

CANADA / JUDGMENT

B.T.D. v. R.C.D.

2023 BCSC 1547

COURT

Supreme Court of British Columbia

DECIDED

20 July 2023

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2023 BCSC 1547 B.T.D. v. R.C.D.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.T.D. v. R.C.D.,

2023 BCSC 1547

Date: 20230720

Docket: E221434

Registry: Vancouver

Between:

B.T.D. also known as B.T.J.

Claimant

And:

R.C.D.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraph 84 on September 14, 2023.

Before: Master Hughes

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

T. L. Jackson

L. Besada Montero

Counsel for the Respondent:

J.K. Broadhurst

Place and Date of Hearing:

Vancouver, B.C.

June 27 & 28, 2023

Place and Date of Judgment:

Vancouver, B.C.

July 20, 2023

- [1] THE COURT: These are my oral reasons for judgment. I have edited them for clarity and for grammar and to make the judgment more readable in written form. The substance and the content have not changed. As these reasons are being published, I have anonymized them in order to protect the privacy of the parties' children.
- [2] The claimant's notice of application, filed June 7, 2023, came on for hearing before me over the course of two days on June 27 and 28, 2023. The claimant seeks orders that I will summarize as follows:
- a) an order that the respondent shall continue to submit to five-panel hair follicle tests in 80-day intervals until further order of the court, such test to be conducted by Frank Soper of Vancouver Drug Testing.
 - b) a conduct order pursuant to ss. 45, 222 and 227 of the Family Law Act, restraining the respondent from attending the Arbutus Club on his non-parenting days on weekdays from 3:00 p.m. to 7:00 p.m. and on weekends from 9:00 a.m. to noon.
 - c) imputation of income to the respondent in the amount of \$800,000 per year or such other amount as the court considers appropriate.
 - d) interim child support payable by the respondent based on that imputed income.
 - e) a proportionate sharing of s. 7 expenses commencing July 1, 2023.
 - f) interim spousal support payable by the respondent commencing July 1, 2023.
 - g) an order that \$100,000 of the net sale proceeds of the matrimonial home be held as security for the respondent's future support obligations, and that the claimant shall be at liberty to draw from those funds in the event of the respondent's non-payment of the support order.
 - h) finally, an order for special costs of this application.

Background

- [3] The parties began living together in a marriage-like relationship on February 10, 2015. They married on August 2, 2015, and separated on or about April 6, 2022. The parties have two daughters, ages five and three (the "children"). Pursuant to the interim order of Master Muir made November 25, 2022, the children reside primarily with the claimant, and the respondent has interim parenting time on Mondays and Wednesday from 4:00 p.m. to 6:00 p.m. and on Saturdays from 1:00 p.m. to 5:00 p.m.
- [4] Due to evidence of cocaine use on the part of the respondent, Master Muir also ordered that he was to undergo random urine tests and three five-panel hair follicle tests of 1 1/2 inches of hair at 80-day intervals. A positive test result or failure to take a test as required would result in the respondent's parenting time being supervised. Following positive test results in December 2022 and March 2023, the respondent's parenting time has been supervised.
- [5] The claimant is 35 years old and has been a full-time stay-at-home mother since the parties' first child was born. She previously worked full time as a freelance interior design consultant. The claimant's evidence is that she would like to begin working part time in September 2023, once the children are back to school. The respondent does not challenge the claimant's lack of income or seek to impute income to her at this time.
- [6] The respondent is 39 years old and works full time as a commercial real estate broker for a large international brokerage (the "brokerage").
- [7] After separation, the claimant and the children continued to reside in the former family home on Dunbar Street in Vancouver. That home has just been sold, with a completion date of July 12, 2023. The parties have agreed that the net sale proceeds will be held in trust pending further agreement between the parties or court order. The respondent is consenting the order sought by the claimant with respect to security for support.

Respondent's Income

- [8] I will first deal with the issue of the respondent's income. Under s. 16 of the Federal Child Support Guidelines, SOR/97-175 ("Guidelines"), a parent's annual income is determined using the sources of income set out under the heading "Total Income" in the Canada Revenue Agency T1 general form, namely the income set out at line 15000 adjusted in accordance with Schedule III of the Guidelines.
- [9] This court in *E.L. v. M.L.*, 2021 BCSC 835, at paras. 22 to 23 said:
- [22] A court is to use the best evidence of current income in determining income for the purpose of calculating child support under the Federal Child Support Guidelines, SOR/97-175, as s. 2(3) provides:

Most current information

(3) Where, for the purposes of these Guidelines, any amount is determined on the basis of specified information, the most current information must be used.

[23] In *Ellis v. Ellis*, 2018 BCSC 510, Master McDiarmid discusses the appropriate approach to determining a payor's current support obligation:

[38] Although historical income is often used as the basis for a determination of support obligations, the best evidence is accurate evidence of current income.

[39] In *Heppner v. Jylli*, 2010 BCSC 1020, Mr. Justice Halfyard wrote:

[25] In *L (RE) v. L (SM)* [2007 ABCA 169], the Alberta Court of Appeal had to decide what time period is to be used to determine income, when calculating child support. At para 22, the court stated in part as follows:

. . . The child is entitled to be supported according to the payor's current income, if ascertainable, and if not, by a reasonably accurate estimate of the payor's current income with an adjustment at year's end once the actual income is known.

[26] The Court of Appeal rejected the proposition that the intent of the guidelines was that the past year's income should be used as the basis for calculating child support. Relying on s.2(3) of the guidelines, the court stated that judges should make "an estimate of the payor's current annual income" (para 18).

[10] Section 17(1) of the guidelines provides:

Pattern of income

17 (1) If the court is of the opinion that the determination of a spouse's annual income under section 16 would not be the fairest determination of that income, the court may have regard to the spouse's income over the last three years and determine an amount that is fair and reasonable in light of any pattern of income, fluctuation in income or receipt of a non-recurring amount during those years.

[11] The Court of Appeal in *Harras v. Lhotka*, 2016 BCCA 246, discussed the averaging approach and summarized as follows at para. 35:

[35] In summary, the averaging approach to income determination under s. 17 is very fact specific. Generally speaking, averaging will be applied where income fluctuates, or where the payor has not demonstrated a lasting decline in earnings. Ultimately, it depends on fairly calculating the amount of income reasonably available to pay child support. Depending on the reasons for a pattern of fluctuating income (or, as in *Grossi*, declining income), averaging may be more or less appropriate. If, for example, a substantial increase in income in one of the three previous years is due to receipt of what might be fairly viewed as a non-recurring amount, averaging may be inappropriate. If, however, the nature of a payor's

employment or business is such that wide fluctuations in income are normal and expected, averaging may be more appropriate. As the Court stated in Jakob at para. 46, "[w]here income has fluctuated in previous years, in the sense that it has increased and decreased over a fixed period of time, and it is anticipated that it will continue to fluctuate in that manner, it may be appropriate to take an average of fluctuating income for a fixed number of years" to determine current income.

- [12] Although s. 17 does not contain a discretion to use an average different from a three-year average, the Court of Appeal in Harras at paras. 36-37, citing Oulette v. Oulette, 2012 BCCA 145, held that other provisions of the Guidelines give the court discretion to impute income on the basis of an average income over a period longer than three years where it would more accurately reflect the income available to a payor spouse than would a three-year average.
- [13] Income may be imputed under s. 19 of the Guidelines in a broad range of circumstances, including where the parent has unreasonably deducted expenses from income: s. 19(1)(g). Section 19(2) of the Guidelines specifies that the reasonableness of an expense deduction is not solely governed by whether it is permissible under the Income Tax Act, RSC 1985, c 1 (5th Supp.). As recently noted by Justice Fleming in Sahi v. Sahi, 2023 BCSC 736, at para. 286:
- [286] Although the party seeking to impute income bears the onus of proof, under s. 19(1)(g) of the Guidelines, the initial evidentiary burden is met by showing the other party had deducted business expenses: D.M.B. v. D.W.A.L., 2018 BCSC 1254 at para. 140; and C.M. v. V.M., 2016 BCSC 2144 at paras. 39-40. The onus then shifts to the other party to demonstrate the business expenses are reasonably deducted from income for child support purposes: C.M. This requires the claimed expense to not only be reasonable, but also to have legitimate business purpose. Personal expenses, that is expenses that provide a personal benefit and/or constitute an ordinary living expense, should be added back into the other party's income: D.M.B.; Kowalewich v. Kowalewich, 2001 BCCA 450.
- [14] Although the respondent has the title of senior vice-president, he is not an employee but rather an independent contractor through his personal real estate corporation ("PREC"). His income is commission-based and varies month to month. His independent contractor agreement dated May 9, 2016, specifies that the brokerage provides office space, equipment, and clerical support and that the respondent's PREC is responsible for paying for expenses such as his real estate licence and professional membership fees, all marketing and promotional expenses, including travel, food and automobile, and personal equipment and supplies.
- [15] One of the issues to be determined is the appropriateness of the expenses deducted by the PREC. The PREC has a fiscal year end of April 30th, and its financial statements indicate the following gross revenues for the previous five fiscal years:

2018 - \$829,556

2019 - \$656,033

2020 - \$268,878;

2021 - \$261,514

2022 - \$741,902

[16] Financial statements for the most recent fiscal year, ending April 30, 2023, are not yet available. There is evidence (claimant's 6th affidavit, Exhibit K) that the respondent's PREC received gross revenues from the brokerage in the amount of \$884,836.65 for period December 22, 2021, to December 21, 2022. Of that, \$348,129.05 was paid prior to April 30, 2022, leaving a balance of \$536,707.60 gross revenues paid in the fiscal year ending April 30, 2023.

[17] The respondent's evidence is that the 2023 calendar year has been disastrous industry wide. The respondent has provided a Broker Statement of Account from the brokerage for the period January 1, 2023, to June 8, 2023, showing total commission income for that period as \$7,813 plus draws of \$10,000. The claimant alleges that the respondent may have somehow influenced the brokerage to delay reporting some commission income such that the commission statement is unreliable. There is no evidence to this effect, and the claimant's suspicions are speculative at best. I accept the brokerage's statement of account as evidence of the respondent's gross commission income for the period covered by the statement.

[18] After deducting expenses, the pre-tax profit declared by the respondent's PREC for the past five fiscal years has been as follows:

2018 - \$514,483

2019 - \$353,187

2020 - \$85,587

2021 - \$150,573

2022 - \$535,433.

[19] The respondent's evidence is that the claimant has not requested disclosure of receipts for the expenses claimed by his PREC, and that he has insufficient time, having just retained new counsel at the end of May, to assemble them for the purpose of this application. He says:

My business expenses are legitimate and for the most part are fully and directly related to my business. I concede that some of my meals and entertainment, telephone, travel, and vehicle expenses have a personal use component. I have not had time to fully assess the numbers, but I estimate that the personal use component of those expenses is approximately 25%.

(respondent's 5th affidavit, para. 32)

- [20] The respondent proposes using his PREC's pre-tax profit and adding back 25 percent of the claimed expenses for meals and entertainment, telephone, travel and vehicle as his personal use component. This results in total income to the respondent of \$566,778.50 in 2022, \$170,973.00 in 2021, and \$114,055.25 in 2020, for a three-year average of \$283,935.58. If 50 percent of those four expenses was added back into income, the three-year average rises to \$308,070.83. Neither of these approaches takes into consideration the respondent's income since May 1, 2022, which has been significantly more than either 2020 or 2021.
- [21] The claimant questions the legitimacy of most of the respondent's claimed business expenses. Due to the respondent's non-disclosure of supporting documentation, she says that not more than \$60,000 per year should be allocated as legitimate business expense deductions.
- [22] The claimant proposes that income be imputed to the respondent in the amount of \$800,000, based on his 2022 total commission income from the brokerage of \$884,000 less an allowance for reasonable business expenses. In the alternative, the claimant proposes using a five-year average of the respondent's gross revenues less \$60,000 per year for allowable business expenses. The five-year average using this approach for the five most recent fiscal years, 2018 through 2022, is \$489,000.
- [23] I am satisfied that the respondent's income fluctuates and will continue to do so. He has not demonstrated a lasting decline in earnings. Accordingly, the averaging approach is more appropriate than simply using his earning for the 2022 calendar year. Given the wide swings in the respondent's gross revenue since 2018, from a high of \$829,556 to a low of \$261,514, in my view a five-year average is the appropriate approach.
- [24] Following Sahi, the burden is on the respondent to demonstrate that his business expenses are reasonably deducted from income for child support purposes. It is insufficient to simply say that the claimant has not requested the supporting documentation. By failing to provide a detailed breakdown of those expenses and supporting documentation, the respondent has not met his burden of proof. Accordingly, I will accept the claimant's estimate of \$60,000 per year as an appropriate deduction for reasonable business expenses.
- [25] Using Master Keighley's often cited "rough justice" approach to interim applications, using the five-year average with a \$60,000 per year deduction for expenses, I impute income to the respondent at \$489,000 per year. Interestingly, had I simply used the respondent's 2022 gross revenues less \$60,000 for expenses, being the most current year, the result would have been almost exactly the same at \$484,000.
- [26] Based on an imputed guideline income of \$489,000, the table amount of child support for two children is \$6,159 per month. The respondent shall pay this amount to the claimant commencing July 1, 2023, and continuing on the 1st day of each and every month thereafter until further court order.

Appropriateness of Section 7 Expenses

- [27] The next issue is the appropriateness of various s. 7 expenses sought by the claimant. As the parties agree that the claimant currently has no income, apportionment of s. 7 expenses is 100 percent to the respondent.
- [28] The respondent agrees that the following are reasonable and legitimate s. 7 expenses for the children:
- a) Preventum Health Clinic fees for the children;
 - b) the uninsured portion of the children's medical or dental care, including orthodontic treatment, speech therapy, glasses, counselling sessions, and prescription drugs;
 - c) the children's annual membership fees, lessons and activities at the Arbutus Club; and
 - d) Whistler ski lessons and passes for the children.
- [29] The contentious items are payment for the nanny and the children's attendance at a private faith-based school (the "School"). The Court of Appeal in *Hsieh v. Lui*, 2017 BCCA 51, noted at para. 65:
- [65] An order for contribution to special and extraordinary s. 7 expenses is discretionary. The court may order payment of an enumerated expense taking into account its necessity relative to the child's best interests and the reasonableness of the expense relative to the means of the spouses and the family's pre-separation spending pattern: *Bodine-Shah* at para. 66. In cases involving high-income earners, expenses that may not be considered reasonable for many people may, in context, be reasonable, so long as the award does not enter the realm of wealth transfer rather than support: *Francis v. Baker*, 1999 CanLII 659 (SCC), [1999] 3 S.C.R. 250; *Sirdevan v. Sirdevan*, 2010 ONSC 2375.
- [30] During the parties' marriage, they employed a full-time nanny. The respondent continued to pay the nanny's wages post-separation until November 2022 when he gave the claimant very short notice that he would no longer be paying the nanny, and thereafter he promptly terminated the nanny's services. The claimant rehired the nanny immediately with financial assistance from her family. The claimant wishes to retain the nanny, as she has been a great source of support to both the children and the claimant, and the claimant says that she needs to have reliable childcare in place when she starts to seek employment in the fall.
- [31] The respondent is opposed to paying for the nanny under the current circumstances, where the claimant is not employed or attending school, nor does she have any health conditions that require her to have child care. Section 7(1)(a) of the Guidelines provides that "child care expenses incurred as a result of the employment, illness, disability or education or training for employment of the spouse who has the majority of parenting time" are a special expense.

- [32] In *Hsieh v. Lui*, the Court of Appeal found that a nanny would not be considered a s. 7 expense where the recipient spouse was unemployed and did not require child care for one of the purposes set out in s. 7(1)(a), despite the fact that the payor spouse was a high income-earner and the recipient was assisted by a nanny prior to separation. Those facts parallel the case at bar, and I do not consider the nanny to be a proper s. 7 expense at this time. That may change if and when the claimant obtains employment, but that is an issue to be determined in the future.
- [33] The other contentious item is payment of the fees for the children's attendance at the School. The evidence is that attendance at the School has been a long-standing tradition in the claimant's family. The claimant and her siblings attended there, as did her father and his siblings. There is no evidence of the benefits of this particular school in relation to these children other than family tradition. The respondent also attended a private school for his high school years. He converted to the claimant's faith prior to the parties' marriage.
- [34] The older child has just completed kindergarten and will be entering grade 1 in September. She has attended the School since preschool, commencing in September 2021. The younger child also attends preschool at the School. The claimant says that the parties always planned that their children would attend the School. The respondent's evidence is that he only agreed to the children's attendance at the School because the claimant's father agreed to pay for it. The evidence of the claimant's father is that he offered financial assistance to the parties to help pay the tuition if they needed it, but without specifying an amount or whether such assistance would be in the form of a gift or a loan. He says that he never committed to paying the entire tuition.
- [35] In her 9th affidavit, sworn and filed June 28, 2023, the claimant's evidence is that the respondent paid for the older child's preschool attendance at the School, and she has provided the respondent's bank and Visa statements showing the monthly payments. In March 2022, shortly before the parties' separation, the respondent advised the claimant that he did not have the funds to pay for the older child's kindergarten tuition. It is notable that the respondent received over \$300,000 in commission from the brokerage that month. As the respondent refused to pay, the claimant initially arranged for her father to pay the tuition. When her father changed his mind, the claimant's evidence is that she borrowed funds from her grandparents to pay for the older child's 2022/2023 tuition.
- [36] The tuition fees for both children to attend the School for the 2023/2024 school year is \$33,808.
- [37] An expense must satisfy two requirements in order to be considered a special or extraordinary expense covered by s. 7. The expense must be necessary and reasonable. In relation to extraordinary expenses, relevant considerations for the tests of necessity and reasonableness include whether the expenses are necessary in relation to the child's best interests, and reasonable having regard to the means of the spouses, the child, and to the family's spending pattern prior to the separation.

- [38] Both parties rely on the decision of *L.C.T. v. R.K.*, 2015 BCSC 2378, which was affirmed on appeal on this point at 2017 BCCA 64. At paras. 380 to 381 of the trial decision, Justice Weatherill said:
- [380] Private school fees may be an allowable extraordinary education expense, depending on the circumstances. The child's history of private schooling or pre-schooling and the parents' history of private schooling will be important considerations: *Cochrane v. Zarins* (1998), 1998 CanLII 4270 (BC CA), 36 R.F.L. (4th) 434 (B.C.C.A.). However, these considerations must be examined in light of the parents' means: *B.A.C. v. D.L.C.*, 2003 BCSC 860. Even if the cost of the schooling is beyond the parents' means, if both parents agree it's a significant priority for their child and can limit their spending in other ways, it may still be an allowable expense: *McDonald v. McDonald*, 2001 BCCA 702. Mere belief by one parent that private schooling is in the best interests of the child is not sufficient evidence. Ultimately, it is a fact-specific and contextual inquiry: *Cochrane*.
- [381] When religious school expenses are at issue, it is necessary to assess the role of religion in the family: *Byrne v. Byrne*, 1999 CanLII 6641 (BC SC), [1999] B.C.J. No. 1087 (S.C.).
- [39] In *Byrne v. Byrne*, 1999 CanLII 6641 (BC SC), cited by Justice Weatherill in *L.C.T.v. R.K.*, Mr. Justice Blair said at para. 34:
- [34] Mrs. Chrobot submits that the Catholic school provides Andrew with a better education experience and, further, that it reflects the desire by both she and Mr. Chrobot, as practicing Catholics, to raise Andrew with a similar religious background and training. Mrs. Chrobot's interest in Catholicism developed after she commenced her relationship with Mr. Chrobot and she made the decision to send Andrew to a private Catholic school without consulting or advising Mr. Byrne. I am not satisfied that given the presence of a public school system in Prince George, that the decision to send Andrew to a private school was one made because such private education was necessarily in his best interests. Rather, it seems to have been made to satisfy the interests of Mr. and Mrs. Chrobot in seeing Andrew raised in the Catholic religion.
- [40] In *S.K. v. G.R.*, 2018 BCSC 1758, at para. 72, in dismissing an application for private school to be considered a s. 7 expense, the court commented that there was no evidence that the child had any unique talents or needs that require a private school education.
- [41] Similarly in the case at bar, there is no evidence before me of the necessity of the expense of private school in relation to these children, their unique talents or needs, and their best interests. In submissions, counsel for the claimant argued the importance of the claimant's family tradition of attendance at the School and the religious and cultural immersion provided by a faith-based school.
- [42] As noted in the cases I have just cited, mere belief by one parent that private schooling is in the best interests of a child is not sufficient evidence. The decision to send these children to a private school appears to have been to satisfy the claimant's interest in carrying on the

family tradition rather than because such a private education is necessarily in the best interests of these children. On this interim application, the claimant has not met the test of necessity to have the School fees considered an extraordinary expense. Accordingly, I need not consider the test of reasonableness.

- [43] For clarity, this decision does not mean that the children cannot attend the School. That is still a decision that the claimant may make pursuant to the decision-making authority allocated to her by Master Muir's order. I am simply not ordering the respondent to pay for it at this time.

Spousal Support

- [44] The claimant's entitlement to interim spousal support is not in dispute. I have been provided with a range of DivorceMate calculations by both counsel based on different income scenarios for the respondent. The claimant has provided variations with and without the nanny expense. However, I have not been provided with a DivorceMate calculation based on income of \$489,000 with both the nanny and private school expenses excluded.
- [45] Accordingly, commencing July 1, 2023, the respondent is to pay interim spousal support to the claimant in the mid-range amount under the Spousal Support Advisory Guidelines using the "with child support" formula, based on the respondent having an imputed income of \$489,000 and the claimant having zero income. The s. 7 expenses for the children are \$3,747 as the children's portion of medical expenses, plus \$14,533 for extraordinary extracurricular expenses. Those are the amounts that both parties have agreed to.
- [46] Counsel will need to do the calculation with the parameters I have just described, using the DivorceMate software, and insert the appropriate amount into the formal order. If counsel are unable to agree as to the appropriate amount of spousal support based on those parameters, they may request a brief appearance before me and must submit their DivorceMate calculations in advance.

Conduct Orders

- [47] The next issue to be addressed is the claimant's request for conduct orders restricting the respondent's attendance at the Arbutus Club. The parties have been members of the Arbutus Club throughout their marriage, and the evidence is that both of the parties and the children spend considerable time there on virtually a daily basis. Almost all of the children's extracurricular activities occur at the Arbutus Club.
- [48] The claimant says that the respondent's presence at the Arbutus Club during her parenting time is disruptive to her and detrimental to her mental health. She describes the respondent as an aggressive, manipulative, and intrusive person, and herself as demure, and conflict avoidant. She says that she has suffered greatly during the marriage and its breakdown and cannot tolerate being in the respondent's presence. He is at the Arbutus Club almost daily, and the claimant says he deliberately inserts himself into her parenting time with the

children. She does not object because she does not want to make a scene.

- [49] The respondent does not deny the frequency of his visits to the Arbutus Club. He says that he goes there to work out, and there is evidence of frequent food and beverage purchases. He denies deliberately seeking out the claimant but says they do see each other from time to time. If the children see him, they will run over and give him a hug. He says that he is cordial, and that he and the claimant have recently attended the children's performances and recitals at the Arbutus Club without incident.
- [50] The parties' evidence is diametrically opposed with respect to recent incidents alleged to have occurred at the Arbutus Club. On March 28, 2023, the respondent allegedly cornered the claimant in order to discuss financial issues. On April 28, 2023, he initiated a conversation with the claimant in front of the children, again regarding finances, while at the older child's sports practice. The respondent entirely denies that the first incident occurred, and says that the claimant initiated the second incident. Such discussions in the presence of these young children are entirely inappropriate. The claimant initially sought the same orders before Master Muir, who denied them. Master Muir said at para.112 of her reasons (indexed at 2022 BCSC 2057):

Although I accept that the presence of the respondent at the Arbutus Club may be oppressive to the claimant, I do not believe a court order is required at this juncture. Should the respondent instigate difficulties, there is liberty to apply.

- [51] Much of the evidence on this application regarding the claimant's discomfort in the respondent's presence is similar to that which was before Master Muir. However, the parenting schedule was determined by Master Muir, and each parent has specified parenting time pursuant to that schedule. I accept the claimant's evidence that the respondent's presence at the Arbutus Club is disruptive to her parenting time. The respondent's parenting time is limited for a reason, and if he wants to increase it, he can take the appropriate steps. Spending time at the Arbutus Club at times he knows the children will be there is not the appropriate avenue. There was no evidence from the respondent as to why he cannot schedule his workouts at other times of the day or at another location. It is not in the best interests of the children for their mother to be constantly anxious regarding their father's presence.
- [52] Accordingly, I am granting the order sought by the claimant in para. 2 of the notice of application, restricting the respondent's attendance at the Arbutus Club with the following proviso: the respondent may attend the Arbutus Club on his non-parenting days, with a minimum of 24 hours' notice to the claimant, in order to attend the children's performances, recitals or games.
- [53] I am also ordering, pursuant to s. 225 of the Family Law Act, that both parties will refrain from any discussions with or in the presence of the children concerning adult matters, including financial, court or legal matters.

Drug Testing

- [54] Finally, with respect to drug testing, Master Muir ordered the respondent to undergo random urinalysis on an ongoing basis and three hair follicle tests at 80-day intervals as requested by the claimant. The claimant now says that her request for only three hair follicle tests was an inadvertent error, and that she seeks ongoing hair follicle tests at 80-day intervals on the same terms as ordered by Master Muir.
- [55] The respondent is not opposed to ongoing hair follicle tests but is opposed to those samples being collected by Frank Soper of Vancouver Drug Testing. He proposes that the hair follicle tests be facilitated by a company called SureHire. Although the respondent assures the court in his affidavit that SureHire follows a strict chain of custody procedure, ensuring the identity of the donor and integrity of the sample, there is no independent evidence before the court to verify that assertion.
- [56] I will address each of the respondent's objections to continuing to use Mr. Soper. First, samples collected in December 2022 by SureHire have produced negative results, while samples collected by Mr. Soper on the same day have produced positive results. This anomaly is explained by a difference in the cutoff threshold between the two labs. The lab used by Mr. Soper had a cutoff threshold of 200 parts per milligram, while SureHire's cutoff was 500 parts per milligram. The respondent's sample tested by Vancouver Drug Testing was at 212 parts per milligram, which would show as positive on their test but negative on the SureHire test.
- [57] Second, Mr. Soper was using Expertox, a lab in Texas that had its licence to perform tests in criminal cases in the state of Texas suspended as a result of inaccurate test results. Mr. Soper has since switched to using a different lab, Omega Laboratories, being the same lab as that used by SureHire.
- [58] Third, there has been considerable delay in receiving test results through Mr. Soper. The first sample was collected on December 12, 2022, received at the lab on December 28, 2022, and results released to Mr. Soper on December 30, 2022. He provided the results to the respondent on January 7, 2023, and to the claimant's counsel on January 10, 2023, almost a month after the sample was taken. The explanation for this delay is inadequate. Another significant delay occurred with delivering the March 2023 sample to the lab. This was explained by Mr. Soper as an unanticipated issue with US Customs and Food and Drug Administration in shipping the sample to the US, but has not recurred with the subsequent tests conducted in May 2023.
- [59] Fourth, Mr. Soper's form indicated he had collected 1.5 inches of hair from the respondent on March 2, 2023, when the lab results indicated only 1 inch was received. I do not consider this a material inaccuracy. 1.5 inches is the standard length for a three-month test, with average hair growth of 0.5 inches per month. The notation of a 1.5-inch sample being collected indicates the type of test, being a three-month test, rather than an exact measurement of the sample. The lab results indicate the length of the actual sample as

measured by the lab. In my view, nothing turns on this, although it is notable that the respondent cut his hair very short after the December test, which resulted in him having insufficient hair for a 1.5-inch sample. The explanation given for the very short hair cut is that the respondent did not like his appearance after the December hair follicle samples were taken.

- [60] Fifth, Mr. Soper failed to deliver results directly to the claimant's counsel despite the respondent's direction that he do so. This occurred with the first test in December 2022, and does not appear to have recurred.
- [61] Finally, Mr. Soper did not produce a certificate of positive results from a medical review officer, nor would he provide the name of the medical review officer. Mr. Soper's explanation, in an email to the respondent, is that a medical review is an additional service that would need to be requested and paid for at the time of sample collection. This was done for the May 2023 sample.
- [62] In my view, the only one of these concerns having any merit is the delay in receiving the December 2022 test result from Vancouver Drug Testing, which appears to have been remedied.
- [63] As the respondent has not provided an alternative proposed testing service having a verified chain of custody and identification procedure, I am ordering that the testing shall continue to be conducted by Mr. Soper at Vancouver Drug Testing.

Orders

- [64] To summarize, I make the following orders.
- [65] Para. 1 of the notice of application related to ongoing drug testing is granted as sought.
- [66] Para. 2 of the notice of application related to the respondent's attendance at the Arbutus Club is granted as sought. This restriction is subject to the proviso that the respondent may attend the Arbutus Club during those restricted times, with a minimum of 24 hours' notice to the claimant, in order to attend the children's performances, recitals, or games.
- [67] Pursuant to s. 225 of the Family Law Act, the parties will refrain from any discussions with or in the presence of the children concerning adult matters, including financial, court or legal matters.
- [68] Pursuant to ss. 16 through 19 of the Federal Child Support Guidelines, income is imputed to the respondent in the amount of \$489,000 per annum, and the claimant's income is determined to be zero. On an interim basis, commencing on July 1, 2023, and continuing on the 1st day of each and every month thereafter until further court order, the respondent shall pay child support to the claimant in the table amount of \$6,159 per month for the support of the two children.

[69] On an interim basis, the respondent shall pay 100 percent of the children's special or extraordinary expenses, which shall include:

- a) Preventum Health Clinic fees for the children;
- b) the uninsured portion of the children's medical or dental care, including orthodontic treatment, speech therapy, glasses, counselling sessions, and prescription drugs;
- c) the children's annual membership fees, lessons and activities at the Arbutus Club; and
- d) Whistler ski lessons and passes for the children,

but which shall not include the cost of a nanny or the School fees.

[70] The claimant may renew her application for child care expenses if she obtains employment.

[71] Commencing on July 1, 2023, and continuing on the 1st day of each month thereafter until further court order, the respondent is to pay interim spousal support to the claimant in the mid-range amount under the Spousal Support Advisory Guidelines, using the "with child support" formula, based on the respondent having an imputed income of \$489,000 and the claimant having zero income.

[72] The s. 7 expenses for the children are \$3,747 as the children's portion of medical expenses, plus \$14,533 for extraordinary extracurricular expenses.

[73] Counsel are to do the spousal support calculation with the parameters I have just described, using the DivorceMate software, and insert the appropriate amount into the formal order. If counsel are unable to agree as to the appropriate amount of spousal support, they may request a brief appearance before me and must submit their DivorceMate calculations in advance.

[74] Para. 7 of the notice of application, relating to security for support, is granted as sought, by consent.

[75] In my view, success has been somewhat divided, and costs ought to be costs in the cause unless counsel wish to make submissions as to costs.

[76] Was there anything requiring clarification, or did counsel wish to make submissions as to costs?

[77] CNSL L. BESADA: So costs for the claimant? Or, sorry, sorry, you are -- sorry. I think -- no, I -- I will make submissions for costs, Your Honour.

[78] THE COURT: Okay.

[79] CNSL L. BESADA: Thank you.

[80] CNSL J. BROADHURST: Your Honour, before my friend does, I do have a clarification.

[81] THE COURT: M'mm-hmm.

- [82] CNSL J. BROADHURST: Typically when we calculate s. 7 expenses, we do the spousal support calculation, and then the spousal support recipient has some income for the purposes of the s. 7 calculation. And that --
- [83] THE COURT: That is not how it showed on the DivorceMate calculations that were provided when this matter was heard.
- [84] CNSL J. BROADHURST: All right. Well -- well, I just need to clarify. If it is going to be 100 percent paid by respondent, then that needs to be clear in the calculation, that -- that he -- because it changes the numbers.
- [85] THE COURT: Right.
- [86] CNSL J. BROADHURST: So I just want to be clear on which way we are doing it.
- [87] THE COURT: Just looking at the ...
- [88] CNSL J. BROADHURST: You will see on the spousal support calculations --
- [89] THE COURT: M'mm-hmm.
- [90] CNSL J. BROADHURST: -- where it has the three scenarios.
- [91] THE COURT: Yes.
- [92] CNSL J. BROADHURST: At the bottom you will see CSG apportioning percentage. It will be the very last line.
- [93] THE COURT: Oh, I see what you are saying. Yes, you are right. Thank you, Mr. Broadhurst. It has been a while since I have done one of these where one of the parties has zero income, and so I had forgotten. You are right, the apportionment should be based on what the DivorceMate software provides. The calculation will be based on zero income for the claimant, \$489,000 for the respondent, with the s. 7 amounts that have been agreed on that I have read in. Both the spousal support amount and the apportionment of s. 7 expenses will be based on what the software calculates.
- [94] CNSL J. BROADHURST: Thank you, Your Honour.
- [95] THE COURT: Thank you. I erred in that.
- [96] Sorry, is that clear, Ms. Besada, that point?
- [97] CNSL L. BESADA: Yes. Yes.
- [98] THE COURT: Yes. All right. Thank you.
- [Submissions on costs]
- [99] THE COURT: In terms of costs, I am going to say that success has been divided, and each party should bear their own costs. Let us leave it at that. Thank you both.

"Master Hughes"

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