CITATION: Star v. Bolster, 2012 ONSC 4744
COURT FILE NO.: FS-11-17625
DATE: 20120828

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
William G. Star	)	*David A. Jarvis*, for the Applicant
	)	
Applicant	)	
	)	
– and –	)	
	)	*Douglas Spiller*, for the Respondent
Beverley A. Bolster	)	
	)	
Respondent	)	
	)	
	)	
	)	
	)	**HEARD: June 11, 12, 13 and 14, 2012**

PENNY J.

This Motion

[1] This is a motion by the applicant, William Star, to change the judgment of Mr. Justice O'Connell dated June 16, 1999 (the "Judgment"). The motion was commenced on October 15, 2010.

[2] In substance, the applicant seeks to terminate all of his support obligations effective December 31, 2010, or in the alternative, to vary the Judgment so as to reduce the amount of support payable, rescind the requirement that he pay cost-of-living increases on the support otherwise payable, and rescind the obligation to maintain life insurance and to continue medical and dental coverage for the respondent, Beverley Anne Bolster.

[3] Paragraphs 2 to 4 of the Judgment are at the heart of this motion. These paragraphs provide:

> 2. THIS COURT ORDERS AND ADJUDGES that commencing July 1, 1999, and on the first day of each month thereafter husband shall pay to the wife Beverley Anne Bolster the amount of $12,000 per month as spousal support.

> 3. THIS COURT ORDERS AND ADJUDGES that the support is to be increased or decreased each year on the anniversary of the separation agreement by an indexing factor being the percentage change in the Consumer Price Index for Canada for prices of all items since the same month of the previous year as published by Statistics Canada.
>
> 4. THIS COURT ORDERS AND JUDGES that if there is a material change in circumstances of the Husband or Wife that would allow a court to entertain an application under the *Divorce Act* for the variation of an order for spousal support, each of the parties is to be entitled to seek a variation in the amount of the payment, the terms for payment, or both, for the support of the wife.

[4] Paragraph 5 of the Judgment also requires the applicant to maintain a policy of life insurance in the face amount of $500,000 to secure his spousal support obligation. Paragraph 6 of the Judgment requires the applicant to continue medical and dental coverage for the respondent for as long as the support obligation exists.

Background

[5] The applicant and the respondent are both 76 years old. They were married and lived together for 39 1/2 years. There are four children of the marriage; all are independent adults. The parties were divorced on January 29, 1998.

[6] The applicant married Elizabeth on March 11, 1998, and remains married to her today.

[7] At the time of the Judgment, the applicant was the CEO of Kingsway Financial Services, an automobile insurance company. His income was $545,000 per year.

[8] The applicant's income rose significantly at Kingsway after 1999 but he was involuntarily "retired" as of December 31, 2007. In January, 2008, he was paid severance in respect of the termination of his employment of $4.5 million.

[9] Since his termination, the applicant says he has earned substantially less than $545,000 per year. He and his wife acquired and oversee the operations of a small automobile insurance company in the U.S. Some management fees are paid from this business to the holding company co-owned by the applicant and his wife. The applicant also receives a certain amount of investment income as well as CPP, OAS, and a small ManuLife pension. His investment account and his RIF are now virtually exhausted.

[10] The applicant maintains that he has been forced to encroach upon capital to pay the spousal support under the Judgment and has, through financial necessity, allowed the life insurance and health coverage to lapse. It is on the basis of his changed financial circumstances that he seeks to change his support obligations under the 1999 Judgment.

The Issues

[11] There are five issues to be resolved in this application:

(1) Has there been a material change as contemplated by s. 17 of the *Divorce Act*, R.S.C. 1985, c. 3 (2nd Supp.) in the condition, means, needs, or other circumstances of either of the former spouses since the making of the spousal support order?

(2) If there has been a change, what is the amount (if any) of spousal support that is payable?

(3) What is the amount of unpaid cost-of-living adjustment ("COLA") arrears that have accumulated under the Judgment and, should they be rescinded in whole or in part?

(4) Should the applicant's obligations under paragraphs 5 (life insurance as security for spousal support) and 6 (provision of medical and dental coverage) of the Judgment to be rescinded? and

(5) If there is to be a new order for spousal support, what is the date upon which it should take effect?

1. Material Change in Condition, Means, Needs or Other Circumstances

[12] The parties agree that this application is governed by s. 17 of the *Divorce Act*. The relevant provisions of s. 17 are:

> 17. (1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,
>
> > (*a*) a support order or any provision thereof on application by either or both former spouses
>
> …
>
> (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought.
>
> ...
>
> (4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the

> spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.
>
> …
>
> (7) A variation order varying a spousal support order should
>
> > (*a*) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
> >
> > (*b*) apportion between the former spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
> >
> > (*c*) relieve any economic hardship of the former spouses arising from the breakdown of the marriage; and
> >
> > (*d*) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[13] In *L.M.P. v. L.S.*, 2011 SCC 64, [2011] 3 S.C.R. 775, the Supreme Court of Canada said, at para. 31:

> *Willick* described the proper analysis as requiring a court to "determine first, whether the conditions for variation exist and if they do exist what variation of the existing order ought to be made in light of the change in circumstances" (p. 688). In determining whether the conditions for variation exist, the court must be satisfied that there has been a change of circumstance since the making of the prior order or variation. The onus is on the party seeking a variation to establish such a change.

[14] There are two aspects to the test. First, there must be a change in the condition, means, needs, or other circumstances of the party. The parties agree that the operative provision relied upon by the applicant is a change in his "means."

[15] Second, the change must be material; that is, a change that, if known at the time, would likely have resulted in different terms from the original agreement/order: see *Willick v. Willick*, [1994] 3. S.C.R. 670, at para. 21; *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370, at para. 48.

[16] As to the second part of the test, Professor Thompson in his 2011 LSUC 5th Annual Family Law Summit lecture, at p. 2, says:

> Much more helpful is the test stated by Proudfoot J.A. in *Carter* – "a change that is substantial, unforeseen and of a continuing nature." *Hickey* tells us that the

> change must be "not trivial or insignificant." *Marinangeli* says the change must have "some measure of continuity," to not be temporary.

See also *L.M.P. v. L.S.*, at paras. 32 – 35.

(i) Change in Means

[17] Between 1999 and 2008, the applicant's income increased dramatically. In the years between 2005 to 2007, his employment income was $1.460 million, $2.012 million, and $1.617 million respectively. In 2008, immediately following his termination as CEO of Kingsway, the applicant received a $4.5 million severance payment.

[18] Mr. Spiller argued that I "should make something that." He argues that the applicant had an "obligation to report" to the respondent the increases over his 1999 income. It was argued that, had he done so, the respondent might have been in a position to seek an increase in support. The implication of the argument seems to be that because the applicant got a benefit or took advantage of the respondent by failing to disclose his increased income, he should not be heard to complain now that his income has fallen off.

[19] Mr. Spiller was unable, however, to cite any authority for this alleged "obligation to report." The Judgment itself, certainly, does not provide for any ongoing disclosure by either party. It does not specify the income upon which the spousal support ordered was based. Nor does it contemplate any review or termination date, other than the "material change" clause.

[20] One might conceivably seek to imply an obligation to report from the material change clause itself. However, the respondent did not specifically argue this point and, in any event, at no time from 1999 until this litigation began in 2010, did the respondent ever make any form of request, demand or enquiry regarding financial disclosure from the applicant. Nor, now that the disclosure has been made, does the respondent seek any retroactive increase in her spousal support payments based on the applicant's higher earnings in those years. Rather, her position is that spousal support should not be reduced because, she says, the applicant's income remained and remains at or above the level ($545,000) which gave rise to the original amount of support ($12,000/mo.) set out in the Judgment.

[21] I am unable, on the law and evidence before me, to find any basis to impose on the applicant a self-initiated, common law obligation to make ongoing financial disclosure to his former wife after the conclusion of their comprehensive settlement and the issuance of the final Judgment.

[22] This is only a preliminary point however. The respondent's real argument is that: a) the applicant's retirement must have been in the contemplation of the parties in 1999, and was thus "foreseeable;" and b) notwithstanding the termination of the applicant's employment at the end of 2007, the applicant still earns in excess of $545,000 per year, such that there has been no "material" change to his means.

[23] The first point is easily dealt with. Both parties testified that neither of them had any expectation that the applicant would ever retire. This fact alone is strongly suggestive of the fact that retirement for the applicant was not a "foreseeable" event at the time of the Judgment.

[24] More importantly, however, the evidence is uncontroverted that the applicant has not, in fact, retired nor does he have plans to do so. The applicant does not have salaried employment, to be sure. I accept his evidence, however, that at age 76 with his precarious health, it is highly unlikely that he would be able to find full-time employment at a level of remuneration approaching that which he previously enjoyed.

[25] Subject to the issue of timing, which is dealt with below, I have no hesitation in finding that there has been a change in the applicant's "means." He went from being a highly paid executive, where he received salary, bonus, and stock options, to being a co-owner and manager of a small automobile insurance firm in the U.S., where he receives management fees and dividends from the earnings of the small enterprise.

[26] In my view, the only real issues in this litigation are whether the change in applicant's means is material and when the change should be deemed to have taken effect. I shall deal with both these issues under the heading below.

(ii) Material Change

[27] To support her claim that the applicant has maintained an income level at or greater than the $545,000 which underpinned the Judgment, the respondent tendered the evidence of Mr. Joslin, who analyzed the applicant's financial records. The admission of Mr. Joslin's opinion evidence was opposed on the basis that it was not necessary and that he lacked qualification.

[28] I admitted Mr. Joslin's evidence, in part, on the basis that his expertise in regard to the source, tracing, and flow of funds, and in the identification of assets available to the applicant, was, in the circumstances of this case, necessary and relevant to the court in obtaining a clearer picture of the applicant's financial situation.

[29] However, I specifically held that Mr. Joslin could not express opinions on fair market value or on any matter involving business valuations. I also found that Mr. Joslin could not express any opinions about the attribution of income or assets to any person or entity. Similarly, I also held that Mr. Joslin could not give opinion evidence on whether the applicant's alleged income was "income" for spousal support purposes.

[30] In the end, I found Mr. Joslin's evidence helpful in obtaining a clearer picture of the applicant's financial situation. However, it turned out that the main areas of controversy between the applicant and respondent on the issue of the applicant's financial situation involved questions on which I ruled Mr. Joslin could not give opinion evidence. These were: 1) the question of the attribution of assets and income vis-à-vis Elizabeth; 2) the purchase value of the applicant's stock holdings in Kingsway; and, 3) whether certain funds obtained by the applicant

through his insurance corporations constituted "income" or an erosion of "capital" for spousal support purposes.

[31] The first issue involves Elizabeth's interest in their matrimonial home and in Trillium Insurance Group ("TIG"), the Canadian holding company which owns the U.S. insurance companies.

[32] As noted earlier, the parties were divorced on in January 1998. The applicant married Elizabeth on March 11, 1998. Prior to their marriage, the applicant and Elizabeth entered into a domestic contract.

[33] When the domestic contract was signed, the applicant and Elizabeth were living in the applicant's condominium. In consideration for Elizabeth's waiver of all property and support rights, the applicant agreed that if their relationship broke down he would, among other things, transfer title to the condominium to Elizabeth.

[34] In 2004, the condominium was sold and the proceeds were used to purchase a home on Brandy Lane in joint tenancy. In 2007, this property was sold for $1,050,000 and the proceeds were used to acquire another home on Fifeshire for $1,595,000. Title to Fifeshire was taken solely in Elizabeth's name.

[35] It was common ground that all, or virtually all, of the funds used to acquire these properties came from the applicant. On this basis, the respondent argues that the value of the Fifeshire home should be attributed entirely, or almost entirely, to the applicant. The respondent argues that putting title to Fifeshire in the name of Elizabeth was nothing more than an attempt to defeat the respondent's legitimate support claims.

[36] I do not think the evidence supports either the respondent's claim that this transfer was done for the purpose of defeating her spousal support claims or her claim that ownership of Fifeshire should be attributed to the applicant.

[37] The evidence shows that from before the date of his marriage to Elizabeth and continuing thereafter, the substantive intention of the applicant and Elizabeth was that Elizabeth would own their home. It is consistent with that underlying intention that Elizabeth took sole title to the Fifeshire property in 2007.

[38] Importantly, in July 2007, when Fifeshire was purchased, there was no indication that the applicant would soon to lose his job at Kingsway. He earned over $2 million in 2006 and was in the process of earning over $1.6 million in 2007. The applicant and Elizabeth had, by this time, been married for about eight years. The applicant was still paying support of $12,000 per month to the respondent. He has continued to pay support (as adjusted for indexing by Czutrin J. on June 28, 2011) to the present time. In these circumstances, I do not think it can be said that the purpose of the transfer was to defeat the respondent's claims.

[39] Further, on his divorce, the applicant was entitled to remarry. A second marriage involves a new set of obligations and considerations. While a second marriage may well be no excuse for failing to fulfill obligations undertaken in respect of a prior marriage, life is not static. Circumstances change. New responsibilities and obligations arise. The applicant was earning a substantial income in 2007. The use of his funds to acquire a home for his wife did not, and could not reasonably have been seen as likely to, impair his ability to pay support to his first wife.

[40] I do not think the law prohibits the applicant from giving effect to a commitment to his wife of then eight years that their matrimonial home should be hers. Accordingly, I reject the respondent's argument that the value of Fifeshire should be attributed to the applicant for purposes of this application.

[41] On essentially the same basis, Mr. Joslin also took issue with Elizabeth's half ownership of TIG. In simple terms, the evidence was that the capitalization of the U.S. insurance business required about $3 million. The applicant put up half and the other half was financed by Elizabeth through a mortgage on the Fifeshire property. On this basis, the applicant and Elizabeth each own 50% of TIG.

[42] The respondent's argument is that because the applicant put up the money to acquire the Fifeshire home, the use of the home to finance a purchase of TIG shares should also result in attribution of ownership of those shares to the applicant.

[43] Given my findings that ownership of the Fifeshire home cannot be attributed to the applicant, I do not think this argument can prevail. Elizabeth is the owner of the Fifeshire property. She was entitled, at her discretion, to invest in an insurance business with the applicant by means of mortgaging her property. That does not result in the conclusion that her shares are actually owned by, or should be attributed to, the applicant. Accordingly, I also reject the respondent's argument that TIG should be viewed as being owned 100% by the applicant.

[44] The second issue of controversy between the applicant and respondent has to do with the realization value of sales of the applicant's shares of Kingsway, principally in 2009. The actual proceeds of sale were $1.33 million. The controversy arises because Mr. Joslin used a unit cost of $2.214 per share[1] whereas the applicant, for purposes of his own income tax return calculations, used his own calculation of adjusted cost base for these shares.

[1] An average unit cost appearing on the applicant's National Bank Financial December 31, 2010 statement (Ex. 10 Tab 4 p. 47). There was no evidence on what the basis of the National Bank Financial's calculation was or why it was done. Mr. Joslin could not explain why he used $2.214 as opposed to, for example, $6.245 appearing two pages later (p. 49) in the same statement. He had no idea when, or at what price, the stocks were acquired.

[45] There was much argument at the conclusion of the trial about whether the applicant had failed to make appropriate disclosure of the basis for his ACB calculation. In a pretrial motion, I dismissed the respondent's request to adjourn the trial to enable the respondent to obtain more disclosure. I did so primarily on the basis that the respondent (or, more precisely, her expert, Mr. Joslin and her counsel, Mr. Spiller) had had ample time to request disclosure and seek production orders. I would be inclined to take a similar view of the tempest surrounding the ACB of the applicant's Kingsway shares.

[46] However, it is in my view unnecessary to resolve this particular issue because, in the final analysis, this application will not turn on the applicant's calculation for tax purposes of capital losses on the sale of Kingsway shares in 2009. Rather, the issue is, 'what are his "means" today and have they changed "materially" since the Judgment was issued in 1999?' In this regard, therefore, the relevant fact is what the shares are worth, not what the applicant paid for them many years ago or how their disposition was treated for tax purposes.

[47] I will return to this issue when dealing with the question of income versus capital. However, I specifically reject the respondent's calculation, through Mr. Joslin (Ex. 10, Tab 6) of a "correction" to capital gains of $533,546 and an "add-on" of $804,124 to the applicant's income in 2009 (these two numbers total the "proceeds" of sale referred to above of $1.33 million) for recovery of stock sales based on an "average unit cost" of $2.214. There is, in my view, an insufficient evidentiary foundation for this assumption.

[48] The third issue of controversy relates to the question of whether funds received by the applicant were properly characterized as "income" or the realization of "capital," as well as the broader question of the extent to which both parties, at age 76, were or were not obliged to encroach or at least realize on capital for support or self-support purposes. In many ways, this was the most controversial, important, and difficult issue in the trial.

[49] The evidence focused on four main areas of dispute:

(1) The nature, proper characterization of and consequences resulting from the payment of $4.5 million to the applicant following his "retirement" on December 31, 2007, from Kingsway Financial;

(2) The proper characterization and treatment of the sales of shares owned by the applicant;

(3) The proper characterization and treatment of certain payments made to the applicant from the insurance business he acquired following the termination of his employment with Kingsway; and

(4) The proper characterization, consequences, and treatment of the funds and capital associated with Belgate Investments Limited, a Canadian investment vehicle 100% owned by the applicant.

The retirement agreement

[50] The applicant testified that at the end of 2007, he had a falling out with the board of Kingsway and was told to resign, failing which he would be let go. The applicant entered into a "retirement agreement" with Kingsway under which he was paid the sum of $4.5 million. In consideration for this payment, the applicant left Kingsway and signed a mutual release in which he released Kingsway from "any and all claims arising from his employment with Kingsway or the cessation thereof."

[51] In cross examination, the applicant agreed that the payment of $4.5 million was a lump sum representing lost salary or income result from the termination of his employment with Kingsway.

[52] The evidence was that the applicant netted about $3 million of this payment after tax.

[53] In an effort to earn income to help replace the income lost after Kingsway terminate his employment, the applicant and Elizabeth incorporated a number of companies to sell non-standard automobile insurance in the U.S. TIG is the Canadian holding company of these assets. The applicant testified that in 2008/2009, returns on retirement-quality investments were extremely low. The applicant felt that he was better off investing in the only business he knew, automobile insurance.

[54] Since the capital cost of starting in an insurance business in Ontario was prohibitive (capitalization of about $10 million is required), the applicant and Elizabeth chose to incorporate their insurance business in the U.S. (Trillium General Insurance in Arizona) in the latter half of 2008 and to purchase, in late 2009, an existing company (Geneva Insurance Company ("Geneva") in Indiana).

[55] The applicant invested $1.5 million; Elizabeth put up the other $1.5 million by mortgaging the Fifeshire home. The rest of the severance payment, the applicant said, was used for "other investments." The evidence was that he acquired some additional Kingsway shares and some Nortel shares in 2008.

[56] In cross-examination, the applicant agreed that he was fortunate to have received a lump sum and that he chose to invest it in this way. He also agreed that because he invested his severance in starting a business and making some other investments, he now thought of the lump sum payment as "capital."

[57] The respondent spent a great deal of time during the trial trying to show that the applicant was able to take more out of Trillium and Geneva than he let on. This was in an effort to show that the applicant's present income is really at least as much as the $545,000 which underpinned the spousal support required by the Judgment. The level of funds available through the Trillium group of companies was, to say the least, controversial during the trial.

[58] The applicant took the position that his "capital pie" is fixed and that in order to afford his spousal support payments he has had to withdraw capital from the insurance business to make ends meet.

[59] It was suggested to the applicant in cross-examination that he could, and did, take whatever he wanted out of the Trillium group when he needed it. The applicant steadfastly denied this, pointing out both strict regulatory and financial constraints on his ability to draw funds (income or capital) from the insurance business. The only way he could continue to draw more than modest income out of Trillium and Geneva, he said, was to grow the business and make it more profitable. The applicant felt the business had the potential to generate more profit but that it was not there yet.

[60] On the evidence, the payment in early 2008 of $4.5 million to the applicant was clearly a payment in lieu of reasonable notice for the termination of his employment with Kingsway. As such, it represented a lost stream of income for a future period of time.

[61] The applicant had been with Kingsway for many years (at least 25) and had operated at the highest level, being the CEO, a member of the board, and the one responsible for taking the company public in 1995. As such, he would have been entitled to very substantial notice of the termination of his employment. The payment of $4.5 million represents about eight years worth of $545,000 income payments, or about three years of $1.6 million income payments, using the average of the applicant's last three years' income. The applicant also suggests, not unreasonably in my view, that given his age at the time (72 years old), some portion of this severance could legitimately be regarded as some form of retirement allowance, even though it was not structured in that way.

[62] Another way of looking at this would be to allocate a "capital" and an "income" component to the $4.5 million payment. In this case, the applicant invested $1.5 million in starting his new business. An allocation of $3 million for foregone income and $1.5 million as retirement fund would reflect, to some extent, what actually happened and would not be an unreasonable apportionment.

[63] The apportionment of the severance payment as income for several years following 2004 can also be justified on the basis of granting the respondent a period of time since the commencement of the motion to adjust to the new reality of the applicant's changed circumstances and the need for a reduction in the amount of support payable.

[64] This was the approach of Greer J. in *Fishlock v. Fishlock* (2007) 46 R.F.L. (6th) 254, a case raising somewhat similar issues. In balancing the considerations affecting both parties, Greer J. said, at para. 47:

> I therefore order Gary to continue to make payments of $4,038 per month to Janice until December 2007 applying the indexing factor, as this is what she is currently receiving. These shall continue to be collected through the FRO unless

> Janice agrees otherwise. I have given Janice one more year under the terms of the Judgment, given that Gary decided on his own retirement date without conferring with Janice or giving her a substantial period of notice so that they could try to work things out between themselves. In the meantime, Janice shall list her house for sale, find appropriate accommodation to meet her reduced income, and invest the net proceeds from her house to produce income. If she nets in the range of $500,000, it can be invested at approximately 4.4% in Treasury Bills or in dividend producing investments, to maximize her income. The eight-month period will give Janice time to sell and move and reorganize her life.

[65] In my view, having regard to all of these considerations, the $4.5 million payment should be treated as compensation in lieu of foregone salary for four years. The applicant's income must be deemed, for present purposes therefore, to have been at or above above the $545,000 level underpinning the Judgment for the period January 1, 2008 to December 31, 2011 inclusive. On this basis, I do not think it can be said that there was a material change in the applicant's means *before* December 31, 2011. I will return to the post-December 31, 2011 period later in these Reasons.

Sale of shares

[66] During and after the term of his employment with Kingsway, the applicant acquired several hundred thousand Kingsway shares. As of December 2007, he had two investment accounts with National Bank Financial: 1) a margin account valued at $3.4 million; and 2) a RIF account valued at $1 million. Both accounts consisted almost exclusively of Kingsway shares. Kingsway stock was valued at the time at about $12 per share (it had been as high as $26 per share).

[67] In 2008, the applicant acquired more Kingsway shares and, in addition, acquired a significant holding of Nortel stock. By the end of 2008, the Kingsway shares were worth only $6 per share. Nortel, in 2008, was worth about $12 per share.

[68] During 2009, the applicant sold most of his Kingsway shares for total proceeds of $1.336 million. He claimed a capital loss for tax purposes. By the end of 2009, Kingsway shares were valued at $1.83 per share. The applicant's margin account was worth only $33,628 and his RIF account was worth $221,470.

[69] By March 2012, the Nortel stock was worth only 18 cents per share and the Kingsway share price had fallen to 77 cents. The margin account was worth $16,522 and the RIF was worth $24,110.

[70] As noted earlier, the respondent's expert, Mr. Joslin, sought to include a portion of the 2009 proceeds of Kingsway shares ($804,000 after adjustment for capital gains) in the applicant's income for 2009.

[71] I do not agree with Mr. Joslin's approach. Mr. Joslin admitted that the stock sales were a realization of capital; that is why he made an adjustment of some $532,000 off the full $1.3 million sale proceeds to "correct" capital gains.

[72] The sale of the applicant's portfolio of Kingsway shares was clearly a one-time event; the value was realized and the shares are gone.

[73] The evidence did not make clear, however, how the $1.3 million was used or where it went.[2] But whatever the ultimate use or disposition of the $1.3 million from stock sales in 2009 may have been, it is not, in my view, properly considered "income" for spousal support purposes due to the one-time nature of the transaction.

Dividend from Geneva

[74] The U.S. insurance operating company, Geneva, paid a $355,000 dividend to its parent company which ultimately became available to the applicant in 2010.

[75] Mr. Joslin ascribed this amount to the applicant as "income" for 2010.

[76] The applicant testified that this was not a dividend in the usual sense of the word. The applicant's evidence was that in order to make spousal support payments in 2010, and otherwise to cover his living expenses, he needed more money than was available to him. He testified that he had to make special application to the U.S. insurance regulator to enable the transfer of those funds. The capital of Geneva was reduced as a result and is now at the bare minimum permissible. He says, in effect, "there is no more where that came from."

[77] I accept the applicant's evidence on this issue. There is no evidence of ongoing profitability in Geneva, or any of the applicant's insurance-related companies, at the $350,000 per year level. I accept the applicant's evidence that the $355,000 payment was a one-time transfer, necessitated by his support and other day-to-day obligations. I accept that he cannot keep taking this kind of money out of the company because it simply is not there.

[78] Accordingly, I do not accept Mr. Joslin's characterization of the $355,000 payment from Geneva as "income" in 2010 for spousal support calculation purposes.

Belgate Investments Limited

[79] Belgate is a holding company owned by the applicant. It was common ground that Belgate holds an interest in a Jamaica holiday property (purchased for about $1 million), a

[2] It seems likely that at least some of these funds were used to fund the closing cost of a Jamaica holiday property of $500,000 in early 2010.

Muskoka holiday property (purchased for about $360,000), a mortgage on a commercial property in Toronto, and a shareholder loan. It was common ground, as well, that Belgate is valued at about $2 million.

[80] The applicant's evidence, not challenged in the trial, was that both the Jamaica and Muskoka holiday property developments are in receivership. There is no income from these properties. The applicant has been unable to sell the properties and their market value, under the circumstances, is unknown.

[81] As I understand it, there are two issues of controversy connected with Belgate.

[82] First, Belgate pays a salary to Elizabeth of about $25,000 per year. The respondent maintains that this income has been improperly diverted away from the applicant in an effort to reduce his support obligations to the respondent.

[83] The second issue is what impact, if any, the applicant's ownership of the Belgate asset should have on his spousal support obligations. The respondent, as I understand it, argues that the underlying assets should be sold and the cash used to fund the current level of spousal support.

[84] The applicant's evidence on the $25,000 paid to Elizabeth is that she performs a number of clerical and administrative functions for the Trillium group of companies. The applicant testified that the $25,000 is compensation for Elizabeth's work for the insurance companies.

[85] On the available evidence, I do not think it has been established that the $25,000 being paid to Elizabeth is anything more than an income splitting device. Belgate has nothing to do with the insurance business. Accordingly, I find that this $25,000 is income which is in fact available to the applicant for purposes of calculating support obligations.

[86] The second issue, of what impact the Belgate asset has or should have on the applicant's support obligations and capacity to pay, raises a broader issue concerning the use and deployment of the parties' capital generally, which I will deal with in the next section of these Reasons.

2. <u>What Amount of Support is Payable?</u>

[87] The applicant's income from all sources in the last three years was: 2009 – $140,249; 2010 –$166,805; and 2011 – $202,164.[3] A significant portion of even these incomes, however,

[3] In 2011, Mr. Joslin sought to impute income to the applicant based on certain management fees, interest and reduction of intercompany loans within TIG. For reasons expressed above concerning the 2010 year, I do not accept the imputation of these amounts as "income" to the applicant.

was made up of RIF withdrawals (the RIF is now essentially depleted) or other special distributions from the Trillium group of companies which, the applicant argues, cannot continue in the future without significant growth and increased profitability.

[88] The applicant has about $3.5 million in assets, at least some of which (TIG and the holiday property investments) appear to be relatively illiquid.

[89] The applicant and his wife now live in rental accommodation.

[90] The sale of the Fifeshire home will eliminate the need to pay interest on Elizabeth's investment in TIG. This, in future, will increase the amount of funds available for distribution by about $50,000.

[91] The respondent's financial statements disclose that, since 1999, the value of her assets has increased from $1.1 million to $2 million. She owns two properties and has no debt. She has about $800,000 in liquid assets. Her children use the cottage property for free. It earns no income.

[92] Her financial statements also show that, with spousal support at $12,000 per month, her income exceeded her expenses by about $20,000 per year and, since the COL increase in July 2011, by some $36,000 per year.

[93] I also note that the respondent's budget includes about $20,000 per year of gifts which, she said in her evidence, is comprised of Canada Savings Bonds and other money which she gives to her children and grandchildren.

[94] The respondent argues that the applicant squandered his assets and imprudently invested in a risky U.S. insurance business. The evidence was, however, that because the applicant was a Kingsway insider, there were limitations on his ability to realize on his Kingsway shares. By the time he was free to do so, the market had collapsed, gutting the value of what was then his principal investment.

[95] The applicant argues that, given the low returns available on Treasury Bills, he is actually earning more from his investment in TIG than if he had simply bought Canada Savings Bond-like investments. He relies on *Doe v. Doe* (1999), 126 O.A.C. 168(C.A.), where the payor spouse's decision to retire from the practice of law was under attack. The trial judge had placed considerable emphasis on the appellant's choice to withdraw from the law firm partnership and take a lump sum payment and two year's salary before retiring at age 65 rather than opting for the firm's retirement plan and receiving a substantially reduced amount of income to age 75 and thereafter. The Court of Appeal reversed the trial judge on this point saying, at para. 4:

> With respect, that finding is not borne out by the evidence. Indeed, counsel for the respondent fairly conceded, correctly in our view, that there were economic pros and cons associated with either option. Rather than focusing on the retirement options available to the appellant, the motions judge should have

> concentrated on the economic implications of his retirement and the substantial reduction in his income occasioned by it.

[96] In this case, there clearly were economic pros and cons associated with the choices available to the applicant following his termination at Kingsway. I do not think it is appropriate, with the benefit of hindsight, and in the complete absence of any expert evidence on what a prudent 72-year-old should have done in the applicant's circumstances, to second-guess the choices he made. Rather, what is important is to concentrate on the economic implications of the decisions that were made and the substantial reduction in his income following his termination and the expiry of a reasonable notice period.

[97] The applicant also relies on upon a line of cases which stand for the proposition that a payor spouse should not be required to pay spousal support out of savings or otherwise to deplete his or her capital. It is said that an order requiring the payment of spousal support out of capital or savings would amount to a "redistribution of property under the guise of spousal support," see *Van Horne v. Van Horne*, [2008] W.D.F.L. 171 (Ont. S.C.),at para. 31.

[98] The twist involved in this case is that both parties are now well beyond the age of normal retirement. Retirement plans are typically premised upon the utilization of both capital and interest or earnings on capital available in the retirement fund. The respondent herself admitted in her evidence that she had "saved for her old age." Precisely how the parties' assets should be utilized to provide support, however, is difficult to determine given the absence of any expert retirement planning or actuarial evidence in this case.

Analysis

[99] In the circumstances, I find that, as of January 1, 2012, there has been a material change in the applicant's means sufficient to warrant a change to the support provisions of the Judgment.

[100] The principal relief sought by the applicant is the complete cessation of all support obligations. I do not think this is a remedy available on the facts of this case. The parties were married for 39 1/2 years. They were divorced when they were both about 63 years of age. The respondent never worked outside the home. I do not think there was, or could be, any reasonable expectation on the applicant's part that the respondent would ever be economically self-sufficient. The applicant has the means and the respondent has the need, so there must be a continuation of the applicant's support obligations.

[101] Mr. Jarvis argues that I should impute income to the applicant of about $136,000 and to the respondent of $26,725, for a spousal support range, based on the SSAGs, of $4,109 to $5,099 per month. This is based, in the case of the applicant, on adding to his employment income, OAS and CPP, and pension income, the added cash flow available to TIG as a result of the elimination of Elizabeth's mortgage ($50,000) and the Belgate income previously paid to Elizabeth ($25,000). In the case of the respondent, he added her OAS and CPP to an assumed

annual income from investing the value of the cottage property and her other liquid savings at 1.5% of $19,825, for the total of $26,725.

[102] Mr. Spiller argues that I could, on the evidence, impute income to the applicant of $604,000 and to the respondent of $9,793, for a spousal support range under the SSAGs of $18,580 to $24,614 per month. As I understand it, however, the respondent does not seek an increase over the amounts provided for in the Judgment, currently $15,008.73 per month.

[103] The respondent's desire to maintain the *status quo* is understandable but that would not, in my view, be a fair or proper result. The applicant's assets should not be depleted while hers continue to grow. If the respondent wishes to remain in her home, she has options by which to generate income from the cottage property or a reverse mortgage on the home or the cottage. The time has come for the respondent to do, in effect, what the applicant has done – to realize on her capital assets and obtain some income from the appropriate deployment of those assets. Both parties are at the stage in life where they should be required to utilize their accumulated assets for their continued financial support, *Tout v. Bennett* (2003), 38 RFL (5^{th}) 223 (Ont. S.C.); *Gainer v. Gainer* (2006), 24 RFL (6th) 18 (Ont. S.C.).

[104] I accept the proposal submitted by the applicant and attribute some income to the respondent, notionally associated with her cottage and other liquid assets, and some income to the applicant, notionally associated with his investments in Belgate and improved prospects for TIG. For purposes of spousal support calculations, the applicant's income is, therefore, deemed to be $136,463 and the respondent's income is deemed to be $26,725.

[105] Both parties submitted DivorceMate calculations based on the SSAGs and argument proceeded on the basis that the SSAGs apply on a motion to vary. Assuming the SSAGs do apply, therefore, the amount of spousal support payable by the applicant to the respondent shall be based upon those figures. The applicant shall pay the high end of the range produced by DivorceMate commencing January 1, 2012.

[106] As I understand it, the spousal support payment based on these findings under the SSAGs is $ $5,099 per month. If I am wrong about this, the parties shall seek to reach agreement on the calculation of spousal support payable based on my findings. If the parties are unable to agree, they may make written submissions or arrange to attend before me by contacting my assistant.

[107] The applicant has, by virtue of my findings on this issue, overpaid support since January 1, 2012. He shall be entitled to a credit for the amount of the overpayment, as discussed below.

3. Cost of Living Adjustments – Arrears and Continuation

[108] On June 28, 2011, Czutrin J., on an interim motion, declined to suspend payment of support pending trial and held that the applicant ought to be paying ongoing support based on the then current indexed amount in accordance with the Judgment. "The arrears," he said, "will be part of the ultimate disposition of this matter."

[109] The applicant has been paying the indexed amount of $15,008.73 since July 1, 2011.

[110] The applicant submitted, on consent, the March 1, 2012, report of Ms. Alterman, of ap Valuations Limited, calculating the gross amount of the COLA under the Judgment that should have been paid and the net after-tax benefit to the respondent if the COLA had been paid from July 31, 1999 to June 30, 2011.

[111] The pretax amount is $276,166. The after-tax amount is $147,954. Both parties agreed that this is the correct calculation of COLA arrears.

[112] In my view, the arrears ought to be paid. They were consented to, and ordered, in the Judgment. The fact that the applicant forgot about the COLA adjustment or that the respondent appears not to have insisted upon her rights for number of years is immaterial.

[113] The issue now is that the applicant, if he pays the arrears, will be unable to obtain tax relief for those payments. In my view, the fairest thing to do is to provide for the payment of outstanding arrears on an after-tax basis. This lessens the negative impact on the applicant and provides the respondent with the net amount she would have received if the payments had been made. Accordingly, an order shall issue that the respondent is entitled to payment of a lump sum from the applicant in the amount of $147,954 representing the amount of unpaid COL adjustment to June 30, 2011. The amount of the applicant's support overpayment since January 1, 2012 shall stand as a credit against that obligation.

[114] The applicant also seeks to be relieved of the COLA provision entirely going forward. The precise basis for this argument was not laid out during the trial. This request seems to have been wrapped up with the general approach that the support payments are simply "too high" and must be reduced.

[115] I have found that, as of January 1, 2012, the current level of support is too high, given the material change in the respondent's means. However, I do not think this conclusion necessarily means that the COLA provision must fall by the wayside.

[116] The Judgment itself makes it clear that level of support and the COLA provision are separate and distinct. The parties, with the benefit of independent legal advice, agreed to a Judgment which provided for a cost of living adjustment, whatever the level of support might be under the variation provisions.

[117] I do not think a sufficient basis for the elimination of the COLA clause has been made out. Accordingly, the applicant's request that the Judgment be varied so as to remove the COLA clause is dismissed.

4. Continuation of Life Insurance and Health Benefits

[118] The applicant testified that his life insurance coverage and health benefit coverage for the respondent under his Kingsway plan continued for three years after the termination of his employment.

[119] The evidence was clear that the applicant did not obtain replacement life insurance. His evidence was that he suffers from high blood pressure, a thyroid problem, and has been diagnosed with skin cancer. He says life insurance at his age and with his health problems is either unavailable or prohibitively expensive.

[120] The evidence was not controversial that when the Kingsway health coverage ran out, the respondent purchased extended health care for herself at a cost of $195.40 per month. There was some evidence that the applicant paid $5,000-$6,000 to the respondent toward the cost of her health benefit coverage but I was not provided with any detailed calculations.

[121] In my opinion, the termination of the applicant's position with Kingsway, combined with the devaluation of his investment portfolio, represents a material change in circumstances which warrants a change to the Judgment with respect to his obligation to maintain $500,000 of life insurance coverage. At his age, the amount of the coverage would now likely exceed the amount necessary to secure his obligations in any event. Further, I am persuaded that the cost of life insurance, given his current circumstances, is prohibitive. The Judgment is, therefore, varied to eliminate the obligation on the respondent to maintain life insurance coverage in the amount of $500,000.

[122] The Judgment also provides, however, that if a life insurance policy is no longer available to the applicant, he must set aside the amount of $500,000 in trust as security for support in the event of his death for as long as the support obligation continues. In my opinion, the *proviso* in para. 5 of the Judgment, that if the applicant dies without the insurance in effect, his obligation to pay support will survive his death and be a first charge on his estate, is sufficient protection for the respondent in the now existing circumstances of this case. Accordingly, the obligation to set aside $500,000 in trust as security for support in the event of his death is also eliminated. The applicant's obligation to pay support will survive his death, however, and constitute as a first charge on his estate.

[123] The Judgment requires the applicant to pay, *in addition to* spousal support, premiums for a policy of medical insurance in the respondent's own name that provides for medical, drug, dental and other benefits which are no less than those that were available under the applicant's Kingsway plan.

[124] There was no evidence lead at trial to suggest that the cost of the health insurance purchased by the respondent was excessive or that the benefits were more generous than the benefits available to her under the Kingsway plan.

[125] Even accepting the applicant's changed circumstances, I do not think that the obligation to provide health benefits to the respondent exceeds his means. Accordingly, the applicant shall pay the ongoing cost of the respondent's health benefits. To the extent the applicant has already made contributions in this regard, I expect the parties to seek agreement on the outstanding balance of any arrears and/or the ongoing monthly cost. If the parties are unable to agree, further submissions and/or further evidence, if necessary, shall be provided so that a determination of the precise amounts due and owing can be made.

5. When Should the New Order Take Effect?

[126] In light of my findings above, the new order shall take effect January 1, 2012.

Costs

[127] The parties shall seek to reach an agreement on the disposition and quantum of costs. Failing agreement, a party seeking costs shall do so by filing a Bill of Costs and other supporting documents together with a written submission not to exceed two typed, double-spaced pages within 14 days of the release of these Reasons. A party wishing to respond to a request for costs shall do so by filing a written submission, subject to the same page limit, within a further 14 days.

Penny J.

Released: August 28, 2012

CITATION: Star v. Bolster, 2012 ONSC 4744
COURT FILE NO.: FS-11-17625
DATE: 20120828

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

William G. Star

Applicant

- and -

Beverley A. Bolster

Respondent

REASONS FOR JUDGMENT

Penny J.

Released: August 28, 2012