No. D52820/10
2013-07-15
Citation: *Mintz v. Mintz*, 2013 ONCJ 382

Ontario Court of Justice

47 Sheppard Avenue East

Toronto, Ontario M2N 5N1

BETWEEN:

MARSHA MINTZ

Applicant (mother)

- and –

JEFFREY MINTZ

Respondent (father)

Before Justice Robert J. Spence

Heard 19 and 20 June and 4 July 2013

Reasons for Judgment released on 15 July 2013

Mr. Jason Gottlieb ……. for the applicant, mother

Ms. Lauren Israel ……. for the respondent, father

Introduction

[1] This case is about whether Mr. Mintz ("father") should be ordered to pay spousal support to Mrs. Mintz ("mother"). Mrs. Mintz says that the court should order spousal support in her favour, retroactive to January 1, 2009**.** Mr. Mintz says that the mother is not entitled to any spousal support whatsoever. In the alternative, he argues that if entitlement to support is established, the court ought not to order any support to be paid because he has two of the parties' children living with him who he supports without any financial assistance from the mother. He also carries the matrimonial debt, on which he is making monthly payments. These facts, the father argues, create an inability to pay support and should offset any spousal support entitlement which the mother may otherwise have. He also argues that, in any event, there should be no order for retroactive support due to the excessive delays in moving this case forward, all of which, the father argues, lay at the feet of the mother.

[2] As at the date of her most recent financial statement[1] the mother discloses an income of $18,780 per year from social assistance. The father's line 150 income on his 2012 income tax return is $83,308, from his employment at Jewish Family & Child Services of Greater Toronto ("JF&CS").[2]

Background

[3] The father is 56 years old. The mother is 61 years old. They were married in 1985, and they are the natural parents of four children. This was the second marriage for the mother, who was previously married in 1977. Her daughter, Fr..., was born July 14, 1979 and is now about 34 years old. Fr... was the child of mother's first marriage. That first marriage was of short duration, ending around 1980.

[4] The mother was born in Brooklyn, New York and lived there until she was about 18 years old. She then went away to university, first to New Mexico, then New York, and from there to Valencia, Spain. She graduated with a Bachelor of Arts degree in Spanish, and subsequently, around 1983, a Master of Education, with a specialty in English as a Second Language.

[1] sworn June 5, 2013

[2] Although the mother's counsel asks me to impute a greater income to the father

[5] The parties met in 1984 and after about four months, they became engaged to marry. They married in January 1985. Fr... had remained with the mother after her divorce from her first husband and she became part of the new family unit with the parties. The parties initially resided in New York, where the father was living and studying at the time. They remained there following their marriage until they decided to move to Toronto in 1988.

[6] They lived in Toronto until 1994, at which time they moved to Israel. They remained in Israel until 2002, following which they returned to Toronto. They have lived in Toronto continuously since 2002.

[7] The parties have four children from their own union – Av... born in 1985; Ri... born in 1987; Ah... born in 1989; and Be... born in 1996. All of the children are independent and living on their own except for Ri...[3] and Be..., both of whom live with their father.

[8] In May 2008 the parties separated, initially agreeing to a "trial" separation. The father moved onto a boat for a few months before subsequently moving into a basement apartment in or about September 2008. Between May and September 2008, the children remained with the mother. When the father moved into the basement apartment, Be..., who was then 11 years old, and Ri..., who was then 21 years old, moved in with the father. Ah..., who was then 19 years old, remained living with the mother.

[9] Subsequent to the parties' separation, their difficult financial circumstances necessitated the sale of the matrimonial home. The debt on the home far exceeded the sale proceeds. Accordingly, in 2010 the father filed a Consumer Proposal which consolidated a substantial amount of the family debt. The result of that Proposal is that for the past three years he has been making monthly payments in the amount of $420. These payments will last for another two years.[4] In order to conserve expenses, the father moved in with his present girlfriend in 2010.

[10] At some point following the sale of the matrimonial home, the mother received a demand letter from a collection agency, as the debts in her name had by then

[3] Although Ri… is 26 years old, she is a university student and financially dependent on her father

[4] It was unclear from the evidence what the total debt amounted to at the time of the Proposal, but according to the father's financial statement, the debt was $22,260 as at February 2011.

accumulated to $46,892. She has never made any payment on that debt.[5] The father had asked her in 2010 to join with him in the Consumer Proposal, but she declined to participate.

[11] The mother commenced this litigation by Application dated December 30, 2010. On April 28, 2011, the parties entered into a consent order whereby the father was granted sole final custody of Be…, with access to the mother in accordance with the child's wishes.

[12] In addition to finalizing custody and access, the parties agreed to detailed disclosure orders.

[13] As at April 28, 2011, the only issue remaining to be decided by the court was whether there should be an order for spousal support in favour of the mother. That is the issue which remained outstanding for more than two years, until the commencement of this trial in June 2013.

[14] I will have more to say about the disclosure orders and the reasons for the two-year delay leading to this trial, later in these reasons.

Mother's Employment History

[15] The mother has had a variety of jobs throughout the years. Some of her jobs were fulltime, others were part-time. It appears that none of her jobs were for a lengthy period of time. The evidence was not clear or consistent either in respect of the dates she held these jobs, or the length of time that she held them. The following is a summary of the mother's career path and jobs[6], with approximate dates (where disclosed from the evidence):

1. Fulltime teaching job in Brooklyn in the year following the marriage of the parties;
2. Working as a supply teacher during the second year following the parties' marriage;
3. Teaching at an Orthodox Yeshiva school for young boys, in general English subjects, for a period of time while the parties were still living in New York;

[5] There was no evidence that the mother has any plans in the future to make any payments toward these debts

[6] The evidence regarding this was patchy and somewhat incoherent

4. Teaching at an Orthodox Hebrew Day school as a teacher's assistant for about 15 hours per week, during 1989-90, a period of about one year;
5. Teaching English to Russian Immigrants. This job lasted for about one year following the job at the Hebrew Day School. She testified she received poor performance reviews and was not hired back after one year;
6. Following this she opened her own business called "Malava Malka's Chocolates", in which she made and sold Kosher Certified chocolates, using the facilities at her synagogue. She had an unspecified number of employees, and the father assisted with chocolate deliveries. She says she made very little money. However, when the parties moved to Israel in 1994 she sold the business for about $5,000;
7. Following the move to Israel in 1994, she became certified as a teacher by the Immigrant Teachers Department in 1997. She had taken 240 hours in courses in various teaching subjects and achieved marks ranging from a low of 80 to a high of 90;
8. While in Israel she worked at the Dror Elementary School and at the Ceci School. She testified that while she was at the Ceci School, "the principal acknowledged my creativity";
9. Following the parties' return to Toronto in 2002, the mother said she decided to use her creativity[7] to become a professional clown, and she joined the clown Association called Clown Alley. As a clown she periodically worked at such things as corporate events and birthday parties, she says, about six times per year. She also had a puppet show that she performed a few times. She said that "performance art came naturally" to her;
10. From 2005 to 2007 she worked part-time as a recreational therapist at SageCare, a home for persons with Alzheimer's disease, and other forms of dementia. This position was for about 20 hours per week. Although she was not formally trained to do this work, she had self-acknowledged great people skills, and she testified that she did "excellent work with patients and families". She says that the nurses became jealous of her abilities. When she protested to her employer that a co-worker had received a promotion instead of her, the employer responded by giving her a raise. She testified "I had to quit that job", but she did not say why she felt that was necessary;
11. In September 2007 she received her teaching accreditation from the Ontario Teachers College. This was in the form of an interim teaching certificate that would have expired in 2013. However, she finished the required courses in March 2013 and obtained her permanent teaching certificate;
12. From September 2008 to January 2009 she worked part-time for the York Region District School Board teaching English as a Second Language to adult classes of recent immigrants to Canada;
13. She was admitted to the inpatient psychiatric unit at York Central Hospital on January 30, 2009, and she was discharged on February 13, 2009;
14. From March 2009 to September 2009 she worked fulltime as a general worker at Maximum Nutrition, a retail nutrition and vitamin store. She testified that she was

[7] As the evidence will later reveal, she has been diagnosed with Attention Deficit Disorder, and she testified that "ADD people are highly creative"

fired from that job because she was frequently crying in the store when customers were present;

15. In her examination in chief she testified that she never worked after that job at the vitamin store. However, on cross-examination she admitted working for Drake Literacy during 2011, marking papers and receiving about $1,500 for each marking session, although the evidence was not clear as to the number of marking sessions she performed;
16. She said she did tutoring for cash, on a part-time basis, during 2010, 2011 and 2012;
17. Since obtaining her permanent teaching certificate in March 2013 she has not applied for any teaching jobs, either at the Toronto District School Board, or any private or religious schools; and
18. She testified that she has now been offered a job through the March of Dimes employment disability service[8]. She says that she will be initially paid $12 per hour[9] and that she might become a supervisor at this location. This job was to begin in July 2013.

Mother's Mental Health

[16] According to the evidence, around 1994 the mother began to suffer from occasional depression which required her to take medication from time to time. She said that she began on medication in or around 1996, and that the medication included Prozac, as well as other drugs. The father acknowledged this depression but he said that the depression was episodic, in that it occurred on "two occasions".

[17] When the parties separated in May 2008, they discussed this in terms of a "trial separation". However, in or about January 2009, the father advised the mother that he wanted the separation to be permanent. Mother testified that in January 2009 she felt her life was over and, as a result, she said that on January 30, 2009 she decided to commit suicide. However, before taking any steps to end her life, she telephoned the father who, in turn called 911. The police arrived at her house and took her to York Central Hospital in handcuffs. It appears she never took any actual steps toward ending her life prior to the arrival of the police.

[18] The York Central Hospital discharge summary states that the mother was "somewhat vague about the reason as to why she was brought to the hospital". She did express "feelings of failure in all areas of her life including relationships, in her career,

[8] She was unable to remember the name of the company she will be working for

[9] At this starting rate, her income would extrapolate to approximately $25,000 per year, based on a 40-hour work week ($12 per hour x 40 hours per week x 52 weeks = $24,960)

and basically in everything else." Under the heading "Mental Status Examination", the summary states:

> Her affect was appropriate; her speech was spontaneous and coherent. There was no evidence of psychotic features, suicidal or homicidal ideation [and] her cognitive functions were intact.

And, finally, the summary diagnosis was "Adjustment disorder with depressed mood".

[19] On August 27, 2009 her doctor referred her to the York Central Hospital Emergency Department after she had expressed thoughts of suicide to her doctor. The Hospital's Emergency Consultation Report states that when she appeared at the hospital,

> [she] had appropriate eye contact and appropriate verbal responses. She did show some emotion with smiling and she was seen with her neighbour and friend. [Following assessment by the Crisis team] she was advised to be discharged home with follow up with Family Services.

[20] In March 2011, her psychiatrist, Dr. Hoffer, completed a Health Status Report in support of her application for social assistance under the Ontario Disability Support Program ("ODSP"). In essence, Dr. Hoffer diagnosed her with "depression", "attention deficit disorder" and "anxiety disorder". Some of his comments include:

- "unable to formulate a long-term plan and feels very hopeless and helpless"
- "feels incompetent, unable to plan and organize, cannot follow through"
- "significant performance anxiety interferes with efforts"

[21] He noted that these "restrictions" were expected to last "1 year or more", that they were expected to be "continuous" and the prognosis for these restrictions: "likely to remain the same". I note that Dr. Hoffer was not called by mother to testify at trial and, accordingly, none of his findings which underpinned his Health Status Report could be tested through cross-examination.

[22] In January 2012, the mother's Case Manager at York Support Services, which had been providing her with services for about two years, prepared an assessment which set out the following [my emphasis]:

> In summary, [she] has experienced low mood for years, and has demonstrated difficulty with concentration, following routine and performing basic daily life skills.

> . . . [given her history] employment at this time would be very difficult and would likely be short-lived. [her] history of sporadic, short-term employment and dismissals further demonstrates her limited capacities. With the right combination of medications and counselling however, [she] may eventually progress to find suitable employment which meets her capacities.

[23] As was the case with Dr. Hoffer, The Case Manager was not called by mother to testify at trial and, accordingly, the findings which formed the basis for her assessment could not be tested at trial through cross-examination.

[24] On January 24, 2012, the mother was notified that her application for income support from ODSP had been approved.

[25] The mother's psychiatrist, Dr. Saffer, has been meeting with her since August 2012. He testified at trial that he has never seen the mother's clinical notes from her prior physicians, her OHIP records, or her hospital records. Nevertheless, he administered his own assessment tests and concluded that the mother was "mildly depressed". He also diagnosed her with Attention Deficit Disorder ("ADD") and Post Traumatic Stress Disorder. In terms of the latter diagnosis, he attributed the trauma to four events: the end of her marriage, her psychiatric hospitalization for two weeks in January 2009, the father reporting her to the Children's Aid Society[10], and the knowledge that she would not get custody of her children following the separation.[11]

[26] Dr. Saffer acknowledged that all his testing and conclusions were based on self-reporting, and he also acknowledged that self-reporting can be inherently unreliable. However, based on his observations and his regular sessions with the mother for about 10 months, he testified, "I have no reason to doubt her sincerity".

[27] The father strenuously disagreed with the mother's evidence which arguably suggested that mother had some form of mental illness. For example, he pointed out that ADD is not a "mental illness" but rather a learning disorder. The parties' daughter

[10] something about which the court heard no evidence

[11] As I noted, there was no dispute about custody, the mother having consented to final custody in favour of the father at the outset of the litigation

Ri… has been diagnosed with ADD; and the father points out that Ri… does not have a mental illness.[12]

[28] At trial, the lawyers spent considerable time on whether the court should "label" mother as a person with a "mental illness". The father was adamant that not only, in his opinion, does the mother not suffer from a mental illness but, rather, she is a highly capable, highly skilled individual who is malingering and is well capable of working. On the other hand, the mother argued that the court should apply this label to her and, because of this she ought to be excused for everything from her excessive delays in complying with court orders,[13] to her inability to obtain permanent, fulltime employment.

[29] There is no question that, as the previous section of these reasons reveals, the mother is a bright and capable person. Her high level of formal education, including a post-graduate degree, her fluency in Spanish, her teaching qualifications, her skills in performance art and her demonstrated ability to work effectively with a specialized clientele at SageCare, are all indicative of a person who is multi-talented. And because of that, one might understand why the father would argue that there is no mental illness here, and that she should just go out and get a permanent job.

[30] However, it is one thing to have a broad range of talents and abilities, and another thing to be able to employ those talents in a constructive and consistent manner. And the problem for the mother is that while she has a demonstrated history of being able to work for remuneration, she has never held down the same job for more than about one year.

[31] I wish to make it clear that the court is not looking for the presence or absence of a label in order to determine the mother's capacity to earn an income but, rather, at the mother herself – the whole person - including her health, as well as her employment history, her age, her qualifications, and whether, given all of these factors, she has the capacity to earn an income and, if so, how much should be attributed to her.

The Mother's Income History

[12] However, Ri…'s ADD has impacted on her ability to complete her formal education in the usual number of years. She is now 26 years old and the parties acknowledge that her university program is a modified one, so that she will not likely complete her degree for another three years

[13] About which I will have more to say later in these reasons

[32] The parties agree that the following correctly state the mother's line 150 income on her tax returns from 2003 to 2012:

- 2003 - $3,159
- 2004 - $8,133
- 2005 - $3,995
- 2006 - $13,287
- 2007 - $9,095
- 2008 - $18,967
- 2009 - $21,918
- 2010 - $10,707
- 2011 - $8,315
- 2012 - $16,025 (T5007 slip only – no income tax return disclosed)

[33] However, the father does not agree that those incomes reflect the total income received by the mother in any given year. In the course of cross-examination, Ms. Israel obtained certain admissions from the mother with respect to her declared incomes.

[34] For example, in 2004 she testified that she was a fulltime homemaker, but her Notice of Assessment discloses gross business income of $13,067 and net business income of $6,752. The mother was unable to explain this beyond stating that the income tax return was "prepared by my ex-husband" because "he was in charge". I can infer from the mother's testimony that she was likely doing her performance art and her tutoring around this time period and this could conceivably account for her business income.

[35] My comments are similar for the 2005 income tax year in which she declared gross business income of $13,560 and net business income of $2,300.

[36] Again, in 2006, she declared both gross business income of $5,200 and gross professional income of $16,800. She was unable at trial to identify which of these came from her work at SageCare. Again, she stated that the father "told me to sign and I signed."

[37] She admitted that during the years 2010, 2011 and 2012 she received cash income from tutoring and she did not declare all of that income on her tax returns.[14]

[14] Or any of it

She was unable or unwilling to provide the court with any evidence as to the amount of these earnings, or even an estimate.

[38] Following the parties' separation, in the summer of 2010, she spent almost a month in Spain. When cross-examined as to her ability to finance such a trip she stated that she was visiting "an old lover that I had" and that person had financed the trip by sending the money from Spain to a travel agent in Toronto. The mother did not have any independent evidence of this.

[39] Since the date of separation, the mother has travelled annually to New York, as well as two trips to Florida. Again, she testified that other people paid for these trips. According to the mother, one of the trips to Florida was paid for by a man she met on the internet. And, again, she had no evidence of others having financed any of these trips, apart from her testimony at trial.

[40] Exhibit number 10 was a tenancy Application/Agreement which she signed in June 2010 for a rental apartment at a cost of $985 per month. In that document she stated that her annual income was $56,000 per year, from a combination of employment insurance, spousal support[15] and private tutoring. As noted earlier, her 2010 Notice of Assessment disclosed total income of $10,707. Obviously, the discrepancy between that Notice of Assessment and Exhibit number 10 is significant. And because the discrepancy is so significant it is difficult for the court to conclude anything other than that the mother lied, either in respect of her income, or on the rental agreement. If she lied on the rental agreement, believing this was necessary in order to secure the rental, it seems likely this fact would have been addressed in her re-direct examination at trial. However, that issue was not touched on in re-direct.

[41] Having regard to all of the foregoing, I am forced to conclude that mother's declared income to Canada Revenue Agency was under-reported.

[42] I must decide how much income to impute to the mother.

How Much Income to Impute to the Mother

[43] Section 19 of the *Child Support Guidelines,* (Ontario Regulation 391/97), ("Guidelines") states [my emphasis]:

[15] The parties agree that the father paid the mother a total of $6,000 in spousal support up to 2010

Imputing income

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

(a) the parent or spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of any child or by the reasonable educational or health needs of the parent or spouse;

. . . .

(f) the parent or spouse has failed to provide income information when under a legal obligation to do so;

. . . .

[44] The leading case in Ontario on this issue is *Drygala v. Pauli*, (2002) CanLII 41868 (Ont. C.A.). In that case, the Court held, at paragraphs 45 and 46 [my emphasis]:

> [45] When imputing income based on intentional under-employment or unemployment, a court must consider what is reasonable in the circumstances. The factors to be considered have been stated in a number of cases as age, education, experience, skills and health of the parent. See, for example, *Hanson*, *supra*, and *Cholodniuk v. Sears* 2001 SKQB 97 (CanLII), (2001), 14 R.F.L. (5th) 9 (Sask. Q.B.). I accept those factors as appropriate and relevant considerations and would add such matters as the availability of job opportunities, the number of hours that could be worked in light of the parent's overall obligations including educational demands and the hourly rate that the parent could reasonably be expected to obtain.
>
> [46] When imputing income, the court must consider the amount that can be earned if a person is working to capacity while pursuing a reasonable educational objective. How is a court to decide that when, typically, there is little information provided on what the parent could earn by way of part-time or summer employment? If the parent does not provide the court with adequate information on the types of jobs available, the hourly rates for such jobs and the number of hours that could be worked, the court can consider the parent's previous earning history and impute an appropriate percentage thereof.

[45] Accordingly, in my view, the starting point in assessing mother's income-earning capacity is the mother's own evidence that she is about to begin a job where she will be paid a salary of about $25,000 per year. From there, she may be able to move on to a supervisor's position which, although no evidence was presented, would presumably command a somewhat higher salary.

[46] The father argued that the mother is a fully qualified teacher and she has failed to provide any evidence of her attempts to obtain a fulltime teaching position in Toronto. And because of this, she has not maximized her income-earning potential.

[47] However, the two main factors that would appear to weigh against the imputation of the significant kind of income that comes with fulltime teaching[16], are the mother's health and her age. While the mother is qualified to teach and could, at least in theory, obtain a fulltime teaching job at the Toronto District School Board, at her present age of 61 years, this may not be a realistic option.[17] As well, the stresses that come with fulltime teaching – time deadlines, dealing with the students, course design, test marking, supervising extra-curricular activities, meeting parents, and so on, could arguably be excessive given both her age, as well as her history of not holding onto fulltime jobs for lengthy periods of time.

[48] The most up-to-date evidence[18] regarding the state of mother's mental health came from Dr. Saffer. As I previously noted, he diagnosed mother with "mild depression". Although I do not necessarily accept chapter and verse all of Dr. Saffer's evidence,[19] his diagnosis of "mild depression" would appear to fit with much of the other evidence in this trial. Accordingly, I give that evidence appropriate weight, and I factor into my analysis mother's history of depression.[20] Although her depression does not appear to have prevented her from working, it does appear to have limited her upside potential in terms of the level of stress she is able to cope with. In this regard, I do not find it necessary to decide whether the wife has a "mental illness" which, as I pointed out earlier, was a point of much contention between the parties. Instead, I conclude that

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[16] Although no evidence was presented on the salaries earned by teachers in the Toronto District School Board, I am aware from many other cases I have heard that salaries tend to average in the range of $50,000 to $90,000. I state this, not for the purpose of taking judicial notice of these salaries, but for context only and, more specifically, to note that I will not be imputing an income to the wife at this upper range of incomes, whatever it might be

[17] My observation should not be interpreted as a form of ageism. I certainly recognize that there are many people in their 60's who are healthy and vigorous and who are well capable of discharging their duties in responsible and demanding jobs. However, not everyone is fortunate enough to be in this position

[18] And the only medical evidence which could be tested at trial

[19] For example, his conclusion that mother is suffering from Post-Traumatic Stress Disorder and, particularly the 4-pronged genesis of that Disorder (as outlined earlier in these reasons). His conclusion is unlike any of the other medical evidence presented at trial. And his reasons which underpin that conclusion are not consistent with the rest of the evidence led during the course of this trial. For example, Dr. Saffer's report dated February 26, 2013 refers to the "trauma" which resulted from "a custody trial while she was in this fragile state". Either he has the facts wrong, or mother reported the facts incorrectly to him, as it is beyond dispute that the mother immediately consented to custody in favour of the father at the very outset of the proceeding.

[20] Whether it be "episodic" (as argued by the father) or more continuous and ongoing (as argued by the mother)

the mother's psychological/emotional history is a factor which would weigh against her ability to obtain high-end employment.

[49] As against these considerations I must take into account the mother's significant level of education – a Bachelor of Arts and a Master of Education – her multilingual capabilities, her extensive teaching experience, her successful experience in other non-formally trained endeavours[21], her own self-acknowledged creativeness, her entrepreneurial capacity,[22] and her stated desire to participate in the workforce.[23]

[50] Having regard to these factors, I conclude that she has the capacity to earn a base income of $25,000 per year, from a relatively low-stress job[24], plus an additional $10,000 per year from part-time tutoring. The mother's evidence[25] was that she can be paid about $30-$40 per hour from tutoring. If she tutors only for six hours per week, she can make well in excess of that additional $10,000.[26]

[51] Alternatively, if the mother finds it easier to not work at a fulltime job, combined with tutoring for six hours per week, she could seek out tutoring jobs only, in which case she would have to tutor for only 20 hours per week in order to reach this $35,000 yearly level.[27] Or she could seek out different combinations of employment and/or tutoring. There are numerous such options available to mother. And while *Drygala* requires her to maximize her income-earning capacity, she has failed to provide sufficient evidence of her efforts in this regard.

[52] I wish to make it clear that although my reference point for the $25,000 per year "low-stress" job is the aforementioned job about which mother herself gave evidence at trial, even in the absence of that specific job offer, I would have concluded that the mother has the capacity to obtain either a job at this income level – given that a $25,000 job is only slightly above minimum wage in Ontario - or a combination of some employment plus tutoring. And having regard to the foregoing factors as enunciated in *Drygala*, I conclude both that she has the legal obligation to pursue these opportunities

[21] For example, at SageCare; see the earlier discussion in these reasons
[22] For example, her chocolate business
[23] As evidenced by applying for and obtaining the aforementioned offer of employment, scheduled to begin in July 2013
[24] A fulltime minimum wage job in Ontario is about $21,300 per year
[25] From a combination of her out of court questioning and her trial testimony
[26] Calculated at 6 hours per week x $35 per hour x 50 weeks = $10,500. I take into account that she appears to have a history of not declaring her tutoring income so that this income would have to be grossed to an even higher amount up to reflect her real income for support purposes (per subsection 19(1) of the *Child Support Guidelines*)
[27] 20 hours x $35 per hour x 50 weeks = $35,000

and that she is capable of doing so. In the result, therefore, I impute income to her at $35,000 per year.

Entitlement to Support

[53] In Ontario, the spousal obligation for support[28] flows from the *Family Law Act* ("Act"). Section 30 of that Act provides [my emphasis]:

> **Obligation of spouses for support**
>
> **30.** Every spouse has an obligation to provide support for himself or herself and for the other spouse, in accordance with need, to the extent that he or she is capable of doing so. R.S.O. 1990, c. F.3, s. 30; 1999, c. 6, s. 25 (3); 2005, c. 5, s. 27 (7).

[54] Subsection 33(9) of the Act sets out the factors that the court is to take into account when determining the amount of spousal to support to be ordered:

> **Determination of amount for support of spouses, parents**
>
> (9) In determining the amount and duration, if any, of support for a spouse or parent in relation to need, the court shall consider all the circumstances of the parties, including,
>
> (a) the dependant's and respondent's current assets and means;
>
> (b) the assets and means that the dependant and respondent are likely to have in the future;
>
> (c) the dependant's capacity to contribute to his or her own support;
>
> (d) the respondent's capacity to provide support;
>
> (e) the dependant's and respondent's age and physical and mental health;
>
> (f) the dependant's needs, in determining which the court shall have regard to the accustomed standard of living while the parties resided together;
>
> (g) the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;

[28] Other than where the spouses are divorced, in which case the *Divorce Act* applies

(h) any legal obligation of the respondent or dependant to provide support for another person;

(i) the desirability of the dependant or respondent remaining at home to care for a child;

(j) a contribution by the dependant to the realization of the respondent's career potential;

(k) Repealed: 1997, c. 20, s. 3 (3).

(l) if the dependant is a spouse,

(i) the length of time the dependant and respondent cohabited,

(ii) the effect on the spouse's earning capacity of the responsibilities assumed during cohabitation,

(iii) whether the spouse has undertaken the care of a child who is of the age of eighteen years or over and unable by reason of illness, disability or other cause to withdraw from the charge of his or her parents,

(iv) whether the spouse has undertaken to assist in the continuation of a program of education for a child eighteen years of age or over who is unable for that reason to withdraw from the charge of his or her parents,

(v) any housekeeping, child care or other domestic service performed by the spouse for the family, as if the spouse were devoting the time spent in performing that service in remunerative employment and were contributing the earnings to the family's support,

(v.1) Repealed: 2005, c. 5, s. 27 (12).

(vi) the effect on the spouse's earnings and career development of the responsibility of caring for a child; and

(m) any other legal right of the dependant to support, other than out of public money. R.S.O. 1990, c. F.3, s. 33 (9); 1997, c. 20, s. 3 (2, 3); 1999, c. 6, s. 25 (6-9); 2005, c. 5, s. 27 (10-13).

[55] The mother claims entitlement to support on two bases, namely, compensatory and need. The leading case on compensatory support is *Moge v. Moge* [1992] 3 S.C.R. 813. In that case, the Supreme Court of Canada held that a spouse is entitled to compensatory support if she has given up career opportunities for the sake of the marriage and the relationship. The father argues that the mother gave up nothing, that theirs was a non-traditional marriage, and that he always encouraged the mother to be actively employed. That may be so. However, the mother’s opportunities, in my view, were limited by a number of events which occurred during the course of the marriage.

[56] The mother brought a five year old child into her marriage. Subsequently, the parties had four biological children of their own in the 11-year period between 1985 and 1996. And while the father may have shared in the child-rearing responsibilities and the maternal grandmother also provided considerable assistance with the children, the fact of four pregnancies and births, and the corresponding child care would have impacted on the mother's opportunities. Perhaps even more significant is the fact of the family's repeated moves – from New York to Toronto, from Toronto to Israel[29], and from Israel back to Toronto. These moves would certainly have limited the mother's ability to establish and build the kind of career foundation which would have been important for a long-term career path.

[57] I find that on the *Moge* model of support, the mother satisfies the threshold test of entitlement.

[58] The second model for support is found in another decision of the Supreme Court of Canada, *Bracklow v. Bracklow* [1999] 1 S.C.R. 420. This case stands for the proposition that even where there is no entitlement to support based on the compensatory model, entitlement for support can be based on need alone. On this model, even on the mother's imputed income of $35,000 per year and the father's income of more than $83,000 per year, the gap is significant enough to demonstrate a need for the mother and an apparent ability to pay by the father. I use the word "apparent" because as the following section of my reasons reveal, the father's ability is more illusory than real.

Quantum and Duration of Support

[59] Once entitlement has been established, in determining quantum and duration, I must be mindful of the factors in subsection 33(9) of the Act, as well as the calculations which flow from the Spousal Support Advisory Guidelines ("*SSAG*").

[60] The leading case in Ontario in respect of the *SSAG* is *Fisher v. Fisher* (2008) 47 R.F.L. (6th) 235 (Ont. C.A.), in which the court held, at paragraph 103 [my emphasis]:

> [103] In my view, when counsel fully address the [*SSAG*] in argument, and a trial judge decides to award a quantum of support outside the suggested range, appellate review will be assisted by the inclusion of reasons explaining why the [*SSAG*] do not provide an appropriate result. This is no different than a trial court distinguishing a significant authority relied upon by a party.

[29] With the concomitant necessity to learn a new language in Israel

[61] In respect of this holding, I repeat what I stated in *Dawson-Fisher v. Fisher*, 2011 ONCJ 489 (CanLII), at paragraph 12:

> [12] In other words, while the Court of Appeal [in *Fisher*] stamped its imprimatur of "significant authority" on the *SSAG*, the Court was clear that the *SSAG* are not to be treated as binding authority.

[62] Nevertheless, as the *Fisher* Court held, if the trial court is going to deviate from the *SSAG* it needs to articulate reasons why the results garnered from the *SSAG* "do not provide an appropriate result".

[63] Prior to submissions, I requested that counsel provide me with *SSAG* calculations employing a number of different income scenarios, so that if I were to find entitlement, then one of the scenarios might be of assistance in determining a range of support outcomes[30], both as to quantum as well as duration.

[64] At these parties' respective incomes,[31] the *SSAG* calculations reveal that the range of spousal support payable by the father to the mother, from "low" to "mid" to "high", is $451 per month, $526 per month and $602 per month, respectively. And, according to those calculations, support would be payable for an indefinite duration.

[65] However, the most significant complicating factor in this case is existence of the child-related expenses which the father presently incurs. The father has two children who live with him and who rely solely on the father for their support. In addition to the typical support requirements for things such as food, shelter, clothing, transportation, and so on,[32], the father pays private religious school fees for the younger child, the cost of which, due to his financial constraints, he has managed to negotiate down from $22,000 to $7,500 per year, as well as summer camp, at an annual cost of $2,000.[33]

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[30] By "range" I refer to the calculations which provide support at the "low", "mid" and "high" amounts, as well as a range of times, from time-limited to indefinite duration

[31] With $35,000 imputed to the mother

[32] These normal or typical support requirements are covered by the "table" amount of support under the *Child Support Guidelines* ("*Guidelines*")

[33] The school fees and (arguably) the summer camp would be considered special or extra expenses under section 7 of the *Guidelines*

[66] When the parties' respective incomes, combined with the father's responsibility to support two children of the marriage, are included in the foregoing *SSAG* calculations, the mother would owe child support to the father in the amount of $508 per month. And this $508 figure does not even take into account the foregoing section 7 expenses which, typically, would be shared by the parties *pro rata*.[34] If the court were to order such a *pro rata* payment, the mother's share would be approximately 30% of the total cost, or about $237 per month,[35] in addition to the aforementioned $508 per month, for a total of $745 per month. The net result of this would be an order for monthly support payable by the mother to the father, rather than the other way around.[36]

[67] Even if the court could be persuaded to order less than a *pro rata* contribution by mother toward section 7 expenses or even (an extreme order) no payment toward section 7 expenses, mother's table amount of her child support obligation would still make her worse off, even if she were receiving spousal support at the mid-range of $526. The reason for this is that the $508 table amount of child support would be payable by her in after-tax dollars, whereas the $526 she would receive in spousal support would be taxable in her hands. Accordingly, the net effect of such an order would be a negative cash flow to mother.

[68] At this point I will briefly address the mother's position that the father's income should be imputed at a greater amount than what he earns from the JF&CS. There was virtually no evidence that the father currently earns any income from other sources apart from his fulltime job in which he is a supervisor and responsible for other JF&CS employees who work under his control. The most that can be said about this argument is that the evidence was scant[37] and, in my view, does not even rise to the point where it requires any further analysis in these reasons.

[69] The combined effect of the income I have imputed to the mother together with the father's child support responsibilities would compel the court to reject any claim for spousal support.[38]

[70] Furthermore, as I noted earlier, subsection 33(9) of the *Family Law Act* sets out the factors to take into account in determining the amount of spousal support to be paid. In this regard, I find that father simply has no ability to pay support. He does not own a

[34] Subsection 7(2) of the *Guidelines*
[35] $9,500 (school + camp) x 30% = $2,850 per year, or $237 per month
[36] Although as father's counsel made clear in submissions, the father is not looking for a monthly payment from the mother, and he would be content with a "wash" of their respective support obligations
[37] Based primarily on a misapprehension of the father's income and expenses as set out in his financial statement
[38] As buttressed by the *SSAG* calculations

house. He does not own a car. He has assumed and is paying down a substantial portion of the family debt which the parties incurred while they were living together. He has no assets; nor on the evidence, including the fact that he is 56 years old, is he likely to accumulate any assets in the foreseeable future.

[71] On the basis of all the foregoing, I conclude that the mother's claim for spousal support must be dismissed.

Claim for Retroactive Support

[72] Having dismissed the mother's claim for support, it is not strictly necessary for me to deal with her claim for retroactive support. However, I will do so in the event another court determines that I am mistaken in dismissing the mother's claim for spousal support in its entirety.

[73] As I noted earlier, mother commenced this litigation in December 2010. In that Application she sought spousal support retroactive to May 13, 2008. However, at trial, she amended the date of her retroactive claim to January 2009.

[74] Following service of the Application on the father, he promptly served and filed his Answer. At the first appearance when the parties agreed to final custody of Be… in favour of the father, they also consented to an order for specified financial disclosure as well as out of court questioning. The father delivered his disclosure in a timely manner, as ordered.

[75] The mother did not deliver her disclosure within the time ordered and, accordingly, both the questioning as well as the motion date of July 15, 2011 had to be adjourned.

[76] Continued non-compliance by the mother with the outstanding disclosure order resulted in further adjournments of the following court dates:

- September 6, 2011
- October 4, 2011, and
- November 18, 2011

[77] The questioning was finally held on December 12, 2011 and the mother gave certain undertakings. She did not comply with those undertakings in a timely manner and, as a result, the following court dates had to be adjourned:

- January 6, 2012
- February 17, 2012, and
- April 27, 2012. However, the father opposed the adjournment request by the mother on this date given the numerous previous adjournments which had occurred over an almost one-year period, all as a result of the mother's repeated non-compliance. Justice Sherr, who was the case management judge, granted the adjournment, peremptory on the mother, to June 14, 2012.

[78] Following this, the father brought a motion to strike the mother's pleadings for continued ongoing non-compliance by the mother. That motion was heard on July 3, 2012. Justice Sherr found [my emphasis]:

- Mother was in "substantial breach of the April 28, 2011 disclosure order";
- "Mother has not complied with several undertakings given on questioning";
- "There is an issue whether non-disclosure is indicative of bad faith or mental health issue (or some combination). Court cannot determine this on the record".
- "Entitlement to spousal support is central issue". "Neither father's counsel or court can properly assess this issue without appropriate disclosure";
- "This is mother's case to prove";
- "There is significant prejudice to father to continue to have this claim (that includes a retroactive claim to support to 2008) hanging over him";
- "Mother's non-compliance is entirely unfair to father and he should not be expected to continue to come to court and face this litigation when mother is in chronic non-compliance". In the result, Justice Sherr stayed mother's action pursuant to section 106 of the *Courts of Justice Act*, with leave to bring a motion to lift the stay upon the completion of her disclosure, provided this was done before the end of 2012, failing which, Justice Sherr gave the father leave to renew his motion to strike the mother's pleadings. Justice Sherr concluded his endorsement with the following:

> Court is not prepared to dismiss retroactive claim at this point, although her delay in this case will undoubtedly be a significant factor for the trial judge to consider when determining the retroactive claim.

[79] Just days before the end of 2012 the mother provided disclosure and she brought a motion to lift the stay of proceedings. Father brought his motion to dismiss the mother's case on the basis that the last-minute disclosure still did not meet her full disclosure obligations. The parties appeared before Justice Sherr on February 22, 2013. Justice Sherr stated [my emphasis, except where noted]:

> Stay is lifted – father's motion dismissed. Court notes that mother still has not provided full disclosure; however she has provided enough to have her day in court. [because of ongoing non-disclosure, this] will likely result in adverse inference being drawn against her at trial. Court emphasizes that ***all*** [Justice Sherr's emphasis] delay in this case has been due to her failure to comply with court orders and undertakings for production. Mother has been told that this will likely adversely affect her claim for retroactive support. Court finds that the delay amounts to blameworthy conduct on her part, as set out in *D.B.S.*[39]

[80] Mother argued that her continued delays in this case were due to her alleged "mental illness". I find as a fact the following:

- Mother spent a month in Spain in the summer of 2010, visiting a former lover;
- Dr. Saffer diagnosed mother in September 2010 as "mildly depressed";
- Mother was employed by Drake Literacy performing marking sessions, and earning about $1,500 per session, one session occurring in May 2011;
- In 2011, Mother was able to attend to the necessary paperwork to complete her application for ODSP, resulting in a confirmation of ODSP benefits in January 2012;
- Despite her claimed disability, mother continued to earn cash income from tutoring during 2010, 2011 and 2012;
- Prior to August 2012, mother was engaging in Tai Chi four times each week; and
- Mother finished the necessary courses to obtain her permanent teaching certificate in March 2013.

[81] I place considerable weight on these factors in arriving at my conclusion that mother's argument that her mental health interfered with her ability to move this case along in a timely manner, is without merit.

[82] I would decline to award retroactive support and would order support only from the date of the trial onward, for the following reasons:

1. The mother's delay in moving this case forward is blameworthy conduct on her part. The father's conduct in this case was beyond reproach. (see *D.B.S.)*
2. The father's financial circumstances would result in significant hardship to him were a retroactive award to be made. On the other hand, the mother was able to

[39] *D.B.S. v. S.R.G*, [2006] 2 SCR 231

support herself and take trips to Spain, New York and Florida following the separation, at least in part because the father paid her a total of $6,000 in periodic support. The hardship to the father in awarding retroactive support would be far greater than the hardship occasioned to the mother by not making such an award. (see *D.B.S.)*

3. The father has been supporting the children without any assistance from the mother. The requirement to pay retroactive support would arguably result in hardship for these two children. Significant weight should be given to the impact on children that might result from an order of retroactive support. (see *D.B.S.)*

Conclusion

[83] Although I am dismissing the mother's claim for spousal support, I have nevertheless found that, but for the father's ongoing obligation to support two of the children of the marriage, he would be required to pay her spousal support. She has satisfied the threshold requirement of entitlement. But for that ongoing child support obligation I would have ordered spousal support to be paid in the mid-range, namely, $526 per month, for an indefinite duration.[40]

[84] This leaves it open for the mother to seek spousal support once the father's ongoing child support obligations cease. I wish to emphasize, however, that any future claim for spousal support on changed circumstances – primarily the cessation of the children's financial dependence on their father – would have to be based on the circumstances as they then exist, rather than the current circumstances of the parties, as reflected by the evidence presented at trial.

[85] In the result, I order the following:

1. Mother's claim for spousal support is dismissed.
2. Mother's claim for retroactive spousal support is dismissed.

[86] In the unlikely event that the father seeks his costs, he may deliver submissions in writing, by 14B, not to exceed two pages in length, exclusive of any Bill of Costs, within 30 days of the date of these reasons. The mother's response, of equal length, shall be delivered no later than 14 days following the father's submission.

[87] I thank both counsel for the effective and respectful manner in which they presented their cases.

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[40] As reflected in the *SSAG* calculations

Justice Robert J. Spence

15 July 2013