

SUPREME COURT OF NOVA SCOTIA
(FAMILY DIVISION)

Citation: Acker v. Acker, 2014 NSSC 5

Date: 20140120

Docket: 1201-058497

Registry: Halifax

Between:

Maurice "David" Acker

Applicant

v.

Elaine Acker

Respondent

Judge:

The Honourable Justice Moira C. Legere Sers

Heard:

October 17, 2013 in Halifax, Nova Scotia

Counsel:

Kim Johnson for Maurice "David" Acker
Julia Cornish, Q.C. for Elaine Acker

By the Court:

[1] This is the application of Mr. Acker dated on November 30, 2012. He seeks a review of and termination of spousal support.

[2] The parties were married in September of 1980, separated in October of 2003 and divorced in September of 2005.

[3] Their marriage lasted approximately 23 years.

[4] At separation the husband was employed as an offshore installation manager, earning approximately \$202,800 per year.

[5] At the time of separation the wife had not been employed for 10 years.

[6] The parties entered into Minutes of Settlement which were incorporated into their Corollary Relief Judgement dated September 7, 2005.

[7] There are three sections of this agreement that are of particular relevance to this proceeding.

Section Three Child Support

[8] The parties did not agree on whether their daughter, born November 1, 1981, qualified as a child of the marriage. She was almost 22 years old at the time and his support was and continues to be considerable.

[9] The parties did agree to an acknowledgement that the amount of spousal support being paid by the husband to the wife took into account the assistance the husband was providing to their child at the time.

[10] They acknowledged that the mother would not be required to contribute to their child's expenses at that time.

[11] The husband/father retained a right to pursue a s. 7 claim pursuant to the *Child Support Guidelines* based on a material change in circumstances.

[12] The wife retained the ability to argue that their child did not meet the definition of a child of the marriage.

Spousal Support

[13] Commencing September 1, 2005 and continuing each month thereafter the husband agreed to pay to the wife \$5,000 in spousal support, subject to variation as contemplated by applicable legislation or by consent of the parties.

[14] In addition to the foregoing, they agreed that spousal support **shall be reviewed** on or after October 1, 2007 with a view to determining the outcome of the wife's efforts to obtain employment.

Division of Assets and Responsibility for Debts

[15] The parties owned a matrimonial home. They valued this home at \$249,670 net of disposition costs.

[16] The wife was to obtain approval for funding at which time the husband was to convey his interest in the home to her by Quit Claim Deed. He was then to be released from all mortgage obligations.

[17] The wife was to pay the husband \$66,170 as his share of the equity.

[18] Failing obtaining approval for funding, they agreed that the house would be listed for sale and sold.

[19] The home was actually sold for \$320,750 in October of 2007. The wife retained the excess profit for her own use absolutely.

[20] The wife enjoyed exclusive possession in the meantime. She was responsible for the upkeep of the home including mortgage, taxes, utilities and day to day upkeep and expenses.

Historical Facts Affecting Dependency and Entitlement

[21] The husband was 26 and the wife was 27 at the date of marriage.

[22] This was a second marriage for Ms. Acker.

[23] She has a child from her first marriage, a son born November 1, 1972. He was eight years old when his mother married Mr. Acker.

[24] Before marriage the respondent lived with her parents, having separated from her previous husband. She worked as a part time waitress. She did not complete post secondary education.

[25] Besides working as a waitress, she operated a stall in a local market with her father.

[26] The applicant was an engineer with British Petroleum when they married.

[27] He had already completed his post secondary education, served in the Army, completed three emergency deployments and two UN deployments.

[28] For the first year of marriage they both lived and worked in England, having both been born and raised there.

[29] In 1981 they decided to move to South Africa. They do not agree on the reasons for this move.

[30] They first lived in Eastern Transvaal.

[31] Ms. Acker was pregnant with their only child.

[32] Ms. Acker went back to work six weeks after the child was born and worked in sales for a Volkswagen dealership.

[33] Mr. Acker contests Ms. Acker's suggestion that she took their child to work for six months until they got a housekeeper. He advises that they employed a housekeeper prior to the child's birth and a nanny immediately after Ms. Acker went back to work.

[34] Mr. Acker believes he participated significantly in the child rearing because of his work schedule. He was home for two-week and three-week block periods and when home, for the most part, he was a full-time parent.

[35] From the birth of the child forward the parties agree that Ms. Acker was never a stay-at-home parent.

[36] The couple then moved to Cape Town for approximately four years (1990). During his weeks home the father was a full time child care parent.

[37] Mr. Acker testified that not only did he spend a considerable period of parenting time with his own daughter but he did so with Ms. Acker's son from a previous relationship. There was no contrary evidence on this point.

[38] Mr. Acker testified that the respondent did not immediately find work after the move to Cape Town until he insisted she find work. She obtained a transfer in the industry to a Mercedes Benz dealership. This proved more lucrative than her previous employment.

[39] During their time in Cape Town both parties agree that the respondent was very successful at her job and recognized on numerous occasions for sales performance and dedication.

[40] Earlier in the relationship while living in South Africa and working with one car dealership in Transvaal and Mercedes in Cape Town, both parties agree that the wife was earning more money than the husband.

[41] The applicant admits that his income in the latter part of the relationship was higher than his wife's, particularly since she left the employment market some 10 years before the separation.

[42] Four years after the move to Cape Town (approximately 1994), Mr. Acker became increasingly concerned about the tensions in South Africa. He wanted the family out of South Africa.

[43] He applied for a job in Newfoundland with Hibernia Management, was offered a position and relocated to St. John's, Newfoundland. Their child was 12 years old.

[44] Upon returning to Canada, Ms. Acker applied for and received her permanent residence status and began to work selling cars. This employment lasted for approximately eight months.

[45] The respondent suggests she was discouraged from working because of the tax consequence to the family. Mr. Acker adamantly denies this.

[46] The applicant testified that her employment in Newfoundland was terminated due to her attitude and performance issues. He advocated on her behalf to have her record of dismissal reflect a lay off rather than a firing.

[47] She denies this although admits she was very unhappy in this employment.

[48] The respondent was not gainfully employed for the following 10 years. She busied herself with some voluntary and charitable activities. However, she maintains she was fully occupied in the home raising their daughter and caring for the household.

[49] The applicant is adamant that he strongly encouraged his wife to work throughout the marriage even so far as to attempt to find employment opportunities for her.

[50] He advised that this was a considerable source of conflict during the marriage.

[51] Ms. Acker admitted that she had earned a significant salary in South Africa yet claimed she was unable to make a significant amount of money from vehicle sales in Newfoundland. I do not have evidence to categorize the meaning of significant.

[52] Mr. Acker continued to work out of St. John's up to 2002. In 2003 he was required to transfer to Halifax. Again, he worked offshore for two weeks and was home for the other two weeks.

[53] The transfer from Newfoundland to Halifax related to the respondent's wish to be in Halifax to assist his daughter make a fresh start.

[54] In October 2003, approximately seven months after they moved to Nova Scotia, the couple separated.

[55] Previous to the separation Mr. Acker paid the expenses associated with the matrimonial home plus an additional \$1,400 per month from November 2003 to August 2005. He stated that these amounts exceeded the final amount agreed upon as spousal support.

Efforts to Find Employment

[56] The respondent was not employed at the time of the separation agreement.

[57] There was a gap of time between separation and the timing of the respondent's work search efforts. She indicates that was because of the stress of separation.

[58] Ms. Acker testified that she applied for "dozens of jobs" in sales and retail without success; even going to the Employment Office for assistance.

[59] Since November of 2006 except for a number of months when she returned to South Africa to live with her son, she has been employed as a sales person in Halifax.

[60] At first she was also employed as a buyer in the company. However, due to new management, her salary at \$14 per hour when she was buying was reduced as were her hours. This resulted in a reduced income. She advised that there were staff layoffs at her place of work.

[61] Her income in 2009 was \$25,900; in 2010 was \$26,771; in 2011 was \$24,489; and in 2012 was \$23,688.

[62] The respondent anticipates the possibility of losing this employment completely.

[63] The respondent indicates she is actively pursuing other employment jobs in the industry without success.

[64] The applicant argues that the respondent was 50 when they separated. She had historically been working very successfully in South Africa. He argues that had she entered the work place and stayed in the work force in Canada, for the 10 years prior to separation and subsequently she would be in a better position.

Effect of Husband's Employment on Wife

[65] Ms. Acker argues that her entitlement in part arises from the fact that she had to undergo many transfers as a result of her husband's employment situation.

[66] He responds that they moved from England, which was their base, to South Africa in order to have a fresh start because the respondent was not able to be in a peaceful relationship with his family. She denies this.

[67] The move from Transvaal to Cape Town was advantageous to the respondent. She obtained a transfer and admits that her salary was in fact at times greater than the applicant's and greater than her earlier income.

[68] The transfer out of South Africa was a decision made to avoid the difficult tensions in South Africa at the time. This transfer benefited both parties.

[69] The respondent first argues that she could have stayed and thrived in South Africa. She was not worried that staying in South Africa posed a risk.

[70] Later after separation however, she returned to South Africa for four months to reestablish herself and live closer to her son. This was an unsuccessful move and she ultimately returned to Halifax.

[71] Based on the respondent's own testimony about an inability to find employment in Newfoundland, the move to Halifax could not be seen as a disadvantaging factor.

[72] Based on the evidence provided I do not accept that any of the moves were detrimental to the respondent.

Prospective Child Care Responsibilities

[73] Mr. Acker advises that shortly after the separation Ms. Acker packed their daughter's bags and put them in the street. The adult child has not returned to her mother's care.

[74] There were clearly difficulties between the parents and their only child had serious issues that required intervention. I have insufficient information to assess the daughter's problems or to assign blame. Nor do I see any value in such an exercise.

[75] The father has continued to support his daughter financially and emotionally, enabling her to finish her education and train for a vocation. He continues to assist her into her adulthood. He has assisted her in purchasing a home and guaranteed her mortgage.

[76] The daughter's entitlement to support does not now supercede the respondent's.

The Parties' Relative Financial Positions at Divorce and Current

[77] At divorce the total net matrimonial assets were \$289,867.62. Of that the husband retained \$143,683 and the wife \$146,184.50.

[78] To effect an equal division, the wife paid an equalization payment of \$1,250.69.

[79] At divorce the parties agreed on a net value of \$249,670 for the home. The predisposition value they agreed on was \$270,000. The mortgage was outstanding at \$117,329.

[80] The wife retained the home and sold it for \$320,750.

[81] Assuming maximum disposition costs of 6% real estate fees and legal fees, the disposition costs would approximate \$23,131 for a rough profit differential of \$49,000 more or less.

[82] It was the intent of the parties to create an overall equal division of the matrimonial assets which was to include an equal division of the husband's Royal Bank RRSPs by way of spousal rollover and the husband's Exxon Mobile RRSP based on an agreed values (see para.23 - Minutes of Settlement).

[83] The husband retained a 1997 Ford Explorer at a value of \$8,500. He agreed that the wife could retain the 1999 Saturn station wagon at a value of \$6,500.

[84] The differential in value was included in the equalization payment.

[85] The wife retained the furniture and possessions in her possession and he those in his possession except for a list which he was to be provided at a later date.

[86] The applicant advised that he did not receive his personal possessions nor did he receive the proceeds of an insurance policy in South Africa. He continues to be entitled in that regard.

[87] They shared the Aeroplan points.

[88] The wife is entitled to a division of Canada Pension Plan and an equal division of his employment plan.

[89] The wife was to receive one-half the value of the Sanlam policy and the investment account which was respectively valued at \$12,980 and \$40,000.

[90] Their matrimonial debts were divided equally.

Current Status

[91] They now both own mortgaged homes. His municipal assessment identifies a value of \$342,400 less a mortgage of \$204,000 and her municipal assessment is \$271,200 with a mortgage of approximately \$207,748. She agrees that the extensive renovations would increase the value of her property.

[92] Her mortgage is significantly higher than the mortgage on the matrimonial home and was increased to effect significant repairs to the home she purchased.

[93] She now leases a vehicle. He owns two vehicles (the Ford at \$16,000 and a new vehicle with net value of \$4,000).

[94] He has had an ability to retain his investments and to add to them significantly due to the increase in his income post separation.

[95] She has reduced her investments considerably. It appears that the one asset she has retained is her share of his pension which is not yet in pay and thus not available to her.

[96] He has debts of \$54,000 aside from his mortgage and he is also the guarantor on his daughter's mortgage.

[97] She has debts of \$24,390 plus a mortgage.

[98] He has also remarried and his wife has immigrated and is currently unable to work in Canada.

The Respondent's Needs and Circumstances

[99] In addition to her employment income over the last 10 years, the respondent has been the recipient of \$60,000 per year in spousal support. Her employment income effectively supplemented her spousal support income.

[100] The respondent advises (Exhibit 8) that since the divorce she has barely been able to meet her ongoing expenses with the combination of her spousal support (\$60,000) together with her employment income (bringing her total income for 2013 to \$88,630; 2011 to \$84,498; 2010 to \$86,772 and 2009 to \$85,950).

[101] There is something radically wrong with this picture and the strategy of financial management. It is also problematic prospectively when retirement will force a material change in her available income.

[102] The respondent advises she had to sell the matrimonial home after the divorce.

[103] Understandably this was difficult but necessary. She did, however, earn a sizeable profit and the applicant did not share in this profit.

[104] She has advised that in addition to her yearly income she has spent her investments (\$26,000) and she has accumulated debt.

[105] She also admits to investing unwisely the division of investment income she received at divorce. What investment she did not lose in the market she spent on significant renovations to the home she purchased.

[106] As a result of what she describes as a poor choice of a contractor, she has to undertake major repairs to the windows and roof of her home. She also renovated the kitchen.

[107] The applicant is not responsible for the failed investments or financial decisions made by the respondent post divorce.

Sharing in Post Divorce Income Increases

[108] The respondent seeks to have an increase in her spousal support to address her difficulties based on the applicant's post divorce increases in income.

[109] His income increased significantly post divorce. However he has now been reduced to a level somewhat consistent with what he earned on divorce.

[110] Mr. Acker argues that the multiple moves as a result of the difficulties in the marriage were in fact difficult on his career and income earning potential during marriage.

[111] He argues that the significant increases in sales and his income post separation are only due to his own efforts post separation.

[112] One could not discount his previous experience in looking at the significant increase in his income and success even though the increase is more tangible post separation.

[113] His income in the intervening years represents a significant increase. This is due to his own efforts, accepting remote and sometimes isolated, hard to fill, postings which require rigorous training.

[114] This training becomes less achievable with his age and the demands of this training.

[115] The applicant's advises that further overseas travel is not anticipated.

[116] The increase in his 2012 salary has been explained in Exhibit 2 (Exhibit "B"). As he repatriated, the company was required to pay significant tax on his behalf.

[117] His true salary for 2012 would be \$188,849 plus whatever would be included for the related allowances and deductions. .

[118] In the last 10 years of the marriage and the years following, the respondent unfortunately placed unreasonable reliance on the length of the marriage for permanent spousal support.

[119] The respondent must anticipate the financial reality of the applicant's future retirement and she must plan to better sustain her assets and allow her to live off the available income.

Ability to Pay

[120] There is no question at this time that the applicant has an ability to continue to pay some spousal support notwithstanding his commitment to his wife and daughter.

Retirement

[121] The applicant's future retirement has been raised as a motivating factor in this application

[122] Given when this agreement was entered into and the fact that a review on the issue of the respondent's employment was anticipated the applicant's retirement will present itself as a material change of circumstances. One strong possibility will be the termination of her spousal support.

[123] This presumes his retirement is not early or voluntary. The annual statement presented (Exhibit 5) assumes the applicant will continue to work to 65.

[124] He will bear the burden of an early or voluntary retirement.

[125] The applicant's anticipated income from his current pension **before** the respondent's share is deducted is projected to be in the range of \$60,000.

[126] This is not the application based on actual retirement, it is a review. However, it can be reasonably anticipated now that when he retires there will be significantly less income available.

[127] The effect of his retirement will be significant.

[128] It has been suggested that the applicant may be able to continue contract work in a different format, in an advisory capacity perhaps. That remains to be seen.

Reasonable Anticipation

[129] This agreement has never been varied although variation was specifically contemplated.

[130] At the time of separation in 2005 it is unlikely that the parties were contemplating the state of affairs that would exist upon the applicant's retirement some 13 years. They could not have know what might take place after a review.

[131] They could have reasonably anticipated a change in the support provisions, even in the child support provision should the child be dependent, the mother employed and called upon to pay support.

[132] The applicant has signalled his intent to move toward retirement.

[133] He has also advised he can no longer complete the rigorous physical testing he must submit to annually to retain his qualifications to work in this field in isolated sites.

[134] He has not provided medical evidence to support this as he will be required to do, yet his assertions are credible and reasonable and the respondent ought to consider herself on notice

Review or Application to Vary

[135] Paragraph 11 of their Minutes of Settlement acknowledged that it was a full and final settlement except where there is an express provision of review or variation of a particular condition or term.

[136] Paragraph 36 of the Separation Agreement incorporated into the Corollary Relief Judgement stated as follows:

36... In addition to the foregoing, support for the wife **shall be reviewed** on or after October 1, 2007 with a view to determining the outcome of the wife's efforts to obtain employment.

Review

[137] Clearly there was an expectation on review that the respondent would account for her efforts to reinstate herself in the work place.

[138] The agreement contemplated variation of spousal support.

[139] Paragraph 37 stipulates the provision of security for spousal support by way of the provision of life insurance "until such time as he is no longer required to provide spousal support to the wife", the intention being to replace the maintenance payment with insurance proceeds upon the death of the husband.

[140] This contemplates both termination at some point and/or death.

[141] The applicant suggests this is to be treated as a review and not as an application that requires a material change in circumstances.

[142] The review was anticipated anytime after October 2007, two years after the original agreement.

[143] The purpose of the review appears to be to assess what efforts the wife has made to retrain, to increase her marketability and return to the employment world.

[144] This review was initiated some seven years after the agreement and some five years after the right to a review arose.

[145] This delay in calling the respondent to account for her efforts is problematic.

[146] At marriage the husband and wife were 26 and 27 respectively; at separation they were 49 and 50 respectively and at divorce and the date of the agreement they were 51 and 52 respectively.

[147] Should the review have taken place earlier they would have been 53 and 54. Now they are 59 and 60.

[148] One can understand why the parties may not be interested in initiating a costly review that would bring them back into litigation two years after they reached a final agreement.

[149] Delaying this review until the respondent was 60 is a delay that favours a conclusion that the respondent's possibility of enhancing her employability is less than likely.

[150] The delay effectively limits the options available principally because of the length of the marriage and the age of the respondent.

[151] If this is a review the respondent must provide information as to her efforts, her strategy, and her diligence at pursuing self sufficiency.

[152] However, neither party bears an onus to prove a material change in circumstances (**Leskun v. Leskun**, 2006 SCC 25, para. 39).

[153] If the review had been earlier, it would have been a reasonable expectation that the respondent was still within an age at 52 where retraining was possible. Her historic employment may have *enhanced* her ability to better supplement her income prospects.

[154] If after an earlier review the court determined that not enough had been done, the court could have reinforced the necessity to diligently plan; to sound the warning bell, avail the recipient of further time and even add an incentive by way of declining payments to spark the interest of the respondent further.

[155] However, to terminate support at that point or any point the court has to have evidence to justify such an abrupt move based on the legislative factors applying to spousal support.

[156] At this late stage, to terminate simply because of her failure to diligently pursue retraining or employment opportunities to achieve whatever self sufficiency she can might be seen to unduly emphasize one of the factors the court must consider, that of self sufficiency.

[157] At age 60 whether or not the respondent has done what she ought to have done, the likelihood of enhancing her prospects is limited.

[158] She continues to be obligated to and may still find employment that increases her current income and is stable. She has a duty to pursue whatever legal options to supplement her income that are available to her.

[159] She does however have to live with/share the consequences of her employment decisions.

[160] There is in the Minutes of Settlement no termination date to the right to review the parties have allowed in their contract.

[161] It is now a question of what must be the reasonable expectations of a review later rather than earlier as permitted.

Application to Vary to Terminate Spousal Support

[162] If this is a variation application to terminate spousal support based on the evidence, the onus is on the applicant to provide evidence to meet the burden.

[163] The factors set out in s. 17.(4.1) of the *Divorce Act* must be considered.

[164] If applicable, I must be satisfied that there is a change in the condition, means, needs or other of either former spouse since the making of the order and consider that change.

[165] According to s. 17(6) conduct is not relevant:

(6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

[166] Section 17(7) of the *Divorce Act* states:

(7) A variation order varying a spousal support order should

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

(b) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

(c) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and

(d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[167] There is no doubt that there are and have been material increases and decreases in the applicant's income.

[168] The child is no longer considered a dependant child.

[169] The applicant is remarried.

[170] At separation and divorce the respondent was unemployed. She is now employed and has been since 2006.

[171] The respondent appears to be in a worse financial position than previously.

[172] The parties are eight years older and approaching retirement age.

[173] The parties are facing a future material change in the next five years should the applicant retire.

[174] In **Moge v. Moge**, [1992] 3 S.C.R. 813 it is written:

... the purpose of spousal support is to relieve economic hardship that results from "marriage or it's breakdown" ... the focus must be ... the effect of the marriage in either impairing or improving each party's economic prospects.

[175] **Moge** shifted the focus from means and needs test to the enumerated factors set out in the *Divorce Act*.

[176] In assessing entitlement, the model of compensatory or non compensatory support must be considered.

[177] The evidence supports some conclusions.

[178] The parties are entitled to a review to determine what efforts and success the respondent has achieved in her search for employment. That review has been available since 2007. Neither party pursued this as a remedy until 2013.

[179] Under either a review or an application to vary, the Court has jurisdiction to vary a spousal support award.

[180] The circumstances have changed considerably.

[181] The circumstances of the applicant improved considerably between post separation and his return to Canada. However, he has now ceased travelling to isolated locations and his income has returned to his pre divorce income. He has now remarried. He looks towards his retirement.

[182] The marriage provided an obvious economic advantage to the respondent. She did not have the educational background the applicant had.

[183] His mobility provided a foundation for the move to South Africa where her employment opportunity put her in a better position than that of her pre marriage employment.

[184] While they lived in South Africa, she earned at times more than the applicant.

[185] It cannot be said that the respondent suffered substantial economic disadvantage from the marriage.

[186] The respondent had a long history of employability.

[187] The disadvantage arising from the breakdown results not exclusively but in no small measure from the respondent's failure to pursue employment in the final 10 years of marriage when they moved to Canada ; her failure to retrain when retraining was more likely to produce results and her failure to obtain appropriate financial advice to wisely invest her assets and plan her future.

[188] The respondent appears to have relied on the applicant's income to sustain her.

[189] Within six months, if not very shortly, after the birth of their child the respondent was employed. From that time forward the respondent was fully employed and a nanny was hired.

[190] The needs of the child did not detract from the respondent's ability to be gainfully employed or impact on her ability to earn an income.

[191] During most of his posting it appears that the applicant divided his time, whether it was two weeks away - two weeks home or some other formulae with significant home time as a parent, present not only to their child but to her child born of a previous union.

[192] Child care, therefore, could not be seen to be a factor which influenced the respondent's employability or keep her out of the market. It did not affect her advancement time within her industry.

[193] At separation and divorce all of their assets and debts were divided equally.

[194] I am left to assess the reasons for the respondents financial and employment status. There was a change in her employability on returning to Canada. She voluntarily withdrew from the work force.

[195] The course of her employment pre and post divorce does not appear to be focussed on pursuing self-sufficiency within a reasonable period of time.

[196] The presence of the child in the home has not been proven to be the obstacle to re-employment.

[197] Leaving South Africa was a decision made to address the couples personal safety rather than to promote the applicant's employment.

[198] I do not have evidence from the respondent that would satisfy me that since separation she has entered into any strategy to become gainfully employed by retraining in other industries, or in the industry with which she was accustomed.

[199] The only evidence I have of the respondent's efforts at self-sufficiency is her evidence that she applied for dozens of jobs in sales and retail without success.

[200] She also went through employment counselling for assistance with her search.

[201] I know little else.

[202] From the 10 years within the marriage and the years following divorce, the economic hardship largely results from her current age and the fact that no training was apparently taken to refocus the respondent to maximize her prospects.

[203] Sometime following separation the respondent thought she would return to South Africa to live near her son and to reestablish a life there. This was unsuccessful and she returned to Canada.

[204] She appears to have only worked at one place between separation and the current application.

[205] Out of a 23-year marriage, the first 14 years were spent employed, the last years minimally employed as compared to her historic performance.

[206] I cannot conclude that reasonable efforts have been made to maximize the respondent's education and employability.

Conclusion

[207] These parties were married for 23 years. Ms. Acker was 50 at separation and Mr. Acker 49. They are now 60 years old.

[208] This was the applicant's first marriage; the respondent's second.

[209] This was a *non traditional* marriage.

[210] Neither the marriage nor the birth, responsibilities, joys and sorrows of raising their child produced any disadvantage to the respondent's income earning potential.

[211] The factors that raised a need for support then were the length of the marriage, the level of education achieved by the respondent pre marriage , her reliance on the applicant for 10 years pre separation, perhaps his decision not to terminate the marriage earlier, her unemployment and failure to embark on retraining or re-qualification and the natural financial consequences immediately following the breakdown of the marriage and divorce.

[212] It did not arise apparently because of the roles of the parties or the effects of children on the respondent's career.

[213] What other disadvantage, if any, occurred arose out of independent choices the respondent made pre and post separation not connected to the marriage relationship.

[214] Nor can it be said that the relocation from England to South Africa to Canada was a principal cause of her financial circumstances and current employment difficulties.

[215] However, these choices may have been contrary to the applicant's interest, he remained married. The choices did not cause him to take any steps to conclude the marriage for 10 years.

[216] Is he taken to have acquiesced prolonging the marriage past the point where termination of spousal support is unlikely until his retirement?

[217] The facts in evidence point to the respondent's independent career choices, decisions and market conditions as the principal reasons for what appears to be a significant reduction in the respondent's employability.

[218] There were 10 of 23 years in the latter part of the marriage where the respondent appears to have decided to remain out of the work force and involve herself in charitable work.

[219] During this period of time her oldest child remained in South Africa and her youngest lived in the matrimonial home but would have been in school.

[220] There is an additional gap between separation in 2003 and her current limited employment stability as that is reflected in her earnings for 2009 forward.

[221] The respondent's five-year average income since 2009 is approximately \$24,900.

[222] Together with her spousal support of \$60,000 she averages \$84,900 each year.

[223] In the 2012 year she has cashed in \$4,943 of her RRSP to add to this average.

[224] It is unlikely that retraining at 60 will *significantly* increase her income.

[225] The likelihood of obtaining self-sufficiency, at what was described as her better years, is minimal.

[226] The kind of self-sufficiency she will attain will be living within her available income to meet her carefully managed needs.

[227] Of the factors set out in s.17(7) the most relevant to this situation is:

(d) In so far as practicable promote the economic self sufficiency of each former spouse within a reasonable period of time.

[228] It is unfortunate in these long-term marriages that there is not a requirement for spouses who require or are entitled to spousal support to obtain expert advice at the starting point to create a financial plan, a strategy that assists them in a meaningful way to prepare for this task of attaining self-sufficiency.

[229] The absence of a financial strategy and an unprepared recipient increases the possibility that assets are depleted. It introduces the prospect of long term poverty of assets and income for the recipient. It further impairs the payor's ability to plan for their own independence and retirement.

[230] The failure to have and initiate such a plan ultimately puts both parties at a serious disadvantage.

[231] In this case, the applicant post separation dived into a work ethic to financially recover from the divorce.

[232] This placed him in isolated, less desirable postings with the advantage of significantly stabilizing his financial portfolio.

[233] The respondent did not effect the same changes. To sustain herself she drew on her investments, placing herself in a situation where she will be

dependant on her share of the divided pension and any other income she is able to generate.

[234] Her investments which have failed or been lost and the purchase of a home that has exhausted some if not all of her savings have contributed to her economic fragility.

[235] Ought the respondent to continue to receive when she has not satisfied her responsibility to move more diligently toward self-sufficiency?

[236] Ought the applicant in this 23-year marriage share the brunt of the respondent's unfortunate financial decisions and bad investments?

[237] The respondent's educational qualifications were minimal; her early employment history was successful and lucrative as confirmed by both parties.

[238] Employment and market conditions are notoriously poor currently.

[239] Is the applicant responsible for the respondent's continued dependency and is this dependency arising from the marriage and her role therein? If so, to what extent?

[240] In this case, the applicant attained his educational and professional qualifications before the marriage.

[241] The respondent did not contribute to this acquisition.

[242] The respondent did not sacrifice for family. This is a long-term marriage but not a traditional one.

[243] While his experience in his industry of choice was gained during the marriage and after the marriage, it was not by any direct contribution from the respondent.

[244] The payor cannot be said to have received the kind of long-term benefit that would arise if the payee had sacrificed her career for home and family to support and permit the payor to pursue a career and educational training.

[245] Her need does not arise from a joint investment in his career.

[246] While the mother was the primary parent during the father's absences on location, he also spent a considerable amount of uninterrupted time at home with their child. In his absence, his income permitted the hiring of service providers to assist in the care of their child.

[247] The significant increases in his income post separation up to the reduction most recently could not be said to be casually connected to the marriage or direct contributions made during the marriage other than as resulted from the experience he gleaned during those years.

[248] Thus, on the totality of the evidence in this case, the facts do not justify an increase in spousal support as a result of the applicant's post separation income increases, as requested by the respondent

[249] There has been little incentive thus far for the respondent to retrain or increase her income in order to obtain what self-sufficiency she is able to achieve.

[250] In large part in her current circumstances, her claim is not based on her role in the marriage and any negative effect the marriage and it's breakdown had on her.

[251] It is based on the length of marriage, the period of time she was not employed ,her age and it's effect on her employability. Her lack of retraining and employment strategy had a compounding effect .

[252] The totality of these factors impact negatively on the respondent capacity to sustain herself at this point in her life without support until his pension is in pay.

[253] I could not conclude currently there is a need that arises out of the circumstances of the marriage or it's breakdown.

[254] The facts as presented do not allow for a conclusion that the causes of her current financial situation arise from the marriage or from the quantum of spousal support she received.

[255] Nor could the applicant have any influence or control over any of the respondent's decision-making.

[256] The request for an increased spousal support award because the applicant improved his financial picture through his own efforts is not justified.

Result

[257] This decision assumes the respondent will be able to access her portion of the retirement funds at the applicant's ordinary retirement date.

[258] Balancing all factors, using the limited figures I have and assuming the applicant is seriously looking at retirement which would place the respondent in a position to commence receiving her equal share of the pension; projecting forward toward the applicant's retirement, I order the following:

- The applicant shall continue to pay for the 2014 year the sum of \$5,000 per month.
- For the 2015 year the applicant shall pay the sum of \$4,000 per month allowing the respondent to enjoy the slightly lesser level of support and still support herself while planning for her future.
- She would be wise to seek financial advice and to use whatever she can to invest and save for her own retirement.
- For the 2016 year, his contribution will decrease to \$3,000 per month commencing January 1st.
- In the 2017 and 2018 year, the spousal support will reduce to \$2,000 per month up until the applicant's retirement at which time the onus will be on the respondent to prove what if any continued entitlement she has to spousal support.

[259] If the respondent continues to work at the same level of income she currently enjoys or better, she will have some time to save up front and invest, more particularly while the spousal support remains the same.

[260] This will also give the applicant some room for further preparation and investment for his retirement.

[261] She will also have time to consider other sources to supplement her income including CPP and other applicable supplements particularly in the latter half of the five year span, the years preceding receipt of her share of the respondent's pension.

[262] She should be on notice further material changes are pending.

[263] When the applicant retires, there will be a material change at which point the respondent may be required to live off her share of the pension and such other supplementary income as she is able to obtain.

[264] This gradual reduction may delay the inevitable and lend urgency to the need to prepare.

[265] Counsel for the applicant shall draft the order.

Legere Sers, J.