

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
CATHERINE MERCER)
) Ryan Aalto, for the Applicant
Applicant)
)
– and –)
)
GARRY B. MERCER)
)
Respondent) Self Represented
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)
)
) **HEARD:** May 30, 31, and June 1, 2016

2016 ONSC 3733 (CanLII)

REASONS FOR JUDGMENT

GILMORE J.:

OVERVIEW

- [1] The issues in this case narrowed considerably throughout the trial. By its conclusion the matters remaining for this court's determination were;
- (a) Whether or what income should be imputed to Mr. Mercer for spousal support purposes;
 - (b) Retroactive spousal support from the date of separation.
 - (c) Child support for Arthur Mercer.
 - (d) The notional tax rate to be used to net out the value of Mr. Mercer's RRSP for equalization purposes, and;
 - (e) The calculation of post-separation credits.

- [2] The parties separated on July 11, 2013 after a 22 year marriage.
- [3] The parties have three children but only the youngest, Arthur aged 18, is still a dependent. The older two children Bethany, aged 22, and Sophie, aged 26, are living independently. Arthur lives with his father.
- [4] The marriage was a traditional one with Mr. Mercer being the primary breadwinner and Mrs. Mercer caring primarily for the children and the home. Mrs. Mercer has not worked full time since 1991 or at all since 2007. Mr. Mercer worked for CIBC 24 years. He was downsized in 2014 and his severance, paid in the form of a salary, lasted until September 2015.
- [5] Although the parties separated in July 2013, Mrs. Mercer did not leave the home until September 17, 2014. The parties lived together in the same home but separate and apart. The environment was clearly a toxic one. Mrs. Mercer complained that Mr. Mercer refused to fill her necessary prescriptions or buy her food. She was not allowed to drive his car. According to Mrs. Mercer, once they were separated Mr. Mercer essentially abandoned her both emotionally and financially even while in the same home. Matters came to a head when Mr. Mercer went away with someone called “Amy.” This was too much for Mrs. Mercer. She booked herself into a hotel and tried to commit suicide by slitting her wrists, taking pills and drinking a bottle of liqueur. Fortunately she was not successful in this attempt. However, after a period of recovery in hospital she moved to a shelter and then an apartment. She now lives in Midland, Ontario.
- [6] Mr. Mercer denies that anything untoward occurred with Amy. He described his wife as emotionally unstable, volatile, aggressive and subject to weekend drinking binges. He did not abandon her financially but he did monitor her spending as there was a family budget to which he insisted the family adhere. He filed police reports from June and August 2014 which he relied upon as proof of Mrs. Mercer’s violent tendencies. No assault charges were ever laid. After Mrs. Mercer left the home Mr. Mercer readied their condominium home for sale. After it sold in January 2015 he and the parties’ son Arthur purchased a new home where they still reside.
- [7] Only the parties gave evidence in this trial. Mr. Mercer was self-represented throughout and struggled somewhat with procedure, the introduction of documents and proper questioning in cross-examination. However, he was open to the court’s direction and both parties were polite throughout despite the fact that the separation, litigation and this trial has clearly taken an emotional toll on both of them. It is hoped that this decision will finally allow them to move forward with their lives.

EQUALIZATION OF NET FAMILY PROPERTY

- [8] After hearing some evidence on what were effectively very minor differences in the calculation of net family property, Mr. Mercer conceded Mrs. Mercer’s position on those

issues to allow matters to move forward. There was some evidence about the number to be used for the balance owing for Mr. Mercer's RRSP withdrawal for his Home Buyer's plan. It was agreed that the proper number was \$6,670 as of the date of separation. The equalization payment owing to Mrs. Mercer is therefore increased by \$665.50 ($\$8,001 - \$6,670 = \$1,331 \div 2 = \665.50) bringing it to \$151,017.35 ($\$150,351.85 + \$665.50 = \$151,017.35$).

- [9] The only remaining issue is the parties' view of the notional tax rate to be applied to net out the value of Mr. Mercer's RRSP.
- [10] The gross value of Mr. Mercer's RRSP on the date of separation was \$89,012.58. Mr. Mercer submits that the tax rate that should be applied is 23 percent resulting in a total deduction of \$20,742.89. He bases this on his previous lawyer's advice.
- [11] Mrs. Mercer's counsel submits the proper rate is 15 percent. This would result in a deduction of \$13,351.88. The difference between the two positions is \$7,121.01 or an additional \$3,560.50 to Mrs. Mercer.
- [12] Mrs. Mercer's counsel relied on the actuarial report related to valuation of Mr. Mercer's CIBC pension. That report (Exhibit 15) used a 14.56 percent average tax rate assuming a weighted retirement age of 62 and an assumed retirement income of \$45,257. Mr. Mercer agreed that his current income is less than \$45,257.

Ruling on Equalization Payment

- [13] Mr. Mercer is currently employed as a school bus driver. He is looking for a position as a building superintendent. Despite many job applications and interviews, he has been unable to find employment at which he could earn anywhere near his previous income with CIBC. Given that this court cannot base its decisions on what might be, the current reality for Mr. Mercer is a far lower income than what he was used to earning. That will hopefully change for him but for now a lower tax rate would be more realistic and fair.
- [14] In terms of an actual rate of tax to be applied, the best evidence available is the rate used in Mr. Mercer's pension valuation of 15 percent. Mr. Mercer could not really point to any concrete evidence or case law supporting a higher rate. The reason he used the 23 percent rate was based on his previous lawyer's advice. He could not recall why that particular rate was recommended.
- [15] Therefore, in the circumstances, therefore, the notional tax rate for Mr. Mercer's RRSP will be 15 percent. The result is that the equalization payment owing to Mrs. Mercer remains at \$151,017.35

POST SEPARATION CREDITS

- [16] Mrs. Mercer acknowledges having received the following payments post separation;

\$50,000 from the sale of the matrimonial home on January 9, 2015.

\$27,000 from the sale proceeds of the matrimonial home on September 2, 2015.
\$40,000 from the sale proceeds of the matrimonial home on February 23, 2016.
\$50,000 rollover from Mr. Mercer's RRSP on March 24, 2016.

- [17] Mr. Mercer acknowledges receiving \$50,000 from the sale of the matrimonial home on January 9, 2015, and another \$50,000 from the sale proceeds on March 24, 2016, for a total of \$100,000. The sum of \$9,275.13 remains in trust from the house sale proceeds.
- [18] Mrs. Mercer concedes that Mr. Mercer paid off the mortgage on the matrimonial home (which was jointly owned) on December 19, 2014. The payout was made post separation but prior to sale. Mr. Mercer paid out the mortgage using funds from an inheritance received from his mother's estate. The total paid was \$41,414.41 resulting in a credit to Mr. Mercer of \$20,707.20.
- [19] The parties had a joint line of credit which was not secured by the matrimonial home. The balance of the line of credit on the date of separation was \$34,781.67. Mr. Mercer paid off the line of credit balance of \$37,813.08 on August 1, 2013. Again he used funds from his inheritance to make the payment.
- [20] The balance on the line of credit remained nil until November 2013 when Mrs. Mercer withdrew \$10,000. Her evidence was she needed these funds for living expenses and legal fees as Mr. Mercer was not paying her support and she had no income. Mrs. Mercer testified that when Mr. Mercer found out about the withdrawal he became angry and made her cut up her bank card. She made no further withdrawals on the joint line of credit and opened her own line of credit in June 2014. Mr. Mercer denies that he forced Mrs. Mercer to cut up her bank card. He denied that Mrs. Mercer's access to the line of credit was in any way limited.
- [21] When the matrimonial home sold on January 9, 2015, the joint line of credit balance of \$37,806.87 was paid out. Despite some initial wrangling about each party taking out unauthorized payments from this line of credit, in the end they both agreed that they should share responsibility and since it was paid from the joint sale proceeds, no further division is necessary.
- [22] Mrs. Mercer seeks a credit of \$7,500 representing the tax she will be required to pay on the \$50,000 RRSP rollover which was ordered in March 2016. She also seeks to receive the balance of sale proceeds held in trust and will credit Mr. Mercer \$4,637.86.
- [23] Mrs. Mercer concedes that Mr. Mercer should receive one-half of the insurance payout for the accidents involving the Cadillac and the Toyota or \$2,250.
- [24] The total adjustments/credits to Mr. Mercer from the equalization payment sought by Mrs. Mercer are as follows:

Credits for house sale proceeds advances:	\$ 67,000.00
Credit for remaining house sale proceeds:	4,673.86

One-half the mortgage payout	20,707.20
Credit for insurance proceeds	2,250.00
Minus tax liability on \$50k RRSP rollover	(7,500.00)
Total credits to Mr. Mercer	\$ 87,095.06

- [25] Based on an equalization payment owing to Mrs. Mercer of \$151,017.35 and subtracting the credit owed to Mr. Mercer as per the above, Mrs. Mercer would be owed \$63,992.29 based on her position. She is prepared to receive this sum either from Mr. Mercer's pension (if available) or his RRSP with the appropriate tax gross up.
- [26] There is a dispute concerning what Mrs. Mercer says is an unpaid costs order dating back to February 23, 2016, in the amount of \$5,000. Mrs. Mercer submits this amount should be added to the amount owing to her. Mr. Mercer says he has paid this and provides proof by way of a screen shot of a bank transfer to FRO of \$11,000 dated, March 30, 2016. This amount, according to Mr. Mercer, represents cost orders of \$6,000 and \$5,000 which he was required to pay and which were enforced as support. However, as the February 23, 2016, order was never issued, it is unlikely that FRO has any record of the \$5,000 owing and has likely applied it to ongoing spousal support. Given the strong possibility that Mr. Mercer has already paid the two outstanding costs orders, I will leave this issue with Mrs. Mercer's counsel to sort out. If the February 23, 2016 order is issued, it can then be enforced if it has not been paid.
- [27] Mr. Mercer does not agree with Mrs. Mercer's calculations of post separation credits. While he agrees that Mrs. Mercer received total house sale proceeds advances of \$67,000 more than him, he seeks a credit for payment of half of the line of credit paid out pre-house sale. The payout made on August 1, 2013, is conceded by all parties to have been \$37,813.08. Mr. Mercer seeks a credit for half of this payment or \$18,806.54. He also seeks credit for half the mortgage payout of \$20,707.20. If Mrs. Mercer is to receive all of the remaining house sale proceeds he should receive a credit of \$4,637.86.
- [28] As for the joint line of credit paid out from the sale proceeds, Mr. Mercer's original position is that \$10,000 of the line of credit taken out by Mrs. Mercer must be her sole responsibility. However, he conceded that the joint line of credit paid from the joint sale proceeds should not be subject to further division in these circumstances.
- [29] Mr. Mercer addressed certain other credits which he claimed were owed to him by Mrs. Mercer. His evidence was that he should be credited one-half of the cost of the mortgage, taxes, insurance and condo fees from the date of separation until April 2014. Thereafter, Mrs. Mercer should be responsible for 100 percent of those costs because her hoarding and refusal to cooperate meant the condominium took seven more months to sell than it should have.
- [30] Based on the condo fees at \$939.52 per month, mortgage at \$1,407 per month (\$325 per week times 4.33 weeks), taxes at \$145.83 (\$1,700 per year ÷ 12) and contents insurance of \$25 per month (\$300 per year), the fixed monthly expenses for the condo were \$2,517.35. Mr. Mercer claims 50 percent of that or \$1,258.67 per month for the ten

month period between July 2013 and April 2014 or \$12,586.75. He claims 100 percent of the fixed expenses for the period of May to December 2014 or eight months at \$2,517.35 per month for a total of \$20,138.88. The combined total claimed by Mr. Mercer is therefore \$32,725.55.

- [31] Mr. Mercer also claims a further \$48,806 from Mrs. Mercer being what he claims to be reimbursement to him for her medical, dental, drug and personal expenses as well as her Visa and cell phone bills from July 2013 to December 2014. Exhibit 5 showed that between June 17, 2013, and September 21, 2014, Mr. Mercer paid \$4,737.89 in medical and dental expenses. This was the uncovered portion from his former SunLife Financial plan. Other than this amount, Mr. Mercer could not point the court to specifics as to how he came up with this number other than his evidence that this number basically represented everything he paid on Mrs. Mercer's behalf between July 2013 and December 2014.
- [32] Mr. Mercer did not deny that Mrs. Mercer had not been working either full or part time for many years prior to separation, that she had no source of income and that she had health problems. When asked how he thought she was supporting herself after she left the matrimonial home in September 2014 he was hesitant and seemed to feel it was up to her to manage and get a job.
- [33] Based on Mr. Mercer's position, his credits would be as follows:

(a) Additional House Sale Proceeds received by Mrs. Mercer	\$ 67,000.00
(b) One-half August 1, 2013 line of credit payout	18,806.54
(c) Mortgage payout (1/2)	20,707.20
(d) House sale proceeds owing to Mr. Mercer	4,637.86
(e) Household expenses July/13 to December/15	32,725.55
(f) Personal Expenses – July/13 to December/15	48,806.00
(g) Car insurance proceeds	2,250.00
 Total Credit owed to Mr. Mercer	 \$194,933.15

- [34] Based on the credit Mr. Mercer says is owing to him Mrs. Mercer would owe him an equalization payment of \$43,915.80. ($\$194,933.15 - 151,017.35 = \$43,915.80$).

Ruling on Post Separation Credits

- [35] Starting with the credits which are to be allowed to Mr. Mercer, they are as follows:
- (a) \$67,000 being the additional amount which Mrs. Mercer received from the sale proceeds over and above Mr. Mercer. There is no real dispute about this amount. Each party received \$50,000 on closing. Further Mr. Mercer received an additional \$50,000 in March 2016 but that is to be offset by the \$50,000 RRSP rollover to Mrs. Mercer. I therefore do not categorize the RRSP rollover

separately as Mr. Mercer suggests. It simply sets off the \$50,000 in additional house sale proceeds which he received.

- (b) One-half the payout of the line of credit from August 1, 2013. It is not disputed that Mr. Mercer paid this out with his inheritance. For reasons which are not clear to me, Mrs. Mercer's calculations did not include any division of this amount. Clearly if it had not been paid out in August 2013, the line of credit paid out on the sale of the home would have been twice the size. I therefore allow a credit to Mr. Mercer of \$18,806.54.
- (c) One-half the mortgage payout. Mr. Mercer paid the mortgage down to nil with his inheritance funds prior to the sale of the home. There is no dispute that he should receive a credit of \$20,707.20.
- (d) One-half the remaining house sale proceeds. Mr. Mercer should receive a credit of \$4,637.86. There is no dispute about this credit.
- (e) One-half of the insurance proceeds for the Cadillac and the Toyota. This is not disputed.

[36] Credits which are disallowed to Mr. Mercer are as follows:

- (a) Household expenses payable by Mrs. Mercer. Mr. Mercer's position was that Mrs. Mercer should essentially be responsible for the bulk of household expenses between July 2013 and December 2014. He blamed the delay in sale on Mrs. Mercer's hoarding and lack of cooperation. I do not accept that Mrs. Mercer should be required to contribute to these expenses post separation. For the period of July 2013 to September 2014 she was still living in the home. Mr. Mercer was responsible for the fixed expenses as he always had been. He was still either working full time or receiving his severance during this period and could afford to continue to support the family based on their previous lifestyle. With respect to the period of October to December 2014, Mrs. Mercer was no longer in the home but Mr. Mercer was not paying her any spousal support. No credit of \$32,725.55 is payable to Mr. Mercer for the period of July 2013 to December 2014.
- (b) Personal expenses of Mrs. Mercer owed to Mr. Mercer. The reasons for disallowing this credit are similar to those expressed above. I should add as well that virtually no evidence was provided by Mr. Mercer as to how he came up with this large number. He simply asked the court to accept it without any real corroboration. It is of significance that Mrs. Mercer was still living in the home

for the period of July 2013 to September 2014. Mr. Mercer denied her claims that he was withholding food and necessities from her. He testified that he was continuing to provide for the family throughout that period. Since he did not pay spousal support for that period, he cannot then claim a credit for paying Mrs. Mercer's living expenses. As for the period of September to December 2014, Mr. Mercer was not paying spousal support even though Mrs. Mercer was not living in the home and clearly unable to support herself at that time. I do not find that there is any evidence which could support the number suggested by Mr. Mercer. Further, I do not find that there is sufficient evidence to show that Mrs. Mercer's alleged hoarding and lack of cooperation can be adequately quantified with respect to any decrease in the sale price of the condominium. While Mrs. Mercer was still in the home Mr. Mercer was still supporting her by paying the household expenses. Living in the same home but apart did not relieve him of that obligation. When she was not living in the home, he likely had a spousal support obligation which will be dealt with below.

- (c) In March 2016 Mr. Mercer received a further \$50,000 from the house sale proceeds. Mrs. Mercer received a \$50,000 RRSP rollover so that each party could notionally have the same amount of capital. However, Mrs. Mercer will be required to pay tax on the rollover. It is fair to apply the same tax rate as was applied to Mr. Mercer for equalization purposes or 15 percent. This amount should be deducted from any credit owed to Mr. Mercer.

[37] Based on the above, Mr. Mercer shall receive the following credits against the equalization payment owing to Mrs. Mercer:

(a) House sale proceeds differential	\$ 67,000.00
(b) Mortgage payout	20,707.20
(c) August 2013 line of credit payout	18,806.54
(d) Remaining sale proceeds differential	4,637.86
(e) Insurance payout	2,250.00

Total credit owed:	\$113,401.60
Less RRSP tax differential	(7,500.00)
Net credit owed:	\$105,901.60

[38] Based on the net credit owed to Mr. Mercer, he will be required to make an equalization payment to Mrs. Mercer of \$45,115.75 (\$151,017.35 - \$105,901.60 = \$45,115.75). This payment may be made either by way of a transfer from Mr. Mercer's pension or his RRSP with a gross up of 15 percent as appropriate. Mr. Mercer need not sell either his

rental property in Windsor or his home in order to satisfy this payment unless he chooses to do so.

OTHER EQUALIZATION ISSUES

- [39] Mr. Mercer insists that Mrs. Mercer has a pension in the United Kingdom from when she worked there as a nurse for seven years between 1978 and 1985. He was bitter about the fact that, despite multiple requests that she do so, Mrs. Mercer had failed to request or obtain a pension statement. Mrs. Mercer relied on Exhibit A, a website page for the Canadian Alliance of British Pensioners. She testified that as of April 6, 2016, British pensioners would need at least ten years of National Insurance contributions in order to qualify for a pension. She only has seven years of contributions. She also relied on Exhibit C which purported to demonstrate, by the inputting of certain information, that Mrs. Mercer did not qualify for any state pension and even if she did she would not be eligible for it until 2027.
- [40] Mr. Mercer appeared certain that Mrs. Mercer would qualify for the pension. Unfortunately, there was no reliable way to establish if she did or what the amount would be.
- [41] I find that Mrs. Mercer was not as cooperative as perhaps she could have been in providing information about the pension as her case had to be re-opened based on documents she “found” on the internet after two days of trial. Be that as it may, I find that is simply insufficient documentation and evidence on which to make any finding on this issue.
- [42] Mrs. Mercer currently has an accident benefits claim and a tort claim outstanding in relation to a motor vehicle accident which occurred on August 14, 2013. Her evidence was that she receives no monthly income from her accident benefits claim. It is simply money which is reimbursed directly to her doctors and therapists for the treatment needed as a result of injuries she suffered in the accident. I accept her evidence in this regard. It is not unusual for accident benefit claims to be paid in this manner.
- [43] A pre-hearing is scheduled for June 13, 2016, in relation to the accident benefits claim. Even if the claim is settled by way of a lump sum settlement, this could not form any part of equalization, because the accident occurred after the date of separation, or any consideration with respect to spousal support as the funds would be related solely to necessary medical treatment for Mrs. Mercer’s injuries.
- [44] The tort claim was issued in July 2015. It is for four million dollars in damages. It has not yet been served as the defendant cannot be found. A motion for substituted service on the insurer is planned. A settlement or trial judgment is likely several years away. Any damages received by Mrs. Mercer would be excluded from the net family property calculation because the accident occurred after the date of separation and by operation of s.4(2) of the *Family Law Act*. If the damages received will affect any ongoing spousal support, that is an issue than can be dealt with at the time they are received.

SPOUSAL SUPPORT

- [45] Mr. Mercer worked for CIBC for 24 years before his position was “downsized” and he received a severance package. His employment was terminated effective June 27, 2014, and he elected to receive a salary continuance until September 30, 2015.
- [46] Mr. Mercer’s income in 2013 was \$95,221. In 2014 his income was \$97,295. In 2015 his income was \$194,137. This amount included \$101,112 in RRSP withdrawals, \$27,997 in rental income, \$59,793 in employment income and various other small amounts.
- [47] Mr. Mercer currently works as a bus driver for four hours a day. He earns \$13 an hour. His April 8, 2016 financial statement indicates he earns \$473.60 a month for this job. The job will obviously end for the summer shortly. Mr. Mercer also receives income from his CIBC pension of \$1660 per month.
- [48] The April 8, 2016 financial statement also indicates rental income of \$2,500 per month. Mr. Mercer owns a small rental building in Windsor, Ontario which he bought post separation with funds from his inheritance. He testified that this income is completely offset by the expenses related to the operation of the rental building he owns in Windsor, Ontario. Exhibit 18 was a breakdown of those expenses prepared by Mr. Mercer which showed total annual expenses of \$27,271.83 for 2015. He did not offer any corroboration for these amounts but insisted that all of the relevant documentation had been given to Mrs. Mercer’s lawyer by his former lawyer.
- [49] Mr. Mercer was cross-examined about the rental income indicated in 2015 income tax return. It indicates rental income of \$29,997 which Mr. Mercer testified was a gross amount. He told the court he gave his accountant all of the back-up documentation for the expenses but the income tax information provided to the court did not appear to account for any deductions for expenses. As such, Mrs. Mercer submits that rental income of \$30,000 (as per the April 8, 2016 financial statement) should be included in Mr. Mercer’s income for support purposes. Mr. Mercer argues that it would be completely inequitable to use the income number without accounting for expenses. It is a 100 year old building and the tenants do not pay their own utilities. There are four apartments which rent out for \$700 each. Only two are currently rented as the other units need repairs.
- [50] Mrs. Mercer submits that Mr. Mercer is underemployed. He had ample time to prepare for the end of his salary continuance in September 2015. Mrs. Mercer claims that after 24 years at CIBC Mr. Mercer is capable of far more than a bus driving job. He is deliberately underemployed and not making sufficient efforts to find remunerative employment.
- [51] Mr. Mercer agreed that his most prolific attempts at a job search were in September and October 2015. Exhibit 22 contains hundreds of emails from Mr. Mercer to prospective employers. He went to four interviews for the position of an Air Canada steward but has not heard back. He had several interviews for a contract position which paid \$20 an hour for five hours a day but he did not receive that job. He continues his search. The amount

of time taken up with preparing for motions and this trial has interfered with his ability to attend job interviews. During his evidence he told the court he may try to obtain a job as a building superintendent so that he and his son can reduce their living expenses.

- [52] Mrs. Mercer's position is that if Mr. Mercer was in the running for a \$20 per hour job, his income should be imputed in the range of \$40,000 per year. Even that is low, given his skills and experience. If his income is imputed at \$40,000 per year and his pension and gross rental income is factored in, his income for support purposes would be in the range of \$89,000 per year. Mrs. Mercer is seeking at least \$2,000 per month in spousal support. She argues there should be no consideration for the fact that their dependent son Arthur lives with Mr. Mercer. He is autistic and receives ODSP of \$1,100 per month. That is more than enough for his needs. In any event Mrs. Mercer submits she is unemployable and has no income from which to pay child support.
- [53] Mrs. Mercer also seeks retroactive support. She seeks support for the period of October to December 2014 when she was on her own but prior to Mr. Mercer commencing support in January 2015. She also seeks retroactive spousal support for the period of September to December 2015. She seeks to effectively set aside the consent order which suspended support for that period.
- [54] Mr. Mercer resists paying spousal support. His view is that Mrs. Mercer is capable of contributing to her own support but simply refuses. He attributes the decline in her health since separation to the car accident in August 2013 which was post separation and for which he is blameless. Her accident benefits are meant to remedy her medical difficulties arising from that accident.
- [55] While Mr. Mercer concedes that Mrs. Mercer has not worked since 2007, this is not because he did not encourage her to do so. He fully supported her working outside the home. She worked as a nurse for seven years in England. Mr. Mercer testified that there are health related jobs she could do such as monitoring patients which would not require lifting or strenuous activity.
- [56] Mr. Mercer is concerned about "double dipping." He does not believe it is fair that his pension income is included in his income for support purposes as the pension has been valued and included as an asset for the equalization of net family property.
- [57] Mrs. Mercer's evidence was that she has never worked full time since she came to Canada in 1991. She was a stay at home mother who cared for the children, cooked the meals and did all the laundry and cleaning. At times she took in some children for daycare or cared for seniors but these were part time jobs and not long term. She has not worked at all since 2007.
- [58] Mrs. Mercer had her first heart attack in 2007 and three more since. She has had eight angioplasties and three stents. She described her condition as a diastolic left ventricle failure. Mrs. Mercer's counsel sought to introduce three reports from Mrs. Mercer's doctors under s. 52 of the *Evidence Act*. The doctors were not called as witnesses. The

court found the letters to be admissible but indicated a concern as to what weight to give to the letters in the circumstances.

- [59] In brief, the first letter was dated January 27, 2015, from Mrs. Mercer's family doctor, Dr. Rosenthal. Mrs. Mercer has been his patient since 1998. Dr. Rosenthal reviewed her medical history and concluded that Mrs. Mercer is unable to work on either a full or part-time basis.
- [60] The second letter was dated July 22, 2015, from Mrs. Mercer's psychiatrist, Dr. Brian Baker. Dr. Baker diagnosed Mrs. Mercer as having a Major Depressive Disorder with suicidality and anxiety. He also concluded that Mrs. Mercer was unable to work now or in the foreseeable future.
- [61] The third and final letter was dated July 23, 2015, from Dr. Balkansky, Mrs. Mercer's chiropractor. He reported mostly on the symptoms from her August 2013 car accident. Given what he described as serious physical and psychological injuries, he opined that she would have "limited functional capacity to participate meaningfully in work environments at this time".

Ruling on Quantum of Retroactive and Ongoing Spousal Support

- [62] I should mention first that I do not believe that entitlement is an issue in this case. After a 22 year marriage and a spouse who has not worked at all since 2007 there would be entitlement even without the complication of Mrs. Mercer's medical issues.
- [63] While I accept that Mrs. Mercer has medical conditions, I found that the doctors letters filed may have gone too far as none of the doctors were really in a professional position to opine on Mrs. Mercer's ability to work long term. However, for the purposes of this trial, there is no doubt that Mrs. Mercer is entitled to spousal support at this time.
- [64] Turning to retroactive spousal support I decline to order any support for the period of October to December 2015. An order was made on consent presumably to allow Mr. Mercer time to look for employment and get back on his feet when his severance ended. The evidence is clear that diligently looked for work during that time but to no avail. This court will not override the determination of the parties that at that time a short suspension of support was in order.
- [65] I do, however, view the period of October to December 2014 as quite different. Mrs. Mercer had left the home under stressful and difficult circumstances. She attempted suicide, was hospitalized, went to a shelter, lived on her daughter's couch and then obtained an apartment. She was in her greatest period of need but clearly without the financial or emotional support of Mr. Mercer. Given that his income for 2014 was over \$97,000 and Mrs. Mercer was clearly in need of support, retroactive support of \$2,000 per month is payable for the period of October to December 2014. Since this will be paid as a lump sum and without the benefit of any tax deduction, the support payable will be

reduced to \$1,500 per month being a total of \$4,500 net of tax owed by Mr. Mercer for the relevant period. No other amounts of retroactive support are payable.

- [66] With respect to ongoing issues, I start first with whether income should be imputed to Mr. Mercer. The main question to be asked is whether Mr. Mercer is deliberately underemployed or simply the victim of unfortunate circumstances. While both and Mrs. Mercer have been very affected by the separation and the litigation, it is now almost three years since the date of separation.
- [67] While I am sympathetic to Mr. Mercer's dilemma in trying to re-insert himself into the job market, his job as a bus driver does seem far below his skill and experience level. A further factor that cannot be ignored in this case is the time, effort and expense of raising a child with diagnosed difficulties as a single parent. Mr. Mercer took on the bus driver job and is contemplating a job as a building superintendent so he can be there for his son. While Arthur is now 18 he is still a dependent.
- [68] Even though Mrs. Mercer does not have the ability to pay child support, the matter does not end there. I find that some consideration must be given to Mr. Mercer's obligations with respect to Arthur in determining an appropriate level of imputed income. In the circumstances I do not believe that \$30,000 a year is too low. Indeed it is far more than he is actually making. However, since the parties will be required to exchange income tax returns each year, support can be adjusted once Mr. Mercer has more steady and permanent employment.
- [69] As for the double dipping issue, this is one of those cases in which double dipping is inevitable no matter how unpalatable that may be to Mr. Mercer. As per *Meiklejohn v. Meiklejohn*¹, Mrs. Mercer is not in a position to generate income from her assets. Indeed, she has none. Even if she invested the equalization payment she receives in this case, it will generate only a small amount of interest.
- [70] This is a case where the economic hardship which arose from the marriage breakdown persists. Consideration must also be given to need in this case. Mrs. Mercer is not living extravagantly. Whatever allegations Mr. Mercer made at trial about her spending habits or indeed an ill-advised purchase of speakers well beyond her means, Mrs. Mercer is now faced with the cold hard reality of living in circumstances that are far less comfortable than when she was married.
- [71] Mrs. Mercer is not able to work **at this time**. That could change. And indeed, she may be motivated to do some work as it will be difficult for her to live on the spousal support alone. However, this case falls into the exceptions set out in *Boston v. Boston* and the line of cases which followed where an already equalized pension must be used an income source given the circumstances of the case.

¹ [2001] O.J. No. 3911 at para 15.

- [72] With respect to Mr. Mercer's rental income, I accept that it is simply not possible to operate such a property without an associated expense. The evidence I have about such expenses is thin and contradictory. What I do accept is that the building currently has 2 tenants (the third tenant is moving out in June). That would generate an income of \$16,800 per year at \$700 per unit. If expenses of 50 percent are allowed (which is far less than claimed by Mr. Mercer) that would leave an income of \$8,400 per year. This is not unreasonable for 2016 based on Mr. Mercer's own evidence and the contradictory evidence related to his 2015 income tax return.
- [73] Based on all of the above, Mr. Mercer's income for support purposes would be \$58,320 (\$30,000 + \$19,920 + \$8,400 = \$58,320).
- [74] This income would generate a range of spousal support with \$1,604 per month in the low range, \$1,871 at the mid-range and \$2,138 at the high range.
- [75] Mrs. Mercer's counsel urges the court to order support in the high range given the length of the marriage, the roles taken on in the marriage, Mr. Mercer's income earning capacity, Mrs. Mercer's lack of employability and the economic hardship faced by Mrs. Mercer as a result of the marriage breakdown.
- [76] These are all very important factors but fail to account for the responsibilities taken on by Mr. Mercer in caring for Arthur. Although Arthur is in receipt of ODSP he is autistic and needs support. Mr. Mercer has taken all of that on and those responsibilities must be accounted for in some manner. As such, an award of support close to the mid-range is more appropriate.
- [77] I have not specifically addressed Mr. Mercer's claim for child support for Arthur. Clearly, Mrs. Mercer has no means to pay child support. Considerations for the caregiving and expense related to Arthur are reflected in the award of spousal support.

RESTRAINING ORDER

- [78] After giving my oral reasons on this matter, Mr. Mercer requested I deal with his claim for a restraining order. Unfortunately, no evidence was given at trial on this issue. Given the propensity of these parties to call the police, there is a concern that a restraining order would simply invite further police involvement.
- [79] Given the terms of this judgment and the fact that Arthur is 18 years old and capable of communicating with his mother directly, a non-communication order is a more reasonable solution.

FINAL ORDERS

- [80] Mr. Mercer shall make an equalization payment to Mrs. Mercer in the amount of \$45,115.75. The payment shall be made within 60 days of June 3, 2016. Mr. Mercer may make the payment by way of RRSP rollover or pension transfer but the payment must be grossed up for tax by 15 percent.

- [81] The house sale proceeds remaining in trust shall be delivered to Mrs. Mercer forthwith.
- [82] Mr. Mercer shall pay retroactive spousal support of \$4,500. This amount shall be paid in full by December 31, 2016. If it is paid by way of RRSP rollover or pension transfer it shall be grossed up by 15 percent.
- [83] Mr. Mercer shall pay ongoing spousal support of \$1,700 per month commencing June 1, 2016 and continuing on the first day of each month thereafter.
- [84] Spousal support may be reviewed upon one of the following occurrences:
- (a) Arthur supporting himself and living on his own.
 - (b) Mr. Mercer obtaining full time employment or any employment in which he earns more than \$13 per hour.
 - (c) Mrs. Mercer obtaining any employment.
 - (d) Mrs. Mercer obtaining a settlement of her MVA tort claim.
- [85] The parties shall exchange income tax returns each year commencing in 2017. A complete copy of the T1 return with all attachments and the Notice of Assessment must be provided immediately once available.
- [86] Mrs. Mercer to provide a copy of any judgment or settlement of her MVA tort claim once available.
- [87] No child support for Arthur is payable by Mrs. Mercer given that he receives ODSP income of \$1,100 per month, Mrs. Mercer has no income and a consideration of Arthur's needs has already been factored into the spousal support quantum.
- [88] There shall be a mutual non-communication order except with respect to the exchange of income tax information or any emergency relating to the parties' child, Arthur Mercer.

COSTS

- [89] The parties shall provide a two page summary of their costs submissions exclusive of any Offer to Settle or Bill of Costs. The applicant's submissions shall be served by June 17, 2016 and the respondent's by July 4, 2016. Any reply to be served by July 11, 2016. Costs submissions to be provided by email to my judicial assistant at Rebecca.mundy@ontario.ca.

Read in Open Court: June 3, 2016

NOTE: *As noted in court, on the record, this written judgment is to be considered the official version and takes precedent over the oral reasons read into the record. Any discrepancies between the oral and written versions, it is the official written ruling that is to be relied upon.*

Madam Justice C.A. Gilmore

Released: June 6, 2016