# In the Court of Appeal of Alberta

**Citation: Bone v Bone, 2020 ABCA 323**

**Date:** 20200916
**Docket:** 1901-0170-AC
**Registry:** Calgary

**Between:**

**Judith Lynn Bone**

Appellant
(Plaintiff)

- and -

**William Mcharg Bone**

Respondent
(Defendant)

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**The Court:**

**The Honourable Mr. Justice Brian O'Ferrall**
**The Honourable Madam Justice Jo'Anne Strekaf**
**The Honourable Madam Justice Ritu Khullar**

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**Memorandum of Judgment of the Honourable Madam Justice Jo'Anne Strekaf and the Honourable Madam Justice Ritu Khullar**

**Dissenting Memorandum of Judgment of the Honourable Mr. Justice Brian O'Ferrall**

Appeal from the Decision by
The Honourable Mr. Justice D.A. Labrenz
Filed on the 3rd day of May, 2019
(2019 ABQB 323, Docket: 4801 112597)

## Memorandum of Judgment

**The Majority:**

## I. Introduction

[1] In anticipation of his retirement, Mr Bone brought an application to terminate or reduce his spousal support obligations to his ex-wife and to terminate his obligation to maintain a life insurance policy as security for his spousal support obligations. The chambers judge reduced the spousal support and cancelled the requirement to maintain a life insurance policy: 2019 ABQB 323 (Reasons). Ms Bone now appeals that decision.

[2] For the reasons below, we grant Ms Bone's appeal.

## II. Background

[3] The parties were married in 1974, separated in 2001 and divorced in 2003, after 28 years and 9 months of marriage and having raised four children. Ms Bone had trained as a nurse and worked while Mr Bone completed his education, which included a professional degree. She continued to work until the birth of the first child but, after that, became a full-time homemaker while Mr Bone pursued his career. It was a traditional marriage with Ms Bone caring for the children and home, and Mr Bone working outside the home and taking charge of the finances. In 2003, after a summary trial, the court ordered a matrimonial property division and spousal support in the amount $8000 per month. The spousal support award was calculated on Mr Bone's base salary of $210,000 per year and included a formula for Ms Bone to share in any bonuses that Mr Bone might receive in the future.

[4] The 2003 order also included a requirement that the spousal support be adjusted for cost of living, again with a formula to account for Mr Bone's compensation. The latter requirement meant that by the time the variation application was heard in May 2019, Ms Bone was receiving approximately $10,000 per month in spousal support.

[5] In addition, the 2003 order required Mr Bone to maintain a term life insurance policy of $200,000 as security for the spousal support, payable to Ms Bone in the event of Mr Bone's death. It also required the annual sharing of relevant financial information.

[6] With respect to matrimonial property, each party received $948,400 in non-taxable assets, RRSPs of $95,856, and an equalization of Mr Bone's pension and supplemental pension. Practically, Ms Bone retained the matrimonial home and received an equalization payment of $480,125.18.

[7] The chambers judge found that Mr Bone has complied with every aspect of the 2003 order.

[8] After the separation in 2001, all of the adult children of the marriage lived with Ms Bone from time to time in the matrimonial home. In 2002, one of the adult children died at the home in tragic circumstances at the age of 22. The chambers judge accepted the evidence of Ms Bone that she has struggled since that time, that the death has affected her ability to cope and has required the use of medication.

[9] In 2006, Ms Bone decided to sell the matrimonial home but then tried to back out of the deal. She was emotionally attached to the home because her child died there. Unfortunately, this led to protracted litigation about the sale of the home and, at the end of it all, she was left destitute and without a home. Ms Bone's financial situation is exacerbated by her failure to pay taxes on the spousal support she received and, as a result, she owes a substantial debt to the Canada Revenue Agency. She declared bankruptcy once in 2008 and, at the time the variation application was heard, she was on the verge of declaring bankruptcy again. The chambers judge attributed the financial mismanagement in part to mental health issues arising from her daughter's death in 2002 and in part to the fact that Ms Bone has limited money management skills due to her role in the marriage.

[10] In contrast, Mr Bone has significantly increased his net worth since separation by continuing to work and taking advantage of various investment opportunities. He says his net worth is just under $2 million while Ms Bone argues it is closer to $4.5 million. The chambers judge made no finding on this point, satisfied that Mr Bone could pay spousal support out his retirement income without encroaching on the capital.

[11] The 2003 order was not time limited and did not provide for a review. In January 2019, Mr Bone brought an application to terminate or vary the amount of spousal support payable, and to terminate the obligation to maintain the life insurance policy. He argued that his planned retirement constituted a material change in circumstances since the 2003 order. Ms Bone brought a cross application to retroactively increase spousal support back to the 2003 order on the basis that Mr Bone had a substantially higher income that had not been disclosed. At the time of the applications, Mr Bone was 73 and Ms Bone was 71.

[12] Mr Bone initially retired from his employment in 2013 but continued to work under a series of contracts through until the end of 2018, so his income was not substantially impacted. In 2019, the contracts were no longer available, so his 2019 income was expected to be approximately $70,000 less than his 2018 taxable income. The chambers judge accepted Mr Bone's evidence and found that Mr Bone's retirement income would be $171,232 per year, derived from pensions and other investments. He also found that Ms Bone's income was approximately $5400 per year without spousal support, comprised of CPP payments ($225 per month) and a monthly income of $200-225 earned from delivering flyers.

## III. The Chambers Decision

[13] The chambers judge found that Mr Bone's retirement amounted to a material change in circumstances.

[14] He found that despite Ms Bone's training as a nurse, she had not worked for 40 years, lacked marketable skills and had significant mental and physical health problems. As a result, it was unrealistic to expect her to re-enter the workforce in any meaningful way: Reasons at para 49. However, had she managed her money better, Ms Bone could be generating a comfortable pension for herself.

[15] The chambers judge concluded Ms Bone has a continuing entitlement to spousal support both on a compensatory basis and a needs basis, and that Mr Bone has the means to pay. He varied the 2003 order, reducing the amount of spousal support payable to $3000 per month, and quashed the requirement for Mr Bone to maintain a life insurance policy payable to Ms Bone. He dismissed Ms Bone's cross-application for retroactive spousal support and there is no appeal from that aspect of the decision

## IV. Grounds of Appeal and Standard of Review

[16] Ms Bone raises three grounds of appeal.

1. The chambers judge erred finding that Mr Bone's retirement was a material change in circumstances since the 2003 order;

2. The chambers judge erred in reducing the amount of spousal support by (a) failing to consider whether the "need" exception to the rule in *Boston v Boston*, 2001 SCC 43 applied; (b) over-emphasizing the goal of self-sufficiency at the expense of other statutory objectives in s 17(7) of the *Divorce Act*, RSC 1985, c 3 (2nd Supp); and

3. The chambers judge erred in terminating the requirement for Mr Bone to maintain life insurance in the 2003 order.

[17] An appeal court may intervene in a support order only if there is an error in principle, a significant misapprehension of the evidence or the award is clearly wrong: *Hickey v Hickey*, [1999] 2 SCR 518 at paras 10-11; *Wild v Wild*, 2019 ABCA 159 at para 6.

### A. Material Change in Circumstances

[18] The chambers judge found that Mr Bone's decision to retire was a material change in circumstances since the 2003 order. Mr Bone calculated his retirement income for 2019 at $171,232, approximately $70,000 less than his 2018 taxable income when he was working full time and the chambers judge accepted that evidence. On appeal, Ms Bone challenges this finding on the ground that there was some evidence that Mr Bone might continue to work on a casual, contract basis, which could increase his retirement income. She argues that it was premature to find that Mr Bone's retirement constituted a material change in circumstances, in light of evidence that he might continue to work in a casual way. She also argues that a trial was necessary to determine exactly what his retirement income would be.

[19] The chambers judge considered these issues, and found any further income Mr Bone might earn would not affect the conclusion that his retirement income would significantly be lower than his working income, so that his decision to retire at age 73 and the resulting income reduction amounted to a material change in circumstances. We see no basis to interfere with this conclusion.

## B. Variation of Spousal Support

[20] Having concluded there was a material change in circumstances, the chambers judge had to decide if Ms Bone was still entitled to spousal support after Mr Bone's retirement; and if so, the amount.

### i. Entitlement to Support

[21] The *Divorce Act*, s 17(7) sets out the objectives for the variation of a spousal support order. A court is to:

1. Recognize any economic advantage or disadvantages to the spouses arising from the marriage or its breakdown;

2. Apportion between the spouses any financial consequences arising from the care of any child of the marriage;

3. Relieve any economic hardship of the spouses arising from the breakdown of the marriage; and

4. In so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable time.

[22] No one factor takes precedence and all must be considered. These objectives can be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown: *Moge v Moge*, [1992] 3 SCR 813 at pp 849, 864; *Anand v Anand*, 2016 ABCA 23 at para 19. The objectives intermingle with the primary grounds for entitlement to support: compensatory and non-compensatory.

[23] The chambers judge was alive to the objectives of the spousal support orders under the *Divorce Act*, and considered the grounds for compensation. He concluded that Ms Bone was *originally* entitled to spousal support on both compensatory and need grounds, and both remained relevant for an ongoing entitlement to spousal support.

[24] With respect to the compensatory ground, he found that if Ms Bone had been prudent with the assets she received from the matrimonial property settlement and spousal support payments to date, she would have been able to generate a comfortable income for herself. The chambers judge was right to consider this fact: *Boston* at para 56; *Alpugan v Baykan*, 2014 ABCA 152 at para 33.

[25] But Ms Bone was not prudent; indeed, she was the exact opposite. This was explained in part by her mental health struggles and by the fact that she never acquired money management skills during the marriage: Reasons at paras 53-54. This resulted in some very bad financial decisions. The chambers judge found that Ms Bone had no savings left. She declared bankruptcy in 2008 and was on the verge of doing so again. Of the almost $10,000 she was receiving monthly, $4400 a month was going to the CRA for income tax, some to pay off arrears and some for current liability. The chambers held that the compensatory basis for spousal support was "weakened" by Ms Bone's failure to make prudent use of her share of the matrimonial property and the spousal support she had received.

[26] With respect to need, the chambers judge found that Ms Bone was and would continue to remain in financial need. He found there was no prospect of her becoming economically self-sufficient, she might not even use the support she receives wisely, and her need would remain high: Reasons at paras 56, 48.

[27] We agree with the chamber judge's careful and empathetic review of the circumstances relating to entitlement.

**ii. Quantum of Support: Failure to Consider the Exception to the Rule Against "Double Dipping"**

[28] Having determined ongoing entitlement, the next task was setting the amount of spousal support. This is a discretionary decision entitled to deference, however, in this case the chambers judge made an error of law in the exercise of his discretion.

[29] "Double dipping" is a term used to describe the situation when one spouse claims continued support from the previously divided or equalized assets of the other spouse: *Boston* at para 1. It often arises when a pension has been divided as matrimonial property and a payee spouse seeks spousal support from the payor spouse's pension income after the payor has retired. *Boston* stands for the general proposition that it is unfair to permit double dipping in spousal support awards. One way to avoid "double dipping" is for the court to focus on the parts of the payor spouse's income and assets that were not part of the equalization or division of matrimonial assets: *Boston* at para 64.

[30] However, in *Boston*, the Supreme Court went on to note that "double dipping" may be permitted in some circumstances:

> Despite these general rules, double recovery cannot always be avoided. In certain circumstances, a pension which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted when the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized

> assets in an income-producing way and, despite this, an economic hardship from the marriage or its breakdown persists. Double recovery may also be permitted in spousal support orders/agreements based mainly on need as opposed to compensation, which is not the case in this appeal.
>
> *Boston* at para 65

In this quote, the Supreme Court of Canada recognizes two circumstances in which double recovery may be permitted. The first (the third sentence) is when the recipient spouse has made "reasonable efforts" to produce an income from the matrimonial assets, but still a need persists. The second, (the fourth and last sentence) recognizes that double recovery may "also" be permitted based on need if spousal support is justified mainly on the basis of need.

[31] As has been observed elsewhere, double recovery should be avoided when it would be unfair, but sometimes double recovery is the only fair way to continue support: *Senek v Senek*, 2014 MBCA 67 at paras 7-8. Where a spouse has failed to invest his or her share of the matrimonial assets prudently, this can be a relevant consideration in determining whether "double dipping" based on need should be permitted: *Alpugan* at para 33. However, it is not necessarily a bar.

[32] The chambers judge erred because he failed to even consider whether double dipping might be appropriate in this case. Rather, he was very concerned about not "double dipping", and he referred to the need to avoid it in two ways. First, he explicitly said: "I am directed to focus, to avoid double recovery, on the portion of Mr Bone's income and assets." and "I am also mindful that a portion of Mr Bone's net worth was previously divided and I must avoid "double dipping"." Reasons at paras 12-13. Second, he relied on the third sentence of para 65 in *Boston*, and the fact that Ms Bone had not made reasonable efforts to generate an income from the matrimonial assets received, to support the conclusion that double dipping must be avoided: Reasons at paras 41, 52.

[33] The chambers judge indicated that he considered the *Spousal Support Advisory Guidelines* calculations but he did not set them out in detail or explain how they helped him arrive at the figure of $3000 per month. He noted that both parties conceded that the *Spousal Support Advisory Guidelines* are not applicable in variation applications: Reasons at para 57. While the *Spousal Support Advisory Guidelines* are advisory, nonetheless, they are a "useful tool" in calculating spousal support, whether as a starting point for the court's analysis or as a check on the amount calculated by the court: *Wild* at paras 9-12. They are equally helpful in variation applications and we reject the suggestion in some cases that the guidelines do not apply to variation applications.

[34] A review of the record shows that the parties provided two spousal support calculations both of which avoided double counting in different ways. One counted all of Mr Bone's income ($171,232) which, according to Mr Bone's evidence was comprised of $100,000 derived from non-matrimonial property assets and the balance of $71,232 generated from matrimonial property. This calculation imputed to Ms Bone an income she would have earned if she had prudently invested her share of the matrimonial property, which according to Mr Bone would have been

$93,774. This calculation, which counted the income generated (or potentially generated) from matrimonial property by both parties, provided a range of spousal support from $2421 to $3227 per month. The second calculation excluded the income generated by the matrimonial property for both parties and had Mr Bone's annual income at $100,000 and Ms Bone's annual income at $5400. This calculation yielded a range of $2956 to $3903 per month.

[35] Based on the first calculation, which included matrimonial property, the $3000 per month awarded by the chambers judge was in the mid to high range of amounts recommended by the *Spousal Support Advisory Guidelines*. Based on the second calculation, which excluded matrimonial property, the amount awarded by the chambers judge was in the low range of the amounts recommended by the *Spousal Support Advisory Guidelines*. We infer that the chambers judge had these in mind when setting the amount of spousal support at $3000.

[36] However, the chambers judge never considered the exception in the last sentence of para 65 of *Boston*, which recognizes that in circumstances of need, it may be appropriate to "double dip". That was a reviewable error. The error was not in refusing to calculate spousal support based on income produced by Mr Bone's share of the matrimonial property but in failing to recognize that he had the discretion to allow some "double dipping" to address Ms Bone's financial need. But for that error, the chambers judge might have exercised his discretion to award a higher level of spousal support than he actually awarded.

[37] The parties also gave the chambers judge a *Spousal Support Advisory Guidelines* calculation that included double counting: it included the income from his matrimonial property, but imputed nothing for hers. It had Mr Bone's annual income at $171,232 and Ms Bone's at $5400 (the actual incomes of the parties as found by the chambers judge) and these calculations suggested monthly spousal support of between $5182 and $6870.

[38] Ms Bone's financial need is obvious. She cannot work, is in considerable debt, earns approximately $5400 per year and has no significant assets. Awarding her monthly spousal support of $3000 would give her a subsistence standard of living markedly different to Mr Bone's. In assessing need a court can consider the relative standard of living of the parties' post separation and the degree of "disparities … in the standard of living that would be experienced by spouses in the absence of support": *JLH v RSW*, 2017 ABCA 98 at paras 23-25. In these circumstances, it was an error for the chambers judge to fail to consider whether some double counting was appropriate.

[39] Since this Court has the benefit of the *Spousal Support Advisory Guidelines* calculations, we are in a position to correct the error and it is in the interests of judicial economy for us to do so. When applying the *Boston* exception, the *Spousal Support Advisory Guidelines*: The Revised User's Guide, April 2016 at p 107 suggest considering calculations which both include and then exclude the divided matrimonial property (as reviewed above), and then the hardship/need of the recipient in order to arrive at an appropriate amount of spousal support.

[40] Based on the statutory objectives in s 17(7) of the *Divorce Act*, the parties' financial situations (including the fact that Ms Bone's is partly self-inflicted) and the ranges recommended by the *Spousal Support Advisory Guidelines*, we conclude a spousal support order in the amount of $4500 per month will provide a more equitable amount of support.

### iii. Over-Emphasizing the Objective of Self-Sufficiency

[41] Given our conclusion that the chambers judge erred in failing to consider the need exception to the *Boston* rule, it is unnecessary to address Ms Bone's further argument that he over-emphasized self-sufficiency at the expense of other 17(7) objectives.

## C. Termination of the Requirement to Maintain Life Insurance

[42] In paragraph 10 of the 2003 order, the trial judge ordered that Mr Bone:

> Shall pay the premiums for term insurance of $200,000 payable to the Plaintiff in the event of the Defendant's death with the Plaintiff to be named the irrevocable beneficiary of such policy. The premiums on this policy shall be paid by the Defendant as long he has an obligation to pay spousal support.

[43] The evidence at the hearing of the variation application was the premiums are approximately $4000 per annum.

[44] Mr Bone's notice of the variation application stated at paragraph 8:

> The insurance on the Applicant's life with the Respondent as the beneficiary is intended to be security for spousal support and *if spousal support is terminated* there is no longer a reason to continue to maintain life insurance. (emphasis added)

[45] By the terms of his own application, Mr Bone was only seeking to terminate the insurance policy *if* spousal support was terminated.

[46] As indicated, the chambers judge reduced the amount of spousal support payable but did not terminate it. There was no request to terminate the obligation to maintain life insurance if spousal support remained payable.

[47] The chambers judge terminated the insurance coverage because "given the age of the parties, and the duration and amount of support, I find that the security for the support obligation imposed by [the 2003 order] contemplated by the life insurance policy has long since been supplanted": Reasons at para 60. He did not explain how the security had been "supplanted" if the obligation to pay remained.

[48] On appeal, Ms Bone argues that the termination of Mr Bone's obligation to maintain life insurance coverage was an error because (1) this was a final order and a judge hearing a *Divorce Act* application does not have the authority to make a final order based on a paper record; and (2) Ms Bone was not given fair notice that a final order terminating Mr Bone's life insurance obligation was a possible outcome. Mr Bone takes the opposite positions on both issues and points out that Ms Bone's counsel in the Queen's Bench proceedings twice stated on the record her client did not want a trial because she could not afford one.

[49] It is unnecessary to address whether it was an error to finally terminate Mr Bone's life insurance obligation in a hearing on affidavit evidence alone because there are more fundamental problems with the order that require this Court's intervention.

[50] First, no one asked for this remedy *if spousal support remained payable*. Mr Bone's notice of application sought a termination of the life insurance obligation *if* his spousal support obligations were terminated. A judge should not grant an order that has not been sought by either party: *DWH v DJR*, 2013 ABCA 240 at para 42; *Wagner v Wagner*, 2014 ABCA 428 at para 38. Second, terminating the life insurance obligation makes no logical sense. The purpose of the insurance requirement in the 2003 order was to provide some security for the spousal support and, by its own words, required the policy to remain in place so long as spousal support was payable. It did not limit the duration of the requirement to so long as the original amount was payable.

[51] The need for security for the spousal support remains and we direct that this portion of the chambers judge's order be quashed and the requirement for an insurance policy be reinstated as per the wording in the 2003 order. The purpose of the insurance policy was to be security for spousal support. As the amount of spousal support is reduced, so should the security. The insurance coverage obligation is reduced to $100,000.

[52] In 2003, the trial judge originally directed that the spousal support be a continuing obligation on Mr Bone's estate should he predecease her. However, after discussion with counsel he changed that to the order for the insurance policy so long as spousal support was payable. We received no submissions about the impact of the insurance policy on Mr Bone's estate planning and therefore do not address this issue.

[53] At the oral hearing, we were advised that the insurance policy is no longer in force. No evidence was adduced before the chambers judge or this Court to suggest that Mr Bone is unable to obtain term life insurance or that it would be unduly expensive. If any issue arises in this regard, the parties can seek direction from the Court of Queen's Bench.

## V. Conclusion

[54] The appeal is granted. The spousal support to be paid by Mr Bone to Ms Bone on a monthly basis is $4500 retroactive to June 1, 2019, the date used by the chambers judge. The cost of living provision of the 2003 order no longer applies, and the amount payable by Mr Bone going forward

is $4500. Mr Bone is directed to reinstate the life insurance policy for $100,000, but if there are difficulties with this, the parties can seek direction from the Court of Queen's Bench.

Appeal heard on February 13, 2020

Memorandum filed at Calgary, Alberta
this 16th day of September, 2020

REGISTRAR
FILED
16 Sep 2020
KH
Court of Appeal of Alberta

Authorized to sign for: Strekaf J.A.

Khullar J.A.

**O'Ferrall J.A. (dissenting):**

[55] With respect, I would have dismissed this appeal. The chamber judge was properly guided by the leading Supreme Court jurisprudence in his thorough analysis of the circumstances of both parties. The chambers judge gave comprehensive reasons and his decision should be afforded deference in the absence of reviewable error.

## I. Standard of Review

[56] In *Hickey v Hickey*, [1999] 2 SCR 518, 172 DLR (4th) 577, L'Heureux-Dubé J. set out the approach to be taken by appellate courts in reviewing spousal support orders at paragraph 11:

> Our Court has often emphasized the rule that appeal courts should not overturn support orders unless the reasons disclose an error in principle, a significant misapprehension of the evidence, or unless the award is clearly wrong.

The Supreme Court in *Boston v Boston*, 2001 SCC 43 at para 72, [2001] 2 SCR 413, in a case not unlike this one, reiterated the approach in restoring a similar support order which the Ontario Court of Appeal had likewise overturned.

## II. Conclusion

[57] The reasons of Justice Lebrenz (2019 ABQB 323) disclose no error in principle and no significant misapprehension of the evidence. Nor is his award clearly wrong.

## III. The Chambers Judge's Decision

[58] At the date of the hearing before the chambers judge (May 2019), Mr. Bone was 73, going on 74 years of age and Mrs. Bone was 71 years of age.

[59] When the matrimonial property was divided in 2003, Mrs. Bone received over one million dollars in matrimonial assets, almost all of which would have appreciated in value over time had they simply been preserved. The chambers judge found that if Mrs. Bone had preserved the matrimonial property she received on division, her investment income, conservatively, could have been $71,000/year. Furthermore, the chambers judge found that Mrs. Bone was able to preserve the assets she received on equalization because she had been receiving adequate spousal support (in amounts in excess of $8,000/month) from Mr. Bone for almost 19 years.

[60] As of the date of the hearing of the variation applications, Mrs. Bone's income was found to be $5,400/year ($450/month). The chambers judge's finding however must be put in context. Mrs. Bone failed to disclose what, if any, income she was receiving as a US citizen by way of social security and she also failed to answer whether she was receiving from sources one might reasonably expect she would be receiving a modest income from.

[61] Mr. Bone's retirement income was found to be $171,232/year (or $14,269.33/month), most of which Mr. Bone contended was income from assets originally divided with Mrs. Bone. The chambers judge attributed roughly $70,000 of Mr. Bone's retirement income to income from matrimonial assets and roughly $100,000 to income generated from assets Mr. Bone acquired after the divorce or which appreciated following the divorce.

[62] The chambers judge then had regard to the *Spousal Support Advisory Guidelines* to determine that $3,000/month was an appropriate award having regard to the difference between Mrs. Bone's income as he found it and that portion of Mr. Bone's income which the chambers judge deemed to be attributable to post-divorce asset acquisition or appreciation.

[63] With respect to Mrs. Bone's cross-application for retroactive adjustment to the spousal support Mr. Bone had been paying since 2003, the chambers judge summarily dismissed it as being completely out of time. Had Mrs. Bone been serious about her application to retroactively vary the 2003 support order, the chambers judge suggested she would have made it during Mr. Bone's income-earning years. Mrs. Bone had been provided with Mr. Bone's income tax returns annually for almost 20 years. Put bluntly, the chambers judge did not consider Mrs. Bone's application *bona fide*. Indeed, he expressly questioned "the sincerity of Mrs. Bone's application" and said, "I am of the view that Mrs. Bone's application was tactical in nature designed to deflect Mr. Bone's application." With respect to the merits of Mrs. Bone's application, the chambers judge held that there had been no material change in her condition, means, needs or other circumstances since the making of the original support order which would justify a retroactive variation upwards of the support provided for in that order.

[64] The chambers judge did, however, conclude that Mr. Bone, now fully retired at age 73, had demonstrated a material change in his means since making the original spousal order and that the change justified a variation, stating at paragraph 42:

> I do find that Mr. Bone has met his onus to demonstrate a material change in circumstances occasioned by the significant reduction of his income on retirement.

[65] The chambers judge found that Mr. Bone's submission that his obligation to support Mrs. Bone should end altogether was not unreasonable. He found that Mr. Bone had provided Mrs. Bone with the means to support herself in a lifestyle similar to his for 19 years. Mr. Bone had been faithfully paying Mrs. Bone anywhere from $8,000/month to $10,000/month for that time period.

[66] However, in the result, the chambers judge held that although Mrs. Bone's compensatory claim had weakened with the passage of time and the significant support she had received from Mr. Bone over the past 19 years, Mrs. Bone still needed support. In making this finding the chambers judge cited the Supreme Court's decision in *Bracklow v Bracklow*, [1999] 1 SCR 420 at paras 31, 32 and 43, 169 DLR (4th) 577 which indicated that where a needy partner cannot obtain post-marital self-sufficiency, the needs of the needy partner and the means of the supporting partner may be enough to justify continuing support.

[67] As indicated above, having considered the *Spousal Support Advisory Guidelines*, the income tax consequences to both parties and the possibility of a graduated downward adjustment (which he rejected, giving reasons therefor), the chambers judge varied the original support order reducing the amount payable to $3,000/month. He also found that, having regard to the ages of both Mr. and Mrs. Bone, the anticipated duration of the support requirement and the amount of support required, the need to maintain the life insurance policy ordered when the parties were divorced had long since been supplanted. Accordingly, the chambers judge varied the 2003 order by cancelling the requirement to maintain life insurance irrevocably payable to Mrs. Bone. Specifically, the term of the 2003 order which the chambers judge canceled was as follows:

> The Defendant [Mr. Bone] shall pay the premiums for term insurance of $200,000.00 payable to the Plaintiff [Mrs. Bone] in the event of the Defendant's death with the Plaintiff [Mrs. Bone] to be named the irrevocable beneficiary of such policy. The premiums on this policy shall be paid by the Defendant as long as he has an obligation to pay spousal support.

## IV. Analysis

### A. Double Recovery

[68] The majority says the chambers judge erred in repeatedly expressing a concern about "double dipping" and the need to avoid it. With respect, avoiding double dipping or double recovery is precisely what the Supreme Court in *Boston* directs courts making spousal support orders to do.

[69] The majority says that having identified Mrs. Bone's need for spousal support, the chambers judge failed to consider whether this was an appropriate case to order double recovery. Again, with respect, the chambers judge did not fail to consider whether it was appropriate to order double recovery. In fact, the spousal support the chambers judge ultimately ordered involved an element of double recovery. That is, he ordered support out of income generated by some of Mr. Bone's assets which he received when the couple's matrimonial property was divided equally upon their divorce.

[70] The chambers judge made it clear that double recovery was only one of a number of considerations he had to weigh:

> I accept Mr. Bone's income in retirement, based on the extensive evidence he had provided, to be approximately $171,232.00, which includes his Old Age Security ["OAS"] and Canadian Pension Plan ["CPP"], his pension his Retirement Income Fund ["RIF"] and income from investments. Mr. Bone's retirement income is well supported in the evidence, and I am satisfied of the accuracy of this figure. Mr. Bone reminds the Court that the pension, RIF and investment income all result from assets that were originally divided with Ms. Bone. I would note that it is certainly

> possible that Mr. Bone's income will increase as the current calculation assume a rather modest rate of return on investments. I accept evidence that I have been provided from his Pension Plan that his retirement pension has been reduced by the matrimonial property division annually by $17,820.00. To the extent that Ms. Bone suggests that any decision regarding variation should be made upon the full income of $171,232.00, I agree that there is an element of "double dipping" as contemplated by *Boston v Boston*, 2001 SCC 43. I have taken this argument into account in coming to my final decision. More specifically, while Boston clearly indicates that there is no reason *per se* that spousal support cannot continue beyond the retirement of the pension-holding spouse, need, ability to pay and double recovery must all be considered. I am directed to focus, to avoid double recovery, on the (sic) portion of Mr. Bone's income and assets.

[71] A fair reading of *Boston* suggests that double dipping must always be considered if it is in play. At paragraph 62 the Supreme Court stated:

> The payee spouse's need and the payor spouse's ability to pay are always factors which a court considers when determining spousal support (see s. 33(9) of the *Family Law Act*). Another issue is the extent, if any, of "double recovery".

In determining spousal support, courts must consider double recovery or double dipping where the supported spouse claims continued support from previously divided or equalized assets of the other spouse. If the chambers judge had not considered double recovery, he would have erred.

[72] However, there is no indication in the chambers judge's reasons that he felt precluded from ordering Mr. Bone to pay spousal support out of income from matrimonial assets which had previously been divided equally with Mrs. Bone. Indeed, the chambers judge factored in some of the income Mr. Bone received from equalized assets to arrive at the spousal support he ordered.

[73] The majority says (at paragraph 30) that double dipping may be permitted when spousal support is justified mainly by need. I do not disagree. The majority cites paragraph 65 of *Boston* for that proposition. However, it might be useful to refer to that paragraph of the Supreme Court's judgment to understand what exactly the "exception" to double dipping avoidance the Supreme Court suggested was appropriate:

> Despite these general rules, double recovery cannot always be avoided. In certain circumstances, a pension which has previously been equalized can also be viewed as a maintenance asset. Double recovery may be permitted where the payor spouse has the ability to pay, where the payee spouse has made a reasonable effort to use the equalized assets in an income-producing way and, despite this, an economic hardship from the marriage or its breakdown persists. Double recovery may also be permitted in spousal support orders/agreements based mainly on need as opposed to compensation, which is not the case in this appeal.

In order to invoke the exception to avoiding double recovery, the supported spouse must have made a reasonable effort to use his or her share of the matrimonial assets in an income-producing way and despite those efforts the supported spouse still has a need for support. In other words, there are two preconditions which must be in place before double recovery can be ordered: need and a reasonable effort to avoid the need when the wherewithal to avoid the need has been provided.

[74] The majority suggests there are two alternative tests: either a failed attempt to employ matrimonial assets to produce sufficient income or need. If the majority is correct, there is really only one test—need—because both tests require there to be economic hardship or "need" in order for any support to be ordered after 19 years of compensatory support. With respect, the majority's view ignores the obligation, which the Supreme Court ruled the supported spouse has, to generate income from the assets he or she receives upon division of the matrimonial property.

[75] The Supreme Court also said that to require the supported spouse to make reasonable efforts to use his or her share of the matrimonial assets to produce income where it is foreseeable that the supporting spouse will not be able to provide the ordered level of support *ad infinitum* was not an onerous requirement. The Supreme Court had this to say at paragraph 58:

> The obligation of the payee spouse to generate investment income from the assets that she received on equalization is not an onerous one. It is not predicated upon insensitive standards on how the payee spouse should have managed her finances from the point of separation. Nor does it require investment-savvy decisions, premised upon an extensive knowledge of the marketplace. The obligation on the payee spouse to generate income from her assets would be satisfied by investing in a capital depleting income fund which would provide a regular annual income.

One might even soften the obligation by suggesting that all the spouse who is receiving appropriate spousal support need do to discharge this obligation is to preserve or save his or her assets for the inevitable reduction in the amount of support he or she will receive on the retirement or death of the supporting spouse.

[76] Marriage does not create a legally enforceable obligation to support a former spouse for life (*Moge v Moge*, [1992] 3 SCR 813, 99 DLR (4th) 456). This Court said as much in *Shields v Shields*, 2008 ABCA 213 at paragraph 30:

> The *Divorce Act* dictates that the amount and duration of spousal support shall be determined taking into consideration the condition, means, needs and other circumstances of each spouse. While the recognition of any economic advantage or disadvantage arising from the marriage or its breakdown remains an overall objective to be considered by the court, that objective cannot dictate a result which guarantees that the payee (sic) spouse must support the other spouse *ad infinitum*.

[77] And so, while receiving in excess of $8,000/month in spousal support from Mr. Bone for almost two decades, Mrs. Bone must be taken to have anticipated that the level of support she was receiving might not continue past Mr. Bone's retirement. Justice Sulatycky expressly warned her of that in making the 2003 Corollary Relief Order. Given the foreseeability of Mr. Bone's income shrinking on retirement, and thereby the level of support he could afford to provide, Mrs. Bone's obligation, at the very least, was to preserve her asset base so that she could help support herself when Mr. Bone retired.

[78] The problem the chambers judge faced was that Mrs. Bone failed to preserve her asset base. She had failed to discharge the obligation which the Supreme Court in *Boston* said she had. And there was no one to blame but herself. Mrs. Bone's circumstances were not a consequence of any economic disadvantage arising from the marriage, nor did her economic hardship arise from the breakdown of the marriage. Her economic hardship was a consequence of her failure to discharge her obligation to be in a position to at least contribute to her own support when her former husband retired. Mr. Bone discharged his post-marital obligations. He made it possible for Mrs. Bone to be self-sufficient upon his retirement. He enabled her self-sufficiency by making support payments for the better part of two decades which permitted her to live a lifestyle similar to his without having to resort to her considerable capital. Mr. Bone relied on Mrs. Bone to preserve her share of the matrimonial assets the couple divided when they divorced, just as he did. Having completely discharged his post-marital support obligations, there is really no basis, other than Mrs. Bone's need, upon which to require Mr. Bone, at age 73 going on 74, to continue providing support.

[79] Sadly, the reality is that if Mr. Bone is no longer required to pay spousal support, there is a prospect that the state will have to provide support for Mrs. Bone. During argument, the chambers judge described the dilemma he faced as follows:

> You know, when you look through the cases, you know, I agree, do talk on the one hand about how people should not feel that even a long marriage, that they are necessarily going to get a life pension by way of spousal support. And, you know, on the plain reading of the section, it does not seem to necessarily contemplate that either.
>
> But on the other hand, you can see some views expressed in some of the cases to the effect of, in the spousal support context, that a Judge shouldn't too readily make the former spouse the responsibility of the State, in terms of welfare or otherwise.

[80] Rather than having Mrs. Bone reliant on state support, the chambers judge ordered Mr. Bone to contribute to her support, quoting extensively Justice McLachlin's (as she then was) *dicta* in *Bracklow* at paragraphs 31, 32 and 43 about the "mutual obligation view of marriage" serving certain policy goals and social values. Among those policy goals, the mutual obligation view of marriage, Justice McLachlin said, placed the primary burden for support of a needy partner who cannot attain post-marital self-sufficiency on the other partner to the relationship, rather than on

the state, in order to avoid foisting a helpless former partner onto public assistance rolls. The dilemma facing the chambers judge was articulated by Chief Justice McLachlin as follows:

> The real question in such cases is whether the state should automatically bear the costs of these realities, or whether the family, including former spouses, should be asked to contribute to the need, means permitting.

[81] Justice McLachlin answered that question by reasoning that because the *Divorce Act* requires courts to consider the needs and means of the parties, Parliament had indicated an intention that in cases of need the primary obligation falls on the supporting spouse to alleviate that need. To quote Justice McLachlin:

> [The *Divorce Act*] retains the older idea that spouses may have an obligation to meet or contribute to the needs of their former partners where they have the capacity to pay, even in the absence of a contractual or compensatory foundation for the obligation.

"Need alone may be enough," [emphasis omitted] Justice McLachlin said.

[82] So, it was primarily on the basis of need that the chambers judge awarded Mrs. Bone continued spousal support; although there was also a recognition that her compensatory entitlement, although weakened, had not been completely extinguished by the 19 years of spousal support.

[83] In assessing whether the chambers judge erred, one must keep in mind what the Supreme Court said about assessing the appropriateness of a spousal support order based on need in *Bracklow*. The Supreme Court made it clear that spousal support based on need does not need to address the entire need. At paragraph 54:

> Fixing on one factor to the exclusion of others leads…to the false premise that if need is the basis of the entitlement to the support award, then the quantum of the award must meet the total amount of the need. It does not follow from the fact that need serves as the predicate for support that the quantum of the support must always equal the amount of the need. Nothing in…the *Divorce Act* forecloses an order for support of a <u>portion</u> of the claimant's need, whether viewed in terms of periodic amount or duration. Need is but one factor to be considered. [emphasis in original]

[84] Given the Supreme Court's decision in *Boston*, which all parties agree governs, I do not see how we can say the chambers judge erred. He did not apply the *dicta* in *Boston* strictly because, while Mr. Bone was not ordered to pay spousal support out of income from a pension he split with Mrs. Bone, a portion of the support ordered was based on income generated by assets he received on his share of the division of the couple's matrimonial property. According to *Boston*, that is only

appropriate when the needy spouse has discharged her obligation to make a reasonable effort to use her equalized assets in an income-producing way. Here Mrs. Bone had not.

**B. Termination of the Obligation to Maintain Life Insurance**

[85] With respect to the chambers judge's termination of the insurance requirement, the majority says that the chambers judge erred because Mr. Bone did not request termination of his obligation to maintain life insurance. I disagree. Firstly, in his filed application with the Court Mr. Bone expressly sought termination:

> An Order to vary the Amended Corollary Relief Order of the Associate Chief Justice Sulatycky of January 29, 2003 to terminate the on-going obligation of the Applicant to maintain life insurance with the Respondent [Mrs. Bone] as the irrevocable beneficiary.

Secondly, in both his written submissions to the court in advance of the special chambers application and in his oral argument before the chambers judge, Mr. Bone makes it clear that the request for termination of the life insurance was based on considerations which would obtain whether or not spousal support was completely terminated.

[86] In the argument before the chambers judge, counsel for Mr. Bone, while acknowledging that the 2003 Corollary Relief Order linked the requirement to maintain the life insurance with the continuing obligation to pay spousal support, went on to argue that Mr. Bone's continued insurability was uncertain at age 73 going on 74. The term of the existing policy ran out at age 75, after which the availability of term life insurance in the amount of $200,000 would be very much in question by virtue of his age. Also, counsel for Mr. Bone argued that the premiums, at $4,400/year or roughly $366/month, were getting to be excessive. That argument resonated with the chambers judge who agreed that paying premiums at that level was excessive. The money might better be paid to Mrs. Bone.

[87] Counsel for Mr. Bone concluded his argument on this issue by asking the question whether continuing the obligation to maintain life insurance was reasonable. Having maintained the $200,000 policy for 16 years, counsel asked whether Mr. Bone should still have to maintain what had become an onerous life insurance policy in terms of premiums. A fair reading of the record indicates that these arguments were independent of whether or not spousal support was varied or terminated. There can be little doubt that Mr. Bone sought termination of the policy regardless of what was ordered by way of spousal support.

[88] With respect to the obligation to maintain life insurance, circumstances had clearly changed and Mr. Bone was seeking a variation. And so the issue squarely before the chambers judge was whether the obligation to carry the insurance should continue.

[89] Section 15.2(1) of the *Divorce Act* provides that a court may make an order requiring a spouse "to secure and pay" such periodic sums as the court thinks reasonable for the support of the other spouse. In general, an order to pay support (and accordingly an order to secure such payment) under section 15(2) of the *Divorce Act* terminates on the death of the supporting spouse. The obligation to pay spousal support is personal and does not ordinarily extend past the date of death of the supporting spouse (*McLeod v McLeod*, 2013 BCCA 552, where child support was held to terminate upon death of the payor). One rationale given for this general rule is that the payor's death constitutes a change of circumstances which renders the personal obligation unenforceable (*Dutkowski v Dutkowski*, 2007 BCSC 1558).

[90] The propriety of a court making an order requiring a spouse to carry life insurance was canvassed by the Ontario Court of Appeal in *Katz v Katz*, 2014 ONCA 606, where the Court concluded that courts do have the power to require it. But the Ontario Court of Appeal also cautioned that the obligation to maintain insurance should end when the support obligation ends (para 74). The dilemma, of course, is that the support obligation ends precisely when the insurance becomes payable to the supported spouse.

[91] The law in this area may not be particularly logical; but regardless, when the divorce was granted, Mr. and Mrs. Bone were in their 50's and Associate Chief Justice Sulatycky was skeptical that Mrs. Bone could ever achieve self-sufficiency. If Mr. Bone had died prematurely, Mrs. Bone might have been in dire straits without some assurance of ongoing support at that time. At that point in their lives, ordering security for the payment of spousal support made sense, but now with Mr. Bone having faithfully discharged his spousal support obligations for almost two decades, there was certainly no need to secure the obligation; and if there is no obligation following death, then the propriety of making such an order is at least questionable. Both parties are in their mid-70s with no guarantees of how long either might live. At this stage of his life, the practicality of Mr. Bone obtaining a life insurance policy in an amount and at a premium which would make sense was considered by the chambers judge in deciding whether or not to vary the 2003 order. Other factors he might have considered included the supporting spouse's insurability and how the policy might be paid out upon the death of the supporting spouse. Also, as both parties were now in their 70s, the amount payable to Mrs. Bone out of any policy ordered would logically have been gradually reduced.

[92] In 2003, Associate Chief Justice Sulatycky specifically ordered term insurance, not permanent insurance. That is significant. As previously mentioned, Justice Sulatycky warned Mrs. Bone that the spousal support he ordered might not continue forever. Justice Sulatycky clearly contemplated the possibility of terminating the insurance requirement at some point. An order for spousal support of indefinite duration does not mean that the support is permanent. It may be varied or terminated, as may the requirement to maintain insurance. And that is what Mr. Bone applied for and that is what the chambers justice ordered after considering all the circumstances, including the fact that the parties themselves contemplated eventual termination of the insurance requirement. In 2003, even the parties agreed that Mr. Bone's purchase of a life insurance policy

with a term of 10 years satisfied the requirement of the order. By agreement, that term was extended when it expired. However the term was not extended indefinitely.

[93] Also, as the parties approach the end of their lives, the requirement to maintain insurance irrevocably payable to Mrs. Bone also becomes a fetter on Mr. Bone's testamentary freedom. A testator's freedom to distribute his property as he chooses is a recognized principle of common law (*Spence v BMO Trust Co,* 2016 ONCA 196 at para 30).

[94] The term insurance provided for in the 2003 support order was to be irrevocably payable to Mrs. Bone. It was not payable on a periodic basis like spousal support. It was payable to her as a lump sum upon Mr. Bone's death. The amount of insurance ordered in the 2003 order would have been the equivalent to more than five and a half years of support at the level awarded by the chambers judge. That alone might have prompted a variation. Also, the amount of spousal support ordered by the chambers judge may well have taken into account the fact that he was terminating the $366/month obligation to maintain the life insurance.

[95] To sum up, the requirement to maintain life insurance with the policy proceeds irrevocably payable to the appellant at this point in Mr. Bone's life may be impossible to comply with and is impractical, unnecessary and wasteful. The chambers judge's decision to terminate the requirement to maintain insurance was not unreasonable and certainly not something he was precluded from ordering, particularly where there were good reasons for terminating it.

**C. Self-Sufficiency and Dissipation of Assets**

[96] The appellant argues that the chambers judge erred in his analysis of self-sufficiency and the appellant's dissipation of assets.

[97] The first point to be made here is that no one has challenged the finding of Associate Chief Justice Sulatycky that Mrs. Bone was not likely to ever achieve self-sufficiency following the marriage. Nor did she. But for almost two decades Mrs. Bone has been supported at a level which enabled her to enjoy a standard of living similar to that which she enjoyed when married. It also permitted her to preserve her matrimonial assets.

[98] The second point to be made is that the issue of self-sufficiency before the chambers judge in 2019 was totally different than that before Justice Sulatycky in 2003. What was at issue before the chambers judge was self-sufficiency in retirement. The parties' standard of living while married was no longer a relevant consideration. A reduced standard of living for both parties is the inescapable consequence of reduced income upon retirement.

[99] What might continue to have some relevance, although even that is doubtful following two decades of separation, is the relative standard of living of the supporting spouse versus that of the supported spouse. But for Mrs. Bone's dissipation of her assets, the two parties might very well have had comparable standards of living.

[100] In retirement, any determination of self-sufficiency requires the court to consider the parties' post-separation circumstances including the impact of equalization. It was in that context that the chambers judge was compelled to consider both the level of spousal support Mrs. Bone received following the parties' separation and the value of her share of the matrimonial property she received following the marriage break-up.

[101] In other words, the chambers judge was obliged to consider whether Mrs. Bone was sufficiently well-supported following the dissolution of the marriage so that she was able to preserve her matrimonial assets. If she had not been properly supported, dissipation may have been found to have been a consequence of the marriage breakdown. But the chambers judge found that the level of support provided by Mr. Bone enabled her to not only enjoy a standard of living similar to what she enjoyed while married, but also permitted her to keep her assets for the day when she would need them for income support.

[102] The appellant suggests that the chambers judge asked the wrong question when he asked, "When is enough enough?" The appellant suggests instead that the appropriate question should have been, "Has compensation been achieved?" It is clear from his reasons that the chambers judge's answer to the appellant's question was that compensation had largely been achieved. The appropriate follow-up question, given the level of support which had been provided, was when is enough enough.

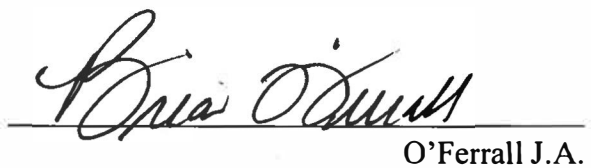
[103] There was no overemphasis on self-sufficiency or dissipation here. Self-sufficiency was never to be achieved. Dissipation was a fact. The question was whether a supported spouse who has been provided the wherewithal to be self-sufficient in retirement, who fails to discharge her obligation to become self-sufficient, is entitled to continued support and if so, at what level. That is the question which the chambers judge appropriately decided having regard to the condition, means and circumstances of both parties. No error has been shown.

**V. Disposition**

[104] For the foregoing reasons, I would have dismissed Mrs. Bone's appeal.

Appeal heard on February 13, 2020

Memorandum filed at Calgary, Alberta
this 16th day of September, 2020

O'Ferrall J.A.

**Appearances:**

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