

CANADA / JUDGMENT

Gartner v. Gartner

2024 BCSC 445

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Supreme Court of British Columbia

DECIDED

15 March 2024

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2024 BCSC 445 Gartner v. Gartner

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gartner v. Gartner,

2024 BCSC 445

Date: 20240315

Docket: E54374

Registry: New Westminster

Between:

Lori Anne Edith Gartner also known as Lori Teichroeb

Claimant

And

Mark Robert Gartner

Respondent

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Claimant:

M. Campbell

Counsel for the Respondent:

S. Sihota

Place and Dates of Hearing:

Port Coquitlam, B.C.

February 12 and 13, 2024

Place and Date of Judgment:

New Westminster, B.C.

March 15, 2024

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I. Introduction

- [1] There are two applications before the Court in this family law proceeding. Each application seeks a change in the amount of spousal support currently paid to the claimant, Lori Gartner, also known as Lori Teichroeb, by the respondent, Mark Gartner, under a final order made on consent of the parties before Justice Jenkins on March 19, 2020 (the "Final Consent Order").
- [2] The claimant applies to increase the monthly spousal support she receives. The respondent seeks to terminate or reduce the spousal support he pays.

- [3] The Final Consent Order contains a clause that purports to allow the parties to review the spousal support. Specifically, the term orders, "[b]y consent, either party may apply for a review of the quantum of spousal support after June of 2023." As I will discuss below, there was some confusion in the nature of the applications before me regarding whether they were review applications--which do not require a material change in circumstances and are conducted as a de novo hearing--or whether they were variation applications--which require a material change in circumstances since the time of the Final Consent Order. This issue was made more complicated because the claimant's application also sought retroactive spousal support which engages different considerations for the Court than would a review application.
- [4] During the course of the hearing, the parties agreed that the nature of the applications was that of a review of spousal support. Further, the claimant abandoned her claim for retroactive spousal support. As I will discuss below, I am satisfied that the applications before me are review applications.
- [5] These applications involve a number of related issues for the Court to resolve which include the following:
- a) What is the scope of the review provided for in the Final Consent Order? More specifically, does the Court have jurisdiction to consider the claimant's entitlement to spousal support, or only the quantum?
 - b) If the claimant is entitled to spousal support, either because it is not for this Court to decide entitlement on this application, or it is determined that entitlement is warranted, what should be the amount and duration of spousal support and when should any changes to the amount of spousal support commence?
- [6] Further, each party asks the Court to impute income to the other party for the purpose of assessing spousal support. As such, I will need to address whether income should be imputed to one, both or neither of the parties.
- [7] Before turning to the substance of my reasons, I note the parties accept that because they were married and now divorced, the doctrine of paramountcy provides that the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp), is the applicable statute under which I should consider the issue of spousal support.
- [8] I also understood from counsel that, given the relatively small amounts of support in issue, the parties seek clarity and certainty regarding the amounts of spousal support into the future so that they will not be required to frequently return to court. As I understand the parties' concern, they do not wish to incur the additional time, stress and expense that is required by litigation. Accordingly, in coming to my conclusion, I have attempted to provide certainty and clarity to the parties in determining the appropriate amount of spousal support in the circumstances.

- [9] In these reasons for judgment, for context, I will begin by providing a brief factual background of the parties, their marriage and the procedural history. I then turn to my analysis and determination of whether the respondent should be required to continue to pay spousal support to the claimant and, if so, in what amount, from what point in time, and for what duration.

II. Background Facts

A. The Parties, the Marriage and the Breakdown of the Marriage

- [10] The claimant was born in June 1964 and is currently 59 years old. The respondent was born in June 1963 and is currently 60 years old. They married in August 1986. They had two children together who are now adults.
- [11] The parties first separated in January 2013, for a period of seven months, but reconciled in July 2013. The parties separated again on June 1, 2015, but continued to live in the same home until the end of September 2015. The parties accept that for the purpose of calculating spousal support, the marriage ended in January 2013, such that the duration of the marriage was 26 years and four months.
- [12] After the first separation in January 2013, the parties entered into a Memorandum of Understanding (the "First MOU"). The purpose of the First MOU was to resolve as many issues as possible between the parties arising from the breakdown of the marriage.
- [13] After the parties reconciled and again separated, they entered into a second Memorandum of Understanding on September 8, 2015 (the "Second MOU"). The purpose of the Second MOU was, similar to the First MOU, to resolve outstanding issues between the parties. In terms of spousal support, which is relevant to the application now before the court, the Second MOU provided the following:
7. The Husband and the Wife have agreed to spousal support in the form of sharing equally in any and all net income they receive from their employment (other than overtime paid). When each party is paid, they will transfer 50% of the net income of said funds to the other party. This arrangement will remain in effect until each of the parties retire, no sooner than age 55, and up to and including any subsequent years beyond age 55.
- [14] In essence, the Second MOU required the parties to share their net income. The respondent points to the language contained in the Second MOU as some evidence that he only ever intended to pay spousal support until he retired and that his obligation to pay spousal support would cease when he retired. I will return to this issue in detail below.

B. The Final Consent Order

- [15] On March 19, 2020, the parties entered into the Final Consent Order outlining the respondent's spousal support obligations as well as other various categories of compensation, such as pension equalization and cash payments for specific claims.
- [16] The spousal support provisions of the Final Consent Order relied on the parties' 2019 incomes which were disclosed in financial statements. The spousal support was calculated using the claimant's income of \$47,656 and the respondent's income of \$65,665 and was set, by consent, at monthly spousal support commencing on January 1, 2020, and payable thereafter in the amount of \$657 per month.
- [17] As set out above, the Final Consent Order provided a clause to allow the parties to apply to review the spousal support:
9. By consent, either party may apply for a review of the quantum of spousal support after June of 2023.

C. The Parties' Work History

- [18] The claimant started working as a Medical Secretary for the British Columbia Cancer Agency in 1990. She retired from that job, where she had been working part time at various times on March 31, 2020, after a 30-year career.
- [19] The respondent starting working with the Abbotsford Police Department ("APD") on November 7, 1995. He retired from the APD on September 28, 2018, with an unreduced pension. The respondent provided evidence that he retired from policing in part due to job-related stress and injuries. I was not provided with supporting medical evidence, but the respondent set out in his affidavit that he suffers from Post-Traumatic Stress Disorder ("PTSD") from his work as a front-line police officer. In the materials before me, he swore that he also suffers from chronic pain in his back and knees from injuries he sustained while working as a police officer. Further, he says that he has anxiety and blood pressure issues which impacted his decision to retire from the APD as soon as he reached his full pension.
- [20] After retiring from the APD, the respondent worked at the Provincial Health Services Authority ("PHSA") as a Forensic Security Guard from August 3, 2018, to January 19, 2020. He says he stopped working at that job because of harassment and bullying that occurred at the PHSA Forensic Psychiatric Hospital. The respondent's annual income from working for the PHSA in 2019 appears to be approximately \$65,000.
- [21] On January 6, 2020, the respondent became employed with the Township of Langley as a part-time Bylaw Officer. I note that there was no gap in employment for the respondent between leaving his employ with the PHSA and beginning his work with the Township of Langley as he had secured his new job before concluding his previous job. The respondent earned approximately \$60,000 annually as a part time Bylaw Officer during the 2020 taxation year. On July 19, 2021, the respondent's employment as a Bylaw Officer was terminated. He

has not worked since that time. In his affidavit filed March 1, 2023, he provides at para. 33, "I have chosen to remain retired."

III. The Parties' Positions

- [22] The respondent contends that he has paid sufficient spousal support and that he should not have been required to pay any spousal support after June 2023. He argues that the review clause in the Final Consent Order allows the parties to adjust spousal support as of July 1, 2023. As an alternative, he asserts that he should no longer be required to pay spousal support going forward or that the amount should be reduced.
- [23] The respondent asserts that the parties never intended for spousal support to continue after they retired. He points to the Second MOU which says that the parties will continue to share income as spousal support, until they retire, but not before age 55. He interprets this section as meaning that after he reached the age of 55 he could retire and his obligation to pay spousal support would cease.
- [24] He also contends that the claimant is currently in a superior financial situation to him and so his support is no longer required to make her economically self-sufficient. In fact, he says that his current financial situation is dire because he is heavily indebted for loans and credit cards and he does not have sufficient funds to pay his expenses and spousal support.
- [25] He points to the claimant re-partnering with an individual who, the respondent says based on tax returns, has significant income. He also asserts that the claimant has a share of his pension and owns a house, thus putting her in a stable and self-sufficient financial situation. The respondent also contends that when all of the spousal support he has paid since separation is summed, it exceeds the amount he would have had to pay if he had paid an initial lump sum amount of spousal support. Put simply, the respondent says he has paid his fair share of spousal support and should no longer be required to pay.
- [26] As a further alternative position, the respondent says that the claimant is choosing not to work and so should have income imputed to her of \$60,000, which would, in effect, equal his income such that a calculation under the Spousal Support Advisory Guidelines [SSAG] would result in no ongoing spousal support obligation. The respondent asserts that the claimant could work, but instead has chosen to retire to care for her mother. I note that during the submissions, the respondent's counsel fairly acknowledged that the argument to impute income to the claimant is a defensive strategy to offset the claimant's application to impute income of \$95,000 to the respondent.
- [27] The claimant contends that the respondent was not truthful about his income in 2019 when the parties entered into the Final Consent Order. She says that the respondent was earning at least \$95,000 in 2019, but the spousal support was calculated on the respondent's income being only \$65,000. However, during the application before me the claimant retreated from that position and now seeks spousal support only from July 1, 2023, forward after accepting that she should have income imputed to her based on her full time employment at the

Cancer Agency of \$47,656 and income imputed to the respondent of \$79,691, which is his income earned as a Bylaw Officer calculated as \$42.57 hourly x 36 hour per week x 52 weeks. Using these incomes, the claimant says she is entitled to support in the SSAG mid-range of \$1,168 per month.

- [28] The claimant asserts that the review process does not permit the Court to assess the claimant's entitlement to spousal support. She points to the language of the Final Consent Order which specifies that the parties may review the "quantum" of the spousal support, but says nothing about reviewing the claimant's entitlement. She contends that she should be entitled to spousal support until one of the parties reaches the age of 65 years old, which is often considered the standard retirement age in Canada.
- [29] The claimant further contends that the respondent's argument that the parties only intended to pay spousal support until they retired and that he is in an inferior economic situation to her does not support a cessation of spousal support. She asserts that the basis of her spousal support was to compensate her for her economic sacrifices during the lengthy marriage. The fact the respondent has since made poor financial decisions that have put him in debt, is not within her control nor her responsibility. In short, she asserts that she should not suffer economically because of the respondent's choice to prematurely stop working or to have a lifestyle he cannot support.

IV. Analysis and Determination

- [30] I will now turn to my analysis and determination of the issues. Before doing so, I note that, although the respondent seeks a change in spousal support back to June 2023, the parties agree that the application before me is not an application for retroactive spousal support. This is because the Final Consent Order provides that the parties are able to review the application "after June 2023."
- [31] Further, the respondent filed his notice of application to review the spousal support in March 2023, which is before the review date of June 2023, set out in the Final Consent Order. As I understand the procedural history of these applications, it is only a result of court resources and scheduling issues that the applications are only now before the Court. As such, for clarity, this application does not involve an assessment of retroactive spousal support because the review is to occur from the circumstances after the June 1, 2023 spousal support payment contemplated in the Final Consent Order.
- [32] Given that reviews of spousal support are prospective only, I do not have the authority on this review application, absent the factors and circumstances contemplated to assess retroactive support set out by the Supreme Court in *D.B.S. v. S.R.G.*, 2006 SCC 37, to vary the spousal support before July 1, 2023: *Riznek v. Riznek*, 2022 BCSC 2068 at para. 105.

A. Is this Application a Review or Variation of Spousal Support?

- [33] While the parties filed the applications seeking a variation of spousal support, they now agree that the applications are review applications. I agree that the applications before me are to review spousal support, and are to be conducted in accordance with s. 15.2 of the Divorce Act. Our Court of Appeal in *Morck v. Morck*, 2013 BCCA 186, described the nature of an application to review spousal support in contrast to a variance application:
- [17] By contrast, on an application to review an earlier order of spousal support, the applicant need not establish a material change in circumstances. Instead, the review is a hearing de novo, and treated as an initial application for support under s. 15.2 of the Divorce Act. This permits the court to adjust support in a manner that takes into account changes that may have been contemplated by the parties at the time the order was made, but were nevertheless uncertain. Because the issues on review are similar to those on an initial application, the Spousal Support Advisory Guidelines may be used for guidance: *Domirti v. Domirti*, 2010 BCCA 472 at paras. 32-36, 10 B.C.L.R. (5th) 281; and *Tedham v. Tedham*, 2005 BCCA 502 at paras. 22, 47 B.C.L.R. (4th) 254.

[Emphasis added.]

- [34] As described by the Court in *Morck*, the review before the Court permits me to adjust the support to consider changes that may have been contemplated at the time of the Final Consent Order, but were still uncertain. Given the fact that the parties were entering a new phase and stage in their employment, with the respondent having retired from the APD in 2019 and taking on different employment at the time of the Final Consent Order, it appears that the purpose of the review period being set for June 2023 was to determine what income the parties would have at that time.
- [35] Supporting the purpose of reviews to better ascertain the parties' incomes in the future, our Court of Appeal in *Toth v. Toth*, 2016 BCCA 50, held that a review mechanism can be useful especially if there are certain circumstances that are unknown to the parties at the time that they make the spousal support order: at paras. 12 and 22.
- [36] In the circumstances of this case, considering the wording of the review clause in the Final Consent Order, I am satisfied that it is appropriate to review the spousal support award by considering the factors under s. 15.2(4) of the Divorce Act. As such, I am able to consider, de novo, the parties' current employment status, income and capacity to earn income to determine the appropriate level of spousal support.

B. Is the Court Able to Review the Claimant's Entitlement to Spousal Support?

- [37] The respondent argues that the claimant is no longer entitled to spousal support and that I am able to review her entitlement to spousal support based on the parties' current circumstances. I disagree. In my view, the language in the Final Consent Order is unambiguous in that it provides for a review of the quantum of spousal support, but is silent on whether the claimant's entitlement to spousal support is reviewable.

- [38] As held by Chief Justice Hinkson in *Kennett v. Kennett*, 2021 BCSC 2265, a review application is not an opportunity for a party to re-litigate the issue of spousal support in its entirety. This also means that a review is not a chance to reargue entitlement if not contemplated in the review process:
- [22] A review application, is not, however, an opportunity for a party to reargue their position. The issues identified in the order permitting the review are the only issues the court ought to consider on the review. The only issue that Kelleher J. intended to be reviewed, was the respondent's income from future employment, and whether that might affect her spousal support with respect to quantum. I find that Kelleher J. did not intend for the review to include a reconsideration of entitlement.
- [23] I therefore find that the claimant's application with respect to spousal support and the termination of Manulife policy 7339730, should be determined on the basis that this is a review that does not oblige the claimant to show a change in circumstances. However, it is not open to me to reconsider the respondent's entitlement to spousal support on this review.
- [39] The Final Consent Order clearly provides that the review, to be conducted after June 2023, is to review only the quantum of spousal support. It is not open to me to consider the claimant's entitlement to spousal support.
- [40] I will now turn to what is the appropriate quantum of spousal support in the circumstances of this case.

C. What is the Appropriate Quantum of Spousal Support?

- [41] As set out above, the respondent believes he has paid sufficient spousal support. Further, he says that he has retired and has insufficient income to pay his current spousal support obligations. The claimant contends that the respondent made a commitment to pay spousal support and his choice to retire and have no income should not affect her right to spousal support which was intended to compensate her for her economic opportunity costs and sacrifices during the 26-year marriage.
- [42] As a starting point, while the issue of entitlement is not before me, I find that there are strong grounds to determine that the spousal support in this case is in the nature of compensatory support.
- [43] The parties were married for 26 years, which I consider to be a long marriage. During that marriage, based on the evidence, I have no reason to doubt that the respondent was an engaged father who assisted with the family and contributed to the household. This is commendable. However, I have no hesitation in concluding that the claimant significantly sacrificed her economic opportunities in her employment by expending her time and effort to raise the parties' children and to maintain the family home. In her affidavit filed June 12, 2023, she sets out her role during the marriage as follows:

8 During the marriage I was employed outside the home part time as a Medical Secretary after the children were born from 1994 - 2009 (for 15 years). During this period I took care of the day-to-day care of the home and children when Mark was at work. I dealt with the kids teachers and caregivers and took them to most medical or dental appointments. We shared in these responsibilities when he was home from work.

- [44] Given that the spousal support is compensatory in nature, there is a strong basis to conclude that while the current means and needs of the spouses is important, the spousal support is also intended to compensate the spouse who gave up economic opportunities during the marriage for the benefit of the other spouse and the family.
- [45] Assessing what is an appropriate amount of spousal support is also guided by the objectives of spousal support set out in 15.2(6) of the Divorce Act. Section 15.2(6) provides that an order for 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.
- [46] While the respondent is now not working and thus not earning employment income, the claimant says the Court should impute income to him as he has both the ability and the obligation to work, in part, to be able to meet his spousal support obligations.
- [47] The court has a broad discretion to impute income to either or both spouses for the purposes of determining spousal support: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para 34. The burden of establishing an evidentiary basis for imputing income to the other spouse lies with the spouse seeking to impute income: *MacCarthy* at para. 35; *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36; *Jendruck v. Jendruck*, 2014 BCCA 320 at para. 23.
- [48] The respondent states that he always intended to retire early. He also sets out in his affidavit that as a result of his work as a front-line police officer he suffers from PTSD and other health issues which prevent him from working. Even accepting the respondent's claims that he had intended to retire once he received his full pension from the APD, he did not do so. Instead, as set out above, the respondent worked at two different jobs after retiring from the APD. Indeed, at the time the Final Consent Order was negotiated and signed, the respondent had already retired from the APD and was working as a Bylaw Officer for the Township of Langley. In my view, the respondent has the skills and ability to be employed in some

capacity.

- [49] A payor cannot cease employment voluntarily and prematurely if they have obligations to pay spousal support. Put a different way, throughout a marriage, each spouse makes contributions and sacrifices. Part of the financial equalization between spouses who separate after long marriages is to compensate the other spouse for the contributions and sacrifices through spousal support. A spouse cannot decide to change their circumstances by becoming unemployed to be released from those obligations. No doubt, circumstances in life are unpredictable and individuals can face unexpected situations that require an adjustment to rebalance equity. In the case of the respondent, however, I am persuaded that his ceasing to work is more voluntary in nature. That said, in imputing income, I am cognizant of his older age and health issues which may present some limit to his earning capacity.
- [50] As set out in *W. v. W.*, 2005 BCSC 1010, Justice Martinson discussed the realities of the contributions made by spouses in long marriages which I find to be applicable in the case at bar:
- [13] Compensatory support recognizes not just economic disadvantage suffered as a result of a marriage or its breakdown but also economic advantage arising from the marriage or its breakdown: s. 15.2(6) (a) of the Divorce Act. The types of advantages and disadvantages that arise can be seen in situations such as the one presented in this case. That is, one spouse's career, (often that of the husband) is given priority and that spouse is the primary income earner. The other spouse (often the wife) is the primary parent, but also works and is a secondary earner.

(See also *Kennett* at para. 48.)

- [51] The respondent stopped voluntarily paying support in September 2020, only months after agreeing to the Final Consent Order. He argues that he always planned to retire at or around the age of 55 and did not intend to pay spousal support after he retired. There are at least two problems with the respondent's argument. First, stopping paying support in September 2020, cannot be supported by the clear terms of the Final Consent Order which ordered a review after June 2023. Second, courts have held that a party's intention to retire is not determinative of that spouse's maintenance obligations. See, *Ernst v Ernst*, 2023 BCSC 65 at para. 83, *Mill v. Mill*, 2014 BCSC 1754 at para. 24, and *Hague v. Hague*, 2021 BCSC 771 at paras. 8 to 9, *aff'd* 2022 BCCA 325.
- [52] Even in the circumstances of a variation application, as opposed to a review like that now before the Court, early retirement (typically before age 65) may not be considered a material change of circumstances where a compensatory obligation still exists, and the obligation may continue into retirement: see *Gajdzik v. Gajdzik*, 2008 BCSC 160 (Chambers); *Lochhead v. Lochhead*, 2014 BCSC 962 (Chambers); and *Raschpichler v. Raschpichler*, 2023 BCSC 1505.

- [53] Given the foregoing, I accept that the respondent could and should continue paying spousal support. I have reduced the income sought to be imputed to him by the claimant of \$65,000 and from the amount of \$67,000 used in the Final Consent Order. Instead, I impute income to him in the amount of \$55,000 per year. He has shown that he can obtain that level of income or higher. For reference, his annual salary as a Forensic Security Officer with PHSA was approximately \$43,462.50 (\$23.18 hourly x 37.5 hours per week x 50 weeks), and his annual salary as a Bylaw Officer with the Township of Langley was approximately \$61,687.50 (\$32.90 hourly x 37.5 hours per week x 50 weeks). The average of those two approximate salaries is \$52,575. Considering that the latter position with the Township of Langley was a significantly higher-paid job, and the potential of other compensation for such things as overtime, I conclude that a reasonable estimate is \$55,000, particularly reflecting that the respondent's more advanced age and his complained of health issues may limit his ability to earn income at the rate he did in 2019.
- [54] While I acknowledge the respondent's claimed health issues and injuries suffered while at the APD, I note that these issues did not prevent him from getting two different jobs after he retired from policing. His argument that he had always intended to retire at 55--which he said was evidence from the Second MOU--rings somewhat hollow to me as at the time he agreed to the terms of the Final Consent Order he had already rejoined the work force after retiring from the APD.
- [55] In respect of the claimant's income, I accept her concession, which I view as reasonable, that, but for her mother's ill-health she could be working in paid employment and earning income. While her counsel submitted that caring for a parent with dementia is "no picnic", the respondent acknowledged that she is making a choice to care for her mother and prioritizing that over working for income. She submits that based on the past income and her earning ability she could earn \$47,000 per year. In my view, this amount may exaggerate the claimant's earning capacity given that she is now older and her finding full time work that pays an equivalent to her highest earning years at the BC Cancer Agency after a 30 year career may be unrealistic. As such, I will impute income for the purposes of calculating spousal support to the claimant at \$40,000.
- [56] I pause to comment on the alternate position of the respondent taken in the application materials that the claimant should have an imputed income of \$60,000. Counsel submitted that this was a defensive strategy to offset the imputation of income of \$95,000 sought to be imputed to the respondent by the claimant. I commend the candidness of acknowledging the rationale of that argument. However, I find that both the claimant's seeking to impute income of \$95,000 to the respondent and the respondent's seeking to impute income of \$60,000 to the claimant is untethered from the evidence.
- [57] While litigation in Canada is based on an adversarial system, I discourage parties, especially in family matters, from inflating numbers in the spirit of gamesmanship or gaining a tactical advantage. In my view, taking positions that are not supported by the facts offend the three core principles of modern family law which were articulated by Professor Rollie Thompson

to include: (1) to assure the best interests of the child; (2) to reduce conflict; and (3) to maintain, restructure and encourage family relationships: D.A. Rollie Thompson, "Are there Any Rules of Evidence in Family Law?" (2003), 21 CFLQ 245. In this case, the positions taken by the parties of inflating incomes for the purpose of obtaining a tactical or strategic advantage run contrary to reducing conflict or assisting in maintaining or encouraging family relationships. A better practice to achieve fair and just results would be for parties to only take positions undergirded by supportable facts.

- [58] In determining an amount of spousal support, I accept that the parties' current financial circumstances appear similar and, in fact, it appears that the claimant may enjoy a superior financial position to the respondent at this time. I have also considered the factor that the claimant has re-partnered, as it can be a factor for considering whether spousal support should continue: *Zacharias v. Zacharias*, 2015 BCCA 376. However, while I was provided with an income tax return purporting to show that the claimant had re-partnered with an individual with significant income, there was no evidence before me about whether the claimant has access or the benefit of that additional income. Further, I understand that the respondent has also re-partnered although I was provided with no evidence regarding the financial implications of his re-partnering.
- [59] In summary, the respondent's financial issues appear to be the result of his voluntary decision to stop work. His decisions, within his control, to make his own financial circumstances worse should not negatively impact the claimant by affecting the respondent's obligation to pay spousal support. As I set out above, the respondent committed to paying spousal support to the claimant and so cannot unilaterally retire hoping to frustrate his obligations.
- [60] In saying this, it is important to ensure that there is fairness between the parties such that neither the payee nor the payor of spousal support is put in a untenable financial position or suffer extreme financial hardship. However, from the evidence before me, it appears that the respondent has the ability to work and earn income for another several years. His obligations to pay spousal support to the claimant should not be extinguished by his current choices.
- [61] Given the foregoing, based on my calculation of spousal support under the SSAG, with income imputed to the claimant of \$40,000 and to the respondent of \$55,000, the respondent is required to pay monthly spousal support of \$469 to \$574 with a mid-range monthly amount of \$547. On this basis, I order that the respondent is to pay the claimant monthly spousal support of \$550 commencing on July 1, 2023.
- [62] In terms of the duration of the spousal support, the evidence supports that the parties had some intention to retire earlier than the age of 65 years old. Further, as set out above, there is some evidence that the claimant is achieving or exceeding the economic self-sufficiency of the respondent, both by owning a home and re-partnering. I trust that this will continue. Accordingly, I find that the respondent should continue to pay spousal support until the

month in which he reaches the age of 63 years old. By my calculation his final payment will be on June 1, 2026.

- [63] The parties sought certainty and clarity in this proceeding. My hope is that by setting out an amount and duration of the spousal support, the parties will have the clarity needed to avoid further expense and stress that, as compared to the relatively small amount of spousal support at issue, appear significant.
- [64] As a final comment on this issue, I will address the respondent's assertion that when the total amount of the spousal support he has been obligated to pay since separation is added together, it is equal to or greater than the lump sum calculation of spousal support generated under the SSAG. I do not accept this argument as persuasive. In my view, the comparison is not of great assistance in determining the duration of periodic payments. While it may give a rough comparison, periodic payments and lump sum payments have many different implications for both the payor and the recipient. Where a court considers a lump sum award, it is obliged to consider the advantages and disadvantages of such an award: *Parton v. Parton*, 2018 BCCA 273 at para. 47. Further, where a lump sum award is considered in the first place, there are "difficulties inherent in calculating an appropriate award where lump sum support is awarded in place of ongoing indefinite periodic support": *Davis v. Crawford*, 2011 ONCA 294 at para. 68, cited in *Parton* at para. 47.
- [65] In any event, in this case, the parties agreed to periodic payments in the Final Consent Order. It is unhelpful, nine years after separation and four years after the parties consented to periodic payments, to now speculate as to what might have been if a different arrangement had been made between the parties for the respondent to pay a lump sum amount of spousal support.

D. Requirement for the Respondent to Pay Spousal Support Calculated on his Shared Pension

- [66] While not seriously contested by the claimant, the respondent expressed concern that the claimant was attempting to have spousal support calculated based on the respondent's pension income. I acknowledge the respondent's concern and accept that it would be improper to calculate spousal support based on pension amounts that have already been divided between the parties. This has colloquially been described as a form of "double-dipping" in that it would require a party to pay spousal support calculated on an asset that has already been shared between the parties.
- [67] The concern against double recovery and how to avoid the issue was described by the Supreme Court in *Boston v. Boston*, 2001 SCC 43, as follows:

[63] How is double recovery fairly avoided? (See Shadbolt, *supra*, per Czutrin J., at para. 46.) It is generally unfair to allow the payee spouse to reap the benefit of the pension both as an asset and then again as a source of income. This is particularly true where the payee spouse receives capital assets which she then retains to grow her estate. The comments of Walker, *supra*, at p. 233, bear echoing:

It is well-recognized that a borrower should not be compelled to continue monthly loan payments to the lender if the borrower has previously paid the full amount owing. "Double dipping" is analogous to such a situation and is logically and mathematically indefensible.

[Emphasis in original.]

[68] Given the foregoing, and the arguments raised before me, I wish to be clear that I am not basing any of my assessment of the quantum of spousal support on the respondent's pension income. In other words, I am not including any of the divided pension income in my assessment of imputed income to the parties in assessing support.

V. Summary of Order

[69] In summary, I order as follows:

- a) The Final Order of Justice Jenkins issued March 19, 2020 (the "Final Consent Order") is varied to the extent necessary to give effect to this order;
- b) The respondent, Mark Gartner, shall pay spousal support to the claimant, Lori Gartner also known as Lori Teichroeb, commencing on July 1, 2023, in the amount of \$550 per month and continuing on the first day of each month thereafter;
- c) Unless varied by written agreement of the parties or further order of the Court, the respondent shall continue to pay spousal support to the claimant until the month in which he reaches the age of 63 years old being June 1, 2026; and
- d) For clarity, the respondent remains obligated to pay all previous amounts owing under the Final Consent Order, including arrears up to and including June 1, 2023. The parties shall adjust any amounts paid after July 1, 2023, in the amount set in the Final Consent Order of \$657 per month to reflect the amount of spousal support set out in this order of \$550 per month commencing on July 1, 2023.

VI. Costs

[70] Due to time constraints, the parties did not have an opportunity to make submissions on costs during the application.

- [71] However, the general rule in respect of costs is that the party who is substantially successful is entitled to his or her costs: *Gold v. Gold* (1993), 106 D.L.R. (4th) 452, 1993 CanLII 1248 (B.C.C.A.) at para. 19. This principle accords with Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009, that costs must be awarded to the successful party unless the court orders otherwise.
- [72] *Gold* has been interpreted as setting the standard of "substantial success" for the recovery of costs: see *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 45, leave to appeal ref'd, 2002 BCCA 454; *Marquez v. Zapiola*, 2014 BCCA 35 at para. 16; and *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 345 at para. 13. In *Fotheringham*, Mr. Justice Bouck determined that substantial success is equated with a party achieving approximately a 75% success rate. Mr. Justice Bouck wrote:
- [45] substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [73] In my view, the claimant has enjoyed substantial success in this application, primarily because she has resisted the respondent's application to terminate spousal support immediately after June 2023 and has instead seen it extended for an additional three years.
- [74] If the parties are unable to agree to costs, or wish to make submissions to me regarding costs, they have leave to appear before me for that purpose by making arrangements to do so through Supreme Court Scheduling within 30 days of the date of this judgment. Otherwise, I order that the claimant is entitled to her costs of these applications at ordinary difficulty.
- [75] I thank counsel for their submissions.

"Gibb-Carsley J."

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Prepared on 28 October 2026 · Esheria