IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: J[redacted] v. J[redacted]
2010 BCSC 153

Date: 20100203
Docket: No. E031933
Registry: Vancouver

Between:

P[redacted] J[redacted]
P.J.

Plaintiff

And

K[redacted] J[redacted]
K.J

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Counsel for the Plaintiff:	Angela E. Thiele
Counsel for the Defendant:	Paul Daltrop
Place and Date of Trial/Hearing:	Vancouver, B.C. September 23, 2009
Place and Date of Judgment:	Vancouver, B.C. February 3, 2010

INTRODUCTION

[1] This is an application for a review of spousal maintenance. The husband concedes that the wife is entitled to spousal maintenance. At issue are the nature of that maintenance, its quantum and duration, the sufficiency of the wife's efforts to become self-supporting, her income and the husband's post-separation increases in income.

BACKGROUND

[2] The parties were married for 17 years. They have two children ages [redacted] and [redacted]. They separated on March 14, 2003. They entered into a separation agreement dated April 22, 2004 (the "Agreement") and were divorced on March 3, 2005. Although now divorced, I shall refer to them as husband and wife.

[3] The wife, who is 46 years of age, earned a commerce degree in 1987. During her education, she was supported by her husband. She then worked in the human resources departments of Lower Mainland hospitals from 1987 to 1989 earning approximately $25,000 per year. In 1989 she opened a clothing store in Vancouver earning $1,000 per month. She operated this store until 1997.

[4] The husband, who is 51 years of age, is an engineer. He earned his degree and commenced employment with his present employer, the City of Vancouver, prior to their marriage.

[5] In 1997 the parties moved from Vancouver to the Sunshine Coast. The wife closed her store as it was struggling financially. The parties made that move in order to raise their children in a small town environment. The wife was a mother and homemaker from 1997 until the separation in 2003. She had some part time work during that time as well. The husband continued to work for the City of Vancouver. He commuted to Vancouver, later using his own helicopter to do so, and stayed there three nights a week.

[6] After the separation, the husband moved back to Vancouver, where he remains. He is now the Deputy City Engineer for the City of Vancouver. The wife has remained in Sechelt with the children. Shortly after separation, she qualified as a realtor. She chose this career due to the limited employment opportunities in her areas of training and experience in Sechelt.

The Separation Agreement

[7] The parties divided their assets equally at separation, with each receiving approximately $250,000. The husband is currently paying $2,415 per month for child support.

[8] The Agreement provided for spousal maintenance as follows:

> 20. P[redacted] will pay to K[redacted] as spousal maintenance pursuant to the Income Tax Act, the following amounts on each of P[redacted]'s 26 bi-weekly paycheques:
>
> (a) $1,384.61 between September 1, 2003 and August 31, 2004;
>
> (b) $1,153.85 between September 1, 2003 and August 31, 2005; and
>
> (c) $1,153.85 between September 1, 2005 and August 31, 2006
>
> Subject to a material change of circumstances.

It also provided for a review:

> 21. K[redacted]'s entitlement to continue to receive further spousal support after August 31, 2006 shall be subject to a form of review by a Court of competent jurisdiction on or about September 1, 2006. The payments of spousal maintenance shall continue past the review date of September 1, 2006 if P[redacted] does not fully cooperate in the review by the production of the appropriate financial information in a timely manner and by agreement to proceed to Court to adjudicate on the issue of continuing spousal maintenance failing agreement by September 1, 2006.

[9] The husband paid spousal maintenance from September 1, 2003 to August 31, 2006. There has been a delay in the review, which only came before this Court in September 2009, approximately three years after the last maintenance payment.

[10] The chronology leading up to this review is as follows:

Date	Description
2006	
August 31, 2006	The husband makes his last payment of spousal support to the wife.
2007	
June 12, 2007	The wife's counsel advises the husband's counsel that the wife is seeking a review of spousal maintenance pursuant to the Agreement.
September 18, 2007	The husband's counsel provides the husband's Financial Statement sworn September 11, 2007, to the wife's counsel by way of letter.
November 9, 2007	The wife's counsel requests the dates that the husband's counsel is available in December 2007 and January 2008.
2008	
February 18, 2008	The wife's counsel writes to the husband's counsel seeking a reply to his November 9, 2007 letter and requesting a copy of the husband's 2007 tax return and T4 as well as a suitable date for hearing. The husband's counsel provides dates available in March 2008 by way of letter.
February 20, 2008-May 21, 2008	Counsel exchange further financial information and correspond respecting their client's positions.
May 21, 2008	The wife's counsel forwards the Notice of Motion to the husband's counsel.
June 11, 2008-August 18, 2008	Counsel exchange offers and discuss hearing dates.
July 16, 2008	The husband makes a with prejudice offer of $1,000 per month commencing on August 1, 2008 and continuing for approximately five years with limited rights of review.

August 20, 2008	The husband's counsel requests an adjournment of the chambers hearing set for August 27, 2008, due to other commitments. She provides dates available in September and October 2008. The letter also seeks a response to the offer made on July 16, 2008.
2009	
June 20, 2009	The office of the wife's counsel calls the office of the husband's counsel requesting available dates to set the chambers hearing.
July 27, 2009	The husband's counsel writes to the wife's counsel seeking a reply to the July 16, 2008 offer and advising that if it is not accepted, the husband will file material in response to the May 21, 2008 motion.
September 2, 2009	The wife's counsel, by letter, rejects the July 16, 2008 offer.
September 11, 2009	The husband's counsel provides the husband's responsive materials to the wife's counsel.

DISCUSSION

The Review

[11] The wording of the review clause in the Agreement is problematic. It provides for the continuation of maintenance payments after the three-year period if the husband fails to cooperate with the review. The Agreement seems to have intended completion of the review in short order with payments, if any, to continue pursuant to the review. The provision appears designed to encourage prompt financial disclosure from the husband.

[12] The wife did not take steps to initiate a review until June 2007, when her counsel sent a letter to her husband's counsel which advised that she wished to proceed with the review and enclosed a copy of her Financial Statement. The husband provided his financial information to the wife's lawyer on September 18, 2007, some three months later.

[13] As shown in the chronology above, this matter has not proceeded with dispatch. However, I find no evidence that the husband failed to comply with the Agreement's disclosure requirements in a timely manner nor that he failed to agree to proceed to court.

[14] The Agreement contemplates a review and assessment, not a termination of spousal maintenance. As a result, this is a hearing *de novo* and no change in circumstances is required. The review is treated as an originating application for spousal support: *Skelly v. Skelly,* 2007 BCSC 810 at para. 8.

Income of the Parties

[15] At the time of separation, the husband was earning $105,000 per year. His income has increased as follows:

- 2004: $116,615
- 2005: $128,945
- 2006: $139,420
- 2007: $168,886.44
- 2008: $156,170.04

[16] The husband's salary has been temporarily increased to $178,560 for the period of May 2009 to March 2010 because of additional responsibilities arising from the Olympics. After March 2010, his salary will return to his regular wage of $164,000 per year.

[17] Prior to their separation, the wife studied via correspondence to become a licensed realtor, while working part-time and being the primary caregiver for the children. As noted earlier she obtained her accreditation as a realtor in the weeks following their separation.

[18] In 2003 she joined a local real estate firm. Her remuneration is based entirely on commissions. She reported her income as a realtor for tax purposes as follows:

- 2003: $1,583 (gross $44,370)

- 2004: $15,636 (gross $49,636)
- 2005: $31,502 (gross $61,502)
- 2006: $15,151 (gross $34,766)
- 2007: $20,049 (gross $56,910.04)
- 2008: $42,010 (gross $113,995)

[19] As of September 2009, the wife's gross income for 2009 was $6,370. She anticipated two sales completing in November 2009 with gross earnings of $14,393.75 resulting in a gross income of approximately $21,000 in 2009. Her expenses have not yet been deducted.

1. The Husband's Post-Separation Increases in Income

[20] The husband submits that in determining his income, regular wage increases and a 7% increase due to his promotion in 2006 should not be taken into account. He argues that the salary increases are unrelated to any contributions made by the wife. He submits that he obtained his engineering degree prior to the marriage and has worked for his entire career for the same employer. He also notes that he works over 60 hours a week and is responsible for 1,800 employees and a budget of over $200 million a year. Therefore, for the purposes of calculating spousal maintenance, his 2003 income of $105,000 should be used.

[21] The issue of whether post-separation increases in income should be taken into account has been the subject of a number of decisions, both in British Columbia and elsewhere. I have been referred to *Kelly v. Kelly*, 2007 BCSC 227; *Logan v. Logan*, 2007 BCSC 904; *Emery v. Emery*, 2007 BCSC 1747, 47 R.F.L. (6th) 72; and *Beninger v. Beninger*, 2007 BCCA 619, 75 B.C.L.R. (4th) 228. I have also reviewed *Hartshorne v. Hartshorne*, 2009 BCSC 698, 70 R.F.L. (6th) 106; *M.M.F. v. R.B.*, 2008 BCSC 984, 57 R.F.L. (6th) 172; *Walsh v. Walsh* (2006), 29 R.F.L. (6th) 164 (Ont. S.C.J.); *Chalifoux v. Chalifoux*, 2006 ABQB 535; *D.B.C. v. R.M.W.*, 2006 ABQB 905, 69 Alta. L.R. (4th) 170; *Rozen v. Rozen,* 2003 BCSC 973, 37 R.F.L. (5th) 205; *Giguere v. Giguere* (2003), 46 R.F.L. (5th) 184 (Ont. S.C.J.); and *Fletcher v. Fletcher,* 2003 ABQB 890.

[22] In *Hartshorne,* Justice Leask addressed a number of the above authorities as follows:

> [110] It is telling that both parties rely on *D.B.C.* The authorities canvassed in that decision illustrate the deeply contextual nature of these determinations. As was observed by the authors of the *SSAG* at c. 14.3, determining whether to consider post-separation increases in income involves a "complex, fact-based approach":
>
> > Some rough notion of causation is applied to post separation income increases for the payor, in determining both whether the income increase should be reflected in increased spousal support and, if it should by how much. It all depends on the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase (e.g. new job vs. promotion within same employer, or career continuation vs. new venture). The extent of sharing of these post-separation increases involves a complex, fact-based decision. [Emphasis added]
>
> [111] I have considered the authorities provided by the parties. The cases where post-separation increases in the payor's income are not considered, or are only partially considered, are distinguishable on their facts from the Hartshornes' situation. For example, they involve circumstances where the payor spouse changed positions or employers since separating, often making lifestyle sacrifices to do so [see *Chalifoux v. Chalifoux*; *D.B.C.*; *Kelly*]; the payor spouse's business underwent a reorganization requiring more work on the payor's part [see *Rozen v. Rozen*]; the payor spouse had been given new career opportunities by virtue of luck or connections [see *Fletcher v. Fletcher*; *Robinson v. Robinson*]; the initial increase in income occurred long after the divorce [see *Bryant* [*v. Gordon*, 2007 BCSC 946, 45 R.F.L. (6th) 99]; *Kelly*]; the recipient spouse was employed and/or was supported in her career aspirations by the payor during the relationship [see *Bryant*; *Kelly*]; or the recipient spouse had not made reasonable efforts to become self-sufficient [see *Bryant*; *Walsh v. Walsh*].
>
> [Citations for previously cited cases omitted.]

[23] The resolution of the issue of post-separation wage increases is clearly fact based. The principle that appears to emerge from current case authority is that the connection the increase in salary has to the recipient's contribution during the marriage is determinative. If the increase in salary is founded in expertise and seniority established during the marriage and no intervening event or events are the cause of the increase, then the increase is to be included unless the recipient's role during marriage necessitates a different determination. If an event after separation is

the reason for the increase, in whole or in part, then the increase may be excluded from consideration, also in whole or in part.

[24] In this case, the husband, although trained before the marriage, developed his expertise and seniority during the marriage. The wife subordinated her career to the needs of the family by working part-time, becoming a full-time stay-at-home mother for a number of years, and, perhaps most significantly, moving to and remaining on the Sunshine Coast, where there are limited employment opportunities, for the benefit of their children. As noted by Leask J. in *Hartshorne* at para. 117, this couple "divide[d] their family responsibilities in such a way as to make a joint investment in one career".

[25] The post-separation increases appear to be divisible into two categories: those arising from regular salary increases and those arising from the promotion. Should a distinction be drawn between them?

[26] The authorities noted above indicate that the portion arising from regular wage increases due to length of service with the same employer should be included for the purposes of a review, taking into account the length of the marriage and the roles of the parties in the marriage.

[27] More problematic is the increase arising from the promotion which presumably requires the husband to work longer hours and to take on more responsibilities. Arguably the promotion, at least in part, recognized the husband's length of service and experience which were acquired during the marriage. Presumably, it also recognized his abilities and performance from both before and after the separation.

[28] The question, in this instance, is whether the promotion is sufficiently disconnected from the marriage that the salary increase should not be included in this review. In my opinion, the husband's promotion is sufficiently connected to the wife's contributions as a wife and mother and his increased income should be taken into account on this review.

[29] I decline to include the one-year increase arising from the husband's additional duties with respect to the Olympics as that short-lived increase is based on a unique event which is not connected to what transpired during the marriage.

[30] For the purposes of the spousal maintenance claim, I set his income at $164,000.

2. Calculation of the Wife's Income

[31] The husband challenges some of the wife's business expenses, including motor vehicle costs, a capital cost allowance and the cost of an assistant, claiming they should be included in her income. He also complains that there is no evidence of what the reported office expenses of $27,563 relate to and what portion are properly considered a personal benefit. He submits that if these write-offs are added back, the wife's true income in 2008 was approximately $70,000, not $20,000.

[32] These allegations obligate the Court to determine what expenses attributed to the wife's real estate business should be included in her income. In *Egan v. Egan,* 2002 BCCA 275, 214 D.L.R. (4th) 687, the court at para. 23 stated:

> Section 16 of the Guidelines sets out the method of calculating the income of a spouse based on the sources of income set out in the T1 General form, as adjusted in accordance with Schedule III. In imputing income to a spouse under s. 19, it is important to emphasize that the court must consider the reasonableness of expenses claimed by the spouse as an expense deduction (s. 19(1)(g)), and that, under s. 19(2), the reasonableness of an expense deduction is not governed solely by whether the deduction is permitted under the *Income Tax Act*.

[33] *Egan* dealt with the child support guidelines however I agree with Chamberlist J. in *Lemcke v. Lemcke*, 2008 BCSC 1051 at para 18 that Egan applies to spousal support claims.

[34] The wife states, that as a realtor, the 80% expenditure for her motor vehicle is a justified write-off and that the small personal usage shown on her income tax return is reasonable in light of her location and the lack of mileage accumulated in Sechelt.

[35] I am satisfied that the vehicle expenses and depreciation claimed are reasonable and appropriate given the nature of the wife's employment. I adopt the comment of Newbury J.A. in *Egan* at para. 49:

> ...unless the CCA schedule attached to the payor spouse's tax return or the answers to questions in discovery about claimed CCA, give rise to some concern that the equipment is not needed or used in the business, or that an inflated cost amount has been used, a judge sitting in a family law trial should not be expected to fulfill the role of a Revenue Canada tax auditor...

[36] With respect to the reference to an assistant on the wife's 2008 statement of business expenses, the wife explains that this was so "her commission was not subject to a 35% deduction" payable to the real estate firm. That is, 35% of her commissions, while included in gross income, flowed through the wife's proprietorship and were transferred to the assistant. In other words, it was revenue neutral. As such it either was a legitimate cost or should be removed from the gross figure for 2008. In any event, the wife states that she is no longer associated with that assistant so it is not going to be a recurring item.

[37] The husband also challenges the wife's general office expenses; however, there is no evidence as to what portion, if any, should be added back as a personal benefit to the wife. She states that what she claimed are her marketing and advertising expenses, her office rent and sundry expenses for her office space at her employer's realty office. In the absence of evidence that those expenses are not legitimate, I am not prepared to infer that a portion of them are personal.

[38] The wife's personal taxable income was noted earlier. In light of the above findings and her earnings over the past several years, I will infer that the wife is capable of earning $25,000 per annum.

Efforts of the Wife to Become Self-Sufficient

[39] The obligation to become self-supporting is an obligation to make reasonable efforts to become self-sufficient: *Rogers v. Rogers*, 1999 BCCA 238, 173 D.L.R. (4th) 449 at para. 46. It is not "a duty": *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 at paras. 26-27.

[40] The husband submits that the wife's efforts to become self-sufficient have been inadequate. He asserts that she has chosen a career change that fails to take advantage of her degree and previous training. In addition, she has had six years to establish herself in the workforce and due to a lack of diligence she has failed to do so. He also submits that she was only out of the workforce for six years during the marriage (1997 to March 2003).

[41] The wife points out that she has remained in the small town where the parties moved for the sake of their children. She therefore has limited prospects for employment in her areas of training.

[42] The husband does not appear to take issue with the fact that the wife and children should remain in Sechelt. He does not suggest that she seek employment elsewhere. As a result, any analysis of her efforts must recognize the limitations imposed by her place of residence. The evidence of the wife is that there is no employment available to her in Sechelt in the human resources or communications fields.

[43] The wife further states that she has in fact been diligent in her efforts to become established as a realtor and that she is working full-time, but, as a realtor, she is subject to the uncertainties of the market and, as a result, her income varies.

[44] The husband submits that the wife is not working full-time. In support of that allegation, he notes that his wife has taken a number of holidays: in 2007 she spent a total of 11 weeks in India, Africa and various locations in B.C. and Alberta; in 2008 she went to Mexico and locations in B.C.; and in 2009 she took a trip with the children to Vietnam. He states that since separation, she has also travelled to Florida, Costa Rica, Cuba and Nova Scotia.

[45] I do not infer from the holidays taken by the wife that she is not fully employed. On the material filed, it does appear that her travel in 2007 was more extensive than usual. That said, it is her choice to take holidays and the extent of

them will clearly have an impact on her income. I have considered this and it is reflected in the income attributed to her for the purpose of her maintenance claim.

[46] The husband also attempted to challenge the wife's efforts to become self-supporting by providing copies of her real estate listings to show that her listings were less than her partner's, apparently asking this Court to infer that the wife was not fully employed. This does not assist the Court as there are many reasons why listing values between realtors may vary. Lack of diligence by the wife is not the necessary inference. The wife confirms that she works lengthy hours as a realtor, noting that the husband has no actual knowledge of the hours she works.

[47] I am satisfied that, given the decision made by this couple to raise their children in Sechelt, the wife has taken reasonable steps to become self-sufficient.

Maintenance

1. Application of the *SSAG* on a Review

[48] The husband asserts that the *Spousal Support Advisory Guidelines* (the "*SSAG*") apply to the parties' incomes at separation, at trial or at the time of a consent order. He argues that, unlike the *Federal Child Support Guidelines*, SOR/97-175, they are not designed so that an increase in the payor's income leads to an increase in spousal support: *Logan v. Logan*, 2007 BCSC 904 at para. 39. In examining the law on the application of the *SSAG* on a review, Justice Powers in *Emery v. Emery*, 2007 BCSC 1747, 47 R.F.L. (6th) 72 at para. 32, stated, "I take it from these cases that the *SSAG* were not designed to deal with reviews or applications to vary spousal support, but that they do provide a form of checklist."

[49] Justice Leask in *Hartshorne* summarized use of the *SSAG* as follows:

> [118] The objectives and factors listed in ss. 15.2(4) and (6) of the *Divorce Act* remain the relevant guiding principles in determining quantum and duration of spousal support. The *SSAG* are merely intended to reflect the existing law, rather than to modify it: *Yemchuk v. Yemchuk*, 2005 BCCA 406 at para. 64, 16 R.F.L. (6th) 430. For that reason, they have been of

> assistance to courts even in situations where the parties' divorce predated publication of the 2005 draft proposal of *SSAG*: see, for example, *Kopelow*.
>
> [119] The *SSAG* are recognized as a "useful tool" for determining quantum and duration of support on an initial application: see, for example, *Yemchuk*; *Redpath v. Redpath*, 2006 BCCA 338, 33 R.F.L. (6th) 91; *Tedham v. Tedham*, 2005 BCCA 502, 47 B.C.L.R. (4th) 254; and *McEachern v. McEachern*, 2006 BCCA 508, 62 B.C.L.R. (4th) 95. They have also been applied, albeit cautiously, to variation applications and reviews: see, for example, *Beninger*; *Kerman v. Kerman*, 2008 BCSC 852, 58 R.F.L. (6th) 157. However, as Prowse J.A. observed in *McEachern* at para. 64: "the Advisory Guidelines are simply guidelines; they are not law. The formulas need not be slavishly adhered to by judges, who must always have regard to the particular facts before them."

[50] In this case entitlement is not in issue. As I will discuss later in this judgment, I have determined that the wife's entitlement to compensatory and non-compensatory maintenance continues. Given my decisions on the issues of the husband's post-separation wage increases and the wife's efforts to become self-sufficient, the factors that were relevant when the parties agreed to the terms in the Agreement have not changed. The *SSAG*, therefore, can be considered.

2. Quantum and Duration of Spousal Maintenance as Calculated Under the SSAG

[51] Counsel for both parties have provided various *SSAG* calculations based on their respective positions.

[52] Given my earlier findings, the *SSAG* ranges based on incomes of $164,000 for the husband and $25,000 for the wife are:

a. Lower: $2,581

b. Middle: $3,011

c. Upper: $3,440

[53] The duration suggested by the guideline calculator is “indefinite (duration not specified) subject to variation and possibly review with a minimum duration of 8.5 years and a maximum duration of 17 years from the date of separation”.

3. Quantum of Maintenance

[54] The husband asserts that the maintenance in the Agreement was compensatory. He argues that the maintenance paid to date satisfies any compensatory claim since the wife was only out of the workforce for six years. However, unlike an order made after a trial, the Agreement does not indicate whether the maintenance is compensatory, non-compensatory or a combination thereof.

[55] In addition, as noted earlier, the husband argues that the fact that the wife is not economically independent is, in part, due to her choice to pursue a new career. The wife submits that in moving to and remaining in Sechelt for the children, she gave up her career. As primary caregiver, it was not possible for her to retain or pursue a career in Vancouver while the husband did the same. The parties agreed that the move to Sechelt was in the best interests of the children. In my view, that joint decision and its ongoing effects weigh in the wife's favour with respect to her claim for compensatory maintenance. Given the ages of the children and their place of residence, she continues to be their primary caregiver and, as a result, remains economically disadvantaged by the breakdown of the marriage.

[56] As noted earlier, this is a *de novo* hearing and, as a result, the Court must be satisfied that the *Divorce Act* requirements are met. On a review, s. 15.2 of the *Divorce Act*, R.S.C. 1985 (2nd Supp.), c. 3, is applicable:

> 15.2 ...
>
> 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.

[57] Counsel for the wife referred to a number of decisions in which entitlement to compensatory and non-compensatory support was found: *McWhirter v. McWhirter* (28 April 2009), Vancouver E042920 (S.C.); *Ringsma v. Ringsma* (1 May 2009), Vancouver E030691 (S.C.); *Skelly*. Each, of course, turned on its facts.

[58] In my view, the factors and objectives under ss. 15.2(4) and (6) of the *Divorce Act* support the wife's position that she was and is entitled to both compensatory and non-compensatory support. This was a 17-year marriage. It is clear that from the decisions they made as a couple and the roles they adopted, the wife has been economically disadvantaged while the husband has benefited. The difference in the parties' financial positions both immediately after separation and now supports this. The role taken by the wife enabled the parties to raise their children in Sechelt and the husband to pursue his career which required long hours and staying in Vancouver three nights a week. The wife's role limited her ability to pursue her career and continues to do so. Her entitlement to compensatory maintenance remains.

[59] With respect to non-compensatory maintenance, the disparate financial circumstances of the parties are relevant. The evidence of the wife is that her income has never been sufficient to meet her expenses, which, based on her Financial Statement, total approximately $5,100 per month. The husband's expenses total approximately $15,700 per month.

[60] In assessing need, as required by s. 15.2(4) of the *Divorce Act*, the husband suggests that the marital standard of living at the time of separation is to be applied.

[61] In *Touwslager v. Touwslager* (1992), 63 B.C.L.R. (2d) 247, 9 B.C.A.C. 203, the standard of living to be applied is a reasonable one taking into account the marital standard of living. If the parties' circumstances have changed significantly after separation, the length of the marriage affects how comparable their standards of living should be. The longer the marriage, the closer the parties' post-separation standards of living should be: *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.).

[62] In determining an appropriate quantum for spousal maintenance, I took the following into consideration:

a. the marriage lasted 17 years;

b. the wife's income decreased during the marriage;

c. the wife will remain on the Sunshine Coast at least until the youngest child finishes school in 2013, limiting her employment prospects;

d. the wife's income is dependent on her establishing herself as a real estate agent;

e. the wife is entitled to both compensatory and non-compensatory spousal maintenance;

f. with respect to her entitlement to non-compensatory or needs-based spousal maintenance, the wife's monthly expenses are approximately $5,100;

g. the parties' respective standards of living;

h. the originally agreed upon spousal maintenance; and

i. the *SSAG* range.

[63] I order that the husband pay to the wife spousal support in the sum of $2,800 per month commencing on February 1, 2010, and monthly thereafter.

4. Duration of Maintenance

[64] When a marriage is under 20 years in length, the *SSAG* shows the duration of support to be from one-half to the full amount of the number of years of marriage. At this time, the wife's future employment and income remain unclear. Thus, the ultimate duration of maintenance payments cannot be determined. The question of the need for a review arises.

[65] The Supreme Court of Canada in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 at para. 39 stated:

> ... Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change of circumstances. If the s. 15.2 court considers it essential (as here) to identify an issue for future review, the issue should be tightly delimited in the s. 15.2 order. ... Failure to tightly circumscribe the issue will inevitably be seen by one or other of the parties as an invitation simply to reargue their case. ...

[66] The history of this application is indicative of the weaknesses of review orders. Normally a court is expected to make a final order. Finality is a desirable result in litigation. The only factor argued in support of a review period is the anticipated future changes in the wife's income as she develops her real estate career. That is a factor which arises frequently in matrimonial litigation. Does it meet the "genuine and material uncertainty" test from *Leskun* at para. 37?

[67] In *Parker v. Vik*, 2006 BCSC 1193, the payor husband's present and future income was uncertain. Notwithstanding that, Justice Satanove imputed an amount for the husband's income and ordered permanent spousal support for an indefinite period, stating at para. 22:

> In keeping with *Leskun v. Leskun*, the trial court should try to fix permanent maintenance wherever possible, subject only to a change of circumstances. The mechanism of constant review of spousal support in family cases under s. 15.2 of the *Divorce Act* is expensive and leads to uncertainty and a lack of finality.

[68] Although it is not possible to predict the wife's future income or when she will achieve self-sufficiency, is it inappropriate to require one of the parties to show a

change in circumstances as required by s. 17(4.1) of the *Divorce Act* before a court can reconsider this spousal support order?

[69] I am of the view that given the uncertainties relating to the wife's income and the changes that may occur once the youngest child graduates from high school, a review should be permitted. This will remove not only the burden of having to establish a change in circumstances but also the risk that under a variation application "the applicant may have his or her application dismissed on the basis that the circumstances at the time of the variation application were contemplated at the time of the original order and, therefore, that there had been no change in circumstances." (*Leskun*, at para. 37).

[70] I order that spousal maintenance be paid until further order of the Court. Either party may apply for a review after June 30, 2013.

Retroactive Spousal Maintenance

[71] Based on *Bowes v. Bowes*, 2005 BCSC 593, 15 R.F.L. (6th) 247 at para. 112, the factors to be considered on a retroactive spousal maintenance request, insofar as they are relevant in this case, include:

a. excuse for the delay in bring the application;
b. the delay of financial disclosure by the payor;
c. depletion of capital by the recipient;
d. the recipient's need for the order;
e. the payor's ability to pay; and
f. whether an order will impose an unfair burden on the payor.

[72] The husband, while aware that under the Agreement the possibility of a review existed, did not know that the wife intended to pursue a review until June 2007. The motion was not filed until May 21, 2008. The review should have occurred shortly after August 2006. Significant periods of the delay are attributable to the wife failing to pursue the matter. She has not provided sufficient explanation

for the delay. The remaining periods of delay appear to relate to negotiations between counsel and problems in setting a date for the hearing.

[73] The husband provided his financial disclosure within three months of the June 12, 2007 request. While not expeditious, this does not constitute a significant delay, particularly when the overall delay is taken into consideration.

[74] It appears that since the date of the Agreement, the wife has incurred an unsecured line of credit of $31,000. She also states that she has been unable to accumulate any savings since the separation. It is not clear if she has encroached on any capital assets. She currently lacks sufficient income to meet her needs.

[75] There is no indication that the husband lacks the ability to pay. However, neither is there evidence that he has substantial savings. The wife has been entitled to spousal maintenance since September 1, 2006. Had she pursued the review in a timely manner, she would undoubtedly have been receiving payments since then.

[76] However, given the unexplained delays and the potential financial burden on the husband, I am of the view that retroactive maintenance should only be paid from June 1, 2008 until January 31, 2010 calculated at the rate of $2,800 per month for a total of $56,000.

Conclusion

[77] I make the following orders:

a. the husband shall pay to the wife spousal maintenance of $2,800 per month commencing on February 1, 2010, and continuing on the first day of each month thereafter until further order of the Court;

b. either party may apply for a review after June 30, 2013;

c. the husband shall pay $56,000 in retroactive spousal support, calculated on the basis of 20 months at $2,800 per month.

Costs

[78] The parties did not address the matter of costs. If they cannot agree, they are at liberty to apply.

"The Honourable Mr. Justice Punnett"