

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

Harpreet Rakhra

Petitioner

- and -

Navdeep Rakhra

Respondent

MEMORANDUM OF JUDGMENT

[1] This is an application regarding spousal support following the divorce of the parties. The divorce judgment has been issued and the issues of custody and access to the children and the division of matrimonial property have already been resolved. The only remaining issues are whether the Respondent should continue to receive spousal support and if so, what is the appropriate amount and for how long.

Facts

[2] For the purposes of this application, most of the facts are not in issue.

[3] The Petitioner was born in India and moved to Canada after marrying the Respondent. The Respondent was born and raised in Ontario to parents of East Indian descent. The marriage was arranged by their respective families in accordance with the Hindu faith. The Petitioner and the Respondent were married on April 4, 1999 in India, having met just 14 days prior.

[4] The Petitioner studied in India to be a dentist. After the Petitioner moved to Canada in 1999, he went to school to receive his dental accreditation in Canada. During some of this time, the Respondent lived with her parents in Hamilton, Ontario. The Petitioner first lived with the Respondent and her parents in Hamilton before residing in London, Ontario where he was studying. The Petitioner received his accreditation in February 2002.

[5] In June 2002, the Petitioner moved Yellowknife to work at a dental clinic. The Respondent moved to Yellowknife in August 2002. The parties lived together in Yellowknife until their separation on April 2, 2004.

[6] There were two children of the marriage: Simran Rakhra, born May 1, 2001 and Sahib Rakhra, born December 17, 2002.

[7] During the marriage, the Petitioner practiced as a dentist and earned a significant income. The Respondent was not employed during the marriage, although she received annuity payments from an insurance settlement which will be detailed below.

[8] When the parties separated, the Petitioner obtained an order for exclusive possession of the matrimonial home and interim custody of the children as well as a restraining order. On April 29, 2004, the parties agreed in a Consent Order that, along with other terms, the Petitioner would pay the Respondent interim spousal support in the amount of \$3000 per month, starting May 1, 2004. Barring any agreement, the issue of spousal support was to be reviewed by the Court by October 1, 2004. This did not occur and, since the Consent Order, the Petitioner has paid spousal support of \$3000 per month.

[9] The parties eventually agreed to settle all issues arising from the breakdown of the marriage, with the exception of the issue of spousal support. The parties agreed that the Petitioner would have sole custody of the children of the marriage and that the Respondent would be entitled to three supervised access visits per year, the costs of which were to be paid by the Petitioner. The Petitioner has also been solely responsible for all financial costs relating to the children.

[10] In 1997, when she was 19 years old, the Respondent was involved in a motor vehicle accident. She suffered a serious head injury and as a result of the injury, she

suffers from significant disabilities. The Respondent's ability to work is limited and she is currently living with her parents in Ontario.

[11] There is no issue that, as a result of the motor vehicle accident, the Respondent has suffered a serious and permanent head injury or that she will be unable to secure or maintain employment in the future. What is disputed is whether the Petitioner was aware of the full extent of the head injury suffered by the Respondent and the effect it would have and continues to have on the Respondent.

[12] The Petitioner claims that he was aware the Respondent had been in a motor vehicle accident, but he was not aware of the full extent of her injuries. The Petitioner says that he had been advised by her family that she was in school training to be a physiotherapist. The Petitioner claims that it was only after the marriage that he became aware of the full extent of the Respondent's injuries. The Petitioner accepts that the Respondent does not have any immediate or long-term prospects for employment.

[13] The Respondent claims that the Petitioner was aware of the serious impact the accident had on the Respondent prior to the marriage. The Respondent also asserts that, as a result of the Petitioner's medical training, it would have been apparent to him that the accident had a significant effect on the Respondent.

[14] This matter proceeded before me by way of a Consent Record which included Affidavits from both the Petitioner and the Respondent. On the basis of the documentary evidence before me, I am unable to make any finding about the extent of the Petitioner's knowledge about the Respondent's injuries prior to their marriage. Both parties acknowledged this and agreed that it is not necessary to resolve this factual dispute in order to render a decision. I have considered this and agree with the parties that a decision can be made without deciding this particular fact. The more relevant facts are the Respondent's injuries which pre-date the marriage and their impact upon her ability to secure or maintain employment.

[15] After the Respondent's accident, she received a structured settlement of approximately \$878,000. Using some of the proceeds of the settlement, three annuities were purchased for the Respondent. The annuities provide a combination of monthly payments and lump-sum payments. Currently, the Respondent receives

monthly payments of \$1788.27. Each year the monthly amount increases so that, for example, the Respondent will receive \$1974.39 monthly in 2017. The Respondent also receives lump-sum payments every 2 to 3 years. The Respondent's next lump-sum payment is due on August 1, 2013 where she will receive \$17,000.

[16] The Respondent currently lives with her parents in Hamilton, Ontario. The Petitioner has since moved to Whitecourt, Alberta where he works at a dental clinic. He has remarried and his new spouse is also a dentist who works at the same clinic. They have two children together and live with the Petitioner's parents as well as the two children from his marriage to the Respondent. The Petitioner, as of 2008, was earning approximately \$263,000 per year.

### The Applicable Law

[17] The *Divorce Act*, R.S.C. 1985, c. 3 (2<sup>nd</sup> Supp.) (the "*Act*") provides authority for a court to make an order for spousal support. A court may make an order for spousal support for a definite or indefinite period of time and may impose any terms and conditions that it thinks are fit and just with respect to that order.

[18] In making an order for spousal support, section 15.2(4) of the *Act* requires the court to:

- 15.2(4) ... (T)ake into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabitated;
  - (b) the functions performed by each spouse during cohabitation; and
  - (c) any order, agreement or arrangement relating to support of either spouse.

[19] Section 15.2(6) of the *Act* also establishes a number of objectives the court must keep in mind in spousal support applications. They are:

- 15.2(6) (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

- c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[20] All of the factors and objectives set out in sections 15.2(4) and 15.2(6) must be taken into account on every spousal support application. Depending on the circumstances of each case, some of the factors and objectives may be given more weight than others but a court must still consider all of them. Additionally, all of the factors and objectives must be considered at each stage of the application. *Moge v. Moge*, [1992] 3S. C. R. 813, para. 52; *Bracklow v. Bracklow*, [1999] 1 S. C. R. 420, paras. 35-36, 50-54.

[21] There are three bases for entitlement to spousal support: 1) compensatory; 2) contractual; and 3) non-compensatory. In this case, the claim for spousal support is on a non-compensatory basis, or what is often referred to as needs-based support. In cases where there is a sick or disabled spouse who is unable to adequately support themselves, support obligations have been found to arise from the marriage relationship itself and the expectations the parties had when they married. In determining whether spousal support should be granted, there is no requirement to establish a causal connection between the condition or illness of the spouse and the circumstances of the marriage or the breakdown of the relationship: *Bracklow v. Bracklow, supra* at para. 44-47.

### Entitlement to Support

[22] In this case, the parties were married in April 1999. They cohabitated from August 1999 until April 2004 when they separated. During that time, from March 2001 to February 2002 and from June 2002 to August 2002, the parties lived mostly apart while the Petitioner pursued his dental studies and established his dental practice in Yellowknife. The marriage was of relatively short duration, lasting approximately 5 years.

[23] During the marriage, the Petitioner was either studying to become a dentist in Canada or working as a dentist. His employment income, along with the Respondent's annuity payments, supported the parties while they were married. The significant financial support of the Respondent's family is also relevant as it provided

the means for the Petitioner to receive his dental accreditation in Canada and to be able to support the Respondent and their children, both during and after the marriage.

[24] The Respondent was not employed during the marriage and was responsible for taking care of the family home and the day-to-day care of the children of the marriage. After it became apparent that the Respondent was overwhelmed by caring for the children, a part-time nanny was hired to assist her.

[25] After the parties separated, the parties agreed that the Petitioner would pay interim spousal support of \$3000 per month, starting May 1, 2004. The Petitioner has continued to pay spousal support of \$3000 since that date, almost 8 years.

[26] A significant factor in considering the Respondent's condition is that her disabilities are permanent and will not improve. Her brain injury makes it unlikely that she will ever become self-sufficient. The Petitioner accepts this and does not dispute that the Respondent was entitled to spousal support from May 2004 until now to allow the Petitioner to adjust to her changed circumstances as a result of the marriage breakdown. However, the Petitioner argues that the annuity payments that the Respondent receives compensate her for these injuries and take into account that she will never be self-sufficient. As a result, the Petitioner says that he should not have to continue paying spousal support.

[27] The means of the Petitioner are not insignificant. In 2008, he earned \$263,000 per year, had a RRSP of approximately \$99,000, his professional Corporation was worth approximately \$50,000, he co-owned property worth \$530,000 and he owned two vehicles whose market value was approximately \$95-\$100,000. He also had significant debts: his mortgage was approximately \$435,000, he owed \$90,000 on the vehicles, and he shared all household expenses on a 76/24 basis with his current spouse. The Petitioner is responsible for the living expenses of his two parents, the children from his marriage to the Respondent, and half the costs of his children with his current spouse and half the costs of a nanny.

[28] The Petitioner is also responsible for 100% of the costs of raising his children from the marriage to the Respondent. He does not receive child support and is responsible for the costs associated with the Respondent exercising access to the children in Ontario three times per year.

[29] The Petitioner's new spouse is also a dentist employed at the same clinic as the Petitioner. The Respondent argues that I should consider the income of the Petitioner's spouse in this application. The Petitioner responds that the income of the Petitioner's spouse is not in evidence and that, in any event, the Petitioner has the means to pay spousal support. I agree that the income of the Petitioner's spouse is not relevant in this application; this is not a situation where the Petitioner is claiming that he cannot meet his spousal support obligations as a result of his obligations to his new spouse and their family. It is apparent that the Petitioner has the means to comply with an order for spousal support.

[30] The Respondent's means are also a factor I have to take into account. While it is difficult to trace what has happened to some of the \$878,000 that the Respondent received in the insurance settlement, it is possible to determine the financial situation of the Respondent from her Financial Statements and Statement of Property. The Respondent is not employed and is not expected to gain employment but she does have a modest, steady and secure stream of income. This year, she receives \$1788.27 per month from the Manufacturers Life Insurance Company and AIG Life Insurance Company of Canada policies. These monthly payments increase each year and if she lives to age 95, she will receive \$5867.36 per month. Since these funds are as a result of an insurance settlement, they are not subject to income tax. As of 2010, she had approximately \$251,000 deposited in a combination of GICs, a tax-free savings account, a RRSP and two chequing accounts.

[31] The Respondent does not have any debt. Of her monthly expenses in 2010, her most significant expenses were: \$833.33 (or \$10,000 per year) to a RRSP; \$400 for transportation; \$416.67 (or \$5000 per year ) to a tax-free savings account; and \$625 to legal fees. The Respondent does not pay any rent or own any property. As previously stated, she lives with her parents and as a result, her housing expenses are negligible. The bulk of her remaining monthly expenses are comprised of expenditures on food, clothing and other similar personal items.

[32] Counsel for the Respondent argued that while the Respondent does not pay rent and lives with her parents, it is anticipated that the Respondent's parents, at some point, will be unable to continue to care for her and the Respondent will have to move into some sort of assisted-living facility. The Respondent will then have significant monthly expenses for rent and personal care. I am urged to consider these future

expenses in deciding this application. However, there is no evidence of what those future costs might be and it would be pure speculation as to when this might come to pass. In the circumstances, I have considered that there is a significant possibility that the Respondent will, in the future, have more substantial monthly living expenses as a result of having to pay for rent and personal care. Without evidence on these points, I am unable to draw any further conclusions regarding this.

[33] Counsel for the Petitioner noted that the Petitioner currently pays the Respondent approximately \$36,000 in spousal support per year. Looking at the Respondent's financial statement, she pays \$22,500 per year towards a RRSP, a tax-free savings account and legal fees. The Petitioner argues that assuming the legal fees (which presumably relate to the divorce litigation) eventually end, the bulk of the money that the Respondent receives from the Petitioner is being saved by the Respondent.

[34] In considering the objectives of a spousal support order under the *Act*, the Petitioner has benefited economically from the financial support of the Respondent's family which has allowed him to pursue his career as a dentist in Canada. In comparison, the Respondent has maintained her income from the insurance settlement but has lost the benefit of the Petitioner's income which contributed to the lifestyle that the parties enjoyed while married. Balanced against this is that the Petitioner has paid spousal support of \$3000 per month for almost 8 years and bears all costs of raising the children of the marriage, including paying for the Respondent to exercise access to the children.

[35] In considering "economic hardship" as referred to in s. 15.2(6)(c) of the *Act*, while the financial situation of both parties is likely different from what it would have been had they remained married, it does not appear that either party has suffered any particular economic hardship (aside from what I have already referred to) arising from the breakdown of the marriage.

[36] In considering the economic self-sufficiency of each spouse, it is conceded by the Petitioner that the Respondent will never become self-sufficient as a result of her disability. However, the Petitioner argues that the Respondent is already receiving compensation for the disability because of the \$878,000 insurance settlement that she received. This factor makes this case different from much of the other case law regarding spousal support for ill or disabled spouses. In my view, this factor is



significant but it has to be considered along with all of the other factors referred to in the *Act*.

[37] As previously mentioned, spousal support is not sought in this case on a contractual or compensatory basis and I do not believe that either would be appropriate in the circumstances. I am satisfied that the Respondent is entitled to spousal support on a non-compensatory basis. The Respondent's disability and her resulting inability to gain employment establish that the conditions for a spousal support order on the basis of need are met. While the Respondent does have a secure and steady source of income from the insurance settlement, it is modest particularly in comparison to the income of the Petitioner.

[38] The issue of whether or not the Petitioner was aware or was misled about the extent of the Respondent's injuries prior to the marriage is not particularly significant, in my view. While there is case law that says that an awareness of the disability or illness can be equated to the assumption of responsibility for the spouse (*Reitsma v. Reitsma-Leadsom*, 2005 CanLII 47609 (ON S.C.)), that is simply one of the factors the court must take into account in determining whether a spousal support order is warranted. In the circumstances of this case, it is acknowledged that the Petitioner had some knowledge of the Respondent's accident and injuries. When considering all of the circumstances referred to in the *Act*, I am still satisfied that, regardless of the extent of the Petitioner's knowledge about the Respondent's injuries, that this is an appropriate case for spousal support on a non-compensatory basis.

#### Quantum and Duration of Support

[39] The Petitioner has calculated the quantum and duration of spousal support using the Spousal Support Advisory Guidelines and states that the Respondent should have received between \$2300 and \$3000 per month for 2.5 to 5 years. As the Petitioner has paid \$3000 for almost 8 years, the Petitioner submits that the Guidelines should be followed and any further spousal support should not be granted.

[40] While the Guidelines are advisory in nature and not binding, they have been considered as useful in assisting courts in determining the appropriate quantum and duration once an entitlement to spousal support has been established: *Fisher v. Fisher*, 2008 ONCA 11.

[41] As noted by Justice Charbonneau in *Gross v. Gross*, 2006 NWTSC 66 at para. 99:

The assessment of quantum in these cases is not an exact science by any means... The Guidelines were intended to reflect the current law, and I accept that they can, in appropriate cases, be a useful tool for the courts. *Yemchuk v. Yemchuk*, (2005) 44 B.C.L.R. (4<sup>th</sup>) 77. Notwithstanding this, I am not inclined to attach much weight to the Guidelines in this case, because the circumstances are quite unique.

[42] Similarly, while I have considered the Guidelines, I am of the view that applying the Guidelines in the circumstances of this case would not result in an appropriate award of spousal support. The combination of the permanent disability of the Respondent which renders her unable to work and the insurance settlement she has already received for her injuries are circumstances which make this situation unique.

[43] With respect to duration, the Guidelines propose granting spousal support for 2.5 to 5 years based on the length of the marriage. The marriage of the parties was not a long one, lasting approximately 5 years. The length of the marriage, however, is just one of the considerations I must take in account: *Gross v. Gross, supra* at para. 98. The permanent disability of the Respondent and her resulting inability to work are also important considerations as are the income and resources of the Respondent. Taking all of the factors and objectives in the *Act* into account, I am of the view that spousal support should continue for a longer period than that proposed by the Guidelines but also should not be for an indefinite period.

[44] In assessing the amount that should be ordered, I have considered what the Petitioner has paid for almost 8 years as well as the condition, means, needs, and other circumstances of both parties.

[45] In considering the Respondent's expenses, removing her contributions to a RRSP and the tax-free savings account as well as her legal fees, her remaining monthly expenses are approximately \$2490. This amount does not include any rent or other household expenses. Currently, she receives \$1718.83 per month from her insurance settlement, resulting in a shortfall of \$771.17 per month. While any number of expenses on the Financial Statement could be added or deducted in calculating the Respondent's expenses, I am satisfied that they establish the need of the Respondent. The Respondent has significant resources in the bank, saving presumably for her future needs. She should not have to completely deplete her savings first in meeting

her current needs before being entitled to claim spousal support. The Respondent's income and resources are important considerations and I have taken them into account in determining the appropriate quantum.

[46] I am also mindful that, as stated in *Gross v. Gross, supra* at para. 100, "it does not follow from the fact that needs serves as the predicate for support that the quantum of the support must always be equal to that need."

[47] Having considered all of the factors and objectives in the *Act* and the circumstances of the case, I find that an order which is less than called for under the Guidelines but longer than what the Guidelines propose would be appropriate. Given that the Respondent has been receiving \$3000 per month for almost 8 years, I think it is appropriate that the reduction occur in phases to allow the Respondent time to adjust to her new financial situation.

[48] In the circumstances, there will be a monthly spousal support order of \$2000 per month, commencing May 2012 and continuing until December 2012. Commencing January 2013, that amount will be reduced to \$1000 per month and be payable until December 2013. From January 2014 until December 2019, the amount will be \$750 per month. After that date, spousal support will terminate.

[49] Neither party wished for the spousal support order to have a retroactive component and were content with any further order being made on a going forward basis. As such, while I have considered the amounts received by the Respondent to date in making the spousal support order, the order itself will be prospective.

### Conclusion

[50] For these reasons, I make the following Order:

- 1) Pursuant to the *Divorce Act*, R.S.C. 1985, c. 3 (2<sup>nd</sup> Supp.) the Petitioner shall pay spousal support to the Respondent of an amount of two thousand dollars (\$2000.00) a month, effective May 1, 2012 and continuing payable until December 1, 2012.
- 2) The Petitioner shall pay spousal support to the Respondent of an amount of one thousand dollars (\$1000.00) a month, effective January 1, 2013 and continuing payable until December 1, 2013.

- 3) The Petitioner shall pay spousal support to the Respondent of an amount of seven hundred and fifty dollars (\$750.00) a month, effective January 1, 2014 and continuing to December 1, 2019.

[51] Costs were not fully argued before me and given the result, I am going to give counsel an opportunity to make further submissions as to costs. If they wish to do so, they can contact the Registry within 30 days of this Memorandum and make arrangements to either appear before me in Chambers or file written submissions (if both parties agree that costs be addressed by written submissions).



SH. Smallwood  
J.S.C.

Dated at Yellowknife, NT, this  
25<sup>th</sup> day of April 2012

Counsel for the Petitioner:  
Counsel for the Respondent:

Sheila MacPherson  
Betty-Lou McIlmoyle

S-1-DV-2005-103662

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