IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *M.F.W. v. M.A.H.,*
2021 BCSC 1581

Date: 20210625
Docket: E12720
Registry: Chilliwack

Between:

M.F.W. also known as M.F.H.

Claimant

And

M.A.H.

Respondent

Before: The Honourable Mr. Justice Basran

Oral Reasons for Judgment

Appearing on own behalf:	M.F.W.
Counsel for Respondent:	U.K. Dhaliwal
Place and Date of Hearing:	Chilliwack, B.C. June 25, 2021
Place and Date of Judgment:	Chilliwack, B.C. June 25, 2021

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Overview

[1] By way of review, Mr. H seeks a retroactive and prospective variation of child support; retroactive termination of spousal support; repayment of purported overpayments of child and spousal support; termination of arrears, interest, and fees with the Family Maintenance Enforcement Program ("FMEP"); and imputation of $35,000 income to Ms. W.

[2] The issues to be determined are:

a) What is Mr. H's past and future income for the purpose of calculating his support obligations;

b) Should income be imputed to Ms. W;

c) Should spousal support be terminated; and

d) Should child and spousal support be retroactively reduced or cancelled.

Background

[3] Mr. H and Ms. W married on July 22, 2006, separated on June 17, 2015, and divorced on May 17, 2019.

[4] The parties have two children aged 11 and 12.

[5] After a 27-day trial, Justice Brundrett issued Reasons for Judgment on April 17, 2019, indexed as *M.F.W. v. M.A.H.*, 2019 BCSC 588 ("RFJ"). The final order was filed on July 31, 2019. It provides for a review of support obligations:

> Due to uncertainty in the income of the respondent (Mr. H) at present, either party may apply for and trigger a one time review of the quantum of child or spousal support, though not entitlement, at any time after July 1, 2020. Prior to such review, the parties will exchange up-to-date financial records showing their incomes for the 2018 – 2019 tax years. This one time review does not require a material change in circumstances and does not affect the parties' right to otherwise apply for a variation in support based upon a material change in either parties' circumstances:

[6] Justice Brundrett ordered that Mr. H pay child support and spousal support based on *Federal Child Support Guidelines*, SOR/97-175 ("Guidelines") income of $170,000 per year.

[7] Mr. H appealed the trial judge's orders regarding parenting arrangements, spousal support, guardianship decisions, and division of property. Prior to the hearing of the appeal, the parties settled the division of property issue. The appeal was heard on September 23, 2020, and the decision released on October 23, 2020. The appeal from orders of guardianship and parenting arrangements was dismissed. The appeal regarding spousal support was allowed to rectify an error in the calculation of monthly spousal support, reducing the amount from $3,846 to $3,324 per month.

What is Mr. H's income for the purpose of calculating his support obligations

[8] During the trial, Mr. H testified that he expected to receive an annual salary of $160,000 from VVI Construction ("VVI") after investing $325,000 in this company. He also estimated that he receives $10,000 in annual income from his farm. On this basis, Justice Brundrett calculated Mr. H's support obligations based on an annual *Guidelines* income of $170,000.

[9] VVI did not hire Mr. H at an annual salary of $160,000, and he deposes that this company is no longer interested in including him as an owner of it.

[10] Mr. H was laid off in December 2020, and has not worked full-time since then aside from a short-term position as a heavy equipment operator in February and March 2021. He says that he has actively sought work for the past three months.

[11] Mr. H is in arrears with FMEP. He owes $28,835 as of April 23, 2021.

Positions of the Parties

[12] Mr. H asserts that he has not earned annual income of $170,000 in the past two years and has therefore been unable to pay child and spousal support as

ordered. He contends that he used borrowed funds to make these payments for an initial period, but is no longer able to afford these obligations at their current levels.

[13] Over the past year, Mr. H asserts that he suffered from several health problems that have impaired his capacity to work. He submits that his *Guidelines* income should be $85,000, and this amount should be retroactively applied to May 1, 2019.

[14] Ms. W submits that Mr. H owns a construction company called Mariposa Contracting and a holding company with his father called HNS Holdings. She asserts that Mr. H is capable of earning significant income because he is an experienced heavy equipment operator, has extensive construction experience, and has a demonstrated ability to earn an income of approximately $150,000 per year. She asserts that Mr. H is deliberately unemployed or underemployed.

[15] Ms. W also further submits that Mr. H relied on a document at trial that confirmed that he bought shares of VVI via a loan from that company and that he partially repaid this loan with $325,000 he obtained from a mortgage on his personal property.

Relevant Legal Principles

[16] A term in an agreement or a court order can create a party's right to a review. The court considers the issue(s) to be reviewed and whether the evidence supports a change in the earlier order: *Jordan v. Jordan,* 2011 BCCA 518 at para. 33.

[17] A review hearing is a hearing *de novo* and it is not necessary to establish a material change in circumstances: *Morck v. Morck,* 2013 BCCA 186 at para. 17.

[18] Section 19 of the *Guidelines* provides the court with broad discretion to determine that the income of a parent should be more than total reported income. The section sets out a non-exhaustive list of circumstances:

> 19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

> (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
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> (b) the spouse is exempt from paying federal or provincial income tax;
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> (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
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> (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
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> (e) the spouse's property is not reasonably utilized to generate income;
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> (f) the spouse has failed to provide income information when under a legal obligation to do so;
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> (g) the spouse unreasonably deducts expenses from income;
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> (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
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> (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[19] The onus is on the person seeking to impute income to show an evidentiary basis: *Windle v. Windle*, 2010 BCSC 18.

[20] The test for imputing income for intentional underemployment or unemployment is one of reasonableness, considering the party's capacity to earn income in light of their age, education, health, work history and work availability. Capacity to earn income includes the ability to work and to be trained to work: *Willms v. Willms,* 2020 BCCA 51.

[21] In determining whether a party is intentionally unemployed or underemployed under s. 19(1)(a), the court must determine whether that party has taken reasonable steps to obtain employment commensurate with their age, health, education, skill, and work history: *Van Gool v. Van Gool*, 1998 CanLII 5650 (B.C.C.A., supplementary judgment 1999 BCCA 188).

[22] *Hathaway v. Hathaway*, 2015 BCSC 1485 at para. 59 provides a summary of the considerations for income determination:

[59] I would add the following:

(a) the court is not limited to a consideration of income alone when determining child and spousal support. It may also consider financial means. The reference in section 1 of the *FCSG* to the parents' "means" expands the calculation of income beyond income. The word "means" has been liberally interpreted to include all pecuniary resources, capital assets, income from employment or earning capacity, and any other source from which gains or benefits are received, together with, in certain circumstances, money that a person does not have in possession but that is available to such person: *Leskun v. Leskun*, 2006 SCC 25 at para. 29; *Griffiths v. Griffiths*, 2006 BCSC 1077 at para. 25; *C.A.B. v. M.S.C.S.*, 2006 BCSC 1393 at para. 11; *S.M. v. V.V.*, 2014 BCSC 565 at para. 118;

(b) there is a broad judicial discretion to impute income for both child and spousal support purposes, despite the fact that the legal foundation for spousal support is different from that of child support: *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-38;

(c) the test for imputing income for the purpose of fixing the quantum of support is similar in both child and spousal support situations. It is one of reasonableness; however, the concept of "needs" for non-compensatory spousal support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 17 R.F.L. (4th) 298 (B.C.C.A.);

(d) the principles that apply to section 4 of the *FCSG* established by the Supreme Court of Canada in *Francis v. Baker*, [1999] 3 S.C.R. 250, were summarized in *Metzner v. Metzner*, 2000 BCCA 474 at para. 30, as follows:

- there is a presumption in favour of the table amount of support under the *FCSG* in all cases;
- the table amount of support can only be increased or decreased under s. 4 if the party seeking the increase or decrease has rebutted the presumption in favour of the table amount of support;
- there must be clear and compelling evidence for departing from the table amount of support;
- the court should examine all the circumstances, including those set out in s. 4(b)(ii), before determining the table amount of support is inappropriate;
- the actual circumstances of the children are as important as any other element of the *FCSG* and the objectives of predictability, consistency and efficiency must be balanced with fairness, flexibility and recognition of the actual circumstances of the children;
- the *FCSG* may result in some transfer of wealth to the children and indirectly benefit the recipient parent. However, the

objective of child support, being the maintenance of the children, must be kept in mind;

- the court must have all necessary information and, if the evidence is a child expense budget, the court must consider the unique economic situation of high-income earners; and
- the payor parent must prove that the budgeted expenses are so high that they exceed the generous ambit within which reasonable disagreement is possible to demonstrate the unreasonableness of an expense;

(e) a wealthy parent faces a "formidable onus" at the threshold stage of showing that the table amount is inappropriate. It is not for the recipient to justify the table amount. One of the objectives of the *FCSG* is to ensure consistent treatment of spouses and children in similar circumstances, which requires that regard be had to the standard of living of other children of very wealthy parents: *Hollenbach v. Hollenbach*, 2000 BCCA 620 at paras. 45-46;

(f) section 19 of the *FCSG*, particularly section 19(1)(a), empowers the court to impute income based on a parent's means. This includes a wide variety of factors, the following being germane in this case:

- a payor's capital and assets, includes assets obtained through the division of property: Bullock v. Bullock, 2007 BCSC 318 at para. 25;
- a parent's lifestyle, monthly living expenses, assets and investments, and the range of income earned during the marriage: *Motyka v. Motyka*, 2001 BCCA 18 at paras. 6, 16;
- the age, education, experience, skills and health of the parent: *Watts v. Willie*, 2004 BCCA 600 at para. 16;
- a parent's experience, business acumen, and business contacts: *Braich v. Braich*, [1997] B.C.J. No. 1764 at para. 68 (S.C.);
- deferring or receiving a reduced income for future benefits: *Motyka v. Motyka* at para. 18; *Nielsen v. Nielsen*, 2007 BCSC 306 at paras. 29-31, varied 2007 BCCA 604;
- business expertise and contacts: *Akkor v. Roulston*, 2009 BCSC 1584 at paras. 74, 79; and
- historic earnings: *Nielsen v. Nielsen* (S.C.) at paras. 29-31; Nielsen v. Nielsen (C.A.) at para. 46; *Akkor v. Roulstonat* at paras. 74, 76;

(g) *Leskun v. Leskun* is authority for the principle that the court may take into consideration assets acquired after the division of marital property as no issue of double dipping arises. Failing to do so could allow wealthy and sophisticated spouses to structure their affairs to reduce their income for support purposes while increasing their net worth;

(h) imputing income can and should be employed to prevent sophisticated payor spouses from reducing their support obligations by using deferred forms of compensation such as shares and stock options. *Motyka v. Motyka*; *Nielsen v. Nielsen* (S.C.) at para. 31;

(i) in *Brown v. Brown*, 2014 BCCA 152 at para. 23, the Court of Appeal noted that sections 17-20 of the FCSG allow courts a degree of flexibility in specific circumstances where parties have unusual forms or patterns of income, or where they are able to manipulate their income for tax purposes in a manner that might frustrate the goals of the *FCSG*;

(j) where a support payor's income fluctuates widely, there is an obligation to create a buffer by budgeting appropriately in order to maintain consistency in support payments: see *Lucia v. Martin*, [1998] B.C.J. No. 1799 at para. 9 (S.C.); *Ferster v. Ferster*, 2002 BCSC 62 at para. 27;

(k) in *Francis v. Baker* at 270-272, 275-276, the Supreme Court of Canada cautioned against placing too much reliance on budgets when dealing with high-income payors;

(l) section 11 of the *SSAG*, which applies to incomes over $350,000, is an exception to the application of the formulas provided for under the *SSAG*. It describes a "ceiling" and a "floor", which is an "attempt to define the upper and lower bounds of the typical case, for which guideline formulas can generate acceptable results": *Hathaway v. Hathaway*, 2014 BCCA 310 at para. 45;

(m) the formulas are not to be applied automatically above the ceiling, although they may provide an appropriate method of determining spousal support in an individual case, depending on the facts. Above the ceiling, spousal support cases require an individualized, fact-specific analysis; *Hathaway v. Hathaway* at para. 48;

(n) accordingly, $350,000 is neither an "absolute" ceiling nor a cap: *Smith v. Smith*, 2008 BCCA 245 at para. 31; *Hathaway v. Hathaway* at para. 45;

(o) the court does not have to depart from the *SSAG* formulas once the $350,000 ceiling is met. Spousal support may be awarded based on the tables on incomes over $350,000: *Hathaway v. Hathaway* at paras. 30-32, 34; *Williams v. Williams*, 2015 BCSC 112 at para. 20;

(p) section 12 of the *SSAG* provides that in some circumstances the ranges themselves and the ability to restructure the award may not produce a fair result. However, the section is applied "[o]nly if neither of these steps can accommodate the unusual facts of a specific case should it become necessary to resort to these exceptions": *Hathaway v. Hathaway* at para. 59;

(q) the *SSAG* can be cautiously applied to variation applications in the determination of the quantum and duration of spousal support following a fact-specific inquiry. That is particularly the case where the circumstances that gave rise to the initial entitlement to support

> remain essentially the same on the variation application, or if there is an absence of the complications not considered in the *SSAG*, such as remarriage, second families, retirement, and the like. Even if some of the complicating factors are present at the time of the variation, the *SSAG* can still be used as a guide: *Beninger v. Beninger*, 2007 BCCA 619 at paras. 52-54; *Jens v. Jens*, 2008 BCCA 392 at paras. 45-48; Powell v. Levesque, 2014 BCCA 33 at para. 42;
>
> (r) it may be an error of law to substantially depart from the *SSAG* in the absence of exceptional circumstances or a reasonable explanation: *Redpath v. Redpath*, 2006 BCCA 338 at para. 42; *Ragan v. Ragan*, 2011 BCSC 766 at para. 18; and
>
> (s) the respondent, for his part, notes that it is open to the court in the case of a high-income earning spouse not to utilize the *SSAG*. This could occur where even the low range table amount would produce an award that is unfair to the payor parent. In such cases, the "pure discretion approach" can be used: *S.G. v. K.G.*, 2012 BCSC 1937 at para. 160; *Hathaway v. Hathaway* at para. 47.

[23] The following principles apply to determine if a parent is earning to their capacity:

a) parents who are healthy and can work have a duty to seek employment;

b) reasonable income earning capacity will be based on consideration of a parent's age, education, experience, skills, health, and on-the-job opportunities that are reasonably available;

c) limited experience and skills do not justify a failure to pursue employment;

d) persistence in remunerative employment or unrealistic career aspirations will not be an excuse; and

e) self-induced reduction in income will not justify the avoidance of child support obligations.

Fong v. Fong, 2011 BCSC 42

Findings of Facts

[24] From 2013 to 2016, Mr. H worked in Fort McMurray as a mine foreman: RFJ para. 258.

[25] In 2017, Mr. H decided not to work in Fort McMurray and instead chose to work closer to his home in B.C. At trial, Mr. H suggested that his 2017 income ought to be imputed at $80,000. He reported income of $53,439 for that year. Justice Brundrett accepted this position and imputed Mr. H's 2017 income at $80,000: *M.F.W. v. M.A.H.*, 2019 BCSC 588 at paras 261-262.

[26] Mr. H's reported income from 2011 to 2020 was:

a) 2011 - $89,818

b) 2012 - $142,844

c) 2013 - $193,896

d) 2014 - $193,091

e) 2015 - $179,577

f) 2016 - $137,472

g) 2017 - $80,000 (imputed)

h) 2018 - $26,355

i) 2019 - $39,522

j) 2020 - $67,521

2011 to 2017 from RFJ paras. 258-262.

[27] Justice Brundrett accepted Mr. H's evidence that he would earn approximately $170,000 commencing in 2018. This estimate was based on anticipated annual salary from VVI of $160,000 and $10,000 of farm income: RFJ paras. 263-265.

[28] In light of the uncertainty surrounding Mr. H's income and its expected variability, Justice Brundrett provided for a review in 2020: RFJ para. 265.

[29] In 2015, Mr. H inherited two 40-acre farm parcels, farm machinery, tools, and equipment. In 2019, he received an offer of $4.5 million for one of the 40-acre parcels.

[30] The General Manager of VVI confirmed in writing that Mr. H purchased shares in that company with funds borrowed from it and that Mr. H made a partial repayment of this loan for 325,000. I am therefore satisfied that Mr. H has an ownership interest in VVI.

[31] Mr. H has not provided a doctor's note or any other similarly reliable evidence confirming that his ability to work is impaired by health problems.

[32] In a Form 8 financial statement filed on April 23, 2021, Mr. H reported monthly expenses of approximately $13,000 excluding his child and spousal support obligations. These monthly expenses also do not include payments on mortgage indebtedness of approximately $2.325 million. Mr. H reported gross annual income of $67,521.

Analysis

[33] Mr. H's earning history and work experience over the past decade indicate that he is capable of earning more than $85,000 per year. He earned approximately $160,000 per year when he worked in Fort McMurray. After inheriting a valuable and significant farming operation, he stopped working there and his income dropped. He has significant experience as a heavy equipment operator and in construction, but he is not working. During a one-month period from January 22, 2021 to February 22, 2021, Mr. H applied online for five positions. There is no evidence regarding the expected salaries for these positions and no evidence that he undertook any other efforts to obtain employment.

[34] In the trial decision, Justice Brundrett imputed Mr. H's 2017 income at $80,000 because during that year, Mr. H was transitioning away from working in Alberta to explore employment opportunities in B.C.

[35] Mr. H invested in VVI and expected to earn a substantial salary from that company. I am satisfied that he continues to own shares in this company. He has not provided an adequate explanation for what happened to his investment. For example, does it earn dividends? Has the value of his investment increased? If not, is he able to withdraw his investment and deploy these funds elsewhere? Mr. H's evidence on the details of his investment in VVI was vague and inadequate, particularly in light of his reliance on an expected salary from VVI about which he testified at trial.

[36] Similarly, there is no adequate or detailed explanation of income earned from his ownership of the farm and Mariposa Contracting. These assets are worth several million dollars but seemingly generate little or no income.

[37] There is a dramatic and significant disparity between Mr. H's reported annual income of $67,521, and monthly expenses of approximately $13,000, not including debt repayment and child and spousal support obligations. This level of expenditure is unsustainable. The wide disparity between Mr. H's reported income and net expenses suggests that he either has income that he is not reporting or is inexplicably exaggerating his monthly expenses.

[38] During the hearing, counsel for Mr. H vaguely asserted that some of these monthly expenses described on the Form F8 are joint with his current partner. The Form F8 financial statement is a sworn affidavit in which the deponent is required to set out their individual income and expenses. I do not accept the late assertion of Mr. H's counsel that he shares some of his stated expenses with his partner because it is inconsistent with the clear wording and intent of this sworn affidavit.

[39] I am not satisfied that Mr. H's alleged health problems impair his capacity to work. There is no objective medical evidence that suggests he is incapable of working full time. He described a number of health concerns that have either not been definitively diagnosed or are being treated without apparently affecting his ability to work. Mr. H has not received a diagnosis that requires a reduction in his capacity to work full time.

[40] By Mr. H's admission, using the average of the past three years of income provides an inadequate basis for calculating his *Guidelines* income. His highest reported income during this period is $67,521. He suggests that his *Guidelines* income should be $85,000. However, his monthly expenditures and potentially income earning assets suggest that his income is much higher.

[41] While the details of his investment in VVI and its status are unknown, the evidence establishes that he did not earn the $160,000 annual income he anticipated from this company. The evidence also demonstrates that Mr. H's highest income earning years were during the period when he worked in Fort McMurray. Over the past ten years, his average annual reported income has been approximately $115,000. This includes the three years from 2018-2020 during which he reported very modest incomes notwithstanding significant monthly expenses.

[42] Mr. H has a responsibility to earn as much as he can using his skills, talent and experience. I am satisfied that he has been deliberately under-employed over the past three years. However, I am not convinced that he should be imputed with the income that he demonstrably did not earn from VVI. Taking into account his earning history over the past decade, employment skills as a heavy equipment operator, work experience in construction and his significant reported monthly expenditures, I am imputing income of $125,000 per year to Mr. H. As of the date of this judgment, this is his *Guidelines* income for child and spousal support.

Should income be imputed to Ms. W

Positions of the Parties

[43] Mr. H asserts that Ms. W has the ability to work and has her own photography business but she has not actively sought work or developed her photography business and instead chooses to remain unemployed. He believes that Ms. W uses the children as an "excuse not to work". He asserts that the children can be dropped off at school around 8:00 am and finish at 2:20 pm so Ms. W should be able to work full time or part time during these hours.

[44] He submits that income of $35,000 per year should be imputed to Ms. W based on working full time in a minimum wage position.

[45] Ms. W maintains that her circumstances have not changed since the trial. She denies operating a photography business and asserts that she remains fully engaged in caring for the children and is not able to commence working until they are older.

Relevant Legal Principles

[46] The relevant legal principles are set out above in paras. 16-23.

Findings of Facts

[47] During the trial, Mr. H argued that Ms. W should be imputed with income of $50,000. Justice Brundrett declined to impute any income to Ms. W:

> [254] The respondent suggests the claimant's income should be imputed at $50,000 per year from the date of the separation until the present. The claimant's tax returns indicate her income was $0 in 2012, $0 in 2013, $2,700 in 2014, $2,640 in 2015 and $31,383 in 2016. During the marriage the claimant fully committed herself to the children, as encouraged by the respondent, and had almost no income and her income in recent years has mostly been based upon child and spousal support.
>
> [255] The claimant has a college diploma in business administration, a certificate in auto mechanics, and experience in computers, data entry, and producing spreadsheets. During the marriage, the claimant developed her prior skills as a photographer and briefly did some small-scale part-time work in photography. However, while she has some talent in these areas, she has made only a token income in recent years from photography and in many years has had no income at all aside from support payments.
>
> [256] Section 19(1)(a) of the Guidelines allows the court to impute an amount of income to a spouse in appropriate circumstances. Nevertheless, I cannot find that the claimant has been intentionally under-employed or unemployed. Her inability to find and maintain employment is no doubt due to her traditional role during the marriage limiting her ability to earn income.
>
> [257] Going forward, it is apparent that claimant's time will be pre-occupied with the children and that her income-earning potential will continue to be impaired by her position during the marriage. The claimant currently has no income aside from child and spousal support. I accept that this is likely to continue in the reasonably near future. I would not impute income to the claimant at this time.

[48] On appeal, the court found that "once the children finish school, she is "open to" obtaining some retraining so that she will be able to earn income at some point. For now, however, she was continuing to perform the role of a "traditional" mother as she had during the marriage, a role similar to that taken on by the father's mother when he was a child." The Court of Appeal found that the trial judge did not err: *M.F.W. v. M.A.H.*, 2020 BCCA 284 at para. 42.

Analysis

[49] I am not satisfied that any income should be imputed to Ms. W. The trial decision was released in April 2019 and the appeal decision was issued in October 2020. The circumstances described by Justice Brundrett and affirmed by the Court of Appeal have not changed. Ms. W continues to focus on the care of her two pre-teen children.

[50] At some point in the future, Ms. W is expected to return to the workforce to support herself, but I am not convinced that the circumstances described by Mr. H warrant the imputation of any income to Ms. W at this time.

Should spousal support be terminated

Positions of the Parties

[51] Mr. H asserts that spousal support should be terminated retroactive to March 1, 2019. Ms. W submits that a date should not be set for the termination of spousal support.

Relevant Legal Principles

[52] The court may change, suspend, or terminate a spousal support order prospectively or retroactively: s. 167(1) *Family Law Act*, S.B.C. 2011, c.25 ("*FLA*").

[53] Subsection 167(2) of the *FLA* provides:

> 167
>
> …
>
> (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:

> (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
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> (b) evidence of a substantial nature that was not available during the previous hearing has become available;
>
> (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.

[54] The court should not lightly disturb the original order and the party seeking variation must show not only the changes in circumstances but also the conditions that call for court intervention: *Walters v. Walters*, 2011 BCCA 331 at para. 48, citing *Oakley v. Oakley*, 1985 CanLII 847 (B.C.C.A.) at para. 313.

Findings of Facts

[55] In his April 17, 2019 reasons for judgment, Justice Brundrett found that Ms. W was entitled to spousal support on both compensatory and non-compensatory bases:

> [278] There is both a compensatory and non-compensatory basis for an award of spousal support. However, I find that the compensatory basis is the primary one that needs to be considered at this time. This was a nine year traditional marriage within a 10 year relationship. The claimant's devotion to the home and the children allowed the respondent to work hard and grow his career in the excavation and construction industry, and has indirectly contributed to the respondent's success.
>
> [279] The claimant has a very strong claim to compensatory entitlement based on the economic loss she suffered during the marriage and the corresponding economic advantage conferred on the respondent: see ss. 161-162 of the FLA.
>
> [280] Upon entry into the marriage, the claimant moved to British Columbia and gave up previous teaching and clerical jobs. I find that the claimant suffered a capital loss during the marriage and was prejudiced by the parties' joint decision that she abandon her career for one in home care and children rearing. This decision allowed the respondent to pursue his career and excel in the construction industry, which for him has been a high-earning vocation. Commensurate with the respondent's career growth, there was a corresponding deprivation to the claimant. Due to her historical and ongoing commitment to the children, it is likely that the claimant will be hampered in her ability to earn any significant income in the future, including her potential for future income through photography.
>
> [281] In my view, permanent spousal support is required to address the economic inequities arising from the marriage. The respondent has invited me to put an end-date on future spousal support but I would decline to do so at this stage.

[56] On October 23, 2020, the Court of Appeal concluded that the trial judge did not err in failing to specify an end date for spousal support.

Analysis

[57] By seeking a retroactive end date of spousal support to March 1, 2019, more than a month before release of the trial reasons, Mr. H seeks to re-litigate the issue of a spousal support termination date. Appealing the trial decision on this issue to the court of appeal utilized the correct procedure. Not having obtained the result he wanted, Mr. H seeks to re-argue this issue under the guise of an application to vary spousal support.

[58] I note that the review contemplated by Justice Brundrett specifically excluded a review of entitlement to spousal support. In my view, by seeking the cancellation of spousal support retroactive to March 1, 2019, Mr. H is seeking to overturn the trial judge's decision on entitlement to spousal support that was affirmed by the Court of Appeal.

[59] Seeking a retroactive termination of spousal support to a date that precedes the trial decision is procedurally inappropriate absent compelling circumstances. It is also doomed to fail because there is no change in the conditions, means, needs or other circumstances of either spouse that has arisen since the Court of Appeal's decision in October 2020. Furthermore, neither of the circumstances set out in s. 167(2) (b) or (c) apply.

[60] The application to set an end date for spousal support is dismissed.

Should child and spousal support be retroactively reduced or cancelled

Positions of the Parties

[61] Mr. H submits that he overpaid child and spousal support because he did not earn $170,000 in income from 2018 to 2020. He seeks repayment of the purportedly overpaid amounts. He also seeks an order terminating the arrears, interest, and fees with FMEP.

[62] Ms. W denies that it will be grossly unfair not to cancel or reduce the arrears owed by Mr. H.

Relevant Legal Principles

[63] Section 174 of the *FLA* provides:

> 174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.
>
> (2) For the purposes of this section, the court may consider
>
> (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
>
> (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
>
> (c) any circumstances that the court considers relevant.
>
> (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
>
> (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

[64] There is a heavy onus on those arguing they cannot pay arrears because their financial circumstances changed. Arrears will only be cancelled or reduced where detailed and full financial disclosure under oath is presented that shows:

a) The change was significant and long lasting;

b) The change was real and not one of choice; and

c) Every effort was made to earn income during the period in question and those efforts were unsuccessful

P.L. v. J.D.L., 2013 BCSC 1492 at para. 24 citing *Earle v. Earle*, 1999 CanLII 6914 (B.C.S.C.).

[65] The Court of Appeal established a two-part test:

> [54] The factors to be considered in granting an order cancelling arrears are set out in Burgie v. Argent, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": Semancik v. Saunders, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".
>
> *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 54

Analysis

[66] I am satisfied that the change in Mr. H's anticipated income was significant but the extent to which it is long lasting is uncertain because there is a paucity of evidence on his efforts to obtain other employment. Similarly, it is difficult to discern if the change in his income was real and not one of choice. After Mr. H inherited assets worth several million dollars, he stopped working in Fort McMurray and correspondingly earned a significantly lower income in the ensuing years.

[67] I concluded that Mr. H did not make every effort to earn income during the period in question. I note that he purports to have earned only $26,338 in 2018, the year during which the trial took place.

[68] Mr. H's financial disclosure suggests that he spends almost three times as much as he earns without accounting for debt repayment or child and spousal support payments. Given his lack of forthright financial disclosure, I am not satisfied that it would be grossly unfair to cancel or reduce the arrears owing. I am unable to conclude that he is unable to pay the arrears now or in the future because he appears to be paying a wide range of other monthly expenses on an ongoing basis.

[69] The application to cancel or reduce arrears, including the amounts owed to FMEP, is dismissed.

[70] (Submissions on costs)

[71] There were four issues to be determined in this matter. In my view, Ms. W. was substantially successful because she succeeded on three of those four issues entirely and partially on the fourth issue. On that basis, I conclude that Ms. W. is entitled to her costs of this application.

"Basran, J"