
CANADA / JUDGMENT

Marthinsen v. Marthinsen

2020 BCSC 619

COURT

Supreme Court of British Columbia

DECIDED

22 April 2020

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2020 BCSC 619 Marthinsen v. Marthinsen

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marthinsen v. Marthinsen,

2020 BCSC 619

Date: 20200422

Docket: E083756

Registry: Vancouver

Between:

Sean Roger Marthinsen

Claimant

And:

Varsenig Marthinsen

Respondent

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Claimant:

N.L. Charlton

Counsel for the Respondent:

D.J. Miller

Place and Dates of Hearing:

Vancouver, B.C.

March 3-5, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 22, 2020

Introduction

[1] After more than 11 years of ongoing strife in this acrimonious family proceeding, the respective parties seek the following orders, including variation orders on the basis of a material change in circumstances:

a) the claimant:

i. a declaration that the children are no longer "children of the marriage" under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.); and

ii. termination or, alternatively, reduction of his child and spousal support obligations, retroactive to July 16, 2019, the date upon which his application was originally scheduled to be heard but was adjourned at the request of the respondent;

b) the respondent:

i. an increase of the claimant's child and spousal support obligations, retroactive to August 1, 2019;

ii. sharing of s. 7 extraordinary expenses proportionate to the newly determined respective incomes;

iii. a review of the claimant's child support obligations upon resolution of the children's extant claims, arising out of three separate motor vehicle accidents;

iv. payment by the claimant to the respondent of:

(1) \$16,336, being her share of his RRSP, plus interest;

(2) \$4,500 to equalize the value of the vehicles retained by the parties at the time of separation; and

(3) \$1,790 to account for the rental income and rental payments associated with rental properties in Prince George, B.C.

Background

- [2] The claimant is currently 48 years old. The respondent is currently 52 years old. They were married on February 1, 1996.
- [3] The parties have two children, Nicolas and Mathew, now aged 21 and 19 respectively (collectively, the "children").
- [4] The parties separated on May 4, 2008. This proceeding was commenced on November 5, 2008.
- [5] On March 11, 2009, Mr. Justice Burnyeat made interim orders relating to the joint custody, guardianship and parenting of the children.
- [6] On April 30, 2010, the parties were divorced.
- [7] Also on April 30, 2010, following a summary trial, Mr. Justice Masuhara made several orders (the "Masuhara Order") including:
- a) that the matrimonial home be sold with the proceeds divided 40% to the claimant and 60% to the respondent;
 - b) that the parties' RRSPs be equalized and that the claimant transfer \$11,471 from his RRSP to a RRSP in the name of the respondent by a spousal rollover;
 - c) that, for as long as the children are each a "child of the marriage", within the meaning of the Divorce Act, the claimant pay child support to the respondent of \$2,264 per month plus \$476 per month as the claimant's proportionate share of the children's s. 7 expenses. Any such expenses exceeding \$7,500 per year were to be agreed upon in advance and paid equally.
 - d) the respondent's entitlement to the receipt of spousal support on both compensatory and non-compensatory grounds was not contested. It was ordered that the claimant pay spousal support to the respondent of \$3,324 per month on the basis of annual Spousal Support Advisory Guidelines ("SSAG") incomes of \$166,600 and \$0, respectively. The support at the low-end of the SSAG range for various reasons, including: (i) the apportionment of 60% of the sale proceeds of the matrimonial home in the respondent's favour; (ii) the equal parenting time regime ordered by Mr. Justice Burnyeat had not been implemented for Nicolas; and (iii) no imputed income to the respondent had been sought by the claimant. The respondent's evidence at the time was that she intended to take significant steps towards becoming independent within five years, including upgrading her education and earning her high school diploma.
- [8] On March 22, 2012, Mr. Justice Punnett determined (the "Punnett Order") that the children were being alienated from the claimant by the respondent and made several orders in that regard. He ordered counselling for the children and the parties. He also found that the respondent was capable of employment but had not made reasonable efforts to find it. He attributed rental and annual part-time income to the respondent totalling \$24,750 and

reduced the spousal support payable by the claimant to \$2,516 per month. He made further orders regarding the division of property, RRSPs and rental property income. He did not vary the claimant's child support obligations.

- [9] Despite the Masuhara Order requiring a sale of the matrimonial home with the claimant having conduct of the sale, the respondent thwarted all efforts on the part of the realtors to sell it. Although the respondent denies having done so, with vague and unsubstantiated language suggesting that the house did not sell because the list price was too high, I accept the compelling evidence of the realtor who was involved to the contrary. The realtor's evidence is detailed and substantiated by email exchanges with the respondent's then counsel and other evidence of market forces, market value, the respondent's refusal to allow the house to be shown to prospective purchasers and of her desire to purchase the claimant's interest in it at the listed price, a price which she now says was too high. Ultimately, and out of sheer frustration, the claimant capitulated and sold his 40% interest to the respondent at that price.
- [10] As a result of the financial burden of the proceedings, the claimant fell into arrears on the payment of his support obligations, and the respondent enrolled with the Family Maintenance Enforcement Program. By 2016, all of the arrears were fully paid and he has consistently met his support obligations since.
- [11] There has been no court-ordered intervention in respect of this matter since 2013 until now, in large part due to the claimant no longer being able to afford the financial and emotional stress of the proceedings.

Motor Vehicle Collisions

- [12] On March 24, 2015 ("MVA #1"), Nicolas was a passenger in a vehicle that was struck from behind by another vehicle, apparently travelling at high speed. Nicolas was injured. He commenced proceedings ("NAction #1") but the matter has not yet gone to trial.
- [13] On March 26, 2015 ("MVA #2"), Nicolas was a passenger in a vehicle being driven by the respondent when it was allegedly sideswiped by another vehicle on the driver's side. The respondent commenced proceedings ("RAction #1") in respect of the injuries she sustained. Nicolas commenced separate proceedings (NAction #2).
- [14] On November 16, 2017, the respondent was driving a vehicle that was rear-ended by another vehicle ("MVA #3"). Both Nicolas and Mathew were passengers in the respondent's vehicle at the time of the collision. The respondent commenced proceedings ("RAction #2).
- [15] In August 2019, Nicolas and Mathew commenced proceedings in respect of the injuries they sustained in MVA #3 ("NMAAction #3).
- [16] No affidavits have been filed by either Nicolas or Mathew in this proceeding.

Nicolas

- [17] The respondent says that the injuries sustained by Nicolas as a result of MVA #1, MVA #2 and MVA #3 were serious, and included:
- a) chronic post-concussive syndrome secondary to mild traumatic brain injury; and
 - b) depressive illness with compromised neurocognitive abilities and fatigue.
- [18] The respondent says that, as a result of these injuries, Nicolas will never be competitively employable, and will be unable to attend post-secondary education or function in an occupation that requires sustained mental activity or sustained manual labour.
- [19] The respondent says that Nicolas has not returned to school since MVA #1 and is only capable of completing one course per year. She says that he is unable to live independently and be self-supporting, and that he remains completely dependent on her to meet his needs.

Mathew

- [20] The respondent says that Mathew sustained a traumatic brain injury as a result of MVA #3, following which he was unable to return to school or take up a scholarship he had received from Queen's University in Kingston, Ontario. She says that he now has significant speech, language, and cognitive difficulties that impact aspects of his functioning, including his ability to attend school, socialize and work. She says that, like Nicolas, Mathew too is unable to live independently and be self-supporting and remains completely dependent on her to meet his needs.

Disability Benefits

- [21] The respondent deposes that the children have completed the first stage of the application process regarding Persons With Disability ("PWD") benefits and says that Nicolas and Mathew have, since October 2019, been in receipt of \$150 and \$375 respectively per month in income assistance. She deposes that neither child will provide her with any documents or information other than that.

The Respondent

- [22] The respondent says that she sustained injuries to her back and neck as a result of MVA #2 and MVA #3, and that she now suffers from chronic myofascial disorder and sacroiliac joint dysfunction. She says that she has been unable to work because of her injuries, and her primary focus is on caring for the children.
- [23] The respondent says she is completely reliant on the support she receives from the claimant to meet her financial needs.

These Proceedings

- [24] The claimant filed this application on May 31, 2019. The respondent engaged in numerous attempts to evade service of process in respect of the application. Service was ultimately effected in July 2019 when the respondent's previously retained counsel agreed to accept service. The hearing of the application was scheduled for July 16, 2019 but was adjourned to allow her counsel time to prepare, without prejudice to the claimant's ability to assert that the effective date of the orders he was seeking would be July 16, 2019.
- [25] On July 17, 2019, the respondent filed her response to the claimant's notice of application. She also filed her own notice of application seeking the various orders outlined above.
- [26] The hearing of the matter was rescheduled for September 10 and 11, 2019 but was adjourned because the parties agreed that there should be independent medical examinations ("IMEs") conducted of the children and because of various document disclosure requests. It was rescheduled to be heard on November 25 to 27, 2019 but was adjourned again, primarily because counsel was confident there would be a settlement of RAction #1 and RAction #2, but also because of ongoing document disclosure requests.
- [27] On January 14, 2020, the respondent settled RAction #1 and RAction #2 for an all-inclusive sum of \$181,720.42 "new money" with Part 7 benefits remaining open. An email in evidence from counsel for the defendants in those actions indicates that a breakdown of the settlement was:
- a) Non-pecuniary damages:
\$75,000.00
 - b) Past wage loss:
\$35,000.00
 - c) Future loss of earning capacity:
\$9,348.85
 - d) Special damages:
\$9,151.15
 - e) Future care costs (Part 7 benefits open):
\$0.00
- Subtotal:
\$128,500.00
- f) Taxable costs:

\$8,624.00

g) Taxable disbursements:

\$44,596.42

TOTAL:

\$181,720.42

[28] The evidence indicates that, of that total, the respondent received approximately \$82,000 from the settlement.

[29] On January 9, 2020, during the settlement negotiations, counsel for the defendants in RAction #1 and RAction #2 sent an email to the respondent's personal injury lawyer stating, in part:

The Plaintiff was barely working at the time of the MVA (netting only about \$8,000 annually working 15 hours a week for 9 months) and has never had any incentive to go back to work (since she's getting hefty support payments from the ex and rental income). She's also barely looked for work although she applied to be a barista so presumably she thinks she can do that. There's little evidence the alleged injuries are interfering with her life in any way and her claims to the contrary are hard to accept. Her performance at the February 2019 examination was not endearing. I will try to get a CD with the highlights of the surveillance to you tomorrow. The surveillance will show the Plaintiff: bounding around town in lululemon pants; socializing and appearing happy; carrying 5x shopping bags in 1 arm; carrying a blue bin; shoveling heavy snow and reaching to remove ice; bending and reaching to do grocery shopping (including lifting what looks like a large milk jug). Given all the evidence, it's really hard to understand why she can't arrange watches in a display window at the mall for 15 hours a week.

[30] Although this email is comprised of hearsay and double-hearsay and is not admissible as evidence of the truth of its contents, it nevertheless provides an indication of the mindset of defence counsel in RAction #1 and RAction #2 that led to the settlement.

Analysis

[31] There is no need to restate the voluminous evidence that was placed before me other than to observe that it overwhelmingly demonstrates the respondent's conduct regarding the claimant prior to the Punnett Order was indicative of her seeming hatred towards the respondent. Mr. Justice Punnett described the respondent's behaviour as "appalling" and "inexcusable" and found that she had "without question damaged her children". He concluded that the respondent "was motivated by a psychological hatred of the father" and that the "alienation of these children from their father is worsening due to the conduct of their mother".

- [32] Dr. Michael Elterman, who prepared a s. 15 (now s. 211) report dated November 3, 2011, described the respondent's behaviour towards the claimant in the children's presence as "obscene and inappropriate" and went on to write: "it is difficult to imagine how, if this situation is allowed to continue, that they [the children] would find their way back to seeing their father. They need to posture against him in order to show their loyalty".
- [33] In 2010, the respondent pled guilty to a charge of assault upon the claimant and his then girlfriend.
- [34] The respondent's resoundingly successful campaign of alienating the children from their father continued, despite court orders requiring her to change her behaviour and requiring that she and the children attend therapy and counselling. The counselling that was ordered took place for eight sessions during April and May 2012, after which the child counsellors prepared a report for the court. Thereafter, the respondent consented to attend therapy with a psychologist or a psychiatrist to "specifically address the issue of her aggressive and impulsive behaviour and, furthermore, to enhance her understanding of the damage she is doing to her children by her conduct and statements to them respecting their father".
- [35] The evidence, including the respondent's medical records, is devoid of any indication that she attended such therapy.
- [36] Throughout, the respondent has shown no remorse for her actions. Indeed, she continues to deny that she has ever done anything wrong.
- [37] In 2014, the claimant stopped attending the children's hockey games because it was clear to him that his continued attendance was only serving to provoke more hostilities between the parties in the presence of the children. His continued efforts to maintain a relationship with the children via phone calls and text messages were unsuccessful.
- [38] It was not until two years after MVA #1, when an accident investigator spoke to him, that the claimant learned of Nicolas' involvement in an accident. It was not until receipt in July 2019 of the respondent's response to his notice of application that the claimant learned of the two subsequent accidents and of the extent of the injuries the respondent says Nicolas suffered in them. Although the claimant had earlier become aware that Mathew may have been involved in a motor vehicle accident, it was only because he received in the mail an invoice from the BC Ambulance Service in respect of the accident.
- [39] After receipt of the respondent's response to his application, the claimant promptly took steps to research the available options that might be available to the children in respect of benefits, including PWD benefits.
- [40] By any measure, the respondent's response to her "best efforts" document disclosure obligations, agreed to as partial consideration for various adjournments of these applications, has been less than industrious and diligent. Examples include:

- a) failing to provide documents regarding the PWD benefits the children are apparently receiving, suggesting that she has no ability to obtain the information because the children are receiving the benefits directly and will not disclose the information to her, all without providing any evidentiary basis for her assertion that she has made best efforts to obtain the information;
- b) failing to provide obviously readily-available statements concerning the payment of her mortgage, other than a one-page "screen shot" provided shortly before the hearing showing a current summary. The respondent concedes that she is accelerating the payment of the mortgage principal by making monthly payments that are significantly higher than necessary, with only a 14-year amortization period. Her banking records show that she has made relatively large lump-sum deposits into her accounts. Her attempts at explaining these payments as being from money she obtained from the sale of jewellery and loans from unidentified sources (not disclosed on her Form F8 Financial Statement) raise more questions than they answer. The records show that she currently has equity in her home in excess of \$1 million; and
- c) failing to provide an accounting of the expenses she says she is incurring for the children.

Claimant's Application for an Order Terminating the Payment of Spousal Support

[41] The spousal support order sought to be varied by the claimant is that set out in the Punnett Order. It was silent as to whether the support was ordered pursuant to the Divorce Act or the then Family Relations Act, R.S.B.C. 1996, c. 128 (the predecessor to the current Family Law Act, S.B.C. 2011, c. 25). However, Punnett J. expressly relied upon s. 17 of the Divorce Act in varying the spousal support under the Masuhara Order.

[42] In *Yu v. Jordan*, 2012 BCCA 367 the court stated, at para. 1:

[1] This appeal demonstrates the potential unintended consequences of failing to specify in a court order which legislation governs corollary relief provisions for the custody and support of a child of the marriage, in a divorce proceeding where both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] are pleaded. It also illustrates how the meaning of a court order is determined: it is not determined by the parties' stated intention as to its meaning after the order is made, but by objective indicia that may be found in the pleadings of the action, the wording of the order and in the circumstances in which the order was made. In the absence of such objective indicia, the doctrine of paramountcy will apply such that the order will be founded in the federal legislation.

[Emphasis added.]

See also para. 53 of that decision.

- [43] In my view, the doctrine of paramountcy requires that the appropriate legislation upon which to proceed in respect of the claimant's application before me is the Divorce Act and, in particular, s. 17(4.1) which stipulates that the court must satisfy itself that a change in the condition means, needs or other circumstances of either former spouse has occurred since the making of the support order sought to be varied.
- [44] Mr. Justice Punnett's Reasons for Judgment did not specifically set out the basis for the award of spousal support but, given the parties' history, it is conceded by the parties that it was on both a compensatory and non-compensatory basis. The Punnett Order applied the SSAG to calculate the claimant's spousal support obligation. The SSAG are not law, but are frequently relied upon by our courts as being consistent with the laws of British Columbia: *Chutter v. Chutter*, 2008 BCCA 507 at para. 100, leave to appeal ref'd [2009] S.C.C.A. No. 41.
- [45] The Punnett Order was also silent on the duration of the support obligation. However, the SSAG set out the "generally understood outside limits" of the duration of spousal support that will inform the variation process in this case (see. s. 8.5.4). The upper end of the range is the longer of the length of the marriage or the date the last child finishes high school. The lower end of the range is the longer of one-half the length of the marriage or the date the youngest child starts full-time school.
- [46] In this case, the parties had a 12-year relationship. The claimant commenced paying spousal support upon the parties' separation in May 2008. The last of the two children completed high school in June 2018, albeit it appears not in the fashion he would have but for MVA #3. Accordingly, the upper limit of duration is May 2020. Since both children were in full-time attendance at school at the time of separation, the lower range was May 2014.
- [47] The claimant has now paid spousal support to the respondent for nearly 12 years. In addition, the respondent received 60% of the value of the matrimonial home. The value of the home has since increased significantly, and the respondent's equity in it is in excess of \$1 million. The respondent is near the end of her maximum entitlement under the SSAG. In my view, although the SSAG is not to be applied as a matter of law, there are no reasons in this case to warrant an order for continuing support beyond the maximum duration proposed by the SSAG: *Domitri v. Domitri*, 2010 BCCA 472 at paras. 46-48.
- [48] The end of spousal support entitlement, as reflected in the SSAG, is a material change that may give rise to a variation order even though there may still be, and usually is, an income disparity between the spouses: *B.D.P. v. D.W.P.*, 2019 ONSC 949 at paras. 71 and 83.
- [49] I do not accept the respondent's submissions that she comes within exceptions that are discussed in the SSAG where the recipient spouse has an illness or disability (s. 12.4) and where a child's special needs impairs a recipient spouse's ability to obtain employment (s. 12.10). For the reasons enunciated in SSAG, its authors were plainly in favour of no exception for cases involving disability or illness (SSAG at ss. 12.1-12.2). As was stated by the court in *B.D.P.* at para. 75:

However, even in cases where one spouse is disable as a result of illness or injury, the Guidelines should be followed. To deviate from the Guidelines is the exception not the rule. The authors of the Guidelines identified on an initial application for support, three approaches to illness and disability: (i) increase amount, extend duration; (ii) lower amount, extend duration; and (iii) no exception. The authors of the Guidelines support the third approach or the "no exception" approach, reasoning that this approach "seems more consistent with the modern limits of spousal support as a remedy.

[50] The latest SSAG user's guide, published in 2016 (ten years after the draft SSAG proposal was released to the public) continues to endorse this "no exception" approach. Moreover, this appears to be the dominant approach in British Columbia: *Powell v. Levesque*, 2014 BCCA 33).

[51] Regardless, this is not a case where a disability existed at the time of marriage or arose during the marriage. Rather the respondent's alleged disability arose as a result of MVA #2 and MVA #3, many years after the parties had separated. I note that there are a few cases that appear to have made support awards taking into account post-separation disability:

- *Soschin v. Tabatchnik*, 2013 ONSC 1707;
- *Tscherner v. Farrell*, 2014 ONSC 976;
- *Jubinville v. Jubinville*, 2013 BCSC 2262 at paras. 50-53;
- *G.W.C. v. K.C.C.*, 2015 BCSC 1802;
- *Firth v. Firth*, 2012 BCSC 857.

However, this approach is rarely adopted.

[52] In this case, there is no connection between any economic hardship arising from those accidents and the breakdown of the marriage. The non-compensatory aspect of the support order portion of the Punnett Order has already relieved any economic hardship arising from the marriage: *B.D.P.* at paras. 91-94.

[53] I am not persuaded that the claimant is obligated to continue to support the respondent on the basis of her untested evidence that she has been disabled from working by MVA #2 and MVA #3 or that the children's special needs impairs her ability to obtain employment. Neither the case law nor the social obligation model of marriage goes so far as to make a spouse an insurer of a former spouse, such that the former spouse is entitled to be fully or even partially indemnified for his or her needs for as long as he or she is in need: *Rayvals v. Rayvals*, 2008 BCSC 176 at para. 27 (cited with approval *Shen v. Tong*, 2013 BCCA 519 at para. 86). Here, the presumption must be made that the respondent has been fully compensated for any past or future loss of earning capacity by the respective tortfeasors in respect of MVA #2 and MVA #3: *Stang v. Stang*, 2001 BCSC 975 at para. 33; *Crawford v. Crawford*, 2006 BCSC 1664 at para. 29. Equally, the presumption must be made that she will be compensated, for example by an "in trust" claim, for any inability to obtain employment if the children

succeed in demonstrating the alleged disabilities in NAction #1, NAction #2 and/or NMAAction #3.

- [54] This is not a situation like that in *J.M. v. L.D.M.*, 2008 BCSC 1235, a case relied upon by the respondent. In *J.M.*, the parties' relationship was one of 23 years and there had been a roughly equal division of the family property. It was not a variation application. The recipient spouse had a neurological disability, which arose from genetic factors present during the relationship, that was found to be the primary reason for her inability to work. Moreover, the payor spouse had significant assets at his disposal.
- [55] A failure to make reasonable efforts to achieve self-sufficiency may amount to a material change in circumstances justifying a variation of a support order: *MacCarthy v. MacCarthy*, 2014 BCSC 2229 at para. 108, *aff'd* 2015 BCCA 496 at para. 29. Here, the respondent deposed that, during 2012 and 2013, she attempted but ceased upgrading her education because she failed her English courses. She decided instead to pursue minimum wage employment. She worked after separation for no more than one year during 2014 and 2015 (more than two years after the Punnett Order) as a merchandiser, earning employment income in those years of \$8,609 and \$5,006 respectively. The job involved re-arranging product displays in retail stores. It appears from the evidence that the respondent may have spent approximately two weeks looking for employment in 2017 after her car accidents and, in 2018 and 2019, looked for work at coffee shops, bakeries, cafes and the like, but she says her efforts were unsuccessful. The respondent has provided no explanation for why it took her two years after MVA #2 to look for work. Her evidence regarding her job search efforts is far from compelling. Rather, it evinces a profound lack of motivation.
- [56] I am not persuaded that the respondent is unable to work because she is required to give her full-time care to the children due to their accident-related injuries. If that were the case, she would not have applied for any jobs. Moreover, she deposes that she is required to drive the children to all of their various medical appointments. However, an Insurance Corporation of British Columbia ("ICBC") occupational therapist has recommended, and the children are likely eligible for, taxi cards from ICBC. There is no evidence as to why those cards have not been issued to them. It is likely that the respondent has not asked for them. The respondent deposes that Nicolas is unable to make his own meals, do his own laundry or clean. Yet, the self reports by both Nicolas and Mathew to ICBC, although hearsay, indicate full capacity in terms of their respective activities of daily life, including cooking and cleaning. They also reported going to the gym or doing some other form of physical exercise, like swimming, four to six times per week with friends.
- [57] Although s. 12.10 of the SSAG provides that children with "special needs" can increase the amount and duration of spousal support, it is incumbent on the party seeking such support to establish that the special needs of the children affect her ability to obtain employment, and that the impact of those needs cannot be accommodated within the ranges set out in SSAG. The court requires clear evidence of both the needs of the child and the necessity of care for those needs to the exclusion of employment (see for example *Rémillard v.*

Rémillard, 2014 MBCA 101 and E.B.G. v. S.M.B., 2015 BCSC 541).

- [58] It is telling that neither of the children filed an affidavit in this proceeding. In my view, an adverse inference can be made regarding their respective abilities and/or alleged disabilities.
- [59] I find that the evidence in this case falls far short of establishing, on a balance of probabilities, that the children have the requisite special needs that preclude the respondent from working. To the extent that that care is required, it does not, in my view, rise to the level required by the case law.
- [60] I am satisfied on the evidence before me that, since the Punnett Order, the respondent failed to take reasonable steps towards becoming self-sufficient. Instead, she chose to content herself with the support she was receiving from the claimant. Rather than being an encouragement for the respondent to move on with her life and become self-sufficient, the support payments together with her ongoing spite towards the claimant acted as disincentive for her to do so.
- [61] Moreover, I am not persuaded that the respondent is in financial need. A comparison of the parties' respective financial circumstances demonstrates that, overall, she is in a much better financial position than the claimant, by a factor of almost two. Her net worth is approximately \$1.2 million. The claimant's net worth is approximately \$640,000. If the claimant's company's retained earnings as at September 30, 2019 of \$295,703 are taken into consideration, as counsel for the respondent submits they must, his net worth is still significantly less than that of the respondent. In my view, any need the respondent says she continues to have for support has been largely self-created by failing to take reasonable steps toward employment and self-sufficiency.
- [62] After considering the objectives of a variation order as set out in s. 17(7) of the Divorce Act, as well as what is fair and just in all of the circumstances, I find that the respondent's entitlement to spousal support has ended and the claimant's obligation to pay it has terminated.
- [63] Given my determination that the claimant's spousal support obligation has terminated, it is unnecessary for me to deal with the respondent's application for both continuing and increased spousal support.
- [64] However, if I had found any entitlement for continuing support, I would not have ordered an increase in the support payments. I accept, in their entirety, the submissions set out in the claimant's written argument at paragraphs 162 to 177, inclusive.

Applications for Orders Respecting the Continuation of Child Support

- [65] The child support order sought to be varied by the claimant is that set out in the Masuhara Order.

- [66] The children are now both of the age of majority and are presumptively no longer children of the marriage. There is no duty or legal obligation on a parent to support an adult child unless the party seeking support can demonstrate that the child is unable, by reason of illness, disability or other cause, to withdraw from the parent's charge or to obtain the necessities of life: Divorce Act s. 2(1); *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.).
- [67] The respondent submits that the claimant's child support obligation should not only continue but be increased because of the children's motor vehicle accident-related disabilities.
- [68] I am concerned by the respondent's bald statements regarding the children's alleged disabilities because they are less than persuasive. Despite having agreed to use her best efforts to obtain information concerning the children's PWD benefits, she simply deposes that the only information she has is what her children tell her, yet, her evidence is devoid of any mention of what she has asked the children about their alleged disabilities and benefits. If the children are as disabled and in need of her care to the extent the respondent suggests, she would be aware of and ought to have been forthcoming with the documents setting out details of attendances at appointments, meetings, and other basic day-to-day routines indicative of significant disabilities involving the children.
- [69] As a term of the second adjournment of these applications, the parties agreed that joint IMEs of the children would be conducted. However, counsel for the claimant subsequently concluded that a determination of whether the children are disabled, such that they continue to be children of the marriage for the purpose of child support, could not be accomplished through one joint IME, but rather would require a full trial on the merits. Counsel for the respondent agreed with that sentiment and the IMEs were not pursued.
- [70] The respondent attempts to rely on clinical records and opinions produced in the MVA proceedings commenced by the children based upon the self reports of the children regarding their symptoms. At best, the documents are double hearsay (Nicolas's, Mathew's or the respondent's self reports to the author, who then accepts the reports as the factual foundation for the opinion). Often they contain triple hearsay (the author relies on statements made by the children to other practitioners). None of the authors has provided sworn testimony. Some of the "opinions" are non-compliant with the Supreme Court Civil Rules regarding the admissibility of expert reports in that they do not provide the required certification or qualifications. None of the opinions have been tested on cross-examination. The respondent merely asks the court to accept as true all of the contents of these documents without proffering any means by which they can be independently assessed.
- [71] Most importantly, as already noted, no direct evidence has been provided by either Nicolas or Mathew in this proceeding. When asked by the court if there was an explanation for that omission, respondent's counsel advised that both the Burnyeat Order and the Punnett Order preclude the parties from discussing with or involving the children in this proceeding. The Punnett Order, for example, provides that neither party will discuss this court proceeding

with either of the children. However, in my view, it would have been not only appropriate, but also necessary to obtain a variation of that term for the purpose of this application, given that the Punnett Order was made in 2012 (eight years ago) and that the children were not of the age of majority at the time. Such a variation could have been easily obtained, either by consent or order of the court.

[72] Respondent's counsel also advised that she considered it would be "unbecoming", "wrong", and not in the best interests of the children to involve them in this court proceeding, given the troubled past between them and their father. However, there is no evidence that the children would be affected by doing so--it is only respondent's counsel's personal assessment. I note, however, that both children have actively engaged in conduct intended to ensure that information about themselves is out of the claimant's reach. I note as well that the children apparently gave their consent to a psychologist, Dr. Owen James, to provide his opinion to the respondent's counsel in this proceeding.

[73] This court does not generally admit into evidence the contentious medical opinions of physicians absent the agreement of counsel or a finding by the court as to their expertise in the area. Even if admitted, the court is in not position to assess the weight to be given to such contested opinions if they are not tested on cross-examination. Moreover, even if the opinions are accepted, they are only as good as the facts upon which they are based. If the assumed facts are not proven, the opinion is of no value, other than for the fact that the opinions were made: *H.S.S. v. S.H.D.*, 2016 BCSC 1300 at para. 343, rev'd on other grounds 2018 BCCA 199; *Seaman v. Crook*, 2003 BCSC 464 at paras. 14-15 (approved in *Samuel v. Chrysler Credit Canada Ltd.*, 2007 BCCA 431 at paras. 35-36, and *Healey v. Chung*, 2015 BCCA 38). Although these rules of evidence are sometimes relaxed in family law cases, each of the examples relied upon by the respondent turns on its particular facts and is distinguishable from the case before me:

- *Dosanjh v. Liang*, 2015 BCCA 18 (neither party had the burden of proof);
- *Walker v. Maxwell*, 2014 BCSC 2357, aff'd 2015 BCCA 282 (limited to whether social science literature was admissible for the purpose of determining the best interests of a child); and
- *Leach v. Leach*, 2019 BCSC 1664 (the 25 year-old son testified at length regarding his disabilities).

[74] Respondent's counsel strenuously argued that, when the court is determining whether a child who has reached the age of majority remains a "child of the marriage", there is no requirement that evidence be lead directly from the child. She relies on the decisions of this court in *T.A.P. v. J.T.P.*, 2014 BCSC 2265; *T.L.G. v. L.B.G.*, 2015 BCSC 1439; and *Phillips v. Fleury*, 2019 BCSC 2181 as examples of cases where the court has made the determination in the absence of such direct evidence.

[75] I accept that there is no requirement that direct evidence from the child be lead and that expert reports from qualified practitioners can be admitted, but each case turns on its own facts.

- [76] I also accept that hearsay evidence can be admissible if it is both necessary and reliable. In this case, however, necessity has not been established. Nicolas and Mathew could easily have provided direct evidence. Moreover, I was provided with no basis upon which to assess the reliability of what the various medical practitioners reported they were told by the Nicolas and Mathew.
- [77] In my view, the circumstances of this case are such that the significant underlying facts contained in the medical reports must be established by cogent, direct evidence. The hearsay contained in the reports is proof of nothing.
- [78] In this case, given the history of her hostility towards the claimant, her continued denial of the alienation of the children from their father, as well as her denials that she has done anything wrong (including interference with the sale of the matrimonial home), and the superficial nature of her unsupported evidence generally, I have concluded that the respondent's evidence must be regarded with caution and cannot be accepted as reliable unless supported by convincing evidence.
- [79] I am not satisfied on the evidence before me that either Nicolas or Mathew is unable to withdraw from the respondent's charge or provide himself with the necessities of life by reason of a disability. There is no satisfactory, admissible evidence that either of Nicolas or Mathew is unable to work, although the respondent does depose that "there is no prospect that Nicolas can be employed and self-supporting at present or in the foreseeable future", and a word-for-word identical statement in respect of Mathew. I find her evidence to be unsupported and self-serving.
- [80] Respondent's counsel submitted that, if the court was not prepared to accept the proffered medical reports as proof of the hearsay facts contained in them, the hearing of this matter should be adjourned to allow the respondent an opportunity to provide further evidence. I am not prepared to accede to that request. The time has come to put an end to this lengthy and financially exhausting proceeding, at least until the true state of Nicolas's and Mathew's abilities and disabilities can be properly assessed.
- [81] Both Nicolas and Mathew have chosen to terminate any relationship they had with their father, despite consistent and ongoing efforts by him to maintain at least some form of a relationship. While the evidence strongly supports a finding that the reason they did so was the respondent's conduct in alienating them from their father, Nicolas and Mathew are now adults and their continuing unwillingness to have anything to do with the claimant or even engage in communication, using him simply as an "open wallet", is a factor that cannot be ignored. *Shaw v. Arndt*, 2016 BCCA 78 at paras. 27-31; *Webb v. Strople*, 2006 BCSC 294 at para. 20; *Classen v. Anima*, 2011 BCSC 868 at paras. 15-21.

- [82] In this case, it is clear that any disability the children may have flows from motor vehicle accidents they were involved in many years after the parties separated. To the extent that either Nicolas or Mathew is able to prove he has been disabled as a result, the presumption must be made that they will be fully compensated for their economic losses, including any past or future loss of earning capacity, by the tortfeasors. Moreover, they have access to Part 7 benefits under the Insurance (Vehicle) Act, R.S.B.C. 1996, c. 231.
- [83] In my view, the respondent has failed to demonstrate, on a balance of probabilities, that the children are disabled such that they are unable to withdraw from their parent's charge or to obtain the necessities of life.
- [84] I find that neither Nicolas nor Mathew is now a child of the marriage. The claimant's child support obligations have terminated.
- [85] However, I am granting leave to the respondent to apply for a review of this ruling upon the disposition, be it by settlement or final order of the court, of Nicolas's and Mathew's claims in NAction #1, NAction #2, and NMAction #3.

Effective Date of the Support Termination

- [86] The claimant submits that the termination of his spousal and child support obligations should be made retroactive to July 16, 2019, the date that this application was originally scheduled to be heard.
- [87] There is no way of determining whether the matter would have proceeded on July 16, 2019 had the parties not agreed to an adjournment. Equally, there is no way of knowing whether the subsequent hearing dates would have proceeded as scheduled. These types of applications are regularly "bumped" from the hearing lists due to the unavailability of judges to hear them.
- [88] Even if this matter had been heard on any of the scheduled dates, there is no way to know when the decision would have been pronounced.
- [89] In my view, the appropriate effective termination date of the claimant's support obligations was December 31, 2019. I so order.

RRSP Equalization

- [90] In his April 30, 2010 reasons for judgment, Masuhara J. noted the parties' agreement that the value of the claimant's RRSP with the Canadian Imperial Bank of Commerce ("CIBC") Wood Gundy was \$22,942 for the purposes of property division. He ordered that the respondent was entitled to have one-half of that amount, \$11,471, rolled over into an RRSP account in the respondent's name.
- [91] Thereafter, the respondent began to assert that the claimant had another, undisclosed RRSP and refused to take steps to facilitate the rollover until the other account was included.

- [92] I am satisfied on the evidence of the claimant, which I accept, that the funds in the CIBC Wood Gundy RRSP account included the funds previously held in an account at National Bank and that the respondent's assertions regarding an additional account are simply incorrect.
- [93] The respondent continues to be entitled to receive the rollover amount ordered by Masuhara J., namely \$11,471. She is not entitled to receive any interest on that amount because the delay in effecting the rollover is entirely of her own making.

Vehicle Equalization Payment

- [94] In his March 22, 2012 reasons for judgement, Punnett J. held as follows:
- [11] Justice Masuhara relied on the agreement of the parties that the Nissan Pathfinder in possession of the respondent had a value of \$7,500 and the 2007 Nissan Maxima in the possession of the claimant had a value of \$18,000. The order was that the Nissan Pathfinder be sold and the proceeds divided to equalize the value of the vehicles as between the parties. That did not occur. The claimant has sold his vehicle, apparently, for \$10,500 and the respondent retains hers, although there is a dispute over its value. By consent the parties agree that the value of the claimant's vehicle as of January 2011 was \$10,500 and that the respondent's vehicle will be valued by a Nissan dealer as of January 2011 with the claimant to pay to the respondent the amount required to equalize the vehicle values credited to each. The claimant shall have liberty to apply for time to pay if the parties are unable to agree.
- [95] The respondent did not have the Nissan Pathfinder valued by a Nissan dealer as she agreed to do. In her Affidavit #11 filed in this proceeding on July 17, 2019, she deposed as follows:
- . and my Nissan Pathfinder which I had valued at \$1,500 as of January 2011 by the Mazda dealership in Port Moody.
- She does not provide any documentation in support of the valuation or any evidence as to the name or qualifications of the person who valued it or when the valuation was done. There is also no evidence that any such valuation was communicated to the claimant prior to her affidavit being sworn on July 16, 2019.
- [96] I agree with counsel for the claimant that, in the circumstances, the respondent has waived any entitlement she had to a vehicle equalization payment. Counsel for the respondent conceded as much during her submissions.

Prince George Rental Unit Income

- [97] Prior to the parties' separation, the claimant owned two separate but roughly identical rental units that were both located in Prince George. The Masuhara Order stipulated that each of the parties was entitled to one of the units. As detailed in Punnett J.'s subsequent reasons for judgment, the claimant's attempts to transfer one of the units to the respondent were frustrated by her and she refused to register the transfer in a timely manner. The transfer

was not registered by the respondent until 2012, resulting in various financial penalties to the claimant (he continued to pay the strata fees).

[98] Mr. Justice Punnett ordered that, for the period May 1, 2010 (when the respondent became the beneficial owner of her unit) and the 2012 transfer registration date, the parties account for all rental income, mortgage payments and strata fees for each unit, and that any payment by one party in respect of the other's unit be reconciled and reimbursed.

[99] That reconciliation did not take place.

[100] During her submissions, counsel for the respondent abandoned her client's claim under for rental income from the property.

Conclusion

[101] I am making the following orders:

- a) the claimant's spousal support obligations are terminated, effective December 31, 2019;
- b) Nicolas and Mathew have each ceased to be children of the marriage for the purpose of the payment of child support under the provisions of the Divorce Act;
- c) the respondent has liberty to apply for a review of the determination set out in subparagraph (b) above upon the disposition, be it by settlement or final order of the court, of Nicolas's and Mathew's claims in NAction #1, NAction #2, and NMAction #3;
- d) the respondent continues to be entitled to receipt of \$11,471 in the form of a rollover from the claimant's RRSP, as was ordered by Mr. Justice Masuhara in 2010 together with any increase on that amount that has accrued thereon while it remained deposited in the claimant's RRSP account from April 30, 2010 to the date of this order. The claimant is entitled to offset from this amount the support payments he has made after December 31, 2019; and
- e) all of the remaining applications of the respondent are dismissed.

[102] Subject to any submissions the parties wish to make, the claimant is entitled to his costs of these applications at Scale B.

"G.C. Weatherill J."

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