

CANADA / JUDGMENT

## Lehenbauer v. Kristinson

2025 BCSC 660

COURT

Supreme Court of British Columbia

DECIDED

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2025 BCSC 660 Lehenbauer v. Kristinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lehenbauer v. Kristinson,

2025 BCSC 660

Date: 20250409

Docket: E141096

Registry: Kelowna

Between:

Katrina Anna Lehenbauer

Claimant

And

Bruce Matthew Kristinson and Sue Hassett Mijo

Respondents

Before: The Honourable Justice Hardwick

Reasons for Judgment

Counsel for the Claimant:

N.L. Mills

Counsel for the Respondent Bruce Matthew Kristinson:

B.R. Coyne

No other appearances

Place and Date of Trial/Hearing:

Kelowna, B.C.

August 29, 2024

Written Submissions Received:

March 21 and 27, 2025

Place and Date of Judgment:

Kelowna, B.C.

April 9, 2025

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## Introduction

- [1] These are my reasons for judgment in respect of two notices of application, both of which concern the issue of spousal support, which I initially heard on August 29, 2024.

- [2] The first was the application of the claimant, Katrina Anna Lehenbauer (the "claimant"), filed May 31, 2024. The second was the cross-application of the respondent, Bruce Matthew Kristinson (the "respondent"), filed July 12, 2024 (collectively, the "Original Applications").

## General Overview

- [3] By way of factual background to the Original Applications, the claimant and the respondent began living together in a marriage-like relationship on May 1, 2008, were married on March 20, 2017, and separated in 2022. There is a slight discrepancy as to the date of separation, but I accept it was on or about July 3, 2022, when the claimant communicated to the respondent her intention to separate without the prospect of reconciliation.
- [4] Moreover, even if I were to accept that the respondent ought to have been aware of the claimant forming an intention to separate somewhat earlier by taking an extended trip to stay with her parents in another community within the province, the precise date of separation is not material to the issues before me for determination at this juncture. It was, for purposes of these reasons, a marriage-like/marital relationship of approximately 14 years in duration.
- [5] There are no children of the marriage.
- [6] The parties were quite young when their marriage-like relationship began. The claimant was born in January 1986 and is presently 39 years of age. The respondent was born in February 1984 and is presently 41 years of age.
- [7] Originally the parties resided in Alberta. They moved to British Columbia prior to marriage and have remained in the province since their separation.

## Litigation History

- [8] The claimant commenced these proceedings on January 13, 2023. She amended her notice of family claim on March 8, 2023. It was originally a Vancouver action.
- [9] The respondent filed a response to family claim and a counterclaim on February 23, 2023.
- [10] The claimant filed a response to counterclaim on March 24, 2023.
- [11] In her amended notice of family claim the claimant sought spousal support from the respondent. In his counterclaim, the respondent sought spousal support from the claimant.
- [12] The parties swore and exchanged Form 8 financial statements in March 2023.
- [13] Both Form 8 financial statements are subject to some criticism from the other party but they are, I accept, entirely satisfactory. Further, while the parties generally maintained individual independence in their financial affairs, they clearly had a functional understanding of the other's financial circumstances.
- [14] There was a judicial case conference (the "JCC") held on March 28, 2023.

- [15] Based on the financial disclosure referred to above and within the context of the limited scope of the court's jurisdiction at the JCC, the parties negotiated a time limited interim spousal support regime.
- [16] Specifically, the Original Applications arise from a spousal support review clause that was included in the order of Justice Baker following the JCC (the "JCC Order"). The JCC Order provides as follows as it pertains to spousal support:
3. The Claimant will pay spousal support to the Respondent, Bruce Matthew Kristinson on an interim without prejudice basis, at the low range of the Spousal Support Advisory Guidelines, with the incomes of the parties to be \$120,000 [for the claimant] and \$30,000 [for the respondent].
  4. Spousal support will be reviewed 12 months from the date of [the JCC] order [(the "Review")].
- [17] Notably, the JCC Order does not actually fix the specific quantum of the support or provide the commencement date.
- [18] I accept from the evidence, however, that the amount was \$1,631 per month payable by the claimant to the respondent commencing April 1, 2023. The claimant continues to pay that amount to date.
- [19] The JCC Order is silent about the status of any claim for spousal support for the period from the date of separation to April 1, 2023.

#### Hearing of the Original Applications

- [20] As noted, the Original Applications came on for hearing before me on August 29, 2024.
- [21] Following the hearing of the evidence and submissions of the counsel, I had a frank on the record discussion with counsel about concerns regarding the relief sought in the Original Applications.
- [22] Specifically, unlike many interim support applications where the court is presented with a conflicting and often unsatisfactory evidentiary record, the evidentiary record in this case is quite straightforward. The parties differ on certain evidentiary points, but those points are relatively discrete and do not warrant this matter being dismissed or even adjourned pending examinations for discovery or cross-examination on the affidavits. I am genuinely satisfied that I can find the necessary facts on the existing evidentiary record. While both parties have strayed slightly from factual statements into opinion at times, the court is in a position to either disregard those statements or treat the weight of that evidence appropriately by removing the opinion from the underlying factual statement.
- [23] However, the court's concern was that both parties were effectively seeking final relief under the guise of interim orders and that granting portions of the relief would potentially constitute an error on behalf of this Court, the most obvious concerns being:

- a) terminating spousal support through an interim order; and
- b) ordering ongoing indeterminate spousal support subject to a review upon a further duration of 60 months, subject to a specified material change of circumstances threshold, again through an interim order.

[24] The Original Applications also both referred to the Family Law Act and the Divorce Act somewhat indiscriminately creating future jurisdictional issues in light of the nature of the relief sought.

[25] Accordingly, following a discussion with counsel regarding these concerns, and acknowledging my reluctance to simply dismiss the applications given my general satisfaction with the evidentiary record, I ordered that the Original Applications be adjourned generally but on very specific terms. Those terms were:

- a) I was seized of the continuation of the Original Applications;
- b) The evidentiary record for the Original Applications was closed effective August 29, 2024, and no further affidavit evidence in respect of the issue of spousal support or income determination was admissible for the continuation;
- c) The parties were given liberty to amend their application materials to clarify the relief sought and the rules and statutory provisions relied on to support that relief;
- d) There were specific time lines for filing and service of amended applications and applications responses subject to agreement between counsel or further direction of the court; and
- e) Upon receipt of the revised application materials, the court would consider whether a further hearing on any legal issues arising from the amendments was required and that leave was pre-emptively granted for any such hearing, if necessary, to proceed via MS Teams for efficiency.

[26] In a memorandum issued to counsel on September 16, 2024, I directed as follows:

I have received, through Supreme Court Scheduling, the correspondence dated September 12, 2024, from Mr. Mills, counsel for Ms. Lehenbauer. I have also received, through Supreme Court Scheduling, the responding email correspondence dated September 13, 2024, from Mr. Coyne, counsel for Mr. Kristinson.

Mr. Coyne's understanding of what the Court directed on August 26 [sic], 2024, is correct. I fully acknowledge that termination of support is an available option for the court upon a review of support. My concern was, and remains, that the pleadings contemplate final orders being sought in the guise of interim orders. Neither of the authorities cited by Mr. Mills stands for the proposition that the court can and should proceed to adjudicate on matters based on the present pleadings in light of the identified deficiencies. In particular, there is no reference to this issue at all in the recent decision of Justice Francis in *Jordan v. Zanni*, 2024 BCSC 1452. It may be that this

was not brought to Justice Francis' attention and, due to the complicated factual underpinning of the case (which I glean from her reasons for judgment), she did not identify it. Thus, in addition to not being binding authority, I think it is very clearly distinguishable. More significantly, the reliance on *Guerra v. Guerra*, 2020 BCSC 1538, completely ignores the comments of Justice Baker, who when dealing with two self-represented litigants, said at para. 3:

[3] . . . Prior to this application, several interim spousal and child support orders had been made. I asked the parties if they were seeking a final order for support on this application, or a variation of the existing interim order. Both parties agreed they were seeking a final order, and I have proceeded on this basis.

The appropriate course is to proceed as I directed on August 26 [sic], 2024. The parties each have the opportunity to amend their notices of application and their corresponding application responses. There is no further need for additional affidavit material and what evidence included in the record that is not admissible for reliance in making final orders (to my recollection, very little) shall simply be disregarded by the Court and there is no need to make any formal orders striking paragraphs of the affidavit given the de minimus nature of the issue.

As for a timeline, I had hoped counsel could simply work this out between themselves. As they have not, I am ordering that amended notices of application be filed and served by 4:00 pm on September 20, 2024, and amended application responses be filed and served by 4:00 pm on September 27, 2024. Counsel are at liberty to agree upon a reasonable modification of those deadlines as between themselves but failing such agreement, my directed timeline governs.

[27] Pursuant to my order, both parties filed new notices of application and corresponding application responses.

[28] The respondent's notice of application filed September 20, 2024, seeks the following relief (excluding costs):

2. An Order pursuant to s. 167 of the Family Law Act, pursuant to s. 15.2 (2) of the Divorce Act commencing forthwith and continuing the first day of each month thereafter, the Claimant, shall pay fixed interim spousal support to the Respondent in accordance with the Spousal Support Advisory Guidelines ("Interim Spousal Support").
3. An Order that the Claimant, shall pay retroactive spousal support to the Respondent in accordance with the Spousal Support Advisory Guidelines for the period between the parties date of separation to the Order Made at the Judicial Case Conference of March 28, 2023.
4. An Order commencing May 1, 2025 and each year thereafter and for so long as interim spousal support is being paid the parties shall exchange their respective income tax returns and notice(s) of assessment;
5. An Order pursuant to s. 168 of the Family Law Act pursuant to s. 15.2 (3) of the Divorce Act that the parties shall review the Interim Spousal Support 60 months from the pronouncement of this Order.

6. Notwithstanding Term 3 [sic] of this Order, any increase and/or decrease in either party's income that exceeds 18% of that party's previous year's reported income will constitute a material change in circumstances and either party is at liberty to seek adjustment as to the quantum of Interim Spousal Support.
- [29] The claimant opposes this relief in the application response filed September 27, 2024.
- [30] The claimant's notice of application filed September 27, 2024, seeks the following relief (excluding costs):
1. An Order pursuant to s. 15 of the Divorce Act that spousal support payable by the respondent to the claimant is terminated as of July 1, 2024 such that no further amounts of spousal support are payable by the Claimant to the Respondent.
  2. An Order pursuant to s. 17 of the Divorce Act that the Order of the Honourable Justice Baker pronounced after Judicial Case Conference on March 28, 2023 be varied retroactively, such that as of August 2023 the Claimant shall pay \$125.00 monthly spousal support to the Respondent according to Spousal Support Advisory Guidelines at the low range, with the income of the Claimant determined to be \$85,000.00 and the income of the Respondent determined to be \$78,119.00.
  3. An Order pursuant to s. 17 of the Divorce Act that the Respondent will pay \$16,566.00 to the Claimant, representing the Claimant's overpayments of spousal support from August 2023 through June 2024, from the Respondent's share of the proceeds of sale of the matrimonial home.
- [31] The respondent opposes this relief in the application response filed September 27, 2024. (collectively, the "Amended Applications").
- [32] Due to a misunderstanding resulting in an unfortunate lack of communication after the filing of the Amended Applications, the file was dormant until early February 2025. Following communications with counsel and the court through Supreme Court Scheduling, the matter was brought forward before me for directions on February 28, 2025.
- [33] At that hearing, counsel was directed to provide the court with a summary, not exceeding two pages, summarizing the relief sought in the Amended Applications together with updated calculations to the date of submission to the court, attaching as appendices any additional DivorceMate (or equivalent) printouts that were required to support the calculations.
- [34] Having received those summaries at the end of March, I am in a position to adjudicate upon the relief sought in the Amended Applications.

## Additional Factual Background

- [35] Both parties are university educated. The claimant's education is in public health and the respondent's education is in social work. This is a generalization, but ultimately both parties pursued their education while in the relationship--with the claimant ultimately obtaining a master's degree and the respondent completing his education, at least to date, with an undergraduate degree.
- [36] The parties' move to British Columbia was in 2015, well before separation.
- [37] Neither party, I find, surrendered employment, education or other meaningful opportunities as a result of the relocation. Similarly, neither party was disadvantaged as a result of bearing any childcare responsibilities or a disproportionate share of domestic household responsibilities.
- [38] With familial financial assistance, in varying forms, the parties purchased a home in Kelowna (the "Former Family Home").
- [39] The parties wisely documented the financial arrangements regarding the Former Family Home with a co-ownership agreement.
- [40] Following separation, the claimant moved to the community of Fernie, British Columbia, to live with her parents. This permitted her, for a time, a comfortable place to reside without the necessity of paying rent. Accordingly, even while paying spousal support to the respondent following the JCC Order, her reduced cost of living, combined with her income, resulted in an improved financial position following separation as compared to the respondent. This is confirmed by the contributions to certain financial accounts over and above market forces.
- [41] By the time of the hearing of the Original Applications, however, the claimant was no longer residing with her parents due to the sale of that home. She was accordingly paying rent on an apartment in Kelowna where she now resides.
- [42] The respondent continued to reside with his mother in the Former Family Home until its eventual sale in March 2024. There was a proportionate sharing of expenses in place as between the parties. Specifically, the claimant contributed \$1,034.24 per month towards the mortgage, property taxes, insurance and utilities and the respondent was responsible for the remainder of costs associated with the Former Family Home.
- [43] The net sale proceeds of some approximately \$432,000 remain in trust. The parties, to their credit, have agreed upon how to recognize the exclusions each party is entitled to under s. 85 of the FLA and distribution shall occur upon resolution of the remaining issues in the litigation--the only one which I am tasked with being the issue of spousal support.
- [44] Following the sale of the Former Family Home, the respondent moved into rental accommodation. The respondent's rental accommodation is the most significant expense he claims on his Form 8 financial statement by a significant margin. The respondent's other

claimed expenses are all quite modest and certainly not exceptional. The reality, I conclude, is that the respondent's accommodation expenses are somewhat disproportional to his net employment income when considered in isolation, but not when considered against his expenses generally.

- [45] The respondent had mental health challenges during the marriage and in 2020 they reached an acute breaking point.
- [46] From in or about March 2021 until separation, the respondent was receiving some combination of short-term and long-term disability benefits.
- [47] At the time of the JCC in March 2023, the respondent was still in receipt of disability benefits.
- [48] As discussed in the course of submissions with counsel, both of whom are experienced, it is often the case that disability benefits are paid on a non-taxable basis to the recipient but then are appropriately grossed up for determination of Guideline income for support purposes. There are exceptions, however, where that is not the case. As it relates to the respondent, it appears the disability benefits he received were reported as taxable income--whether that was correct or not. In any event, counsel agree that I need not gross up the disability benefits in the circumstances. I shall further note in this regard that these disability benefits are not overly significant and so the potential prejudice, if any, to the claimant from proceeding in this fashion is modest.
- [49] As set out above, the spousal support payable pursuant to the JCC Order was based on the low range of the Spousal Support Advisory Guidelines [SSAG], with anticipated 2023 incomes of \$120,000.00 and \$30,000 for the parties respectively.
- [50] The claimant's income for the purposes of the JCC Order exceeded her annual income for any year preceding separation. Her 2022 Line 15000 income was \$90,560. The claimant's income for the purposes of the JCC Order also ultimately exceeded her actual income for 2023. The claimant's 2023 Line 15000 income was \$114,848.52.
- [51] The respondent's income for the purposes of the JCC Order, save for his non-declared coaching income, was very consistent with his declared income, which was \$33,063 in 2021 and \$29,949 in 2022.
- [52] Before moving on, I will note that the claimant knew of the respondent's receipt of undeclared coaching income. Given the parties maintained separate bank accounts and had a fairly structured system of shared household expenses, I am not concluding that the claimant knew exactly how much this undeclared coaching income was to the dollar prior to separation. However, I am satisfied that the claimant knew the respondent received this coaching income, did not declare it for income tax purposes and used it to fund some personal discretionary expenses, mostly notably a golf membership, which would have otherwise been outside of his means. This undeclared income was thus not something the claimant learned of after the JCC Order was made and she had at least a rough idea of how

much the respondent was earning in this regard when agreeing to an estimated Guideline income.

- [53] On or about July 25, 2023, just shy of four months after the JCC, the respondent returned to gainful employment in his preferred field in a role that paid approximately twice the estimated income of \$30,000 per annum set in the JCC Order.
- [54] The respondent did not disclose his change in employment status despite two requests for employment information made in writing through counsel. One in October 2023 and again in March 2024.
- [55] It was not until on or about April 10, 2024 that the respondent disclosed in correspondence through counsel that he had "recently" returned to full-time employment.
- [56] It was the claimant who discovered, through inquiries of the BC College of Social Workers, that the respondent had started working again on or about July 25, 2023. That was not, I find, "recently".
- [57] The respondent provided an updated Form 8 financial statement for the purposes of the Original Applications sworn July 4, 2024 (the "July 2024 F8"). The respondent deposed therein that he is employed by ARC Programs ("ARC"), a social services organization in Kelowna, with an annual income of \$62,400.
- [58] The respondent did not include any coaching income in the July 2024 F8. I return to this point in due course.
- [59] Turning to the claimant's circumstances, whilst the respondent had mental health challenges during the relationship, the claimant had primarily physical health challenges along with some mental health issues of her own.
- [60] In 2010, the claimant was diagnosed with an autoimmune condition known as Spondyloarthritis. It is a serious condition that the claimant says can be both physically and mentally debilitating. The claimant requires physiotherapy, acupuncture, massage therapy and pharmaceutical treatment for symptom management. Fortunately, the claimant's medication, whilst expensive, is currently covered by a combination of Pharmacare and her employee benefits. The claimant's last episode of elevated symptoms from her Spondyloarthritis was in December 2022. It restricted her mobility for several weeks.
- [61] From the mental health perspective, the claimant struggles with anxiety and depression for which she receives medication and counselling. The only identified period in the record where the claimant was off work due to her mental health was in February 2022 when she took a month-long leave of absence due to what she deposes was stress, anxiety and burnout.

## Support Review - The Law Generally

- [62] It is trite law that on a review the parties are not required to establish a material change in circumstances. It is a hearing de novo: see *Tedham v. Tedham*, 2005 BCCA 502 at para. 21. Further, in the case of a spousal support review, it is a review of both entitlement and quantum unless the terms of the review have been circumscribed in the underlying agreement or order mandating the review: see *Domirti v. Domirti*, 2010 BCCA 472 at paras. 38-41.
- [63] On a comprehensive spousal support review, once a party's entitlement has been established, the quantum of the support ordered should be determined with reference to the SSAG.
- [64] The fact that there is a review does not preclude a variation for a material change in circumstances pending the review unless the terms of the underlying agreement or order strictly fixes the amount of support pending the review without such a right. That is not the case here as the JCC Order provided for interim without prejudice support, but this principle is relevant to the importance of the obligation on parties to provide accurate financial information where the opportunity, at law, remains available to seek a variation of an order on the basis of a material change in circumstances in advance of a scheduled review date. Stated another way, parties are generally not permitted to wait to make disclosure until the review date when there is a change in circumstances that could be considered material in the intervening period.

## Retroactive Support and Retroactive Adjustment of Support

- [65] Before addressing any prospective support issues, there are two retroactive support claims which require consideration by the court. Those claims are for:
- a) spousal support payable by either party to the other from the date of separation to the JCC Order (the "Retroactive Support Claim"); and
  - b) adjustment to the spousal support payable by the claimant to the respondent pursuant to the JCC Order pending the Review Date (the "Retroactive Adjustment").
- [66] It is well accepted proposition that the considerations for establishing a claim for retroactive child support entitlement are also relevant to deciding the suitability of a retroactive award of spousal support, although they must be considered and weighed in light of different legal principles and objectives: see *Kerr v. Baranow*, 2011 SCC 10 at para. 207. Those factors being:
- a) the needs of the recipient;
  - b) the conduct of the payor;
  - c) the reasons for any delay in seeking support; and
  - d) any hardship the retroactive award may occasion on the payor spouse.

- [67] The Retroactive Support claim in this case is, in my view, addressed on the basis that, as is often the situation in the initial period following separation, the financial circumstances between the parties remained intertwined. As I set out above, the respondent was residing in the Former Family Home along with his mother. The claimant was residing with her parents in Fernie. There was sharing of certain household expenses. The claimant made contributions to those expenses with "after tax" dollars.
- [68] Moreover, the parties, to their credit, negotiated a comprehensive settlement of the distribution of the net proceeds from the sale of the Former Family Home as between the respective financial stakeholders in advance of the JCC. The cost of the servicing of secured debt on the residence prior to its sale was thus known to the parties in reaching that settlement.
- [69] The proceedings, wherein there were competing spousal support claims made as articulated above, were not even commenced until January 13, 2023. The JCC happened expeditiously thereafter on March 28, 2023, and the parties agreed on an interim spousal support regime at that JCC.
- [70] On this basis, I am not satisfied that the evidentiary record before me warrants any order with respect to spousal support from the date of separation to the JCC Order. In reaching this conclusion I place great weight on the lack of any blameworthy conduct combined with the fact that the informal arrangements between the parties saw their immediate post-separation financial needs being met. The Retroactive Support claim is thus dismissed.
- [71] With respect to the Retroactive Adjustment, the parties consented at the JCC to a specific time limited interim spousal support regime.
- [72] That regime included:
- a) determination of the claimant's estimated Guideline income;
  - b) determination of the respondent's estimated Guideline income;
  - c) spousal support calculated at the low end of the range provided for under the SSAG; and
  - d) a time limited duration of 12 months subject to the Review.
- [73] The regime was, importantly, made on a without prejudice basis. That means that the claimant was not conceding that entitlement to support had been established and that neither party was conceding that the quantum of support, if entitlement was established, should be regarded as establishing a status quo.
- [74] Rather, I find that the parties agreed to an interim spousal support regime on a rough and ready basis for a period of 12 months knowing that it would come on for a review, a hearing de novo, at the end of those 12 months.

- [75] It was not a perfect regime with the benefit of hindsight; but few are in the realm of interim support. Importantly, it was a regime founded upon mutual compromises which afforded both parties a degree of certainty over that 12 month period without incurring the cost of a contested interim support hearing. That certainty alone also has an intangible value in and of itself to both parties. Moreover, in reliance upon that certainty, the claimant received the tax deduction for the spousal support paid to the respondent and the respondent paid tax on that support (albeit more tax than was anticipated given his employment income that was not contemplated at the time of the JCC Order).
- [76] In the circumstances, I am not satisfied that this is appropriate to make the Retroactive Adjustment, either in the amount sought or otherwise.
- [77] The above conclusion should certainly not be considered a condonation of the respondent's failure to disclose his new employment despite written demand and without regard to his obligation generally under the Rules to provide updated income information. That would be contrary to my own ruling in *J.N.G. v. S.C.M.*, 2023 BCSC 1217 at para. 33.
- [78] Clearly the respondent was aware by that by or about July 25, 2023, there had been a material change in his financial circumstances by no longer receiving his disability benefits and beginning to receive employment income after securing a position with ARC. While I accept that the respondent did not immediately know whether he would be able to maintain full-time employment after having been out of the workforce in excess of two years, his transition to full-time employment ought to have been communicated to the claimant well prior to April 2024.
- [79] Notwithstanding this, I am still not satisfied that it is appropriate to make the Retroactive Adjustment and will instead consider the respondent's conduct in addressing costs. I conclude that is the more appropriate means of doing so given my earlier conclusion that the parties should live with the rough justice support regime they agreed upon in the JCC Order and my determination below that the claimant's spousal support entitlement under the Review commence effective April 1, 2024.

#### Entitlement to Spousal Support

- [80] Entitlement to spousal support was, as noted, conceded on a strictly without prejudice basis for the purposes of the JCC Order.
- [81] There is no concession as to entitlement to spousal support for the purposes of the Review and accordingly for support to continue the respondent must establish entitlement on its merits.
- [82] The objectives of a spousal support order are set out in the Divorce Act s. 15.2(6), which provides that an order 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.

[83] Under the Divorce Act s. 15.2(4), courts must also 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.

[84] No single objective set out in s. 15.2(6) is paramount, and all must be considered by the court: see *Moge v. Moge*, [1992] S.C.R. 813 at pp. 850-853, 1992 CanLII 25. The first two objectives relate to compensatory support, and the last two objectives relate to non-compensatory support. Compensatory entitlement will arise where, as a result of the parties' roles during the marriage, one spouse has suffered economic disadvantage or has conferred economic advantages on the other. Most often, such entitlement will arise where one spouse has sacrificed career opportunities in order to take on more of the family's household or child-rearing responsibilities. Upon the dissolution of the marriage, the spouse who has given up opportunities may be entitled to spousal support, either to compensate for diminished earning capacity or to share in the augmented earning capacity of the other spouse: see *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 26.

[85] Non-compensatory support entitlement focuses on the needs of the spouses and on their respective means. It is based on the idea that spouses, by virtue of marriage, have some ongoing responsibility to care for one another. The degree to which non-compensatory principles will apply will depend on a close examination of not only the means and needs of the spouses, but also of the nature of the marital relationship and its duration: see *Zacharias* at para. 27.

[86] A court is not required to decide one basis of support to the exclusion of the others, and the doctrine of equitable sharing is the overarching principle to be focussed on by the court: see *Chutter v. Chutter*, 2008 BCCA 507 at para. 49.

[87] In this case, I find there is no evidentiary basis for compensatory support. The respondent did not suffer an economic disadvantage as a result of the marriage or confer an economic advantage on the claimant. Nor did the respondent sacrifice career or educational opportunities as a result of the marriage. I specifically do not accept that the respondent's employment choices during the COVID-19 pandemic were sufficiently related to the

marriage as to possibly ground a claim for compensatory support. It was a modern relationship of two individuals who worked and/or pursued additional education as they each deemed fit.

- [88] In contrast, I do find that there is entitlement to spousal support on a non-compensatory basis given the economic hardship arising from the breakdown of the marriage and consistent with promoting the economic self-sufficiency of the respondent.
- [89] Specifically, as of July 25, 2023, the respondent is a full-time salaried employee working in a position that is consistent with his educational background. He is earning what he is capable of earning and is not underemployed. However, despite that, there is still a notable disparity in their respective incomes. That disparity in their incomes has had a resulting impact upon the respondent's lifestyle. This can ground an entitlement to non-compensatory support: see *McKenzie v. McKenzie*, 2013 BCSC 749 at paras. 114 and 119.
- [90] Consistent with this, in the years preceding separation, the claimant was earning more income than the respondent. That continued at the time of separation when the claimant was earning considerably more than the respondent given that the respondent was in receipt of disability benefits. For comparison purposes, financial disclosure confirms the following Line 15000 incomes:

2019

Claimant = \$71,375

Respondent = \$37,837

2020

Claimant = \$83,783

Respondent = \$36,730

2021

Claimant = \$85,021

**Respondent = \$33,063**

- [91] In the course of submissions, counsel for the claimant relied significantly on *Lee v. Lee*, 2014 BCCA 383 for the proposition that disparity in income alone is not a sufficient basis for awarding spousal support.
- [92] While that is true, to put that submission into appropriate context, one needs to review the decision in *Lee* more closely.
- [93] In *Lee*, the parties separated after a 20-year marriage. Both had lived a fairly extravagant lifestyle, generally supported by constantly refinancing credit card debt by borrowing against the equity in the family home. There were no children. Since an accident

approximately seven years prior to trial, the husband had worked only part-time as a personal trainer and claimed to make less than \$20,000 per year. The trial judge was unable to determine what his actual income was as there was objective evidence showing the husband to be more physically capable than he claimed to be and, moreover, the husband admitted to selling steroids and growth hormones illegally for what was suggested, but not ultimately specifically found to be, considerable profit.

- [94] In contrast, the wife was earning \$120,000 per year. The trial judge allocated family assets (this being a Family Relations Act matter) almost equally, but found that most of the debt at the end of the marriage had been incurred for the husband's personal purposes and should therefore be allocated against the husband's share of the assets. The trial judge rejected the husband's claim for spousal support on both the compensatory and non-compensatory bases. The primary reason for doing so was that the husband was living in a new relationship with a partner, a police officer, who earned almost as much as the wife and the new couple were living in a condominium comparable to that being lived in by the wife. The husband appealed the allocation of family assets and the dismissal of his claim for spousal support.
- [95] In writing the majority decision allowing the appeal in part, Justice Newbury held as follows:
- [65] If Mr. Lee had not formed this new relationship, the case law in British Columbia would have permitted an award of spousal support to him, given the length of the parties' marriage (which presumably creates interdependence) and the expansion of the meaning of "need" in the family law context. But whether it would have been a "material error" in law or a wrong exercise of discretion to refuse support in such circumstances is another matter. To rule as a matter of law that Mr. Lee should be compensated indefinitely for the "loss" of the ability to share in Ms. Lee's income and lifestyle would, taken to its logical conclusion, mean that support must be ordered on one model or the other in virtually every case that comes before the court. The concept of need (in the true sense) of the applicant spouse would be supplanted by the sole criterion of the respondent spouse's ability to pay. Marriage would, contrary to what was said in *Moge*, automatically entitle a spouse to the standard of living enjoyed during the marriage, or as much as the payor could afford. I respectfully agree with Professor Rogerson's suggestion, and with the Court in *Griffiths*, *supra*, that this cannot be correct. A 'clean break' is clearly possible in this case, and again as stated in *Moge*, the mere fact of marriage or its breakdown does not activate a "general tool of redistribution." As far as I am aware, this principle has not been overruled (emphasis in original).
- [66] At the same time, the case law of this province referred to above does indicate that a party who experiences a marked decline in standard of living due to divorce should receive some financial assistance (either in the form of re-apportionment of assets or maintenance) in adjusting to his or her new situation - hence the concept of a "transitional" award, which is recognized by the SSAG. Such awards have regularly been made in favour of women, but rarely in favour of men, perhaps reflecting that, as Rogerson suggests, "Non-compensatory

support is significantly structured by social norms of what is fair and just. The economic dependency of husbands on wives is not reinforced and naturalized by strong cultural norms, as is the dependency of wives on husbands ...". (At 234-5.) It seems to me that, setting aside for the moment the support already paid by Ms. Lee from August 1, 2012 to June 1, 2013, Mr. Lee could have expected some transitional award, if only on the "principle" that what is sauce for the goose is sauce for the gander. As it is, Ms. Lee did pay a total of \$17,500 to Mr. Lee, presumably assisting him in adjusting to his new circumstances.

- [67] Normally, one would refer to the SSAG to help determine an appropriate amount and duration of a transitional order. In this case, however, I am inclined simply to order that Mr. Lee not be required to repay the \$17,500 to Ms. Lee (assuming that it has not been repaid.) . . .
- [96] In the result, I do not conclude that my finding that the respondent has established an entitlement to non-compensatory support based upon a consideration of the factors enumerated in the Divorce Act to be inconsistent with law as set out in Lee when that decision is considered in the appropriate context.

### **Claimant's Guideline Income**

- [97] As I have already detailed above, I accept that the claimant's Line 15000 income went from \$71,375 in 2019 to \$90,560 in 2022 to \$114,848.52 in 2023.
- [98] In the claimant's Form 8 financial statement sworn May 17, 2023, the claimant deposed that as of April 1, 2023, she had secured a permanent full-time position with Interior Health carrying a salary of \$119,204 per annum.
- [99] Based on the evidence, the claimant continues to maintain this position and her annual income is at least this amount at present.
- [100] The claimant submits, however, that her Guideline income for support purposes should be determined by this Court to be \$85,000 per annum on the basis that her post-separation increase in income should not be considered in quantifying the amount of spousal support payable.
- [101] In this regard, I accept that, for the purposes of spousal support, a recipient spouse is not automatically entitled to increased spousal support where a payor's spouse's post-separation income increases. Rather, a payor spouse's post-separation increase in income is relevant only if the increase is connected to the recipient spouse's contribution to the marriage: see *Helle v. Helle*, 2019 BCCA 97 at paras. 35-39.
- [102] The resolution of the issue of post-separation wage increases is, however, clearly fact based: see *Judd v. Judd*, 2010 BCSC 153 at para. 23.

- [103] In this case, I conclude that the claimant's increase in income post-separation was founded in the expertise and seniority she established during the marriage and that there were no intervening event or events that are the cause of the increase. Further, whilst I have concluded that the respondent has not established an entitlement to non-compensatory support, I am not satisfied that that the respondent's role during the marriage "necessitates a different determination" to use the language of Justice Punnnett in Judd.
- [104] In reaching this conclusion, I recognize that Justice Branch found otherwise when considering a non-compensatory spousal support claim following the breakdown of a somewhat shorter but at least similar length relationship in *L.T.F. v. R.B.F.*, 2023 BCSC 834. However, as a fact-based decision, the result in one case is not determinative in another provided that both justices are applying the same general principles of law.
- [105] Importantly in this regard, while Branch J. in *L.T.F.* used the payor spouse's income as of the date of separation and did not give the recipient spouse the benefit of his post-separation increase in income, he set the amount of spousal support at the midpoint of the SSAG range and ordered that duration be at the upper end of the range. Namely, 10.5 years of support following a marriage-like relationship found to be, after some detailed analysis on the issue, some 10 years and 6 months in length.
- [106] In this case, I find that the claimant's Guideline income for the purposes of the Review shall be \$119,204 per annum.

#### Respondent's Guideline Income

- [107] The respondent has been employed with ARC on a full-time basis since on or about July 25, 2023.
- [108] His total Line 15000 income for 2023 from all sources was \$55,984.00.
- [109] In his July 2024 Form 8 the respondent deposed to having an annual income of \$62,400 per annum.
- [110] This, I accept, continues to be his employment income from ARC as there has been no material change to it since he obtained his current position.
- [111] Beyond the respondent's now disclosed and reported taxable income, the claimant submits that additional income should be imputed to the respondent by virtue of his coaching endeavours. The respondent objects to any imputation of income on a prospective basis.
- [112] In this regard, the respondent deposes that he stopped coaching in December of 2023 and has not received any coaching income thereafter. The respondent attributes his decision to an inability to manage his coaching responsibilities together with his full-time employment.

- [113] The evidence from the claimant to contradict that the respondent ceased having a paid coaching position after late December 2023 is limited to a website printout which showed the respondent as the head coach of the subject hockey team for the 2023/2024 season.
- [114] I am not satisfied this proves that the respondent received coaching income in 2024 as the website was clearly created at the start of the season when the respondent was the head coach. I reach this conclusion on the basis that it has the link to the 2023/2024 schedule for the subject hockey team. That schedule had concluded by April 30, 2024, when the claimant printed off the website for inclusion in her affidavit.
- [115] Notwithstanding this conclusion regarding income determination, I do accept that the respondent has a passion for junior/amateur sports and a history of receiving non-taxable income for his efforts in this regard. Accordingly, while am not prepared to impute income on a prospective basis, I will later consider this a factor in the overall analysis of the appropriate quantum and duration within the range provided for under the SSAG because it is a possible option available to the respondent in the future if he so chooses to fund his discretionary expenses.
- [116] On the basis of the foregoing, I accept that the respondent's Guideline income for the purposes of the Review is \$62,400 per annum.

### Quantum of Spousal Support

- [117] Based upon the claimant having a Guideline income of \$119,204 per annum and the respondent having a Guideline income of \$62,400 per annum, the SSAG calculates a range of spousal support of between \$994 per month and \$1,325 per month with a midpoint of \$1,160 per month.
- [118] Although the respondent has established an entitlement to ongoing spousal support, that entitlement is strictly on a non-compensatory basis. Further, by virtue of the respondent obtaining, and maintaining, full-time employment within approximately four months after the JCC Order, his financial need and economic hardship arising from the breakdown of the marriage underlying his non-compensatory claim is significantly reduced.
- [119] Considering all the circumstances, I am satisfied that it is appropriate to use the low end of the SSAG range. Specifically, I find that commencing April 1, 2024, the appropriate quantum of spousal support payable by the claimant to the respondent was \$994 per month.

### Duration of Support

- [120] Based upon the length of the parties' relationship and the presumptive range provided for under the SSAG, the duration of support payable would be between 7 and 14 years.
- [121] That is, however, only a presumptive range and the court may depart from it provided that there is a basis, articulated in the reasons, for doing so: see Chutter at para. 101.

- [122] This, I find, is a situation where a departure from the presumptive range is appropriate.
- [123] Although this was a 14-year relationship, it commenced when the parties were young and ended when they were both in their later thirties. Both are presently employed on a full-time basis and nothing from the marriage, I have concluded, is disadvantaging their ability to pursue their employment or educational opportunities on a prospective basis. Moreover, while both parties dealt with health issues, mental and/or physical, prior to separation, those issues as they relate to the respondent have not impeded him from sustaining full-time employment for approximately 21 months as of the date of these Reasons. The respondent's entitlement is thus in the nature of transitional support to use the language from Lee, which merits a shorter duration and a fixed termination date to allow for a clean break.
- [124] On this basis, I have concluded that the respondent is entitled to spousal support from the claimant for a period of 36 months (three years) commencing April 1, 2024, after which the respondent's entitlement to spousal support from the claimant and the claimant's corresponding obligation to pay spousal support to the respondent shall be terminated.
- [125] When combined with the spousal support paid by the claimant to the respondent pursuant to the JCC Order, the respondent will have received a total of 48 months (four years) in spousal support in full satisfaction of his entitlement.

### Calculation of Support Owing

- [126] The claimant continued to pay the respondent spousal support pursuant to the JCC Order of \$1,631 per month through to and including April 1, 2025. This results in an overpayment for the period April 1, 2024, through to and including April 1, 2025. Specifically:
- a) the claimant paid spousal support to the respondent totalling \$20,969 (\$1,613 x 13 months);
  - b) the claimant ought to have paid, based upon my findings, spousal support totalling \$12,922 (\$994 x 13 months); and
  - c) the claimant thus overpaid the respondent spousal support in the amount of \$8,047 for the period April 1, 2024, through to and including April 1, 2025.
- [127] The above amount would be lower if I conducted the Review effective September 1, 2024, as submitted by counsel for the claimant. This date was a concession from the July 1, 2024, date based on the respondent's change in employment in the claimant's Original Application and reflects the time to get the matter on for hearing.
- [128] In my view, however, the appropriate approach is to conduct the Review effective 12 months from the date of the JCC Order as that is what was intended in the terms of that order. Doing so is consistent, in my view, with my decision to dismiss the Retroactive Adjustment claim for the support paid during the 12-month period covered by the JCC Order.

- [129] Given that the proceeds from the sale of the Former Family Home remain in trust, one option to address the overpayment would be to order the repayment of this amount to the claimant from the respondent's share in the distribution of said proceeds.
- [130] However, given the date of these reasons for judgment, I suspect that the parties very likely have already filed their respective 2024 T1 personal income tax returns on the basis that the claimant is entitled to a deduction for her payment of \$1,613 per month according to the JCC Order and the respondent is required to pay tax on that support.
- [131] Although T1 personal income tax returns can be amended to account for these types of situations, in my view that is an unnecessary cost and inconvenience to the parties where there is another quite simple solution that is consistent with my clean break approach in this matter.
- [132] Specifically, pursuant to these Reasons, the claimant should be paying the respondent spousal support in the amount of \$994 for a further 23 months commencing May 1, 2025, and concluding with the March 1, 2027, payment.
- [133] If the overpayment of support during the period of April 1, 2024, through to and including April 1, 2025, is split over the remaining 23 months of support owing, it results in a monthly deduction of \$350 ( $\$8,047 \div 23 = \$349.87$  rounded to \$350).
- [134] \$994 per month less the overpayment credit of \$350 per months yields a net support obligation owing by the claimant to the respondent of \$644 per month.
- [135] On this basis, my resulting orders shall be that:
- a) Pursuant to the Divorce Act, commencing May 1, 2025, and continuing on the 1st of each month through to and including March 1, 2027, the claimant shall pay to the respondent spousal support of \$664 per month;
  - b) The parties shall, if they have not done so already, file their respective 2024 T1 Personal Income Tax Returns to reflect the payment by the claimant and the receipt by the respondent of spousal support in the amount of \$1,631 per month for the entire 2024 calendar year; and
  - c) The parties shall in due course, and subject to the claimant paying the support owing pursuant to this order, file their respective 2025 T1 Personal Income Tax Returns to reflect the payment by the claimant and the receipt by the respondent of spousal support in the amount of \$1,631 per month for the period of January 2025 through April 2025 and \$664 per month for the period of May 2025 through December 2025.

## Costs

- [136] Costs are always in the discretion of the presiding justice, whether in chambers or at trial.

[137] Pursuant to R. 16-1(7) of the Supreme Court Family Rules, entitled "costs follows the event", the general principle is that costs are awarded to the successful party. Specifically that subrule provides:

Subject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders.

[138] The standard of "success" required to be awarded costs of an action under R. 16-1(7) is "substantial success": see *Harras v. Lhotka*, 2016 BCCA 246 at para. 48.

[139] Pursuant to the court's discretion, even a substantially successful party can be denied an order for costs where appropriate.

[140] In the case of the Amended Applications, the respondent was the substantially successful party. Although I dismissed the claim for Retroactive Support and awarded spousal support in a lower amount and for a shorter duration than sought, the respondent received a total of 36 months of additional support commencing upon the date of the Review whereas I dismissed the claimant's Retroactive Adjustment claim and her claim to terminate spousal support effective September 1, 2024.

[141] However, as identified above, the following conduct by the respondent is to be strongly discouraged:

- a) failing to disclose a material change in his income following the JCC Order despite written demand for an update as to his employment status; and
- b) when ultimately providing the update being rather disingenuous in representing, through his counsel, that it was a recent development.

[142] On this basis, I am exercising my discretion to deny the respondent the benefit of a costs order despite him being substantially successful. Rather, the parties shall bear their own costs of the Amended Applications.

"Hardwick J."

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