

CANADA / JUDGMENT

A.R. v. M.E.R.

2022 BCSC 509

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 509 A.R. v. M.E.R.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.R. v. M.E.R.,

2022 BCSC 509

Date: 20220330

Docket: E54447

Registry: New Westminster

Between:

A.R.

Claimant

And

M.E.R.

Respondent

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Claimant:

R. Huinink

Counsel for the Respondent:

A. Ngom

Place and Dates of Trial:

New Westminster, B.C.

February 28 - March 3, 2022

March 9, 10, 2022

Place and Date of Judgment:

New Westminster, B.C.

March 30, 2022

Table of Contents

I. Introduction.. 3

II. Background.. 4

III. Past Child Support and Spousal Support. 8

A. Retroactive Support in the Case of Interim Orders. 9

B. Should Past Income be Imputed to the Claimant?. 14

C. Effective Date for Calculating Support 20

D. Income of the Respondent for Retroactive Support Claims. 21

IV. Future Spousal Support. 23

A. Entitlement to Spousal Support - Future. 23

B. Quantum of Future Spousal Support 28

V. Other issues. 29

I. Introduction

[1] This case involves claims for past and future child and spousal support.

[2] The parties began cohabiting February 1, 2014. They were married later that same year on September 13, 2014. They have two children. A daughter, A., was born in September 2015. She is now six years of age. They have a son, L, who was born about a year later in October 2016. L. is now five years of age. The claimant is the mother, and the respondent is the father.

[3] The parties separated December 9, 2017. The claimant commenced these proceedings December 15, 2017. They continued to reside together in the former family residence until August 2018, when the claimant moved out.

- [4] An interim order was made by Justice G.P. Weatherill November 9, 2018 (the "Weatherill order"). The order provided for equal parenting on a week on week off basis. The order also provided for interim child support and spousal support to be paid by the respondent. The respondent's income for support purposes was determined to be \$195,000. The claimant was not working at the time and had no income. Justice Weatherill ordered that there would be a review of the interim child and spousal support order six months from the date of the order. Although the reasons for judgment were not transcribed and are therefore not available to me, based upon the comments of Weatherill J. during the hearing, it is clear that the issue to be reviewed was the efforts the claimant was making to earn an income. He stated:

" between now and six months, she needs to be able to explain to somebody that these are the steps I'm taking."

- [5] On the review, on June 26, 2019, Master Harper made an order (the "Harper order") based upon imputed income to the claimant of \$55,000 per annum. Master Harper was persuaded that the claimant had the ability to earn that amount as an executive assistant, and that she had chosen not to pursue that work. She determined the respondent's income at \$202,322. This again was an interim order.
- [6] The parties were divorced pursuant to an order of Mr. Justice Jenkins made October 9, 2020. By then the family residence had been sold. Justice Jenkins made orders by consent of both parties for continuation of equal parenting on a week on week off rotation, division of property, and other orders.
- [7] The major issues in this trial include incomes of the parties for support purposes, both past and future, and entitlement of the claimant to spousal support in future.

II. Background

- [8] The claimant is 36 years of age. The respondent is 38 years of age. The claimant graduated from high school in Ontario in 2004. She attended Riverside City College in California from 2005 to 2007, studying criminology, but did not complete a program. She has one sibling, a sister, who resides in California. When the parties began cohabiting February 1, 2014, the claimant was working as a "customer experience manager" at a retail store, Chapters. A "customer experience manager" is essentially a lead hand or retail clerk with some supervisory roles. Her work experience had primarily been as a retail clerk. She terminated her employment with Chapters in December 2014, about three months after the parties were married.
- [9] During both of 2015 and 2016, the claimant worked as an executive assistant for an employer called Western Pro Show. She worked for several months during each of her two pregnancies, working just enough hours on each occasion to qualify for employment insurance maternity benefits. When she applied for work at Western Pro Show she did not tell the employer that she was already pregnant. On her first day of work, in March 2015, she informed her employer (apologetically) that she was pregnant and planned to work only

long enough to qualify for EI benefits. Her daughter was born in September 2015, and the claimant went on maternity leave at that time.

- [10] Although the claimant had planned to be on maternity leave for a year, she returned to Western Pro Show early, in May 2016, as she was pregnant with her second child and wanted to work enough hours to again qualify for EI maternity benefits. Western Pro Show allowed her to return to work. She worked only for the 600 hours necessary to qualify for the benefits before leaving for a second maternity leave. Her son was born in October 2016. On September 1, 2017, at the end of her second maternity leave, she advised Western Pro Show that she would not be returning to work, as she needed to stay at home to look after the two babies and run the household.
- [11] In 2016 she obtained a license as a real estate agent. She has never worked as a real estate agent, however. According to the claimant, the idea at the time, shared by both parties, was that in future she could work part-time as a real estate agent, while still taking care of the children and household, and that the respondent's good income would support the family and allow time for her to develop a real estate sales career.
- [12] The claimant was not working when the Weatherill order was made November 9, 2018. As noted, that order established the 50-50 equal parenting arrangement.
- [13] The claimant obtained qualifications as an English as a Second Language teacher in April 2019, through studies with VGC International College, a private language school. VGC then offered her work as a substitute ESL teacher during 2019. As a substitute teacher, the work was irregular and part-time. However in November 2019 her position was terminated when the employer realized that she did not have a bachelor's degree.
- [14] From late November 2019 to early 2021 she worked in various positions at a senior's residence located in Langley, called Chartwell Langley Gardens. Initially she was hired as a Customer Service Representative. It was a "casual" position, meaning that she worked part time, when work was available. She was on a call list, where shifts were assigned based upon seniority. She had no seniority. In addition to working as a receptionist, she worked as a kitchen helper, dishwasher, and food service worker. Eventually she worked enough hours to qualify for a permanent part-time position, which she obtained in October 2020. Her position was Customer Service Representative, earning \$22.94 per hour.
- [15] However in January 2021 she was forced to take a medical leave of absence for three weeks from the Chartwell job due to mental health issues, for which she was treated by a psychiatrist. She did not return to Chartwell after the medical leave.
- [16] In February 2021, she obtained full-time employment as a "Taxpayer Services Agent" with the Canada Revenue Agency ("CRA"), on a limited term contract basis. Her contract has been extended several times. Her current contract terminates May 2023. She works from a call centre. She handles general inquiries from the public in relation to personal income tax matters. Initially the contract was for three months, during which the claimant obtained

training in various CRA software programs and in dealing with the public. Her contract was then extended for four months, then six months, and has now been extended for one year to May 2023. She earns \$58,076 per annum. She hopes to continue to be employed by CRA. She would like to work in investigations.

- [17] The respondent graduated from high school in 2001. He studied at British Columbia Institute of Technology for two years, then Southern Alberta Institute of Technology for two years, obtaining a diploma in information systems technology, and a Bachelor's degree in technology. He worked with a company providing military support services to NATO in Bosnia for two years from 2005 to 2007. He then worked in Afghanistan for NATO in intelligence, analytics, and systems technology and engineering capacities. He returned to Canada in November 2009.
- [18] When the parties met, the respondent was working for a Vancouver company called "Vision Critical". He worked there from 2010 to 2017. He started as a systems administrator in the technology area, and progressed into a management role with the company.
- [19] In May 2017, he began working for another IT company, Sauce Labs Inc., as director of engineering. His pay increased to \$195,000 per annum, including a variable compensation bonus of \$10,000 per annum. He was working for Sauce Labs when the parties separated in December 2017.
- [20] In April 2021, the respondent accepted a position with "Spin", an urban electric scooter provider, as "Senior Director of Engineering, Fleet Systems", starting May 24, 2021. His base salary increased to \$260,000. He received a signing bonus of \$37,500, which must be repaid if his employment does not continue for one year after May 24, 2021. He is also entitled to receive a retention bonus of \$150,000, payable over three years, annually on the anniversary of the commencement of his employment. The retention bonus is only payable if he continues to be employed with the company through the respective anniversary dates. In addition, he is entitled to receive an annual performance bonus.
- [21] At the time, Spin was a subsidiary of Ford Motor Company. On March 2, 2022 (during the trial) Ford sold Spin to a German company, Tier, which is engaged in the same business. The respondent testified that his employment could be in jeopardy. Spin laid off a large number of employees within the last two months. If the respondent does not remain employed with the same employer through May 24, 2022, he could be obliged to repay the signing bonus of \$37,500, and would not be entitled to payment of the annual \$50,000 retention bonus. He is looking for other work.
- [22] As part of his employment contract with Sauce Labs the respondent entered into in April 2017, the respondent received stock options for 150,000 shares in Sauce Labs Inc., exercisable in four installments, over four years. He exercised all of the options. The company exercised a right of first refusal for the sale of the shares in November 2021. The respondent produced no documents in relation to this sale and did not refer to it on his latest financial statement prepared for this trial. He contends that he was unaware of any

obligation to produce the documents, beyond the annual exchange of income tax documents pursuant to the Weatherill order. He has not yet filed a tax return for 2021, which will report this receipt. There is no documentation in evidence about this transaction, but the respondent testified that he expects a capital gain of 37 cents per share, for a gain of \$55,500 in total. He is unsure as to the amount of expenses he will incur, or the tax treatment of this receipt.

[23] The claimant currently resides in a rented apartment in Port Moody. The respondent resides in a rented apartment in Pitt Meadows.

III. Past Child Support and Spousal Support

[24] The claimant claims that the amounts paid by the respondent for child support and spousal support should be retroactively adjusted upwards, based upon the actual incomes of the parties since separation. She claims the following amounts:

Spousal Support Shortfall:

\$ 7,551 (2018)

\$ 7,410 (2019)

\$11,172 (2020)

\$12,609 (2021)

\$ 2,692 (2022)

\$41,434

Child Support Shortfalls:

\$ 1,190 (2018)

\$ 7,416 (2019)

\$10,692 (2020)

\$10,049 (2021)

\$4,250 (2022)

\$33,597

[25] Thus, the total amount claimed by the claimant for past child and spousal support is \$75,031. However, her claim is subject to adjustments based upon the evidence at trial and the court's findings. At trial, the claimant accepted the accuracy of the respondent's detailed schedule of payments made, as reflected in Exhibit 8, Section E.

[26] The respondent's position is that he paid support prior to the Weatherill and Harper orders, then paid support in accordance with the orders, and even voluntarily adjusted the support payments upwards annually based upon the parties' prior year's incomes. He says that only minor adjustments to past child support and spousal support are required.

[27] The past annual income of the parties was as follows:

Tax Year

Respondent

Claimant

2014

(not in evidence)

\$53,209 (Chapters)

2015

\$103,756 (Vision Critical)

\$29,033 (Western Pro Show \$22,789 + EI maternity payments)

2016

\$115,549

\$35,429 (Western Pro Show + EI maternity payments)

2017

\$185,986 (Vision Critical/Sauce Labs)

\$16,564 (EI maternity payments)

2018

\$202,322 (Sauce Labs)

\$4,500 (spousal support only - - no employment)

2019

\$214,872

\$6,135 (employment; teaching at VGC; Chartwell Langley Gardens)

\$32,208 (spousal support)

2020

\$227,324

\$15,028 (employment - Chartwell)

\$30,985 (spousal support)

\$12,000 (CERB)

2021

\$____(Sauce Labs/Spin)

\$46,700 (estimate - CRA) + spousal support \$____

[28] The parties have not yet filed their tax returns for 2021.

[29] Based on the parties' positions at trial, there are several underlying issues that require determination in order to determine the past support issues.

A. Retroactive Support in the Case of Interim Orders

[30] The claimant argues that the Weatherill and Harper orders were interim only, and that, as the trial judge, I am entitled to reassess her claims for past child and spousal support. Therefore, the claimant argues, in particular, I should re-evaluate the question of whether income ought to have been imputed to her, pursuant to the Harper order. She argues that no income should have been imputed to her.

[31] The respondent argues that, given the prior orders, the claimant is seeking a retroactive variation of child support and spousal support, and therefore the court must be guided by the principles set out in the decision of the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37 [D.B.S.], and more recently, *Colucci v. Colucci*, 2021 SCC 24. He argues that no retroactive awards should be made.

[32] He also argues that the imputation of income of \$55,000 to the claimant as set out in the Harper order was appropriate. Practically speaking, this is one of the major disputes between the parties.

[33] Generally, interim orders are made on an incomplete and often inadequate record. The court is compelled to rely on affidavit evidence, usually of the parties themselves, which can be expected to be self-serving and selective. There is no opportunity for cross-examination and testing of the evidence adduced. As noted in *Tedham v. Tedham*, 2003 BCCA 600 [Tedham] (leave to appeal ref'd: [2004] 2 S.C.R. vii), at para. 59, financial disclosure is often incomplete.

[34] The claimant argues that the interim orders are intended to achieve "rough justice" at best, and that the court is entitled to reassess support payment issues at trial, on a complete record. There is ample support for these propositions, which I accept.

[35] In *Robles v. Kuhn*, 2009 BCSC 1163, Master Keighley summarized the principles that apply on interim applications, as follows:

- [12] On interim support applications, the application of these provisions must be qualified by certain established considerations:
1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
 2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
 3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
 4. The courts should not unduly emphasise any one of the statutory considerations above others;
 5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
 6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);
 7. Interim support should only be ordered where it can be said a prima facie case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);
 8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: *L.G.B.*

[36] Therefore, the court's task on interim applications is not the same as the court's task at trial.

[37] The general principles of retroactive spousal support are concisely summarized in the publication, Carol Rogerson & Rollie Thompson, *Spousal Support Advisory Guidelines: The Revised User's Guide* (Ottawa: Department of Justice, 2016) [RUG]. The authors of the RUG also authored the *Spousal Support Advisory Guidelines* (Ottawa: Department of Justice, 2008) [SSAG]. At s. 20, the authors of the RUG state:

The law of retroactive spousal support was revised and restated in *Kerr v. Baranow*, 2011 SCC 10, after the release of the SSAG. The Supreme Court of Canada ruled that the retroactive child support analysis of *D.B.S. v. S.R.G.*, 2006 SCC 37, with some modifications, should be applied to the determination of retroactive spousal support. The D.B.S. factors are:

- (i) the reasonable excuse for any delay in seeking support by the recipient;

- (ii) the presence or absence of blameworthy conduct by the payor;
- (iii) the circumstances of the support recipient; and
- (iv) any hardship to the payor occasioned by a retroactive award.

[38] As the RUG notes (at 109), initial spousal support applications commonly include claims for retroactive spousal support. It may be necessary to revisit interim support.

[39] I accept that the D.B.S. factors may play a more substantial role in some cases. For example, where, as noted in *Ducharme v. Rempel*, 2016 BCCA 198 [Ducharme], the circumstances are such that the payor could reasonably believe that he was fully complying with his support obligations (para. 40). Certainty of the payor's obligations can be a factor in the analysis: *Kerr v. Baranow*, 2011 SCC 10 [Kerr], at para. 209.

[40] However in this case, the Weatherill and Harper orders were clearly intended as true interim orders. That is, orders that were intended to apply only until the trial. The factors of certainty and predictability have very little weight in this case.

[41] I attach no significance to the fact that the orders were not expressly stated to be "without prejudice" to my decision as the trial judge. That is implicit in the nature of the orders, and as a matter of law. No such language was necessary.

[42] This is not a case where the claimant delayed in seeking support. She filed a notice of family claim December 15, 2017, within days of the agreed-upon date of separation, claiming child support and spousal support. She was entitled to wait until trial in order to put the full financial picture before the court: *Tedham*, at para. 62. The court may award retroactive spousal support to the date of the commencement of proceedings, even where the recipient brings no interim application: *Kerr*, at para. 216. In *Kerr*, the trial judge relied on the SSAG to determine the amount of retroactive support that should be paid. I applied this same approach in *James v. Chase*, 2020 BCSC 1181, at paras. 93 to 99, cited by the claimant here. In that case no interim application was made, and I assessed retroactive spousal support to the date the notice of family claim was filed.

[43] In my view, the claimant should not be in a worse position for having brought an interim application for spousal support than she would have been if she had simply waited until trial. The "rough justice" interim orders should not stand in the way.

[44] The claimant need not establish blameworthy conduct of the respondent in order to obtain a retroactive award in the face of an interim order: *Tedham*, at para. 68.

[45] In *Ducharme*, the Court of Appeal accepted that the presumption that the previous order is valid may be rebutted in the circumstances of the case. The court held that in the circumstances of that case, the interim spousal support order did not preclude the making of a retroactive spousal support award (*Ducharme*, at paras. 39-40). The court noted:

- [40] Interim proceedings are not geared to determine final issues or disputed issues of fact; interim orders provide "rough justice" until the trial may be held and a final determination of issues made: *Newson v. Newson* (1998), 65 B.C.L.R. (3d) 22 (C.A.). In my view this was not a case in which Mr. Rempel could reasonably have assumed that he was fully complying with his support obligation. I would not accede to this ground of appeal.
- [46] The concept that the previous order should be presumed to be valid is at odds with the nature of interim orders designed to provide "rough justice" on an incomplete record, until the trial is held and a final determination of the issues may be made.
- [47] There are numerous decisions in which courts have made retroactive support orders at trial that vary interim orders: see e.g., *Tedham*; *Ducharme*; *Pereverzoff v. Pereverzoff*, 2017 BCSC 687; *J.D.C. v. K.L.M.F.C.*, 2014 BCSC 2182 (additional reasons: 2016 BCSC 509); *A.B.Z. v. A.L.F.A.*, 2014 BCSC 1453 (additional reasons: 2015 BCSC 34).
- [48] The respondent argues that the children have enjoyed a high standard of living and have not been deprived. However, any material underpayment of child support or spousal support can be expected to have some effect on the living standards of the children or spouse.
- [49] The respondent does not argue that payment of a retroactive award would result in any great financial hardship to him. The payment may be structured over time to reduce hardship. The claimant has suggested this approach, for tax reasons.
- [50] Moreover, as I will explain, I am satisfied that if Master Harper had had a full evidentiary record, she would not have imputed income to the claimant. Therefore, it is in the interests of justice to reassess past support.
- [51] In summary, I conclude that in the circumstances of this case, it is appropriate to reassess past child and spousal support, in light of the full record available to me as the trial judge.

B. Should Past Income be Imputed to the Claimant?

- [52] The fundamental principles relating to imputation of income were recently re-stated by the Court of Appeal in *Zilic v. Zilic*, 2021 BCCA 107 [Zilic], at para. 19:
- [19] The imputation of income is discretionary. The burden is on the party seeking to establish that income should be imputed. The broad governing test is reasonableness, having regard to the parties' actual capacity to earn income in light of all of their relevant circumstances, including age, education, health (physical and mental), work history, and work availability (which also takes into account child care responsibilities).
- [53] The test for imputing income for the purpose of fixing the quantum of spousal support is similar: *Zilic*, at para. 20, quoting *Marquez v. Zapiola*, 2013 BCCA 433, at para. 38.
- [54] In her reasons for judgment, Master Harper stated:

- [6] The wife has a history as an executive assistant, both before and after the marriage. Her resume clearly sets out a successful history in the field of executive assistant. The wife has decided that she is not interested in that field of work and she has a long-term goal of being a realtor. That is a very long-term goal because the hours do not work when one has young children.
- [7] So, very late in the day, the wife has pursued this ESL course. The average salary seems to be between \$16 and \$25 per hour, which, if she were working on a full-time basis, would produce an income of about \$42,000.
- [8] The husband's affidavit material is extensive, in that it produces convincing evidence that jobs are available as an executive assistant and the salary achievable is at least \$50,000, and maybe up to \$60,000, per year.

Analysis

- [9] With respect to the law, the notion of imputing income to a party is not meant to be punitive, and I make that point here. Nobody is saying, and I am not saying, that Ms. [R.] is to blame for her current situation. It is simply that, applying the law, she has a duty to become self-supporting within a reasonable period of time. She does not have the option to decline work because it is not interesting to her. The parties separated 18 months ago, although they did continue to live under the same roof. It was not because of a court order that Ms. [R.] is required to become self-supporting. That is what the law says. I am persuaded that she has not taken reasonable steps to become self-supporting. Whether or not she chooses to obtain work that she is qualified for is entirely up to her.
- [55] It is apparent that Master Harper relied heavily on what she understood to be the claimant's "history as an executive assistant", both before and after the marriage. The evidence at trial does not support the conclusion that the claimant had a successful history as an executive assistant, before or after the marriage.
- [56] In fact the claimant never worked as an executive assistant before the marriage. Her meaningful employment experience was confined to retail work. Her only experience in a role described as "executive assistant" was the two stints at Western Pro Show, during her two pregnancies. I have no hesitation in accepting her evidence that she worked as an "executive assistant" in name only during these periods. She answered telephones, did filing, and did some other clerical work. She had no actual experience working as an executive assistant and did not have a suitable skill set for the position. She was hired to work as the executive assistant to a vice president, a new position. It is not surprising that she would be given little actual responsibility in that role, given the temporary nature of her employment, and the fact that she had no actual experience as an executive assistant, nor the appropriate skill set.

- [57] The employer allowed her to return from her maternity leave only for the express reason of working just long enough to qualify for EI maternity benefits. I accept the claimant's evidence that on her second stint at Western Pro Show, she was ignored and given no real responsibility. The office manager was hostile to her. I expect that the employer considered itself obliged to continue the claimant's employment but felt resentful. The claimant is unable to use Western Pro Show to provide a reference for other prospective employers.
- [58] In particular Master Harper relied upon the claimant's history as an executive assistant as reflected in her resume. However, the resume relied upon by Master Harper is largely a concoction. So for example the claimant described her work at Chapters as involving, "Overall responsibility for operations, including administrative duties, HR functions, and marketing programs". This was not even close to accurate. She falsely claimed experience as an executive assistant for Prudential Realty, in Toronto. She had no such experience. In reality, as a young person she and her sister had done basic clerical work for her step-father's real estate sales business, such as stuffing envelopes and delivering flyers. She and her sister were occasionally paid small lump sums in cash. She claimed to have worked as a part-time administrative assistant for Riverside City College Student Services. This was false. She claimed computer and software skills that she did not have. She claimed to have worked as a licensed real estate agent, when she had never actually worked as such.
- [59] Since this is not an appeal of the Harper order, I need not address the legal test applied by Master Harper. It is sufficient for me to make findings of fact on the evidence at trial, and apply the law to those findings.
- [60] The standard to be applied is one of reasonableness, in the circumstances, as set out in Zilic. The standard is not one of perfection, or re-appraisal with the benefit of hindsight. The onus is on the respondent.
- [61] When looked at holistically, in my view the claimant has made reasonable efforts to obtain suitable remunerative employment since separation, and in fact has succeeded in doing so. Despite a limited skill set, and other obstacles, she now has full-time work at CRA that pays quite well. Her annual pay is \$58,076 at grade level SP-4. She works 37.5 hours per week. The salary range at SP-4 is \$58,076 to \$65,363. There could be a possibility of upward progression within CRA. Her current pay is more than she has ever earned in the past.
- [62] When the parties separated, the children were only one and two years of age, and the claimant remained primarily responsible for their care, at least until the Weatherill order. After the Weatherill order, the claimant remained equally responsible for their parenting and care. The parties paid for day care to enable them to work.
- [63] It made sense for the claimant not to return to retail sales work, which involved shiftwork that would conflict with her parenting duties, particularly after separation. As noted, however, her only meaningful experience was in the field of retail sales. She needed to retrain, and to look for work in other areas.

- [64] As I have said, she did not actually have the experience or skills necessary to work as an executive assistant.
- [65] She had no post secondary diploma or accreditation, except for obtaining a real estate sales licence. It was reasonable for her to not attempt to establish a career in that highly competitive field, in which the prospects were very uncertain. She would have had to be prepared for a long period of time with negative income. She took some additional training but did not pursue this option.
- [66] She succeeded in obtaining accreditation as an ESL teacher, and working for a time in that field. This career option did not pan out. In retrospect it may be seen to have been a mistake. But as I said, the standard is not one of perfection, or re-appraisal with the benefit of hindsight.
- [67] I accept the claimant's evidence that she consistently looked for suitable work, made many job applications, and in general, did her best in the circumstances.
- [68] She was not too proud to do whatever work was available for her at Chartwell, in an effort to gain enough seniority to obtain stable employment in a union work environment.
- [69] Unfortunately, the Chartwell work also foundered. In January 2021 the claimant experienced serious mental health problems that forced her to take a leave of absence.
- [70] The claimant's mental health has been another limiting factor in her efforts to become self-sufficient.
- [71] The claimant experienced post partum depression after the birth of her first child, A. She received medical treatment from her family doctor, and extensive counselling. She had difficulty coping after the birth of her second child, L. As an infant, L. went through a period in which he cried unrelentingly, for many hours at a time. The claimant experiences anxiety, depression, thoughts of suicide, and other disorders including panic attacks. Her doctor prescribed Xanax for her condition. She was referred to a psychiatrist, Dr. Gopinath. He prescribed several other psychiatric medications, which she continues to use. She has been treated by Dr. Gopinath since 2019, and continues to see him regularly.
- [72] In January, 2021, Dr. Gopinath prescribed a two week medical leave of absence from the claimant's work at Chartwell. Later he recommended an additional week. As it happened, the claimant did not return to Chartwell, as she obtained an offer of full-time work with CRA and began work there on February 17, 2021. While working at Chartwell the claimant had continued to seek other employment. She received the CRA job offer after several months of applications and efforts.
- [73] As is common in cases of this nature, I heard much evidence from both parties which is of little or no direct relevance. In particular, each party alleges various instances or examples of family violence against the other. Unsurprisingly, each party denies the allegations the other makes. I do not find it necessary to specifically review and consider these allegations.

That would be an almost impossible task, as there is very little in the way of corroborative evidence. The only material witnesses in this respect are the parties themselves. In my view, these allegations do not materially affect the issues I must decide.

- [74] The respondent was aware from early on in the relationship that the claimant suffered from anxiety and that she sometimes experienced episodes that were consistent with panic attacks. He says that she would become enraged and violent on these occasions.
- [75] It is clear that the relationship was volatile and generally unhappy. In March 2015, while the claimant was pregnant with their first child, the respondent called the police, complaining of assault and violent destructive behaviour by the claimant. He was also concerned about the claimant's use of psychiatric medications while pregnant. In May 2015 the claimant called the police, alleging assault by the respondent. The respondent was arrested. The respondent alleged that he was assaulted. He told the police the claimant was mentally unstable. In November 2017 the respondent made a complaint to the police of domestic assault against him by the claimant. The police attended, and arrested the claimant. No charges ensued in relation to these incidents. The Ministry of Child and Family Development was involved in the parties' physical separation in August 2018. MCFD prepared a safety plan that required the parties to reside separately. In November 2020, the claimant alleged that the respondent assaulted their child L. The police were involved yet again.
- [76] The respondent argues that the claimant's psychiatrist, Dr. Gopinath, did not testify or provide a medical-legal opinion, and therefore there is no medical evidence as to the claimant's mental health. However, the evidence, including the respondent's evidence, is ample for me to conclude that the claimant has experienced mental health issues in the past, and continues to do so. She receives appropriate medical treatment for her mental health condition. No expert evidence is required.
- [77] The claimant's volatile personality is also confirmed by the evidence of the claimant's mother. In the past, her mother and step-father have assisted the claimant financially. However, since December 2018 the claimant has been estranged from her mother and step-father, who reside in Toronto. As noted, her only sibling, her sister, resides in California. She has no local family members or other people to support her or assist her with child care. This too has limited the claimant's ability to obtain and maintain employment.
- [78] In summary, I conclude that no income should be imputed to the claimant in respect of her claims for retroactive spousal and child support. Thus, her claims should be assessed based upon her actual past income.

C. Effective Date for Calculating Support

- [79] The respondent argues that support should be calculated on the basis of the parties' incomes for the prior calendar year, based upon the tax returns they file in the following year. However, he argues that the support payments should not reflect the actual incomes earned

until the following year. In other words, he contends that adjustments should only be made prospectively, beginning for example on July 1 of the year following any increase or variation in income, after the parties have exchanged tax information for the prior year. Therefore, to take an example, if the respondent were to receive an increase in pay effective January 1 of year one, an upwards adjustment of support would not occur until eighteen months later, effective July 1 of year two, after the parties had exchanged year one income information.

- [80] In this respect, the respondent relies upon the Weatherill order, which provided that the parties shall exchange their respective tax information for the prior year not later than June 1 of each year. He also contends that by implication the parties agreed to this approach, which has in fact been followed.
- [81] However, the Weatherill order does not say anything about how retroactive adjustments should be made. It merely states that income information shall be exchanged annually. And there is no actual agreement between the parties to the effect relied upon by the respondent.
- [82] The respondent's position is contrary to the established principle that insofar as possible, retroactive support is to be determined base upon actual income earned in the year for which it is due: *Hsieh v. Lui*, 2017 BCCA 51, at para. 49.
- [83] However, ongoing support orders may provide for adjustment based upon evidence of the income for the previous year, particularly where the payor's income fluctuates or is uncertain: see *K.A.M.R. v. W.H.G.*, 2014 BCSC 103, at paras. 9-19; *Vanos v. Vanos*, 2010 ONCA 876 at paras. 14-16.
- [84] In summary, the claimant's retroactive support claims should be on actual past incomes, in the year in which the income was earned. Prospective support should be based on the previous year's income.

D. Income of the Respondent for Retroactive Support Claims

- [85] The respondent's income for the years prior to 2021 is documented and not in issue.
- [86] His 2021 income remains uncertain, to some extent. Prior to May 24, 2021, he worked at Sauce Labs. The sale of his Sauce Labs shares will provide gross receipts of \$55,500. The net amount and the tax treatment of this payment is not yet clear. His base salary at Spin is \$260,000. He received the \$37,500 signing bonus in 2021, but this is subject to possible repayment if he does not remain employed with Spin past May 24, 2022. At that time he would qualify for a retention payment of \$50,000, which would form part of his income for 2022.
- [87] The respondent argues that his post-separation increase in income should not factor into the spousal support assessment. As noted in the RUG at 82, this is an issue that usually comes up at the variation and review stages, after the initial order.

- [88] I have no difficulty concluding that, at this stage, in respect of the respondent's 2021 income and for ongoing spousal support purposes, the respondent's post-separation increase in income should be taken into account. Currently there remains a link or connection between his current career success and the marriage. During the marriage he continued to progress in his successful career. He was recruited to join Sauce Labs during the marriage. Later he was recruited to join Spin. As noted, the steady upward trajectory of this career was not impeded by parenting, thanks in part to the claimant.
- [89] Fairness is another factor. The respondent, naturally, contends that the claimant's current income should be taken into account.
- [90] Therefore, for 2021, the respondent's actual income for the year should be utilized for both child support and spousal support re-calculation purposes.
- [91] Given that the uncertainty concerning the respondent's 2021 income ought to be removed by late May of this year, it makes practical sense to defer the final calculation of the claimant's retroactive support claims until, at the latest, July 1, 2022. The calculation will be for the period of time up to the date of the order arising from these reasons for judgment.
- [92] I note that both parties contend that a simple set-off approach is appropriate for child support, pursuant to the Guidelines, s. 9(a). In other words, neither party argues that ss. 9 (b) or (c) should affect the result. I accept these submissions.
- [93] The parties have been sharing s. 7 expenses, notably day care. As the RUG notes at 4, the s. 7 expenses paid must be taken into account.
- [94] The claimant seeks spousal support, both past and future, on the basis of equal sharing of net disposable incomes (NDI). I understand the respondent does not disagree.
- [95] The respondent's liability for past spousal support may be structured in a manner to ensure tax efficiency, as the SSAG assumes: *Outaleb v. Waithe*, 2021 ONSC 4330, at para. 105; *A.M.D. v. K.R.J.*, 2015 BCSC 1539 at para. 96; *O.O. v L.M.*, 2020 BCSC 851 at paras. 94-104 (aff'd on other grounds: 2021 BCCA 258). The RUG at page 110 suggests one method. In addition, the claimant suggests that the past spousal support obligation could be paid over time periodically.
- [96] The parties will have liberty to apply in relation to the form of order in this respect, in the event they are unable to agree.
- [97] The respondent seeks an order that the claimant provide a receipt for past spousal support payments made in excess of the amounts payable pursuant to the interim orders. If this remains an issue between the parties, the respondent has liberty to apply.

IV. Future Spousal Support

A. Entitlement to Spousal Support - Future

- [98] The claimant argues that she remains entitled to spousal support, but there should be a review of spousal support in or about July 2025, in about three years.
- [99] The respondent contends that the claimant is not entitled to further spousal support. He argues that the marriage (including pre-marriage cohabitation) was of short duration, at three years and 10 months. He argues that parenting is shared. He argues that his career was not advantaged by the marriage, and the claimant's career was not disadvantaged.
- [100] I adopt my discussion of the legal principles involved in relation to spousal support set out in *McGrail v. McGrail*, 2016 BCSC 104, at paras. 95-100. There, I referred to a number of leading authorities on these topics, including the decision of the B.C. Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507, the decision of the Supreme Court of Canada in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715 (SCC), and with respect to retroactive spousal support, *D.B.S.*; and *Kerr*. I stated:
- [95] The factors and objectives of a spousal support order for set out in ss. 15.2 (4) and 15.2 (6) of the Divorce Act. They read as follows:
- 15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- [(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.]
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

- [96] All of the factors referred to in s. 15.2(4) and all four of the objectives under s. 15.2(6) must be taken into account. No single objective is paramount. The four objectives set out in s. 15.2(6) can be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown: *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813 [Moge].
- [97] Section 161 of the FLA is substantially the same as s. 15.2(6) of the Divorce Act.
- [98] The relevant principles regarding spousal support were reviewed and summarized by Madam Justice Rowles, for the Court, in *Chutter v. Chutter*, 2008 BCCA 507 at paras. 45 to 61. Madam Justice Rowles at para. 47 states that the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support, citing *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420 at paras. 15, 41-42.
- [99] With respect to orders for retroactive spousal support, in *D.B.S. v. S.R.G.*, 2006 SCC 37 (CanLII), [2006] 2 S.C.R. 231 [D.B.S.] the Supreme Court of Canada states that in determining whether to make a retroactive award of child support, the court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix: page 275-276.
- [100] In *Kerr v. Baranow*, 2011 SCC 10 (CanLII), [2011] 1 S.C.R. 269 [Kerr] the Supreme Court stated that while D.B.S. was concerned with child as opposed to spousal support, similar considerations are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support; Kerr, para. 207. Nonetheless, the same flexibility and regard for a holistic view of the matter on its merits is appropriate in the case of retroactive spousal support: Kerr, para. 212.
- [101] In my view, the claimant continues to be entitled to spousal support on both compensatory and non-compensatory grounds.
- [102] I have accepted that the claimant's role as the mother of the parties' two children made the continuation of her career in retail supervisory roles less practical, due to the need for shiftwork. She quit her job at Chapters in December 2014 expecting that the parties would soon start a family together, as they did. The parties both had in mind a career change for the claimant. Real estate sales was discussed, and the claimant took steps to become licensed. The claimant's career was interrupted by her pregnancies, in quick succession, and child care obligations. The pregnancies and the marital relationship have had negative consequences on the claimant's mental health.

- [103] As noted in the RUG, in relation to compensatory support, it is a mistake to focus on where the claimant was at the beginning of the relationship, instead of on where the claimant would have been if they had continued in the labour market: Chapter 3, page 6.
- [104] The claimant had limited marketable skills, but had there been no relationship, it is reasonable to assume that the claimant would have continued in her retail career, possibly with increases in responsibility and progression, or some other career. Her career would not have been constrained by the pregnancies and parenting responsibilities, which continue even though parenting is shared. The combined effects of her limited marketable skills and the relationship have left her in a vulnerable position in the labour market. She may be able to overcome these obstacles if she is able to sustain stable, secure employment with CRA. However, her CRA job is temporary. She has no real job security yet. A further disadvantage related to the breakdown in the marriage is that pursuit of a real estate sales career is no longer a practical option for her. That option depended on the idea that the respondent's healthy income could support the family while she established herself, which could take a very long time.
- [105] The claimant's work requires regular fixed attendance at the CRA call centre. It is likely that any work she can obtain would have similar requirements. Her ability to work depends on reliable, scheduled day care. This is another constraint and disadvantage caused by the marriage breakdown.
- [106] By contrast, the respondent's career has not been detrimentally impacted by the relationship, and fatherhood. He is a very well qualified and talented person, whose special skills are in high demand in the marketplace. His career continued to progress during the relationship, and subsequently. Although his current job may be in jeopardy, he is a very intelligent and adaptable person, who will likely continue to be very successful professionally, even though he now shares parenting equally with the claimant. In contrast with the claimant, the respondent's skills and the nature of his work allow him greater flexibility in child care. He can often work from home, and tailor his hours.
- [107] Non-compensatory grounds are also present. Absent spousal support, the claimant would suffer a significant decline in her standard of living as compared with the joint standard of living of the parties during the relationship. I recognize that this factor is much weaker in the case of a short marriage such as this one. However in my view it remains a factor presently.
- [108] As noted, the respondent argues that spousal support should now be terminated. In effect he argues that the grounds for spousal support no longer exist, and that his obligations have been satisfied by the financial support and spousal support he has already paid to date. Based on my previous comments, it should be apparent that I do not agree. In my view, compensatory and non-compensatory grounds continue to exist.

[109] This conclusion is supported by the commentary in the RUG, chapter 8(n), as follows (at 43-44):

(n) Short marriages, young children (SSAG 8.5.5)

This has now emerged as one of the major problems under the with child support formula. Lawyers argue for, and courts grant, a short time limit at the initial stage where the marriage is short and there are young children. The time limit on spousal support is typically fixed at the number of years of marriage or cohabitation, e.g. 4 years of support after a 4-year marriage, even though the recipient has the primary care of children aged 1 and 3.

Such short time limits will only rarely be the right outcome at the initial hearing. The vast majority of these orders should be "indefinite (duration not specified)". Often a review will be required in these indefinite orders.

Remember that there are two tests for duration under the with child support formula. Not just the length-of-marriage test, but also the age-of-children test. The second test is more important for shorter marriages, with a range from the time the youngest child commences full-time school to the upper end of the last child finishing high school.

These are usually cases with strong compensatory claims. The compensatory claim derives less from the past disadvantage during the marriage and much more from the future disadvantage for the parent with ongoing primary care of the children, as identified in s. 15.2(6)(b) of the Divorce Act.

[]

The imposition of short time limits in these cases reflects a failure of compensatory analysis. A more careful approach is needed. The most obvious area for such analysis would be the basic formula cases, where the recipient continues with a disproportionate share of child care going forward. In the more complex custody cases, like shared, split, hybrid or step-child cases, there may be circumstances that warrant shorter time limits, especially the step-child cases. A short time limit would normally mean a quick "bounce back" by the support recipient, someone with pre-existing skills who can find good employment reasonably quickly and become truly "self-sufficient."

[Emphasis added.]

[110] The RUG commentary at ch. 18 is also helpful (at 95):

Self-sufficiency is only one of the four objectives stated in s. 15.2(6), said the Supreme Court of Canada in *Leskun v. Leskun*, 2006 SCC 25, and a qualified one at that. There is no absolute "duty" on a former spouse to become self-sufficient.

Moge reminded us all of some important lessons about self-sufficiency: courts must be realistic about self-sufficiency; courts must not underestimate the labour market disadvantages faced by recipients returning to work; and courts should not be too quick to "deem" or "predict" that recipients will achieve self-sufficiency in future

[111] And at 99:

Time limits under the with child support formula are "softer", with initial orders "indefinite" and time limits coming later through variation or review, perhaps not until a "crossover" to the other formula. Under this formula concepts of "self-sufficiency" will be shaped by the strongly compensatory nature of many of the claims. For marriages shorter than 20 years, it is anticipated that at some point the economic disadvantages of the recipient will be fully compensated and, if there is no non-compensatory claim left, a time limit will be imposed and spousal support terminated

[112] In this case it cannot be said that the claimant is a person "with pre-existing skills who can find good employment reasonably quickly and become truly 'self-sufficient'" (RUG at 44).

[113] Although in this case parenting is shared, the claimant continues to share equally in parenting duties, which limit her career options, as I have explained.

[114] I conclude that the spousal support order should be indefinite. In view primarily of the short duration of the marriage relationship, I accept the claimant's submission that a review of spousal support in approximately three years is warranted. The question will be whether the claimant continues to be entitled to spousal support in the circumstances then existing. The review may take place at the option of either party anytime after July 1, 2025.

B. Quantum of Future Spousal Support

[115] The current incomes of the parties for child and spousal support purposes must be assessed.

[116] The current income of the claimant is \$58,076.

[117] The respondent's income is somewhat uncertain, due to the uncertainty regarding his retention bonus of \$50,000, and the possibility that his employment with Spin may not continue. His present base salary is \$260,000. He also received \$37,500 in 2021, which is subject to repayment. Thus the respondent's 2021 income level could be \$297,500, leaving aside the income from the share sale.

[118] The respondent's 2022 income at Spin could be \$310,000, in effect, if his base pay remains the same and if the \$50,000 retention bonus is paid.

[119] If the respondent does not remain with Spin, it seems likely that he would be able to obtain other employment that pays an amount commensurate with the remuneration he is entitled to receive at Spin. His remuneration could again include bonuses such as signing, retention, or performance.

[120] In my view, having regard to these considerations, a fair assessment of the respondent's current income for current support purposes is \$290,000.

V. Other issues

[121] The claimant's submissions refer to a claim for determination of past special and extraordinary expenses payable by the respondent. However, I heard no evidence about unpaid amounts in the past. Therefore, no order can be made.

[122] The respondent suggests that in the future, the parties re-calculate support annually, on the basis of the incomes of the parties for the prior year. I agree with this approach, which is imperfect, but practical and fair, and may help to reduce conflict between the parties. Therefore the order will provide for annual exchange of income information not later than June 1 of each year, and recalculation of the child and spousal support amounts and payment of the adjusted amount of support from July 1 of each year.

[123] Future s. 7 expenses are to be shared in proportion to the parties' incomes, as set out in these reasons, and as adjusted annually.

[124] Section 7 expenses are those the parties agree to in writing, in advance of the expenditure. Receipts for reimbursement must be provided within 30 days, and reimbursement is due within 30 days of the receipts being provided. In the case of disagreement about s. 7 expenses, the parties have liberty to apply to the court. I am not seized of such applications.

[125] In addition to the review of spousal support I have ordered, naturally, the parties are at liberty to apply for variation upon a material change in circumstances in accordance with the relevant provisions of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

[126] In their final submissions, both parties included various proposed orders in some detail. I have not attempted to address all of the details in these reasons.

[127] In addition to the matters already mentioned, the parties have liberty to apply with respect to ancillary orders that may be required, or matters I may have overlooked.

[128] The claimant has been substantially successful, and is entitled to costs, subject to the Supreme Court Family Rules, B.C. Reg. 169/2009, Rule 11-1.

"Verhoeven J."

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