SUPREME COURT OF YUKON

Citation: *D.T.R.* v. *T.M.R.*, 2011 YKSC 58

Date: 20110715
Docket S.C. No.: 09-D4209
Registry: Whitehorse

BETWEEN:

D.T.R.

AND:

Plaintiff

T.M.R.

Defendant

Before: Mr. Justice A.C.R. Whitten

Appearances:
André Roothman — Appearing for the Plaintiff
Karen Wenckebach and
David Christie — Appearing for the Defendant

REASONS FOR JUDGMENT
DELIVERED FROM THE BENCH

[1] WHITTEN J. (Oral): Initially, this matter included a claim for custody of two children, the twins, E. and D., born September 10, 1992. That claim was appropriately abandoned given the fact that these persons are on the cusp of adulthood. The remaining issues are that of equalization of family assets and the matrimonial home, and spousal support.

[2] With respect to the former, the plaintiff has suggested a less than equal distribution given his contribution to the everyday maintenance of the family unit and attentiveness to the defendant, who had suffered from a progressive deterioration given she has multiple sclerosis. The entitlement by the defendant to spousal support is

effectively conceded; it is merely a matter of the quantum.

[3] It is undisputed that the plaintiff has ongoing financial responsibilities, at least for the post-secondary school education of the twins.

GENERAL BACKGROUND

[4] The plaintiff is presently 53, the defendant 51 years of age. After a courtship of approximately 10 months the parties married at Edmonton, August 22, 1981. The plaintiff was employed as a mental health therapist having, at the time, three years of a science degree. When the parties met the defendant was working as a counsellor at Project 72, a halfway house. The plaintiff commenced a part-time Bachelor of Education program while he was employed. The defendant obtained employment as an educational assistant for the Edmonton School Board.

[5] From the beginning this couple pooled their resources, namely, both salaries would go into the common pot. The plaintiff acknowledges that they have always maintained solely a joint account. They acquired their first home. The parents of the plaintiff gifted the couple a sum. The plaintiff had savings. The ongoing mortgage responsibility was satisfied out of the pooled funds, as was the plaintiff's student loan. The plaintiff graduated with his educational qualifications in 1987. As with many neophyte teachers he was only able to get fractional employment, therefore he continued with this full-time job as a mental health worker.

[6] In 1987, an opportunity for employment as a teacher presented itself in the hamlet of Ross River, Yukon Territory. Regrettably, given the state of the housing market at that time, the couple realized nil when they sold their Edmonton home. The

defendant worked part time as the community librarian. Given the size of this community it was necessary to have occasional trips to Edmonton to re-stock. During one of these expeditions the defendant was pregnant with C., who was born February 7, 1989. This birth was both planned and welcomed by the couple. It could be said that the couple socialized and had a circle of friends, as most couples do, throughout this time. The defendant, as a new mother, took care of her daughter and was primarily responsible for the housekeeping, while the plaintiff worked. Both parties shared cooking responsibilities.

[7] In 1990, the couple decided to move to Whitehorse, originally living in a condo. The regime of daily housekeeping responsibilities continued as before, as did the mutual financial affairs. The defendant gained employment for a while as an educational assistant in an elementary school.

[8] The twins, as mentioned, were born September of 1992. It was a difficult pregnancy, and by January of 1992 [sic] the defendant had exhausted her sick leave. However, the defendant did manage to take care of the twins for a time. Eventually resort was had to daycare. One must keep in mind that the care of a toddler and two newborns would be demanding for the most healthy of individuals.

[9] It would appear that up until shortly after the birth of the twins the plaintiff would describe himself as happy within the marriage. The children were welcomed by the couple. Their happiness in 1992 was punctured by the diagnosis of the defendant as suffering from multiple sclerosis, a progressively degenerative disease that affects the communication between nerve cells in the brain and those cells in the spinal cord.

[10] The day-to-day realities of this disease aptly described by the plaintiff as a disease of the family were visualized through the testimony of D.R. His recollection of his mother was that she was always sick; his mother was always handicapped. She deteriorated considerably. He recalls being cared for by her but that care was assumed by his father and eventually his older sister. His mother did cook from time to time but mostly it was his father. The plaintiff father became primarily responsible for taking the children to and from daycare and grocery shopping for the family. His mother, the defendant, did her best with such tasks as laundry. Eventually, his mother could not feed herself. The children and father had to feed her. Her personal care was partly addressed by the visits of home care professionals and the father and the children.

[11] The contribution of the home care professionals was not inconsequential. (See page 157 of the Supplementary Book of Documents, Exhibit 3.) Needless to say, the mother did not have energy for socializing, for going out, for travelling, for participating in activities with her children and their children. All of the things that parents take for granted were not available to this person given her infirmity. The daily routine of the mother was quite simple. She would go to bed late and rise late. Sleeping together for the couple eventually ceased with the defendant's inability to control her bowel movements. There were, as D.R. describes, "ongoing arguments." Suggestions by the plaintiff husband to make the house more accessible would be accepted but then rejected. As D.R. observed, part of the disease involved fluctuating decisions on the part of his mother. The plaintiff also testified that his wife's recollection deteriorated, repetition was necessary given her inability to recall.

[12] M.S., a close friend of the defendant, has maintained regular contact throughout

the onslaught of the disease upon the defendant.

[13] The plaintiff was able to advance career-wise to become principal of a secondary school in 2006. Finally, in February 16, 2009, the defendant mother/wife became a permanent resident of Copper Ridge, a long-term care facility. This placement had been contemplated for months by the parties, with the knowledge of the defendant's family. (See Exhibit 3, page 23-24 of the Health Care Record.)

[14] Over time visits by the husband diminished. However, he would take the family dog for visits. Part of the diminishment of contact is attributable to his perception that he was not respectfully treated by the staff, and, having heard the testimony of M.S., his inability to come to terms with the privacy boundaries of his estranged spouse.

[15] The plaintiff commenced a relationship with another in May of 2009, a co-worker. This relationship appears to be founded on, amongst other things, a shared interest in physical activities. That relationship continues today. Co-habitation is contemplated.

[16] The defendant continues to reside at Copper Ridge, seen occasionally by her children, often by her friend M. Contact with her siblings and parents, who reside in Edmonton, is difficult given the distances involved.

[17] It would be hard for any couple to experience what this couple did. There is no moral blameworthiness. The disease not only ruined the defendant, it ruined their otherwise happy relationship. Everyone has their limits. It would be extremely hard for a partner to continue in an ever-demanding role to the expense of his or her own existence. The tragedy to the sufferer is beyond comprehension. The frustration that

must exist, experiencing her progressive inability to participate in life, to be a parent, to be a partner, must be immense. The anger and helplessness at seeing a partner reach the point of no return would be palpable.

[18] M.S. was an impressive witness in that her affection for her friend, the defendant, was both profound and objective. Since the relocation of the family to this territory in 1988 she has maintained regular weekly contact with the R. family, originally and with the defendant specifically after the latter became a resident of Copper Ridge. She describes how her friend was a good, nurturing mother to her first born, C.R. The interaction between their two families with the children was attested to. Ms. S.'s employment facilitated contact with her ailing friend between 1999 and 2003 on a frequent basis. The contact over the years between these two friends has been continuous, notwithstanding Ms. S.'s own struggle with cancer. It is through the eyes of Ms. S. that one visualizes the daily life of Ms. R. since her residency at Copper Ridge.

[19] The time post the separation in February 2009 was disorientating for Ms. R. Her husband visited a lot at the outset but that diminished. Ms. R., because of her increasing challenges to her mobility, had difficulty gaining access to money. She was initially quite dependent upon her husband. Ms. S. related how her friend would not have the physical dexterity to utilize the internet or to use an automated teller machine, access which a lot of people take for granted. The requests for financial aid from her husband were fraught with emotion. This was in addition to her having to cope with the breakdown of her marriage. As Ms. S. stated, there had to be some certainty established. The rent at Copper Ridge was not being paid. Ms. R., because of her memory issues, could not manage her own affairs. Her having to solicit help from her

husband caused tension with her firstborn, to whom Mr. R. complained, a somewhat puzzling reaction on his part given the obvious disparity between his wife, in a long-term care facility, and he and the children in the matrimonial home in an upscale Whitehorse area.

[20] Apparently, Ms. R. requested money to be able to travel to Edmonton. Her husband initially refused, but according to her brother, Mr. T., the plaintiff did eventually pay for the trip. Not only was she disabled, she was reduced to being "parented" by her own spouse. Her disability cheque, pursuant to the Canada Pension Plan, which had been coming for the last 12 to 13 years, were directed to the matrimonial home and deposited by the plaintiff in the joint account.

[21] Although the plaintiff did not obstruct the ultimate redirection of this cheque, one wonders why he would not have simply deposited it into the comfort account of the defendant at the residence from the very beginning. In that first year Mr. R. contributed about $2,000 before Ms. R. started to receive her own cheques. Finally, by the late summer/early fall, the outstanding rent, laundry and telephone bills were paid for by the husband. By the fall of 2009, Ms. S., with the help of Ms. R.'s brother and sister, were able to establish an independent banking system for her. I should mention that it took until December 2009 before the CPP disability cheques were directed to the Copper Ridge residence. The financial affairs are now all online, literally, with Ms. S. acting as the local point person to ensure that the fiscal needs of her friend are met. Ms. S., with the aid of the sibling, monitors the personal account. This is absolutely necessary given Ms. R.'s physical and memory issues.

[22] The defendant's brother testified that he naively thought initially that the plaintiff was providing for his spouse financially when she took up residency at Copper Ridge. He was shocked to realize otherwise. Mr. T. told the Court how the plaintiff announced in March of 2009 he was not going to continue to pay for both the telephone and television accounts of his spouse. Both items would be of considerable importance to an isolated spouse, as the defendant was. The plaintiff gave the siblings of the defendant 30 days' notice of his intention.

[23] Tab 4 of the trial record, the financial statement of the defendant, was, in essence, prepared by Ms. S., collaborating with the brother and sister of the defendant, who sought to establish a budget for their friend and sibling. All of the expenses enumerated therein have been reasonably explained to the Court. Some items, by agreement, have been deleted, for example, the arm alarms. Some items were reduced. Some of the items may be covered by various Yukon Government subsidies, for example, wheelchair maintenance. However, at the end of the day this represents an extremely modest budget, which would be severely tested by a contemplated move to Edmonton. Some things one, as a reasonably mobile person, would not realize; for example, that Ms. R., because of her limited dexterity, would, from time to time, break her own glasses. Ms. R. experiences a monthly shortfall of approximately $1500.

[24] Ms. S. was able to communicate the extensive logistics involved in Ms. R. being mobile for such benchmark experiences as attending the graduation of her twins. Ms. S. communicated how her friend had tried to make her own room in the residence somehow personal in a milieu in which privacy is virtually impossible. Access to the family dog is quite meaningful to Ms. R., a welcome treat in a world in which she is

completely dependent upon others for mobility.

[25] In response to questions by the Court, Ms. S. was able to describe the homecare Ms. R. received from 2000 onwards. This homecare increased with the severity of the disease. It provided for personal care, housework, meal preparation and assistance with laundry. This assistance reveals that Mr. R., although no doubt pressed into a lot of service, was not exclusively the provider of assistance. Ms. S. never witnessed any unwillingness to participate in the life of her family exhibited by Ms. R., aside from that caused by her deteriorating condition. She spoke of how her friend would even attempt to fold laundry whilst lying on the floor. D.R. corroborated Ms. S. in this regard. In the opinion of Ms. S., Ms. R.'s life was her family and her friends. The continuous exposure by Ms. S. is more of an aid to the Court than the limited glimpses attested to by the plaintiff's sister, J.B.

ANALYSIS

1. Equalization of family assets

[26] The basic formula for equalization requires a totalling up of all the family assets. Those are assets accumulated during the course of a marriage, which includes the matrimonial home and the growth in personal pension plans which are in the hands or in the name of one or both spouses. The distribution which is provided for is that each spouse end up with half of the value of the assets, of course, minus any indebtedness or taking into account such indebtedness. Joint tenancy is *prima facie* proof of a one-half beneficial interest, which is the case with the present matrimonial home.

[27] Section 13 of the *Family Property and Support Act*, R.S.Y. 2002, c. 83, provides

for a discretion on the part of a Supreme Court judge, as evidenced by permissive language "may" as opposed to obligatory language such as "shall," to make an unequal division of assets if the jurist is of the opinion that the standard equal distribution would be inequitable, and I emphasize the word "inequitable", having regard to certain factors. The plaintiff seeks to evoke subsection (f):

> (f) any other circumstance relating to the acquisition, disposition, preservation, maintenance, improvement, or use of the property rendering it inequitable for the division of family assets to be in equal shares;

One notes the following subsection, namely (g) "the date of valuation of family assets."

[28] Dealing with subsection (f) to begin with, at first blush the wording of the section appears to address behaviour of a spouse which is economically detrimental to assets or family assets generally. This behaviour would contemplate the concept of unjust enrichment. The section does not appear to be sensitive to behaviour in general. The fact that Mr. R. spent considerable time taking care of his spouse and performing the lion's share of the daily chores necessary in a family is not related to the preservation and acquisition of an asset per se. There are things which a spouse does within the context of a marriage. That is a response to the vicissitudes of life. There are few lives devoid of significant bumps in the road.

[29] Counsel for the plaintiff refers to *LeBlanc* v. *LeBlanc*, [1988] 1 S.C.R. 217. Justice La Forest wrote this judgment. As with most family law cases, it is quite fact specific. The father was an alcoholic who worked only occasionally and took virtually no role in the bringing up of seven children. The mother, by sheer determination and hard work, was able to acquire and build up a restaurant business. The couple bought a

house but aside from an equal contribution to a modest or minor deposit, the wife carried the property with her earnings from the restaurant. The lower courts found that the husband made no financial contribution to the family in any way, shape or form. Sounds quite damning.

[30] So how did this translate out into the typical equal distribution amongst spouses of family assets? Justice La Forest quoted Justice Galligan of Ontario and stated that a court should be loath to deviate from the principle of equal distribution but can exercise its discretion "in clear cases where inequity would result," with reference to the excepting criteria of the statute. His Honour went on to state "a court should not put itself in the position of making fine distinctions regarding the respective contributions of the spouses during a marriage." (para. 11.)

[31] If one spouse single-handedly takes care of the entire debt related to a house out of their self-employment, plus manages the rearing of children, with a negligible contribution by the other, as did Ms. LeBlanc, a court could exercise that discretion. Justice La Forest went on in his analysis to observe that the court in *Leatherdale* v. *Leatherdale*, [1982] 2 S.C.R. 743, had held that:

> a "substantial" contribution need be no more than "beyond de minimis, a matter of the evidence in the particular case," in order for the general rule of equal distribution to apply.

[32] The suggestion that a progressively disabled person should somehow receive less than an equal share of family assets is problematic for a variety of reasons. For starters, multiple sclerosis is not something that one would voluntarily choose. It is not like alcoholism, which, although many health care professionals characterize as a

disease, has an element of choice on the part of the sufferer. As the remarks of Justice La Forest illustrate, the *Divorce Act,* R.S.C. 1985, c. 3, and provincial property distribution statutes are essentially "no fault." Bad behaviour is not punished, nor is good behaviour rewarded, unless there are economic consequences as referred to above. Courts, as Justice La Forest noted, do not want to cloud economic issues such as physical property distribution with extraneous behaviour. It would be odious to think that a spouse would gain an unequal share on the basis that his or her spouse was slothful, or not up to snuff. That may be an extreme example, but it illustrates how inequity would flourish if such accusations could gain traction; more so the case if lacking participation in family life generally is attributable to an incurable malady, a completely fault-free situation.

[33] As it was, the defendant did contribute to the household and childrearing. For the first 11-12 years of the marriage the parties shared the household and child responsibilities. There was no suggestion otherwise. For 12 to 13 of the last years of cohabitation, the defendant's CPP disability cheque went into the common pot/joint account. The image of the defendant trying to fold clothes while lying on the floor graphically illustrates her ongoing desire to contribute as her malady progressed. This is a contribution beyond de minimis. It was not a trifling contribution. It was a contribution, nevertheless, as the couple cohabitated to a point where both realized it was physically impossible to go forward.

[34] To say that a handicapped spouse may suffer a diminishment of the rights attributable to a healthy spouse because other family members had to rise to the exigencies of the malady is patently unfair. Although one can understand that such a

disease is, in a way, a disease of the family, it would be discriminatory to tip the scales of equalization. There is absolutely no evidence in this trial that would justify deviating from the equalization contemplated by the statute. To do so would be inequitable. Therefore, there shall be the presumed equalization of the family assets.

2. The matrimonial home

[35] The comments above with respect to equalization are applicable to the matrimonial home. Equalization contemplates at first blush the application of the formula based on the value of the assets at the time of the breakdown of the marital relationship. So what happens if a home held in joint tenancy actually increases in market value between that valuation and the time and the date of trial? According to the agreed-upon admissions, the matrimonial home is worth $300,000 as of February 16, 2009, and $369,500 as of June 7, 2011. Returning to subsection (f) of section 13 of the statute, the judicial discretion with respect to equal or unequal distribution appears to be potentially evoked because of "the date of valuation of family assets." Is this the means by which depreciation or appreciation after the break-up is addressed? That exercise of discretion is not necessary.

[36] In *Rawluk* v. *Rawluk*, [1990] 1 S.C.R. 70, the Supreme Court wrestled with the interplay between the common law concept of constructive trust in the Family Law Act of Ontario. Justice Cory, writing for the Court, traced the evolution of constructive trust and its application in matrimonial cases. Constructive trust is a common law concept. At para. 36 His Honour stated:

> It is trite but true to state that as a general rule a legislature is presumed not to depart from prevailing law "without

> expressing its intentions to do so with irresistible clearness."

As Justice Cory noted, the applicable sections of the Ontario statute, namely 4 and 5, "create a two-step property division process that emphasizes the distinction between the determination of legal and equitable ownership and the equalization of net family property." (para. 39).

[37] His Honour further developed this distinction in para. 44 when he stated:

> The distinction between a share in ownership and a share in property value through an equalizing transfer of money is more than an exercise in judicial formalism. This distinction not only follows the two-step structure of the Family Law Act, 1986 but reflects conceptual and practical differences between ownership and equalization. Ownership encompasses far more than a mere share in the value of property. It includes additional legal rights, elements of control and increased legal responsibilities.

[38] Faced with the same possibility of dealing with post-valuation date increases or decreases in property values, Justice Cory declined to use the discretion section, the equivalent of this territory's s. 13, because the section does not have the effect of supplanting the constructive trust remedy (para. 45). In other words, the concept of constructive trust survived as a common law concept independent of the statute. There is no express language in the statute that abrogates the common law concept.

[39] Justice Cory concluded, in para. 55:

> The Family Law Act, 1986 does not constitute an exclusive code for determining the ownership of matrimonial property. The legislators must have been aware of the existence and effect of the constructive trust remedy in matrimonial cases when the Act was proposed. Yet neither by direct reference nor by necessary implication does the Act prohibit the use of

the constructive trust remedy.

[40] Although *Kerr* v. *Baranow*, 2011 SCC 10, may have changed the applicability of common law concepts resulting in a constructive trust, the survival of common law concepts, in the absence of statutory language to the contrary, still exists. This logic is equally applicable to the concept of joint tenancy. It is a form of legal ownership independent of a valuation. Both parties had equal shares with the right of survivorship. The *Family Property and Support Act* does not detract from the essential elements of this form of ownership. This common law right is not affected by a statutory regime of valuation and distribution. It stands independent. There is no language within the statute which directly diminishes the value of the joint tenancy. It would be, in the world outside of family law, difficult to contemplate a temporal event which would diminish the value of the joint tenancy. The only potential benchmarks are the death of one of the tenants, and a tenant acting inconsistently with the concept; for example, by mortgaging his or her interest, assuming for a moment that there would be such a foolhardy financial institution.

[41] Therefore, the value of Ms. R.'s interest is what the worth of an individual half interest is today. The same result would apply if one applied the s. 13 discretion. The home was acquired through joint efforts, maintained by joint funds, and registered in joint tenancy. The plaintiff has had the benefit of living in the matrimonial home without addressing the interests of his wife for over two years. He has not had to pay interest on a sum borrowed to discharge her interest. By the same token, she has not earned interest in the sum which represents her share. Occupation rent has neither been paid nor claimed. If their home has appreciated since the separation date, there is no reason

that the defendant should not benefit from that appreciation, as should the plaintiff. The defendant is contemplating a move to Edmonton to be closer to her extended family, her siblings, and her daughter C.R. She will require the maximum realization of her interest in the present value of that asset to facilitate such a move. There is no reason why she should not receive the market value of her share.

Conclusions with respect to equalization in the matrimonial home

[42] For all of the above reasons the defendant is entitled to an equal share of the family assets after the satisfaction of related indebtedness. The Court understands that with respect to the Government of Canada superannuation fund of the plaintiff, the fund has its own distribution mechanism, namely, a half of the equal share being locked into an RSP; the other half payable in periodic amounts. The rests of the family assets will be distributed evenly, with an eye to what each spouse presently possesses of those assets.

[43] The interest of the defendant in the matrimonial home is one half of the present value. It is understood that the defendant has $1,000 worth of household items and is entitled to her bone china, possibly manufactured by Royal Doulton.

SPOUSAL SUPPORT

A. Generally

[44] As stated at the outset, the entitlement to spousal support by the defendant is conceded. This concession was no doubt influenced by a variety of factors referenced in the *Divorce Act* and elsewhere:

(a) the duration of the relationship, namely 28 years of marriage as of the

date of separation;

(b) an otherwise happy marriage until the onslaught of MS some 11 years into the marriage;

(c) the sharing of household responsibilities, certainly during the first 11 years, and a progressive diminishing contribution from that point forward by the defendant for health reasons;

(d) a relationship which demonstrated all the indicia of a partnership, the plaintiff working, the defendant working part-time, and being a stay-at-home parent, three children, planned for and welcomed, the maintenance of a joint bank account into which went both the plaintiff's salary and 12 years of CPP disability cheques, a pooling of resources;

(e) the tremendous reduction in lifestyle experienced by the defendant;

(f) the obvious economic need of the defendant, who is utterly incapable of generating any income stream, a defendant who qualifies for a disability pension, a defendant who needs an income stream, whether it be from investing her own capital realized from the equalization or spousal support, to provide for the care she needs. Self-sufficiency in this context means the economic wherewithal to pay for the necessary day-to-day care.

[45] By default, the plaintiff bears the parental responsibility for aiding the three children in the attainment of their educational objectives. The testimony of D.R. as to his anticipated costs of attending university in Edmonton is credible, namely, approximately $17,000. This testimony dovetails with that of his father as to the

availability of the Yukon bursary; the actual costs of tuition, accommodation and meals. The testimony of both reflects what Justice Veale observed in *G.T.F.* v. *K.L.F.*, 2009 YKSC 72, para. 31.

[46] The defendant, according to the testimony of Ms. S., has made modest gifts and contributions to her children as they advanced. The suggestion by the plaintiff that, based on an annual cost for D.R. attending University of Alberta in Edmonton for a Bachelor of Arts program he will be required to contribute in the region of $6,000 per annum is not unreasonable. C.R., the eldest, appears to be more independent. She has taken time out of school, lived with her uncle and aunt in Edmonton, and worked in a retail store. She now has a forestry-related job. That employment reflects her career interests. Further education appears to be simply a matter of a year or two. Leaving aside the issue of whether she would still be a child of the marriage, the necessity of a contribution by the plaintiff is uncertain. E.R. also appears to have an independent streak. She has employment in a health supply business. She plans to attend Yukon College in Whitehorse. No doubt she will reside with her father until any plans to transfer out of the territory are firmed up.

[47] Mr. R. may be able to benefit tax-wise from claiming the tuition deduction, at least with respect to D.R. and E.R., as most young people do not have any taxable income.

[48] All in all, the educational expenses related to C.R. and E.R. present as being somewhat soft, uncertain, and dependent upon their choices.

[49] The defendant may be able to contribute to the education of her children after

she realizes her equalization and the money is converted to generate an income stream to meet her needs and possibly beyond. This obligation is framed in terms of possibility given the prevailing low rates of return in low risk, long term investments, and the reality of the increase of costs of care as Ms. R. advances along her difficult path.

[50] The plaintiff, by virtue of his income in excess of $100,000, is in the highest tax bracket. Literally, whatever dollar amount in spousal support is awarded costs him 50 cents in after-tax dollars.

[51] The defendant receives approximately $10,000 by virtue of the CPP disability payments. She is presently experiencing a shortfall of approximately $1500 a month. This is on the basis of an extremely modest lifestyle, far less than she enjoyed during cohabitation. No doubt the satisfaction of the equalization of the family assets will leave the plaintiff fiscally challenged; however, he is an exceptional money manager. The couple had modest debts at the time of separation. Their debt income ratio was enviable. He was able to service his obligations without any difficulty.

[52] The Court received two sets of DIVORCEmate calculations. The latter contained a more modest range of $1,700 to $2,300. DIVORCEmate calculations are not of the binding nature of child support guidelines; however, their value lies in that, like the child support guidelines, they are the product of economic research and precedent. No court will likely just punch in the numbers, but the guidelines are of some utility. They guide the discussion. Given the particular needs of this defendant, the impossibility of replicating her previous married lifestyle and the capability of her husband, this court is of the view the appropriate sum for monthly spousal support is $2,000. Mr. R.'s

capability of paying such a sum is predicated upon his present salary level. It would be impossible for him to maintain this level of support upon his retirement when his pension vests. This is recognized and it is accepted that spousal support will cease with the vesting of his full pension.

B. Retroactive spousal support

[53] *Kerr* v. *Baranow*, (supra) at paras. 204 to 212, contains the most current observations on the date of spousal support by the Supreme Court of Canada. The discretion of a trial judge to award spousal support effective the commencement date of the proceedings; in this case, January 2010, is a given. Spousal support retroactivity before pleadings has been analogized to that of child support, in that criteria such as the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support, and any hardship occasioned a payor by such an imposition, are all considered. (para. 207.)

[54] Having regarded these shared criteria, child support can be distinguished in that the parent-child relationship is a fiduciary relationship of presumed dependency. For that reason, child support is, as Justice Cromwell, writes "automatic". It is a right of the child, a right to be satisfied by both parents setting aside their own needs. Consequently, Justice Cromwell observes:

> In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. (para. 208)

[55] With regard to the contrast that Justice Cromwell describes, is this not an adult

situation which approximates the child-parent relationship. Mr. R. knew from the day his wife took up residency in Copper Ridge that she had memory retention issues. She was severely lacking in dexterity such that independent banking tools that we take for granted, as ATMs, were inaccessible. She had mobility issues in terms of going to a bank to set up her separate account, et cetera. Equally so, it would be difficult for her to access legal services. It was quite cavalier on the plaintiff's part to not address those needs immediately. The needs of his spouse were modest and elemental. Her standard of living had plummeted. He basically left her to fend for herself until her friend Ms. S. and Ms. R.'s siblings became progressively more proactive.

[56] No wonder the latter were shocked. Their assumption that he, Mr. R., would take care of his spouse, the spouse's financial needs, was objectively reasonable. No doubt, Mr. R. compounded this impression of his in-laws when he high-handedly gave them 30 days' notice of his intention to cancel either the telephone or cable service for his wife. The blithe absorption of the Canada Pension Plan disability cheque into the joint account for six months is mind-boggling. What could have prevented him from depositing at least that sum into the comfort account at the long-term facility? That deposit would have addressed the residential rent which started to accrue. Certainly, Mr. R. is entitled to seek reimbursement from his insurance carrier, but not to ignore the rent and the consequential accumulation of arrears. Given the unique circumstances of this case, primarily the immediate physical needs of his spouse and his failure to address those needs whilst in receipt of her CPP disability pension, this is a situation which justifies retroactive spousal support to the date of separation.

[57] Mr. R., fortunately, saw the light before too late and brought the rental arrears

into good standing by the end of the summer of 2009. He also made other payments of a $2,000 sum, a flight to Edmonton costing approximately $2,000, and various telephone and cable service bills. He should receive credit for those contributions for both: one, the months in which the CPP remained in the joint account, those deposits were due to the dependent, on top of which would be added the $2,000 support payment; and, secondly, for the ongoing months when the CPP had been transferred and the support obligation of $2,000 alone would be due. He also - and I stand corrected - from the summer of 2010 voluntarily paid spousal support. He should be credited for these payments as well.

[58] To address part of the burden of having to catch up, which Justice Cromwell recognized in *Kerr* v. *Baranow*, Mr. R. may address his obligation in a go-forward monthly amount of at least $400, until his obligation is discharged.

3. Other matters

[59]

(a) Ms. R. shall cooperate in recognition of retroactive support to enable Mr. R. to apply for a reassessment of his net taxable income from the taxation year 2009 onwards.

(b) The dog. The plaintiff shall continue to deliver the dog as long as the health of the canine permits, twice a week, at a time to be agreed upon with the administrator or his or her delegate at Copper Ridge. This obligation shall continue as long as the defendant is a resident of Copper Ridge and the plaintiff is a resident of Whitehorse, or the parties otherwise

agree. The costs associated with this transportation have been factored into the spousal support so found.

(c) Divorce. Given the outstanding dental care required for the defendant, presently scheduled for August 7, 2011, and the existing dental coverage available to the plaintiff through his employment for his "spouse" which would result in a maximum payment of $1,000, the judgment for divorce is adjourned until the receipt of that contribution, whether it be from the plaintiff or the insurance carrier, or six months henceforth, whatever event occurs sooner.

COSTS

[60] This issue should be dealt with in court now, immediately after this judgment is read into the record and submissions are made accordingly.

[61] That is my judgment.

[Submissions re costs]

[62] THE COURT: Costs payable by the plaintiff for fees in the amount of $22,523, and disbursements, $767.76, totalling $23,290.76.

WHITTEN J.