA 338, the Court of Appeal indicated that an order of spousal support which falls substantially above or below the suggested range could give rise to an error in law. However, where the payor's income is well above the ceiling of \$350,000, different considerations apply. Professors Carol Rogerson and Rollie Thompson in *The Spousal Support Advisory Guidelines: A Draft Proposal*, (Ottawa: Dept. of Justice, 2005), suggested two possible approaches to determine the amount of support for high income earners. The "minimum plus" approach is generally well suited to incomes which are close to the \$350,000 ceiling. That approach starts with a notional calculation for spousal support at the \$350,000 ceiling and uses the child support payable at the ceiling. A discretionary amount is then added to the "minimum" spousal support range after taking into account the actual amount of child support being paid by the payor at the higher income level.
- [73] Counsel have put forward a variety of SSAG calculations, based on the income and other assumptions they contend for. Inevitably, none of them are directly applicable to the findings that I have made.
- [74] Therefore, before I determine the appropriate amount of spousal support, I ask counsel to provide me with their SSAG calculations based on incomes of \$430,000 and \$350,000 (the SSAG "ceiling") and the child support I have ordered. These must be submitted within two weeks of the date of these Reasons and may be submitted to me through Trial Scheduling. I emphasize that I am seeking only SSAG calculations. I am not inviting any further submissions.

The Registered Charge

- [75] The claimant also seeks cancellation of the judgment registered against his home. That was registered pursuant to s. 26(1) of the FMEA, which reads:

Registration in land title office

26 (1) A maintenance order may be registered in a land title office in the same manner as a charge is registered and is deemed for the purposes of Part 5 of the Court Order Enforcement Act to be a judgment as defined in section 81 of that Act if an application is made under this section for the registration and the application is accompanied by,

- (a) if registration is by the director, a copy of the maintenance order, or
- (b) in any other case, a copy of the maintenance order certified by a proper officer of the court.

[76] The court's discretion to postpone or cancel such a charge is contained in s. 26(10) of the FMEA:

(10) On application by

- (a) the person against whose land a maintenance order is registered, or
- (b) the creditor, if the director refuses to sign a discharge or postponement of a registered order,

the court may make an order discharging or partially discharging the registered order or an order postponing the registered order to allow the registration of a charge

[77] The claimant says he has needed to refinance the property on three occasions since 2009. Although he has never been in arrears of child or spousal support, he says that on each occasion the respondent consented to postponement of the charge in favour of the new financing only after he was put to the expense of preparing an application and only at the "11th hour" before the application was to be heard.

[78] The respondent points out that her right to register the June 9, 2009 Order is given by statute and exists regardless of whether there are or have ever been arrears. She also submits the claimant should not be incurring more debt against the property but should, in fact, be, paying down the debt. But as long as the claimant is able to meet and is meeting his support obligations, I fail to understand why his level of personal debt should be any of the respondent's concern.

[79] However, the respondent has a statutory right to register the June 9, 2009 Order and there is no evidence it is currently causing hardship to the claimant. In view of the ongoing level of mistrust, I do not find it appropriate to force the respondent to give up her security.

[80] The claimant suggests an alternative order under which the respondent would be required to consent to postponement whenever the claimant wishes to either sell the property or refinance it up to 90% of its value. Counsel for the respondent indicated that she might be agreeable to that if the refinancing limit was 80% and subject to a minimum amount of remaining equity.

- [81] In my view, an order requiring the respondent to consent to something in the future on the basis of pre-defined conditions will only invite further disputes about whether those conditions exist at the time consent is sought. For example, I can easily imagine disputes over the validity or accuracy of any future appraisal that is obtained to demonstrate the property's value. If the respondent, in the future, unreasonably refuses or delays consenting to a proposed postponement of the charge, the claimant will always have a potential remedy in costs.

Summary and Conclusion

- [82] The claimant will pay to the respondent, or directly to the parties' adult daughter, additional (retroactive) child support for 2016 in the total amount of \$26,460.
- [83] Commencing as of January 1, 2017, and continuing as long as the parties' daughter remains enrolled in her current educational program, the claimant will pay child support in the amount of \$5,000 for each of the nine months of the academic year and \$3,395 in each of the remaining months.
- [84] The respondent will continue to receive spousal support for an indefinite period. The claimant's income from and after January 1, 2016, for the purpose of spousal support, is set at \$430,000 a year. The amount of spousal support payable will be determined after counsel have submitted the appropriate SSAG calculations based on the findings in these Reasons. The claimant and respondent will exchange copies of their tax returns on an annual basis and the claimant will provide copies of corporate financial statements at the same time.
- [85] The respondent's application for retroactive child and spousal support for the years 2009 through 2015 is dismissed.
- [86] The claimant's application for cancellation or postponement of the registration of the judgment against his home is dismissed.
- [87] In view of the divided success on these applications, the parties will each bear their own costs.

"Smith J."

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