

CANADA / JUDGMENT

Lussier v. Ritchie

2023 BCSC 1817

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Supreme Court of British Columbia

DECIDED

17 October 2023

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2023 BCSC 1817 Lussier v. Ritchie

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Lussier v. Ritchie,

2023 BCSC 1817

Date: 20231017

Docket: E201457

Registry: Vancouver

Between:

Dwain Michael Lussier

Claimant

And

Cortny Maja Ritchie

Respondent

Corrected Judgment: The text of the judgment was corrected
at Paragraph 78 on October 18, 2023.

Before: The Honourable Mr. Justice Punnnett

Reasons for Judgment

Counsel for the Claimant:

J. Murphy

Counsel for the Respondent:

W. MacGregor

Place and Date of Hearing:

Prince Rupert, B.C.

July 5-6, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 17, 2023

Introduction

- [1] At issue in this family proceeding is child support, spousal support, the parties' incomes, and the division of the parties' Canada Pension Plan ("CPP") credits and the claimant's employment pension. The parties had a common law relationship of approximately 13 years, separated and then had a further common law relationship of more than two years. The underlying contentious issue is the effect of that separation, if any, on the division of the claimant's employment pension and CPP credits and spousal support. That is, was there one overall spousal relationship of approximately 16 years or one relationship of 13 years followed by a second marriage-like relationship of two years?
- [2] By consent, the parties have agreed to orders respecting guardianship, equal sharing of parental responsibilities, the residences of the children and parenting time. They have also resolved the issues of property division except for the noted issues of the CPP and pension division.

Background

- [3] The parties began to live together in a marriage-like relationship in or around March 2004. They have two children, Jyllian Maja Lussier, born March 27, 2006 and Drew Pamala Mae Lussier, born June 2, 2009. Jyllian primarily resides with the claimant and Drew primarily with the respondent.
- [4] The claimant and the respondent lived together until an argument occurred on February 19, 2017. The respondent alleges the claimant backhanded her in the face during the argument. The claimant states she attacked him. The respondent and the children spent the night at the claimant's mother's home. The respondent called a friend who told her to file a report with the police.

- [5] The respondent attended at the RCMP detachment as she thought they should keep a record of the incident. The police arrested the claimant for assault. He was released on an undertaking dated February 24, 2017 to attend court on April 5, 2017. It included provisions he have no contact, direct or indirect with the respondent, except through his parents to arrange parenting time. The undertaking also provided that he not attend at the family home or any place known to be the home, school or workplace of the respondent.
- [6] The claimant was to appear in court April 5, 2017. On April 5, 2017 he was contacted by the police and advised he did not have to attend court as the Crown was not proceeding with any charges.
- [7] The respondent states that the claimant called her and advised her that the Crown was not proceeding and asked her to let him return home. She informed him she did not feel safe yet. She recalled no further discussion about their future.
- [8] The claimant stayed with a friend until August 2017. Beginning August 1, 2017, the claimant rented accommodation at 1510 Atlin Avenue, Prince Rupert, British Columbia.
- [9] During the period between June of 2017 and late 2017, the claimant began and ended a relationship with his now wife. The respondent denied being in a relationship during that time.
- [10] The respondent states she and the claimant were in regular contact after the undertaking was vacated, primarily over the children, but states they also had frequent lunches together, although the claimant disputes the latter. They spent Christmas Day in 2017 together and according to the respondent they agreed the claimant would move back in. She testified the claimant started staying overnight the next day and thereafter, he started moving his things back into the family home.
- [11] The parties listed the family home for sale in the summer of 2017. The respondent states she told the realtor on January 13, 2018 the home was coming off the market as the claimant was moving back and that he had done so by that date.
- [12] The claimant submits they separated as of February 2017. He denies spending social time with the respondent in 2017. He asserts that they did not discuss reconciliation until 2018. He states it was not until late January they decided to reconcile and he gave notice regarding his rental. He denied sleeping at the family home in December 2017. He states that he only started staying overnight towards the end of January 2018.
- [13] After they re-commenced residing together the parties remained together until May 23, 2020. They have not lived together since.
- [14] At the Judicial Case Conference on October 19, 2020, the following support orders were consented to:

BY CONSENT, on an interim without prejudice, commencing on October 30, 2020, the Claimant will pay to the Respondent the sum of \$1,500 per month in child support, until further order of the Court or agreement between the parties.

BY CONSENT, on an interim without prejudice, commencing on October 30, 2020, the Claimant will pay to the Respondent the sum of \$2,500 per month in spousal support, until further order of the court or agreement between the parties.

BY CONSENT, child support and spousal support shall be paid in the combined amount of \$1,000 per week every Friday, except where there are months where there are 5 Fridays, there will only be payments on the first 4 Fridays.

Position of the Claimant

- [15] In this family proceeding the claimant seeks an order respecting the agreed to parenting arrangements and an order for child support, as well as the division of his employment pension and the parties' CPP benefits.
- [16] He argues that the length of the parties' relationship for division of his employment pension and the parties' CPP benefits is the period from February 2018 to May 2022. He submits the relevant period is not from 2004 as, on his interpretation of s. 83(1) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the reconciliation did not include 90 days of living together in the alleged 12 months following their separation in February 2017. Hence, he argues the respondent's entitlement to spousal support and pension and CPP credit division arises only from the second marriage-like relationship between January 31, 2018 and May 23, 2020.

Position of the Respondent

- [17] The respondent submits that: (i) the claimant's interpretation of s. 83(1) of the FLA is incorrect; (ii) they were separated for less than 12 months; (iii) they did reconcile for over 90 days under s. 83(1); and (iv) her entitlement to spousal support and the division of pensions and CPP credits arises from the March 2004 commencement of their common law relationship through to their separation on May 23, 2020.

Issues

- [18] The issues to be resolved are:
- The date of the parties' separation in 2017;
 - The date of their reconciliation;
 - The length of the parties' relationship, and the resulting division of the claimant's pension and the parties' CPP credits;
 - The claimant's income, and specifically whether it includes his pension contribution deductions for the purposes of calculating support;

- e) The claimant's child support obligations;
- f) The appropriate income, if any, to impute to the respondent;
- g) Whether the respondent is entitled to spousal support, and if so, if and when spousal support should be terminated.
- h) Costs.

Law and Analysis

The Date of Separation

- [19] It is not in issue that the parties physically separated sometime after the alleged assault and the removal of the claimant from the matrimonial home. What is in issue is when they separated with the intention to permanently live separate and apart. It is not in issue that they later reconciled.
- [20] There is no evidence that separation was contemplated before the alleged assault. The respondent states that when the police informed her they would have to arrest the claimant, she did not want them to do so. The claimant moved out of their home because of the undertaking.
- [21] They did meet with a counsellor once thereafter, although it is unclear when that occurred and if that meeting was to address issues relating to the children or if it was for marriage counselling. No further counselling occurred.
- [22] The claimant submits the parties separated when he had to leave the home. The respondent states they did not intend to separate at that time.
- [23] Section 3(4) of the FLA provides that evidence of separation may include a party communicating an intention to separate permanently and accompanied by an act or actions indicating that intention:

For the purposes of this Act,

spouses may be separated despite continuing to live in the same residence, and the court may consider, as evidence of separation,

- (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
- (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

[Emphasis added.]

- [24] In *Bhimani v. Beninteso*, 2019 BCSC 2074, Mr. Justice Myers considered what a "separation" involves:

14 Dardi J. outlined the test for separation in *H.S.S. v. S.H.D.*, 2016 BCSC 1300:

[40] It is clear that the law does not require a meeting of the minds with respect to the intention to separate. A physical separation, coupled with one party's intention to live separate and apart, is sufficient: *Nearing v. Sauer*, 2015 BCSC 58 at para. 54. The legal framework for determining that spouses have lived separate and apart requires that the Court find, first, an intention of one spouse to repudiate or end the marital relationship and, second, action consistent with that intention. The parties disagree on whether that action must include an unambiguous verbal expression of his or her settled intention.

15 The courts have recognised that contact between the parties can continue after the separation without negating the separation. In *Y.T.C. v J.C.V.*, 2018 BCSC 773, Murray J. stated:

[56] The soft break approach taken by the respondent does not result in the intention to separate being obscured or negated. In *Nearing* the court stated:

Taking the evidence as a whole, and giving little weight to the respondent's evidence regarding this issue, I am satisfied, on a balance of probabilities, that the claimant made it clear to the respondent she wanted to separate and asked him to leave the home well before he actually left on or about August 15, 2009. I accept that he saw the note she prepared in 2008 and was well aware of her demand that he move out, and that he took the teaching job in Manitoba as a result. The brief reference in the note to the possibility the marriage may be salvaged does not defeat the claimant's clearly stated insistence that the parties live separate and apart. I do not interpret the authorities as requiring the spouse who intends to separate to demonstrate absolute certainty that the marriage is at an end. Such a view would be inconsistent with the express language of s. 3(b)(ii) of the Divorce Act. It is enough to communicate an intention to separate, accompanied by actions consistent with that intention, assuming, of course, there is a physical separation between the spouses. [Emphasis in original.]

[25] In *Henriksen v. Wildman*, 2001 BCSC 951, Master Horn summarized the test that applies to the issue of separation:

[11] The question is whether the previous period of cohabitation must be taken into account in calculating whether they have lived together for a period of at least two years. There are several decisions that discuss this question, which I have considered. They are, *Hohn v. Coppin* (unreported) July 25, 1984, Doc. 1204/83 (Prince George Registry); *Smart v. Wiewior* (1987) 7 RFL (3rd) 172; *Berezowski v. Keutzer*, (unreported) [1995] BCJ No. 518 (QL); *Roch v. Payne* (unreported) (2000) BCSC 869.

[12] The test as set out in those cases seems to me to be this:

1. whether, when the couple did separate, they intended to live separate lives on a permanent basis; and if so
2. whether, when the couple recommenced living together, they intended to revive their former relationship.

[26] At least one of the parties must intend to terminate their relationship as a married couple if they are to be found to have separated: *Ishebabai v. Temu*, 2015 BCSC 1321 at para. 38.

[27] Leaving the matrimonial home is not conclusive of an intention to end the relationship. In *Malecek v. Leiren*, 2021 BCSC 1052 at para. 47, Justice Giaschi summarized principles relevant to assessing evidence of separation:

47 In assessing the evidence of separation I keep in mind the following principles:

- a) The law does not require a meeting of the minds to find an intention to separate. All that is required is an intention of one spouse to separate and action consistent with that intention: *Nearing v. Sauer*, 2015 BCSC 58, at para. 54; *H.S.S. v. S.H.D.*, 2016 BCSC 1300, at para. 40;
- b) The law does not require an unequivocal communication of separation by one spouse to the other. The court is to assess on the totality of the evidence whether one spouse had a settled intention to separate and communicated that intention through conduct to the other spouse: *H.S.S.* at para. 42; and
- c) The mere living separate and apart of spouses because of enforced long term residential medical care is not conclusive of an intention to end the matrimonial relationship, nor of an intention to separate permanently; *Dediluke v. Dediluke*, 2000 BCSC 487, at para 65; *Cole v. Cole*, 2016 BCSC 716 (Emphasis added).

[28] Similarly, the separation here due to the criminal proceeding is not conclusive of an intention to separate nor of an intention to separate permanently.

[29] As noted earlier, there was no evidence of intention to separate at the time of the alleged assault. The parties ceased residing together on February 24, 2017 because of the criminal proceedings. As of April 5, 2017, when the claimant could have returned home, the respondent was not agreeable to him doing so at that time, although he proposed that he do so according to the respondent. The claimant testified their relationship at that time "was not very good" and that they were "split up". The claimant did not state he informed the respondent that they were "split up" nor did he state that it was his intention then to permanently separate.

[30] Neither party testified they informed the other the marriage was over. There was a vagueness on the issue from both, and a retrospective interpretation of the events in the spring of 2017, particularly by the claimant.

[31] The Court is left with the conduct of the parties after April 5, 2017 in order to address the issue. I find that firstly there was no intention of either party to separate before the February incident. In reporting the matter to the police, the respondent did not seek nor did she expect they would take any action. Nor is there any evidence either party had the intention that while bound by the recognizance, such represented the intention of either to end their relationship. On April 5, 2017, the claimant sought to return to the family home, but the respondent testified she was still concerned about the violence.

- [32] The claimant did not immediately seek his own rental accommodation but rather commenced residing with a friend, clearly not a permanent move. He did not rent his own residence until August 1, 2017. The parties listed the family home for sale in the summer of 2017. Both of those events indicate that by then they were living separate and apart and that the relationship had ended. In addition, in June 2017, the claimant commenced a relationship with his now wife.
- [33] No specific date of separation has been established. There is a lack of evidence as to when at least one of the parties intended to live separate and apart on a permanent basis. Rather, it appears that as time passed the claimant moved on. On the balance of probabilities, I find the intention to separate likely arose sometime in the month of May 2017.

The Reconciliation

- [34] The claimant states they did not reconcile until late January or early February 2018. His evidence appears to tie the date to when he moved his possessions back in. The respondent submits they did so just after Christmas 2017 when the claimant started staying in their home. She notes that on January 13, 2018 she informed their realtor they were taking their home off the market.
- [35] What is clear is that they decided to reconcile in January. The decision to cancel the listing of the family home for sale is indicative of the change in their plans for the future, as is the claimant giving notice in January regarding his tenancy. I find the parties reconciled in mid-January 2018.
- [36] If I am correct that neither had the intention to permanently separate until after mid-May 2017 and that they reconciled mid-January 2018, then they were separated for approximately eight to nine months commencing May 2017 and ending January 2018. They then remained together until 2020, hence the parties were together and reconciled for over 90 days within a 12-month period. Hence, pursuant to s. 83 of the FLA they are not considered to have separated.
- [37] I need not address the respondent's alternate argument regarding the interpretation of s. 83.

The Respondent's Interest in the Claimant's Pension

- [38] Therefore, the relationship in question commenced in the spring of 2004 and continued until May 23, 2020. The respondent's interest in the claimant's Waterfront Foremen's Pension Plan pension shall be 50% of the pension for the period of March 2004 to the date of separation May 23, 2020, to be divided in accordance with Part 6 of the FLA.
- [39] The parties' unadjusted pensionable earnings earned from March 2004 to May 23, 2020 in the Canada Pension Plan shall be equalized pursuant to ss. 55, 55.1 and 55.2 of the Canada Pension Plan, R.S.C. 1985, c. C-8.

Claimant's Employment History and Income

- [40] The claimant was employed by Empire Grain from 2014 to 2018 as a foreman with the International Longshore and Warehouse Union loading log and grain ships. Since 2018 he has been employed by DP World as a foreman overseeing longshoremen loading containers and rail cars. He advised there were 30 foremen but now there are 55, resulting in less work for each of them. He is also employed as part of a pool of foreman at the Pinnacle Renewable Energy Group terminal loading pellets, and Empire Stevedoring loading logs.
- [41] Regarding his pension, he testified his mandatory contributions are substantial and that his Guideline income should be reduced by them and his union dues.
- [42] The parties dispute the line 150 incomes of each. The claimant submits his line 150 income should not include his Waterfront Foreman's Pension Plan contributions nor his union dues. The respondent concedes union dues are to be deducted to establish the claimant's Guideline income but submits that the Waterfront Foreman's Pension contributions should be included.

Deductibility of the Claimant's Waterfront Foreman's Pension Plan Pension Contributions from His T-4 Income

- [43] Section 16 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines], states a spouse's total income is determined by the "total income" heading in the T1 General form issued by the CRA, subject to adjustments under Schedule III to the Guidelines. Schedule III lists permitted deductions such as "sales expenses" and "travel expenses" and references the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.). The Guidelines do not provide for the deduction of mandatory pension contributions from income. The claimant argues such contributions are more akin to an "asset" as they are locked-in and inaccessible to the payor parent until retirement. The claimant submits that, in effect, the mandatory pension contributions are not "income" that is available to him.
- [44] In *S.L.P. v. C.W.P.1*, 2002 BCSC 1384, Justice Koenigsberg considered the child support issue with respect to a payor parent whose company contributed approximately \$35,000 per year to his pension. As he had no control over such contributions, such funds were not available to him to pay support. The funds were not included in the payor's reported income at line 150:
- [34] There is no evidence to support that this payment which amounted in 2002 to almost \$23,000 was a manoeuvre by Mr. C.W.P.1's employer or Mr. C.W.P.1 to manipulate his receivable income in order to reduce his exposure to child support. 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. (See, Dahlgren v. Hodgson (1998), 1999 ABCA 23 (CanLII), 43 R.F.L. (4th) 176 (Alta. C.A.), Rattenbury v. Rattenbury, [2000] B.C.J. No. 889, 2000 BCSC 722 (B.C.S.C.)). There is no such evidence in this case. Therefore, it cannot fairly be said that, in fact, Mr. C.W.P.1 has the pension income available to him to pay child support. I decline to include those amounts to determine his guideline income.

[45] Mr. Justice Greyell cited C.W.P.1 and adopted its reasoning in Redlick v. Redlick, 2013 BCSC 1155:

[55] I also note Madam Justice Koenigsberg's reasoning in S.L.P. v. C.W.P.1., 2002 BCSC 1384. In this case, the husband's company had contributed approximately \$35,000 per year to his pension. After changes were made to the income tax rules in 1998, a limit of contribution was set at \$13,500. Any contributions over the limit were paid into the husband's holding company where he was the sole shareholder as taxable income. Eventually, the income tax rules created a vehicle for pension overpayments called an "RCA". Koenigsberg J. did not find any evidence that the company's decision to make contributions into an RCA for the husband amounted to a maneuver to manipulate his receivable income. She distinguished cases relied upon by the wife as examples of arrangements where an employee had control over whether their income was received as pension or in other non-taxable ways. In those cases, the payee could receive the amount as income, if the payor so chose.

[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.

[60] Ms. Redlick's income for the purpose of calculating child support will have her employer's contributions to her locked-in RRSP deducted.

[46] In Yip v. Yip, 2016 BCSC 1595, Mr. Justice Smith followed the reasoning of Redlick and deducted a payor parent's employer's RRSP contributions from his Guideline income:

[37] There is no dispute about the husband's obligation to pay child support. His total income in 2015 was \$124,029. The parties have agreed that certain deductions for employment expenses are appropriate, and 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: Redlick v. Redlick, 2013 BCSC 1155 at para. 60. In the result, his Guideline income is \$115,242 requiring child support of \$2,174 per month.

[47] In Phillips v. Phillips, 42 B.C.L.R. (3d) 218, 1997 CanLII 2688 (SC), Justice Hutchinson held that Schedule III of the Guidelines did not allow a payor spouse to deduct EI premiums and CPP payments from their gross income for Guideline purposes.

[48] In *Brown v. Brown*, 2014 BCCA 152, the payments in question were made into a share purchase scheme that the payor chose to participate in. They were found to be analogous to an employer's contributions to a pension plan rather than to employee contributions. Mr. Justice Groberman, writing for the Court of Appeal, stated:

5 Before the chambers judge, Ms. Brown contended that the dividends should be included in Mr. Brown's income under the Federal Child Support Guidelines, SOR/97-175 (his "Guideline income") for 2008 and 2009, and that he should pay retroactive child support based on that income. Mr. Brown disagreed, arguing that the dividends did not increase his ability to pay child support. The chambers judge agreed with Mr. Brown on this issue:

[20] While the dividend that Mr. Brown received was classified as income for tax purposes, it was not discretionary income, because he was required to apply it entirely to the debt for purchase of his shares. It therefore had no impact on his ability to pay support or his lifestyle. I agree that the purchase gets him an asset, that is the shares in his employer company, that may well have great value some day, but it is an asset that he cannot currently sell or borrow against. It would be unfair to take it into account in settling Guideline income for the purpose of a retroactive award.

6 For reasons that follow, I am satisfied that the judge's conclusion that the dividends should not be included in Guideline income was correct.

17 With respect to the first step, dividend income from Canadian corporations is included in line 150 income. Indeed, the amount included in line 150 is a "grossed up" figure that is greater than the actual amount of the dividend received.

18 The second step in the calculation is to apply the adjustments to line 150 income set out in Schedule III to the Guidelines. The only adjustment that is important in the case before us is s. 5 of the Schedule, which provides that in calculating Guideline income, the actual amount of dividends received from Canadian corporations is used, rather than the grossed up figure that is used in calculating line 150 income.

19 With respect to the final step in calculating Guideline income, the parties have referred the Court to two provisions of the Guidelines:

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

...

19(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

...

- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax...

The court noted that s. 1(a) of the Guidelines states that one of the objectives of the Guidelines is "to establish a fair standard of support for the children that ensures that they continue to benefit from the financial means of both spouses after separation."

[49] The Court of Appeal then stated:

23 Sections 17-20 of the Guidelines allow courts a degree of flexibility in specific circumstances where parties have unusual forms or patterns of income, or where they are able to manipulate their income for tax purposes in a manner that might frustrate the goals of the Guidelines. It is important, however, in interpreting and applying those sections, that courts recognize the need for consistent and predictable results. Courts should interpret ss. 17-20 of the Guidelines with a view to advancing the objectives set out in s. 1.

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.

36 The dividend amounts received by Mr. Brown in the case before us are not ordinary income, nor are they analogous to a return of capital. In order to analyze how the objective in s. 1(d) of the Guidelines applies, it is necessary to find a more common form of income that is analogous to the dividends received by Mr. Brown in this share purchase scheme.

37 The share purchase agreement scheme can be analogized to a company pension plan. Through the scheme, funds from the company are invested in a financial vehicle designed to provide retirement income. If the investment had been in a registered pension plan operated by the company, the company's payments into the plan would not have formed part of Mr. Brown's line 150 income.

38 The characterization of the dividends as analogous to employer contributions to a pension plan recognizes the fact that the dividends are not part of Mr. Brown's ordinary remuneration. But for the existence of the share purchase scheme, Mr. Brown would receive no dividends. The dividends are, therefore, more closely analogous to employer contributions to a pension plan than to employee contributions.

39 Given the Guidelines objective that "spouses and children who are in similar circumstances" be treated consistently, it is difficult to accept that Mr. Brown's dividend income should be treated differently from employer contributions to pension plans. Accordingly the dividend income should be excluded from his Guideline income.

40 The same characterization would not apply to other amounts that Mr. Brown is required to pay into the share purchase scheme. His \$10,000 down payment came from his ordinary income. As well, any future company profit-sharing entitlements that Mr. Brown is required to pay into the scheme would have come to him as part of his terms of employment, whether or not he chose to enter into the share purchase scheme.

41 While it is true that neither the down payment nor future profit-sharing entitlements are amounts that are available to Mr. Brown to pay child support, they are amounts that he has chosen to apply to the scheme. More importantly, because they are part of his ordinary remuneration, they are analogous to employee contributions to pension plans, not to employer contributions. Employee contributions to pension plans are included in line 150 income, and are not deducted from it to determine Guideline income. In my view, consistent treatment of payors in similar situations demands that Mr. Brown not be treated more favourably than payors who contribute to more conventional retirement plans.

42 In the result, while the dividends should be excluded from Mr. Brown's Guideline income, both the down payment and any future payments coming from the company profit-sharing plan should be included.

[50] However, in *Mastrangelo v. Di Cristofaro*, 2019 ONSC 7264, the Ontario Superior Court of Justice noted:

[114] While this approach is attractive, as it makes the whole Contino analysis unnecessary, I find that it contains many pitfalls. As one example, the mother in this case has mandatory pension contributions each month in the amount of \$808. The Table amount that she would be required to pay pursuant to the Guidelines is not reduced because her available income is less due to the payment of mandatory pension contributions. Dividing the net disposable income between the parties, which in her case is lowered by her mandatory pension contributions, would result in a decreased monthly child support obligation than that required by the Guidelines, based on her gross income. In some cases, this method could potentially result in the children subsidizing the acquisition of an asset (for instance a pension plan) in which they have no interest. [Emphasis added]

[51] *Mastrangelo* addressed factually different circumstances than this case and did not analyse the broader issue in light of the British Columbia authorities noted earlier.

[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, as are his annual union and professional dues.

[54] The income of the claimant from 2019 to 2022 is:

Year

Annual Income

Less Union dues

Less Mandatory Pension Contribution

Guideline Income

2019

\$292,758.21

\$2,520

\$26,630

\$263,608.21

2020

\$244,128.20

\$2,520

\$27,230

\$214,378.20

2021

\$215,414.47

\$2,480

\$28,610

\$184,324.47

2022

\$229,006.80

\$2,520

\$30,180

\$196,306.80

Respondent's Employment History and Income

- [55] The respondent left high school without finishing her last remaining credit. In 2000, she took a resident care aide course at Northwest Community College in Prince Rupert lasting approximately nine months, which she completed in 2001.
- [56] When the parties met in 2004, the respondent was employed by Reitmans. She left that employment to go on maternity leave in 2006 when their first child was born. The respondent remained off work until after their second child was born in 2009. She then secured casual employment as a care aide at a retirement home called Acropolis Manor (the "Manor") in Prince Rupert. She secured her Class 4 driver's licence to drive the Manor bus and became an activity worker there. She was so employed for about four years. The respondent left the Manor on her doctor's advice after she had difficulty working with the elderly following the death of her mother. She stated that she suffered from mental health issues diagnosed by her psychiatrist as anxiety, depression and OCD.
- [57] Thereafter, she worked as a house cleaner for about 20 hours a week at \$25.00 per hour. In 2016, she began work for the City of Prince Rupert as a clerk at the RCMP City Detachment until 2019. She then worked part time at the City of Prince Rupert Recreation Centre, and then full time in the Public Works Department as a janitor working the afternoon shift from 3:30 p.m. to 11:30 p.m. Monday to Friday.
- [58] However, problems developed with their oldest daughter and the respondent sought other employment that did not take her out of the home for the evenings. She began working for Lighten Up Electric as a clerk Monday to Friday from 8:00 a.m. to 4:30 p.m. for \$25.00 an hour. She was however fired without cause in November of 2022. It was not explained to her why she was let go. She testified she has been looking for work since then without success. She was receiving Employment Insurance of about \$550 per week after tax. More recently the respondent started cleaning houses again. She has also been providing private care aide services about 10 hours a week, earning approximately \$350 to \$400 per week for this work. She intends to continue such employment with the hope she will expand her clientele.
- [59] The claimant submits that, to date, the respondent has failed to demonstrate reasonable efforts to research possible training or programs to enhance her employability or develop reasonable plans for her employment in the future. The claimant notes that from the respondent's dismissal from Lighten Up in November 2022 up until February 15, 2023, she submitted a total of seven job applications. Further, the claimant notes that the respondent has only submitted an additional five applications since then. He submits that two job applications a month is unreasonable. He notes she was capable of working full time for the City of Prince Rupert at about \$30.00 per hour, showing that she can earn approximately \$63,000 per annum, and that such income should be imputed to her.
- [60] The respondent submits she has made reasonable efforts to find employment. She left her employment with the City of Prince Rupert due to the fact that the work hours caused her to leave her teenage daughter alone at home on weekday evenings while her daughter was

having difficulties that required her presence. She found employment with Lighten Up at a lesser rate of pay, however submits that was a reasonable decision given her parental obligations. That employment ended for unknown reasons and the employer acknowledged it was not for cause. As her efforts to find other employment were unsuccessful, she started her own business providing housecleaning and care aide services. She is hopeful that over time she will earn more than her current income of approximately \$20,000 per annum. She acknowledges that income at minimum wage should be imputed--that being an annual income of approximately \$30,000.

[61] The onus is on the claimant to provide an evidentiary basis to support imputing income to the respondent: *El-Jaroudi v. El-Mikati*, 2020 BCSC 868 at para. 238. In *El-Jaroudi*, Justice Shergill summarized the applicable principles for imputing income:

[238] The following principles for income imputation emerge from the authorities:

- a) The court must have a rational and evidentiary basis for imputing income: *Windle v. Windle*, 2010 BCSC 18 at para. 88.
- b) The onus lies on the party seeking to have income imputed to the other spouse: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 35.
- c) Bad faith is not required for a finding that a party is intentionally underemployed. What is required is a finding that the party is not earning to their capacity: *Beissner v. Matheusik*, 2014 BCSC 1785 at para. 37, *aff'd* 2015 BCCA 308.
- d) When imputing income, the court must consider what is reasonable given the age, education, skills, health of the parents, and availability of work: *Yeung* at para. 47.
- e) A parent who chooses to work less than full-time must justify the choice by the needs of the children: *Yeung* at para. 47.
- f) Limited experience and skills do not justify a failure to pursue employment: *Fong v. Fong*, 2011 BCSC 42 at para. 82.
- g) A court may impute income where a person pursues unremunerated employment or unrealistic career aspirations: *Fong* at para. 82.

[239] The overriding principle underlying income imputation is to make the fairest determination of income, having regard to the evidence.

[62] The claimant has produced no evidence of jobs available to the respondent, nor of what further training she could take that would enhance her employability. On the other hand, the respondent has applied for a number of jobs without success. There is no evidence that there have been jobs available that she is qualified for that she has not applied for.

[63] I accept that she is capable of working and from her past work history is likely to earn an income greater than minimum wage. The test to impute income is one of reasonableness. In this instance, I am of the view imputing an income of \$40,000 per annum to the respondent is reasonable.

[64] As a result of the above, I turn to the incomes of the parties to be applied to child and spousal support.

Summary of the Parties' Incomes

[65] The parties' respective incomes have been:

Year

Claimant's Income for Support Purposes

Respondent's Income

2019

\$263,608.21

\$28,952

2020

\$214,378.20

\$17,318

2021

\$184,324.47

\$30,593

2022

\$196,306.80

\$40,000 (imputed)

[66] The child support payable where parenting is shared is \$1,341 per month payable by the claimant to the respondent.

Entitlement to Spousal Support

[67] Section 162 of the FLA states:

The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

(a) the length of time the spouses lived together;

- [68] The respondent submits that given the length of the relationship, there were economic advantages and disadvantages to each of the parties. When the claimant obtained his employment as a foreman, he was able to do so as she remained at home and cared for the children for a three-year period. That decision made sense given the claimant's significant earnings. She submits that time out of working as well as changing employment to care for the child in her care has lessened her income and employability to some extent.
- [69] She seeks compensatory and non-compensatory support in the mid-range.
- [70] The Spousal Support Advisory Guidelines (Ottawa: Department of Justice, 2008) [SSAG] indicate that if a party is entitled to support based on a relationship of 16.33 years, such support should be for a period of 8.16 to 16.33 years. The claimant paid voluntary support for five months after the May 23, 2020 separation and further spousal support payments of \$2,500 per month in accordance with the JCC order of October 19, 2020. To the date of this hearing, that is over three years of support.
- [71] The claimant submits the onus is on the respondent to establish entitlement to support. He submits the respondent's economic disadvantage is self-inflicted and is not from the relationship, its breakdown or her care of the children. As a result, her entitlement to compensatory support is undermined. He also submits her economic hardship is likewise self-inflicted.
- [72] The parties lead little additional evidence regarding their roles during the relationship. When not fully employed during portions of the relationship, it appears the respondent cared for the children and household and, as a result, the claimant was able to work the hours and shifts required by his employment.
- [73] I reject the suggestion the respondent's economic circumstances are self-inflicted. Each of the parties had their respective roles in their relationship. The respondent is entitled to spousal support on both a compensatory and non-compensatory basis.
- [74] The SSAG set the range of support of between \$2,324 and \$3,388, with a mid-range of \$2,860 per month for an indefinite duration subject to variation and possibly review, with a minimum duration of 8.16 years and a maximum duration of 16.33 years from the date of separation.
- [75] The respondent has taken steps since separation towards self-sufficiency. She is hopeful to increase her income working as a care aide. The child in her care is now 14 years of age. I accept the respondent's decision to not work evening shifts is appropriate in the best interests of the child.
- [76] I find the respondent is entitled to spousal support on both compensatory and non-compensatory basis at the mid-range being the sum of \$2,860, commencing on October 1, 2023 for a minimum of six years from that date, subject thereafter to review, but to continue until any review is completed.

[77] I make the following orders:

1. BY CONSENT, pursuant to s. 39(1) of the Family Law Act, the parties shall be guardians of the children, Jyllian Maja Lussier, born March 27, 2006, and Drew Pamala Mae Lussier, born February 6, 2009.
2. BY CONSENT, pursuant to s. 40(2) of the Family Law Act, the parties will equally share all of the s. 41 parental responsibilities for the children.
3. BY CONSENT, Jyllian Maja Lussier has been primarily residing with the claimant since the separation on May 23, 2020, and will continue to primarily reside with the claimant.
4. BY CONSENT, Drew Pamala Mae Lussier has been primarily residing with the respondent since the separation on May 23, 2020, and will continue to primarily reside with the respondent.
5. BY CONSENT, the parties will each have reasonable generous parenting time with the child who is not primarily residing with that party, at times to be mutually agreed upon by the parties, in consultation with the children.
6. Commencing October 1, 2023, the claimant's income will be set at his 2022 income of \$229,006.80 minus union dues and mandatory pension contributions, for a Guideline income of \$196,306.80.
7. Commencing October 1, 2023, the respondent's income will be imputed in the amount of \$40,000.
8. Pursuant to s. 149 of the Family Law Act and s. 9 of the Federal Child Support Guidelines, commencing on October 1, 2023, and continuing the first day of the month thereafter, the respondent shall pay to the claimant the sum of \$1,341 per month (being the off-set amount) for the care of the children.
9. The parties will share the cost of special and extraordinary expenses for the children, with the claimant paying 80% of these costs and the respondent paying 20%. The proportionate share of extraordinary expenses shall be reviewed annually.
10. As of the date of this order, there is no child support owing by either party to the other.
11. Neither party will incur special and extraordinary expenses for which he or she seeks contribution from the other party without first obtaining the written consent of the other party. Receipts shall be provided for any agreed upon extraordinary expense for which a party seeks reimbursement.
12. For the purpose of calculating the parties' share of any special and extraordinary expenses, the amount of the expense will be calculated by considering any tax benefit or subsidy for the expense.

13. The parties will review the child support amounts payable and the parties' proportionate share of the special and extraordinary expenses by July 1st of every year with the first review to be completed by July 1, 2024 (the "Review"). For the purpose of the Review, the parties will, by no later than June 1st of each year, provide each other with the following documents, and base child support/spousal support on each party's income for the previous year:
 - a) a copy of the most recent income tax return including all attachments for all corresponding jurisdictions;
 - b) the Notice of Assessment or Notice of Reassessment, if received;
 - c) where the spouse is an employee, the most recent statement of earnings indicating the total earnings paid in the year to date, including overtime or, where such a statement is not provided by the employer, a letter from the spouse's employer, a letter from the spouse's employer setting out that information including the spouse's rate of annual salary or remuneration;
 - d) where the spouse is self-employed, the financial statements of the spouse's business or professional practice, other than a partnership, and a statement showing a breakdown of all salaries, wages, management fees or other payments or benefits paid to, or on behalf of, persons or corporations with whom the spouse does not deal at arm's length;
 - e) the most recent annual statement of earning, including but not limited to, bonuses, commissions, trust income, share dividends, etc.;
 - f) particulars of the children's special and extraordinary expenses anticipated for the coming year, if known; and
 - g) any other relevant information, to facilitate determination of the adjustment, if any, required to review the child support amounts payable.
14. Spousal support of \$2,860 shall be paid from October 1, 2023 for a minimum of six years.
15. Either party may apply for the equalization of the unadjusted pensionable earnings under the Canada Pension Plan pursuant to ss. 55, 55.1, and 55.2 of the Canada Pension Plan with entitlement dates being the date of cohabitation of March, 2004 and the date of separation of May 23, 2020.
16. The claimant's employment pension will be divided pursuant to Part VI of the Family Law Act as follows:
 - a) The benefits accrued to Dwain Michael Lussier (the "Pension") under the under the Waterfront Foremen's Pension Plan Employee Number 35209 between the dates of March 1, 2004, and May 23, 2020 (the "Entitlement Dates"), are family property;

- b) Cortny Maja Ritchie is entitled to a share of Dwain Michael Lussier's Pension determined and divided in accordance with Part 6 of the Family Law Act and this order;
- c) Cortny Maja Ritchie will receive her share of the pension which is 50% of the Pension accrued during the Entitlement Dates;
- d) If the Pension has commenced, and there is a guarantee period, Dwain Michael Lussier must designate and maintain Cortny Maja Ritchie as the beneficiary of the guarantee period, and Dwain Michael Lussier may only change the designation if Cortny Maja Ritchie predeceases Dwain Michael Lussier;
- e) The parties must each pay half of the administrative fees charged for dividing the Pension; and
- f) Dwain Michael Lussier or Cortny Maja Ritchie may apply to a court of competent jurisdiction for such directions and further orders as may be necessary to facilitate and enforce the division of the Pension.

Costs

[78] As the respondent has been substantially successful, she is entitled to her costs as a matter of ordinary difficulty under Appendix B.

"The Honourable Mr. Justice Punnett"

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