IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***W. v. W.,***
2005 BCSC 1010

Date: 20050704
Docket: E042021
Registry: Vancouver

Between:

W.

Plaintiff

And

W.

Defendant

Before: The Honourable Madam Justice Martinson

Reasons for Judgment

Counsel for the Plaintiff	A. E. Thiele
Counsel for the Defendant	J. D. Spears
Date of Trial/Hearing	March 30-31, and June 7, 2005 Vancouver, B.C.

INTRODUCTION

[1] In this family law trial the issues were: the husband's income for child and spousal support purposes; whether there should be an equal division of the family assets or a reapportionment in favour of the wife; and spousal support, including the question of what if any use should be made of the Spousal Support Advisory Guidelines, set out in C. Rogerson and R. Thompson, ***Spousal Support Advisory Guidelines: A Draft Proposal***, (Ottawa, Dept. of Justice: 2005) (the "Advisory Guidelines").

[2] The complete reasons for judgment in this case were given orally in Court. For these written reasons I will first refer to those facts necessary to explain my decisions. Then I will review the law in British Columbia relating to spousal support, and discuss what use, if any, the Court can make of the Advisory Guidelines. I will next consider the relationship between reapportionment and spousal support. Finally I will apply the applicable legal principles to the facts.

THE FACTS

[3] Both the husband and wife have professional careers and are in their late 40s. They have two older teenaged children and one child under 12. At the time of separation they had been married for 22 years and lived together for an additional two years. While both have professional careers, the amount the wife can earn is fixed by the nature of her employment. This is not the case with the husband.

[4] The husband's income for support purposes is $125,000 per year and the wife's is $56,728. The wife will have custody of the children and the two younger children reside with her. The older child resides elsewhere. The husband will pay the ***Federal Child Support Guidelines***, S.O.R./1997-175 (the "***Guidelines***"), table amount based on two children. Their assets, which are all family assets, are close to $600,000.

[5] They decided early on in their relationship that the husband's career would be the primary career and the wife would be the primary parent. The wife sometimes worked full time and sometimes part time. She chose not to further her education during the marriage. The husband always worked very long hours and participated in volunteer professional activities that have had the effect of enhancing his career.

[6] The wife lost some pension benefits as a result of her child care responsibilities. The family accumulated only a very small amount in RSPs. Instead, they focused upon obtaining clear title to the family home and were successful in doing so.

[7] There is no doubt that this was a marriage where both the husband and wife worked very hard and played different but equally important roles. They have both been highly successful in achieving the joint goals they set for themselves. They have both played different but equally important roles with respect to their children. They should both be proud of their accomplishments.

LEGAL PRINCIPLES

Spousal Support

[8] The legislative framework for spousal support in British Columbia is found in s. 15.2 of the ***Divorce Act***, R.S.C. 1985, c. 3(2nd Supp.). Making a decision about spousal support involves applying the objectives and factors found in that Act. However, the objectives and factors cannot be applied in a vacuum. They are to be applied within a broader conceptual framework.

[9] There has been much recent academic and judicial comment on exactly what that conceptual framework is in light of the Supreme Court of Canada's decisions, first in ***Moge v. Moge***, [1992] 3 S.C.R. 813, and later in ***Bracklow v. Bracklow***, [1999] 1 S.C.R. 420. I have found particularly helpful J.G. McLeod and A.A. Mamo, ***Annual Review of Family Law***, (Thompson Carswell, 2004), C. Rogerson, "Spousal Support Post-Bracklow: The Pendulum Swings Again?" (2001) 19 C.F.L.Q. 185, and R. Thompson, "Slow Train Comin': Are Spousal Support Guidelines Around the Bend?", online: Continuing Legal Education society of British Columbia <http://www.cle.bc.ca/CLE/Analysis/Collection/03-spousalsupport>.

[10] Compensatory support, as articulated by the Supreme Court of Canada in ***Moge*****,** is still the main focus of spousal support law in British Columbia. The unanimous Court in ***Moge*** spoke about marriage as a joint endeavour and emphasized the impact of the length of the marriage on the significance of the endeavour. In the often quoted passage the Court said: (at p. 870)

> Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement... As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[11] In British Columbia this comment in ***Moge*** has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, ***Dithurbide v. Dithurbide*** (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); ***Rattenbury v. Rattenbury***, 2000 BCSC 722; ***Rinfret v. Rinfret***, [1999] B.C.J. No. 2949 (S.C.)(QL); ***O'Neill v. Wolfe*** (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); ***Walton v. Walton***, [1997] B.C.J. No. 1089 (S.C.)(QL); ***Ulrich v. Ulrich***, 2003 BCSC 192; and ***Carr v. Carr*** (1993), 46 R.F.L. (3d) 326 (B.C.S.C.);

[13] Compensatory support recognizes not just economic disadvantage suffered as a result of a marriage or its breakdown but also economic advantage arising from the marriage or its breakdown: s. 15.2(6) (a) of the ***Divorce Act***. The types of advantages and disadvantages that arise can be seen in situations such as the one presented in this case. That is, one spouse's career, (often that of the husband) is given priority and that spouse is the primary income earner. The other spouse (often the wife) is the primary parent, but also works and is a secondary earner.

[14] It is sometimes argued that the disadvantage to the primary parent is off-set by the advantage that person receives by obtaining a share of the assets accumulated. In my respectful view this approach does not take into account how the advantages and disadvantages can arise based on the roles spouses play.

[15] Raising children is a round the clock endeavour. The primary income earner is in a position to earn money to accumulate assets often in large part because that person is relieved of many aspects of that 24 hour a day job. When the relationship ends, it is not just the secondary earner who receives assets. The primary earner also receives a share, often half, of the assets.

[16] Therefore, in a typical case, the primary earner has three benefits: the benefit of a share of the assets; the benefit of having had children; and the benefit of a higher income earning ability because of full participation in the work force, substantially unencumbered by child care responsibilities. The secondary earner has two of these benefits: the benefit of a share of the assets accumulated; and the benefit of having had children. However, that spouse often does not have the same

income earning ability at the time of separation because of the role played in the marriage. It is that disadvantage, and the concurrent advantage to the other spouse, that can be addressed by a compensatory spousal support award.

[17] ***Moge*** left open the question of whether compensatory support was the only principle at play when applying the objectives and factors set out in the ***Divorce Act*** or whether non-compensatory principles also applied. The Supreme Court of Canada in ***Bracklow*** confirmed the compensatory principles enunciated in ***Moge*** and at the same time expanded the underlying principles to include a non-compensatory basis in those cases where a compensatory claim was not appropriate. The Court in fact further expanded the basis of support to include a contractual basis.

[18] The Court in ***Bracklow*** did not narrow the compensatory basis for spousal support claims as set out in ***Moge*** but broadened it. As I read ***Bracklow***, the Court says that non-compensatory support is based on the economic dependency and interdependency of spouses. It recognizes the difficulties of disentangling lives that have become intertwined in the ways to which I have referred.

[19] The Court emphasized that all the factors and principles must be considered in each case. In non-compensatory cases need is not confined to situations of absolute economic necessity. It is considered to be a relative concept related to the marital standard of living.

[20] Under the approach taken in ***Bracklow***, it would be wrong to conclude that there is not entitlement to spousal support on the basis that the person claiming

support has the same career at the end of the marriage as at the start of the marriage. Such a conclusion would overlook the lack of access to the marital standard of living by the spouse earning the lower income. Matters of quantum and duration will vary depending on a consideration of all the relevant objectives and factors: ***Johnstone v. Wright***, 2005 BCCA 254.

[21] Courts in British Columbia have also specifically recognized the concept of shared ongoing parenting responsibility as it relates to spousal support. The obligation is based on the ongoing need to provide support for the children. In the example I used earlier, the spouse who takes on the role of primary parent would continue to have responsibilities for child care that impact on that parent's ability to earn an income.

[22] The statutory foundation is s. 15.2(6) of the ***Divorce Act***. One of the four objectives of support set out in s. 15.2(6)(b) is to:

> 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.

[23] This section is referred to in ***Kennedy v. Kennedy*** (1994), 98 B.C.L.R. (2d) 287 (S.C.); ***Harvey v. Harvey*** (1995), 9 B.C.L.R. (3d) 83 (C.A.); ***L.R.V. v. A.A.V.*** (2003), 21 B.C.L.R. (4th) 358 (S.C.); ***Farrant v. Farrant***, [1996] B.C.J. No. 576 (S.C.)(QL); ***J.B. v. J.A.E.***, [1995] B.C.J. No. 1291 (S.C.)(QL); and, ***Harman v. Harman*** (1997), 34 R.F.L. (4th) 121 (B.C.S.C.).

[24] This arises, at least in part, because only the direct costs of child rearing are included in child support awards under the ***Guidelines***. Indirect costs include continued child care responsibilities and the impact they can have on income earning ability. The Court in ***Moge*** referred to some of these indirect costs in approving the comments of Bowman J. in ***Brockie v. Brockie*** (1987), 5 R.F.L. (3d) 440 (Man. Q.B.), aff'd (1987), 8 R.F.L. (3d) 302 (Man. C.A.). Though lengthy, the remarks are worth repeating in full: (at pp. 868-869)

> It must be recognized that there are numerous financial consequences accruing to a custodial parent, arising from the care of a child, which are not reflected in the direct costs of support of that child. To be a custodial parent involves adoption of a lifestyle which, in ensuring the welfare and development of the child, places many limitations and burdens upon that parent. A single person can live in any part of the city, can frequently share accommodation with relatives or friends, can live in a high-rise downtown or a house in the suburbs, can do shift work, can devote spare time as well as normal work days to the development of a career, can attend night school and in general can live as and where he or she finds convenient. A custodial parent, on the other hand, seldom finds friends or relatives who are anxious to share accommodation, must search long and carefully for accommodation suited to the needs of the young child, including play space, closeness to daycare, schools and recreational facilities, if finances do not permit ownership of a motor vehicle, then closeness to public transportation and shopping facilities is important. A custodial parent is seldom free to accept shift work, is restricted in any overtime work by the daycare arrangements available, and must be prepared to give priority to the needs of a sick child over the demands of an employer. After a full day's work, the custodial parent faces a full range of homemaking responsibilities including cooking, cleaning and laundry, as well as the demands of the child himself for the parent's attention. Few indeed are the custodial parents with strength and endurance to meet all of these demands and still find time for night courses, career improvement or even a modest social life. The financial consequences of all of these limitations and demands arising from the custody of the child are in addition to the direct costs of raising the child, and are, I believe, the factors to which the court is to give consideration under subsection (7)(b). (at pp. 447-448)

The Advisory Guidelines

[25] In my view the Advisory Guidelines formulas are consistent with the law in British Columbia as I have described it. As I have explained, the idea of rough equivalency of standards of living is a part of British Columbia law and is supported by the Supreme Court of Canada jurisprudence.

[26] In the Without Children formula, the concept of merger over time is another way of describing the intertwining of lives which increases over time. In the With Children formula, the idea of parental partnership is another way of describing shared ongoing parenting responsibility.

[27] The Advisory Guidelines are advisory only and are guidelines in the true sense of that word. There is no intention to legislate them. I agree with the authors, Professors Rogerson and Thompson, that they provide one useful tool to lawyers, to people who need a resolution to spousal support issues, and to decision makers. In the decision making context they need not be proven but can be used as part of the legal argument.

[28] I also agree with other judges who have said that the Advisory Guidelines are an important step towards rationalizing and bringing some uniformity to the computation of spousal support. See ***Simmonds v. Simmonds,*** 2005 NLUFC 10 and ***Friess v. Friess***, 2005 SKQB 248.

[29] The Advisory Guidelines can provide a crosscheck against the assessment made under existing law. See ***Carr v. Carr***, [2005] A.J. No. 391 (Alta Q.B.)(QL);

Kerr v. Kerr, [2005] O.J. 1966 (Ont. Sup. Crt. Of Justice)(QL); ***Modry v. Modry*****,** [2005] A.J. No 442 (Alta Q.B.)(QL); and ***Anderson v. Anderson***, 2005 NSSC 94.

[30] The fact that there is a regime in British Columbia that allows reapportionment does not make the Advisory Guidelines inapplicable as a tool. If there is reapportionment the extent of the reapportionment can be considered when calculating spousal support within the range provided by the formula.

[31] The With Child formula requires software because of the complexities of the formula. British Columbia Courts have used software to assist judges in dealing with these complexities. I see no reason why Advisory Guidelines software cannot be similarly used. As consumers, users will have to consider the quality of the product chosen. Challenges can be made to its accuracy when appropriate.

Reapportionment

[32] There is a presumption of an equal division of assets: ***Family Relations Act***, R.S.B.C. 1996, c. 128, s. 56. The Court can only reapportion assets if it finds that equal division would be unfair having regard to the factors listed in s. 65(1)(a) through (f) of the ***Family Relations Act***. The factors are:

(a) the duration of the marriage,

(b) the duration of the period during which spouses have lived separate and apart,

(c) the date when the property was acquired or disposed of,

(d) the extent to which property was acquired by one spouse through inheritance or gift,

(e) the needs of each spouse to become or remain economically independent and self-sufficient, or

(f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

[33] No other factors may be taken into account. Reapportionment can be granted if a consideration of the factors listed in s. 65(1) reveals that the economic consequences of the marriage breakdown were not shared equitably in the circumstances: ***Hartshorne v. Hartshorne***, 2004 SCC 22. The onus of proof lies on the person asking for reapportionment: ***MacNeil v. MacNeil*** (1995), 14 R.F.L. (2d) 393 (B.C.S.C.), varied on other grounds, (1997), 32 R.F.L. (4th) 438 (B.C.C.A).

[34] The provision for equal division is based on the presumption that there has been joint contribution to the accumulation and maintenance of family assets: ***Bawtinheimer v. Bawtinheimer*** (1985), 49 R.F.L. (2d) 393 (B.C.C.A.). The concept of contribution should be viewed on a broad basis and the Court should not make fine distinctions regarding the respective contributions of each of the spouses during the marriage. Contribution may be financial or by way of child care, household management or other positive activities that promote the family unit. The ***Family Relations Act*** does not distinguish between the types of contribution, and recognizes that each is as important as the others.

[35] However, contribution is only one factor. Section 65 of the ***Family Relations Act***, which sets out the bases for reapportionment of family assets, does not require the Court to effect a division of property that it feels is proportionate to the contribution each spouse has made to the particular assets or groups of assets.

While the contribution of a spouse, direct or indirect may be a governing consideration in determining which assets are family assets, this is not so in deciding their apportionment between the spouses where a number of other factors come into play.

The Relationship between Reapportionment and Spousal Support

[36] The law requires that the question of asset division be dealt with before support issues are considered because a person's asset base is relevant to support: ***Hartshorne.*** Child support must be considered before spousal support: ***Divorce Act***, s. 15.3(1).

[37] British Columbia law allows for both reapportionment and spousal support but says that there cannot be double recovery: ***Hartshorne***, para. 54; ***O. v. N.*** (2003), 18 B.C.L.R. (4th) 247 (C.A.); ***Toth v. Toth*** (1995), 13 B.C.L.R. (3d) 1 (C.A.); and ***Lodge v. Lodge*** (1993), 79 B.C.L.R. (2d) 360 (C.A.).

[38] This does not mean that certain factors such as child rearing contributions cannot be considered under both. A court could decide to only reapportion or only grant spousal support. The court could do both and adjust the extent of the reapportionment and the spousal support so as to avoid double recovery. A court could also find that certain contributions and responsibilities are more suited to a property reapportionment remedy and others to a spousal support remedy.

DECISION

Reapportionment

[39] As I said earlier, the Court can only reapportion if it finds that equal division would be unfair having regard to the factors listed in s. 65(1)(a) through (f) of the ***Family Relations Act***. No other factors may be taken into account. I turn to those factors. This is a long marriage. The parties have been separated a relatively short period of time. The family home was disposed of relatively recently. The question of acquiring the property through inheritance or gift has limited application in this case. The value of the family home was enhanced at the expense of a retirement income plan. There are no other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.

[40] That leaves the question of the needs of each spouse to become or remain economically independent and self-sufficient. There is no doubt that the role a parent plays with respect to child rearing is relevant to this factor. However, looking at all of the factors, including the fact that the husband has no funds set aside for retirement, I am not satisfied that an equal division would be unfair. I therefore direct that all of the assets be divided equally. The wife's pension shall be divided based on Part 6 of the ***Family Relations Act***.

Spousal Support

[41] The question for the Court is the determination of quantum and duration of spousal support, applying the legal principles that I have just summarized. I have considered all of the evidence, including the financial statements of the parties. I have considered the objectives and factors set out in the ***Divorce Act*** in the context of the legal principles I have described.

[42] In my view the wife has a strong claim for spousal support, primarily on a compensatory basis. Neither party had a professional career at the start of the marriage. Based on their joint endeavours, they now each have the benefit of having children and of receiving one half of the family assets.

[43] This was a long marriage. The wife was the secondary wage earner. There is no dispute that the husband worked very long hours and that the wife was the primary care giver to accommodate his working hours. The wife lost pension benefits. She did not pursue further education because of her role in the marriage and that was a reasonable choice, given her child care responsibilities. She adapted her career choices to accommodate being the primary care giver for three children.

[44] She will continue to have those child care responsibilities and they will have a significant impact on her lifestyle for several years. She has at the same time done everything she should reasonably do to keep her career intact, and now works full time.

[45] The husband benefited significantly in his career by not having to be the primary care giver for the children. Not only did he work long hours, but he pursued volunteer career related activities. The wife supported him in those endeavours. They cannot help but enhance his reputation and income earning capability. He will not be the primary care giver for the children in the future, though his parental responsibilities will continue, at least with respect to their youngest child, for several years to come.

[46] It is, with respect, not appropriate to assess the wife's standard of living against that of other Canadians, as suggested by the husband. Their lives have been significantly intertwined financially over many years. The wife is entitled, in the particular circumstances of this case, to a roughly equal standard of living, assessed against her marital standard of living. She is entitled to indefinite support. The quantum will vary depending initially on whether and when the children become independent. She is entitled to a roughly equal standard of living after the children are independent.

[47] I have been provided with the usual software calculations based on annual incomes of $125,000 for the husband and $56,728 for the wife. I have also been provided with software calculations for the Advisory Guidelines which I have used as a check. I assess spousal support at $1,500 per month beginning April 1, 2005. This will be subject to review when the circumstances of the children change. The purpose of the review is to achieve a rough equality of income given the change of the circumstances of the children.

[48] I am seized of any applications to be made to review this order in the next three years.

[49] I grant an order of Divorce.

[50] Each party shall pay his or her own costs, subject to submissions being made to the Court in writing within 60 days of the date of the oral reasons.

"D.J. Martinson, J."
The Honourable Madam Justice D.J. Martinson