

CANADA / JUDGMENT

Loehr v. Loehr

2023 BCSC 2229

COURT

Supreme Court of British Columbia

DECIDED

19 December 2023

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2023 BCSC 2229 Loehr v. Loehr IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Loehr v. Loehr, 2023 BCSC 2229 Date: 20231219 Docket: E54520 New Westminster Between: Lindsay Boyd Loehr also known as Lindsay Boyd Pickering Claimant And Aaron Patrick Loehr Respondent Before: The Honourable Justice Branch Reasons for Judgment Counsel for the Claimant: M. Long Counsel for the Respondent: S. Rai Place and Date of Hearing: New Westminster, B.C. August 15, 2023, October 4, 2023, and November 1, 2023 Place and Date of Judgment: New Westminster, B.C. December 19, 2023 Table of Contents I. INTRODUCTION. 3 II. BACKGROUND. 3 III. ANALYSIS. 5 A. Attribution of Income to the Claimant 5 B. Deduction of RRSP Contributions from the Respondent's Income. 7 C. Averaging. 9 D. Range. 9 E. Duration. 9 F. Retroactivity. 10 IV. CONCLUSION. 10 I. INTRODUCTION

- [1] Before me is an application by the respondent to review the support payable and determine the associated arrears. The key issues are whether (1) RRSP contributions should be deducted from the respondent's income, and (2) a higher income level should be attributed to the claimant. II. BACKGROUND
- [2] The parties began to live in a marriage-like relationship on or about June 1, 2004 and were married on September 19, 2009. The parties separated on or about March 2, 2017, but lived under the same roof until June 9, 2017.
- [3] There are two children of the marriage: K, born June 2007, and D, born October 2010.
- [4] The respondent is an electrician. He reported income of \$134,915 in 2020, \$166,687 in 2021 and \$193,039 in 2022. The respondent was promoted during this period, and his hourly rate increased due to a new collective agreement.
- [5] These income figures include amounts contributed by the respondent to an RRSP arranged through his employer. These contributions are mandatory under his union's collective agreement. However, after an adjournment to confirm the details, the respondent confirmed that once his contributions are deposited into the RRSP, the respondent has the right to withdraw the funds.

- [6] The claimant worked as a behavioural therapist in the past. She later started a master's program, studying special education and developmental disabilities. She paused her educational efforts after her children were born. In 2018, the claimant began a different master's program to become a clinical counsellor. The programme was designed to take 2.5 to 3 years. She completed it in November 2021. Her practicum work was delayed by six months due to COVID. She started her own business, HeadSpace Counselling Inc. ("HeadSpace"), in January 2022, and she became fully credentialed as a counsellor in April 2022.
- [7] In 2020, the claimant reported an income of \$48,452, but this was mostly made up of her support payments. Her employment income that year was only \$15,798. In 2021, the parallel figures were \$35,418 and \$6,929. In 2022, the year she started her business, she received \$28,750 in taxable Canadian dividends from HeadSpace (or \$25,000 for support calculation purposes). This dividend amount reflects the profit reported by HeadSpace. Regarding her future prospects, she hopes to bill between 17 and 22 hours per week, at around \$66 per hour. After expenses, she expects to earn a net income of between \$30,000 and \$40,000 in about a year.
- [8] On December 19, 2018, the parties participated in a mediation. At the mediation, the parties agreed that the respondent would pay the claimant \$2,374 monthly in spousal support.
- [9] On February 20, 2019, the parties entered into a more comprehensive separation agreement (the "Separation Agreement") incorporating the items agreed at the mediation. However, the Separation Agreement was not executed until August 2020. The Separation Agreement provides in relevant part as follows: 6.1 [The respondent] will pay [the claimant] spousal support of \$2,374.00 per month starting on December 15, 2019, and on the 15th day of each month thereafter 6.2 Spousal support will be reviewed in three years on December 19, 2021, or subject to a material change in circumstances.
- [10] The respondent stopped paying support at the agreed level for a period, which has resulted in an accrual of approximately \$34,000 in arrears.
- [11] Since the agreed review date of December 2021, the respondent has been trying to adjust his support payments, but he has had difficulty scheduling his application. The parties agreed that the present application should be treated as a review that did not require the establishment of a change in circumstances to justify a change in support.
- [12] At the hearing before me, the parties confirmed that they had resolved items 7-9 from the respondent's application dated January 10, 2023. These items addressed the transfer of certain financial assets, the respondent's credit for certain special expense payments, and the execution of travel documents. III. ANALYSIS A. Attribution of Income to the Claimant

- [13] The respondent sought to impute an income of \$85,000 to the claimant. At the hearing, the respondent lowered that request to \$70,000 in recognition of the fact that the claimant was just starting out. The respondent also accepted that any income attribution would be treated as effective only in November 2022, after the claimant had been out of school for a year. This figure was largely derived by multiplying the claimant's stated hourly rate by the number of work hours available per year.
- [14] Section 19(1)(a) of the Federal Child Support Guidelines, SOR/97-175, allows the court to impute additional income for child support purposes if the spouse is intentionally unemployed or underemployed (other than where (1) the unemployment or underemployment is required by the needs of a child or (2) the unemployment or underemployment required by the reasonable educational or health needs of the spouse). There is intentional unemployment or underemployment when the parent voluntarily chooses to earn less than what they are capable of earning. The onus is on the party trying to impute income to show that the unemployment or underemployment is intentional: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 36.
- [15] The claimant's position is that no attribution is justified because she has been making reasonable efforts to develop her business. The claimant argued that any evaluation of her appropriate income level should reflect the following:
- a) The claimant anticipates incurring approximately \$20,000 per year in expenses, and hence it would be unfair to attribute to her an income based on gross revenue;
 - b) Any calculation should reflect that she should be entitled to at least two weeks holiday each year; and
 - c) It will take more than a year or two to build up to her stable long-term earning potential.
- [16] She states that these adjustments would, at a minimum, yield an estimate of her earning potential at \$66,000 gross and \$46,000 net.
- [17] Regarding her effort level, the claimant gave evidence rebutting any alleged delay in completing her studies. Specifically:
- a) She was unable to transfer credits from her earlier studies;
 - b) The programme was of longer duration than suggested by the respondent; and
 - c) Her practicum work was delayed by six months due to COVID.
- [18] The respondent has not met his burden to show that income attribution to the claimant is necessary or appropriate. The claimant appears to have been making reasonable efforts to obtain her counselling certification and then ramp up her practice. She has met her duty.
- [19] The claimant takes the position that for the 2022 support calculation her 2021 income should be used, and for 2023 her 2022 income should be used. I agree.

- [20] The claimant did accept that a further review would be appropriate after June 1, 2025, to allow the claimant sufficient time to build up to full capacity. This is somewhat longer than necessary, and I would modify the review date to November 1, 2024, three years after her graduation. This is a reasonable amount of time to reach a more stable long-term earnings level. B. Deduction of RRSP Contributions from the Respondent's Income
- [21] The respondent argues that a deduction should be applied to his Line 15000 income (formerly Line 150) to reflect that, because of his collective agreement, he must contribute a substantial amount of his gross income towards his RRSP. The respondent accepts that the income level he agreed to at the mediation or in the Separation Agreement did not make this adjustment. However, he argues that given that this is a review, he should not be bound by his earlier concession.
- [22] The claimant argues that the court should simply use the respondent's Line 15000 income in determining support.
- [23] The issue raised is well-framed by the recent decision in *Lussier v. Ritchie*, 2023 BCSC 1817. In that case, the Court accepted that the claimant's mandatory pension plan contributions should be deducted from his total income, as these amounts were not "available to him": para. 43. The Court reviewed the other relevant decisions, including *S.L.P. v. C.W.P.1*, 2002 BCSC 1384, *Redlick v. Redlick*, 2013 BCSC 1155 and *Yip v. Yip*, 2016 BCSC 1595. The Court also examined the appellate guidance from *Brown v. Brown*, 2014 BCCA 152, in which the Court of Appeal allowed a party to deduct certain dividend amounts received that were in fact required to be immediately redirected towards the repayment of a loan the party took out to purchase shares in the company. The shares could not be sold or borrowed against at the time of the application. The Court concluded:
- [24] In the case before us, Mr. Brown has received income that is unusual in certain respects. Most obviously, the income is not directly available to him. Mr. Brown has not, in any real sense, received money, nor has he acquired an asset that can be pledged or otherwise used to immediately obtain funds.
- [33] Because the dividends received by Mr. Brown do not represent a resource that could have been available to him to pay child support, I do not see the objective set out in s. 1(a) of the Guidelines as supporting their inclusion in Mr. Brown's Guideline income. [Emphasis added.]
- [24] Returning to the fact pattern in *Lussier*, the Court there concluded as follows:
- [52] I am satisfied that in British Columbia, despite the claimant's pension contributions being part of his line 150 income, they are (i) not under his control, (ii) required to be made under his collective agreement, and (iii) not part of his disposable income. As such, the contributions are not available to him to pay support.

- [53] Therefore, for the purposes of child support, the claimant's pension contributions are to be deducted from his Guideline income [Emphasis added.]
- [25] Here, one of the three identified characteristics in Lussier is missing, as the respondent can withdraw the amounts put into his RRSP. Is that distinction sufficient to justify distinguishing this case from the result in Lussier? I find that it is.
- [26] In my view, the control aspect is the key characteristic of the three listed by the Court in Lussier. The respondent may have been obligated to contribute in the first place, but he has the ability to turn that around immediately and pay the amount to himself. In my view, that effectively puts him in an equivalent position to any other payor who receives a salary and then voluntarily purchases an RRSP with that salary. That person must recognize their entire salary, and so should the respondent.
- [27] From a policy perspective, the RRSP contributions represent amounts the respondent could make available to himself and his children, but he has chosen not to. His children should not suffer payment of a lower support amount simply because the respondent has decided to leave his money parked within his RRSP.
- [28] In Yip, the Court stated as follows in determining that a deduction was appropriate:
- [37] I agree with counsel for the husband that a further deduction is appropriate to reflect employer RRSP contributions over which the husband has no discretion [Emphasis added.]
- [29] Similarly, in Redlick, the Court stated:
- [59] Although the RRSP in which the employer contributions are made is registered in the name of Ms. Redlick, I accept her evidence that this amount is locked-in. She has no option of drawing it down. [Emphasis added.]
- [30] Finally, in S.L.P., the Court held:
- [34] The authorities relied upon by the plaintiff supporting the inclusion of a gross up of Mr. C.W.P.1's pension contributions and inclusion of the amounts in his RCA all reflect facts in those cases primarily supportive of the proposition that in one way or another, the payor had control over whether income was received as pension or in other non-taxable ways. In other words, the findings or inferences in those cases, where such non-taxable income was included for guideline purposes, were that the payor could receive the amounts as income, if the payor chose to. [Emphasis added.]
- [31] Here the respondent had the "discretion" to "draw down" the amounts put into the RRSP and use it as income, if he "chose to" do so. As such, the amounts should be treated as income. C. Averaging
- [32] The respondent's application suggested that he was also seeking an order allowing for a three-year income averaging. This point was not pressed in oral argument, for good reason. I see no basis for not using the actual income earned by the respondent each year. D. Range

- [33] Support at the mid-level would be appropriate in this case. The case presents a fairly typical fact pattern, i.e. a spouse with some employment qualifications who then takes a long period off work to raise the parties' children and then seeks to retrain as the children become older. E. Duration
- [34] The DivorceMate calculations provided by the parties generally suggested a duration between 6.5 and 13 years from separation. The respondent's motion sought termination as of July 1, 2024, although this point was not advanced with particular vigour in oral submissions. This would be at the low end of the duration range. I do not find a basis to make such a finding at this time, but I have accommodated a November 1, 2024 review, at which time the court should be in a better position to fix a duration. I adjourn the question of duration over to any subsequent review hearing. Alternatively, the parties are obviously at liberty to agree to a duration. F. Retroactivity
- [35] I agree that there is a proper basis for a retroactive support adjustment back to January 1, 2022, given the respondent's efforts to secure a review since the agreed December 1, 2021 review date. Regarding the retroactive recalculation, I find that the parties' actual 2021 (non-support) income should be used for 2022, and their 2022 income should be used for the 2023 calculation.
- [36] I leave it to the parties to calculate the precise amount payable, both retroactively and going forward, consistent with these reasons. If they cannot resolve same, the matter shall be determined by reference to the Registrar. IV. CONCLUSION
- [37] The respondent's application is granted in part. In terms of costs, unless either party seeks to make further submissions, I find that there were mixed results such that each party should bear their own costs. "The Honourable Mr. Justice Branch"

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