

CANADA / JUDGMENT

P.L.W. v. A.S.W.

2022 BCSC 1279

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Supreme Court of British Columbia

DECIDED

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2022 BCSC 1279 P.L.W. v. A.S.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P.L.W. v. A.S.W.,

2022 BCSC 1279

Date: 20220728

Docket: E151421

Registry: Vancouver

Between:

P.L.W.

Claimant

And

A.S.W.

Respondent

Before: The Honourable Justice Francis

Reasons for Judgment

The Claimant, appearing in person:

P.L.W.

Counsel for the Respondent:

J.K. Mangat

Place and Date of Trial/Hearing:

Vancouver, B.C.

May 18, 2022

Place and Date of Judgment:

Vancouver, B.C.

July 28, 2022

Introduction

- [1] The parties to this family law dispute married in 2000 and separated in 2015. They have three teenaged children. Their eldest son, T.W., was born in October 2003. He is eighteen years old and has recently completed his first year of university studies at the University of British Columbia ("UBC"). The younger two sons are 15 and 17 years old.
- [2] The parties signed a separation agreement on December 21, 2018 (the "Agreement"), in which they agreed on parenting time and responsibilities, income for the purposes of the Federal Child Support Guidelines, SOR/97 - 175 ("Guidelines"), child support, and spousal support. In this application, the respondent, A.S.W., seeks a review of spousal support, a retroactive and prospective variation of child support, and orders with respect to ongoing education expenses regarding T.W.

Issues

- [3] The respondent seeks to have the claimant's income imputed at \$75,000. He seeks to have spousal support and child support retroactively reduced as a consequence of the adjustment to the claimant's Guideline income. He also seeks a reduction in child support on the basis that T.W. should not be treated as a child of the marriage as of September 2021, when he commenced full time university studies. Finally, the respondent seeks an order with respect to how T.W.'s ongoing post secondary education costs should be funded.
- [4] For clarity, I have framed the issues in the following manner:
- a) Should the Guideline income of the claimant be adjusted as of July 1, 2021 and, if so, should there be a retroactive adjustment of child support?
 - b) Should there be a retroactive reduction in child support payable by the respondent because T.W. is attending university and no longer living at home?
 - c) Is it appropriate to order that T.W.'s tuition and living expenses should be paid by the parties in equal shares from the RESPs?

- d) Is the respondent entitled to a review of spousal support or, pursuant to the Agreement, is he limited to seeking a variation, which requires him to demonstrate a material change in circumstances?
- e) What amount and duration of spousal support is payable?

The Agreement

- [5] The respondent makes his living as a recruiter, and is the sole shareholder of S.W. Holdings Ltd. ("SWH"), which owns a 45% interest in Swim International Recruiting Inc. ("Swim"). The respondent draws a salary from Swim. At the time of the negotiation of the Agreement, the parties retained Blair Mackay Mynett Valuations Inc. to prepare joint business valuations for SWH and Swim, and to prepare a joint Guideline income assessment to determine the respondent's income.
- [6] For the purposes of the Agreement, the parties agreed that the respondent had a Guideline income of \$160,000. While the notice of application seeks to have the respondent's Guideline income set at \$153,949.92, at the hearing of this application, counsel for the respondent advised that for the purposes of this application he is content with the Guideline income of \$160,000 imputed to him in the Agreement.
- [7] The claimant, P.L.W., works as a special education assistant. Her T4 income in 2021 was \$20,927. In 2021, she also received \$8,751 in employment insurance ("EI") payments. For the purposes of the Agreement, the parties agreed that her Guideline income was \$35,000.
- [8] Based on the shared parenting arrangement, and the agreed upon Guideline incomes of the parties, the Agreement requires the respondent to pay the claimant \$2,210 a month in basic child support. Special and extraordinary expenses are to be shared, with the claimant paying 25% and the respondent paying 75%.
- [9] The Agreement contemplates the parties exchanging financial information annually for the purposes of conducting a review of basic child support and the proportionate sharing of special and extraordinary expenses.
- [10] With respect to spousal support, under the Agreement, the respondent must pay the claimant \$1,862 per month until August 31, 2025.
- [11] The Agreement's provisions with respect to review or variation of spousal support are not entirely clear. On the one hand, the Agreement provides at para. 15.5 that "[t]he Spousal Support quantum will be reviewed commencing on June 1, 2021, with any adjustment to be made commencing July 1st, 2021." On the other hand, the Agreement states at para. 15.7 that "[n]either party may seek to vary Spousal Support unless there is a material change in circumstances that affects the financial need or ability of either party whether or not the change in circumstances was foreseeable or causally connected to the marriage." The parties have differing interpretations of this provision. The respondent submits that the Agreement contemplated a review of the quantum, but not the duration of spousal support,

commencing June 1, 2021. The claimant submits that the respondent is not entitled to a review of quantum or duration of spousal support, and that in order for him to be eligible to vary spousal support, he is required to show a material change in circumstances.

The Claimant's Guideline Income

- [12] In addition to the income she earns as a special education assistant and from EI, the claimant operates a small business called Tidalwood Wellness Limited, incorporated in October 2020 ("Tidalwood"). Tidalwood offers hypnotherapy and energy healing services. It is not profitable. On the basis of the Tidalwood financial statements and the sworn evidence of the claimant, it does not appear that the claimant derives any income from it at all.
- [13] The respondent asks the Court to impute income to the claimant on the basis that, at present, the claimant only works part time. At her hourly rate of \$30.35 an hour, if she worked full time, she would make about \$45,000 a year. Further, the respondent submits that, even if the claimant is not making money from her business, she has the intelligence and skills to make the business profitable. He submits that income should be imputed to her in the range of \$55,000 - \$75,000.
- [14] After separation, the claimant trained to become an education assistant, and she continues in that occupation now. As a classroom assistant, the claimant's available working hours are tied to the school day. She can only work during school hours, because her job involves working with children in the classroom. This means that the maximum number of hours she can work is 29 hours a week, when school is in session. School is in session for 35 weeks a year.
- [15] The claimant has taken steps to secure an additional income stream through her small business. She has yet to make any money at this venture, but it has been operating for less than two years.
- [16] The claimant's recent actual income has been consistently below the amount imputed to her in the Agreement. Her T4 income in 2020 was \$28,527, her 2021 T4 income was 20,947, and she has not received employment income for 2022 due to being on medical leave for stress and anxiety-related medical conditions.
- [17] The respondent urges me to find that the claimant is intentionally underemployed. In support of this argument, he has appended to his affidavit online job postings for education assistant jobs. These jobs pay approximately the same amount as the claimant's current position.
- [18] Prior to going on medical leave, the claimant was working the maximum number of hours one can work as an education assistant. She expects, on her return from medical leave, to work similar hours. The respondent's suggestion that she could work two part time jobs as an education assistant in order to obtain 40 hour a week of employment ignores the reality of a classroom job that requires attendance at school during school hours only. I am satisfied

that the claimant is working to the best of her abilities and making reasonable efforts to secure a further income stream through her business. I therefore decline to find that she is intentionally underemployed. Her Guideline Income should remain at \$35,000 as set out in the Agreement.

- [19] As such, there should be no retroactive adjustment of child support on the basis of imputation of income to the Claimant.

Retroactive Reduction of Child Support on Basis of T.W.'s Living Arrangements

- [20] During the 2021/ 2022 academic year, T.W. attended the first year of his undergraduate degree at UBC. During this time, he lived in residence on campus. His tuition and residence fees were funded by his parents from RESPs they each hold, in shares proportional to their Guideline incomes as set out in the Agreement.

- [21] The respondent continues to pay a set off amount of monthly child support for T.W. in the same amount as if he were living at home full time while attending university. The respondent submits that he should not be responsible for paying any child support for T.W. in the circumstances.

- [22] The amount of child support payable by a payor parent is set out in s. 3 of the Guidelines:

Presumptive rule

3 (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is

- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
- (b) the amount, if any, determined under section 7.

Child the age of majority or over

- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
 - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

- [23] Unlike many of the cases in which child support for a young adult attending school full time has been in issue, in this case, T.W. is below the age of majority. As of the date of the hearing of this application, he was still 18 years old and will not turn 19 until October 2022. Nevertheless, the respondent argues that s. 3(2) of the Guidelines applies and the Court should order an amount less than the table amount for support of T.W., retroactive to September 2021, on the basis that he has not lived with either parent full time since then.
- [24] Section 3(2) of the Guidelines applies "where a child to whom a child support order relates is the age of majority or over." It has no application in this case. Any application to review or vary child support payable with respect to T.W. on the basis of s. 3(2) is premature.

How Must T.W.'s University Education be Funded?

- [25] The respondent seeks an order that the parties must contribute equally to the cost of T.W.'s post secondary tuition from their individual RESP accounts and that they must pay for T.W.'s residence proportionally in accordance with their Guideline incomes. The claimant takes the position that both tuition and T.W.'s residence costs should be funded proportionally by the parties in accordance with their Guideline incomes.
- [26] As at separation, the respondent had approximately \$98,000 in an RESP (the "Family RESP"). Under the Agreement, the parties deducted \$31,775 as excluded property and then equally divided the Family RESP as family property. Each party deposited their share into a separately managed RESP (the "Separate RESPs"). The Agreement requires the parties to manage the Separate RESPs for the benefit of the children.
- [27] Between August 2021 and January 2022, the respondent withdrew \$20,000 from his Separate RESP to fund T.W.'s tuition and residence. The balance in his RESP as at December 2021 was \$92,880. The claimant has spent \$6,000 from her Separate RESP on T.W.'s education. The balance in her Separate RESP as at April 28, 2022 was \$97,759.26. The claimant states that her Separate RESP has a greater value than the respondent's Separate RESP because she has made post-separation contributions.
- [28] Post-secondary education expenses are a recognized category of special expenses under s. 7 of the Guidelines, and the court will often order parents to share such expenses as part of a child support order: *R.C. v. D.R.C.*, 2019 BCSC 1218 at para. 87. Special expenses are generally payable in proportion to parties' incomes, not their assets.
- [29] I find that T.W.'s tuition is properly conceived of as a s. 7 expense. As such, it should be paid by the parties in proportion to their Guideline incomes, not equally on the basis of the fact that they hold similarly valued Separate RESPs. Both T.W.'s tuition and the cost of his residence must be borne proportionately by the parties in accordance with their Guideline incomes.

Spousal Support Review v. Variation

[30] The parties disagree about whether the Agreement provides for a review of spousal support. The relevant provisions of the Agreement are set out below:

15 SPOUSAL SUPPORT

15.1 For the purposes of determining the current basic child support payable pursuant to the Family Law Act, Divorce Act and/or the Spousal Support Advisory Guidelines (the "SSAG"), and subject to any review of spousal support. [P.L.W.] and [A.S.W.] agree that;

- (a) [P.L.W.'s] annual Guideline income will be imputed and set at \$35,000; and
- (b) [A.S.W.'s] annual Guideline income will be imputed and set at \$160,000.

15.2 The parties agree that spousal support will be paid in an amount above the low-range and below the mid-range.

15.3 Commencing January 1st, 2019, and continuing each and every month thereafter until August 31, 2025, pending further agreement, review or Court Order, [A.S.W.] shall pay to [P.L.W.] for her support the total sum of \$1,862 per month, paid in equal payments of \$931 each on the 15th and the last day of each month (the "Spousal Support").

15.4 The Spousal Support shall be part of [P.L.W.'s] income the years received and a corresponding deduction for [A.S.W.] in those years, pursuant to the Income Tax Act (Canada).

15.5 The Spousal Support quantum will be reviewed commencing on June 1, 2021, with any adjustment to be made commencing July 1st, 2021 (the "Spousal Support Review").

15.6 For the purpose of the Spousal Support Review commencing June 1, 2021, the parties will exchange the financial information required pursuant to the Divorce Act, the Family Law Act, the SSAG, and the Guidelines, including copies of:

- (a) [A.S.W.'s] filed personal income tax returns and income tax assessments filed in 2018, 2019 and 2020 for the most recent prior tax year;
- (b) Corporate financial statements for SWH and for any other company of which [A.S.W.] is a sole or majority shareholder for the 2018, 2019 and 2020 fiscal years ending prior to June 1st;
- (c) Corporate tax returns and assessments for SWH and for any other company of which [A.S.W.] is a sole or majority shareholder for the 2018, 2019 and 2020 fiscal years ending prior to June 1st; and
- (d) [P.S.W.'s] filed personal income tax returns and income tax assessments for the most recent tax year; and
- (e) As and when applicable, statements showing a breakdown of all salaries, wages, management fees, other payments or benefits paid to or on behalf of persons or corporations with whom the parties do not deal at arm's length,

15.7 Neither party may seek to vary Spousal Support unless there is a material change in circumstances that affects the financial need or ability of either party whether or not the change in circumstances was foreseeable or causally connected to the marriage. Before applying to vary the Spousal Support, the party seeking the variation must provide the other with written notice of the intention to seek variation.

15.8 If the parties are unable to determine or agree upon the quantum of the Spousal Support by July 15, 2021 after exchanging financial information pursuant to this Agreement, the parties will first attempt to negotiate a settlement of the Spousal Support by way of negotiation through counsel and/or mediation before either will apply to the Court.

[31] The claimant submits that, pursuant to paragraph 15.7, the respondent may only seek to change the amount of spousal support payable if he can establish a material change of circumstances. I do not agree. When s. 15 of the Agreement is read as a whole, it is clear that the parties intended the spousal support quantum would be reviewed as of June 2021, irrespective of any change of circumstances. The Agreement uses mandatory language at paragraph 15.5: "the spousal support quantum will be reviewed commencing on June 1, 2021" (emphasis added). For the purposes of that review, the parties are required to exchange financial information (paragraph 15.6). On the basis of that exchange of financial information, an agreement about quantum of spousal support is to be reached, or, absent an agreement, there must be mediation or negotiation to seek to settle the quantum of spousal support prior to a court application (paragraph 15.8).

[32] The limitation on the right to vary spousal support at paragraph 15.7 must be interpreted in the context of the fairly detailed procedure for spousal support review that the Agreement mandates. In this context, the parties could not reasonably have intended that a material change of circumstances was required before an adjustment could be made to the monthly quantum of spousal support. Rather, the parties clearly intended that quantum must be reviewed as of June 2021, irrespective of circumstances. The duration of spousal support, however, is not subject to the same review procedure. According to paragraph 15.3, spousal support will be payable "January 1, 2019, and continuing each and every month thereafter until August 31, 2025". Since only quantum, and not duration, is referenced in paragraph 15.5, the most reasonable interpretation of paragraph 15.7 is that it limits the ability of a party to seek to vary the duration of spousal support, rather than the quantum, absent a material change of circumstances.

[33] As such, there is no procedural barrier to the respondent seeking to review the quantum of monthly spousal support absent a finding of a material change in circumstances.

Relevant Considerations on a Spousal Support Review

[34] The respondent cites both the Family Law Act, S.B.C. 2011, c. 25 [FLA] and the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), in support of his application to review spousal support.

- [35] In accordance with the doctrine of federal paramountcy, where both statutes apply, it is preferable to make orders under the Divorce Act, and under the FLA only in the alternative: *Hejzlar v. Mitchell-Hejzlar*, 2011 BCCA 230 at para. 20. I have, therefore, proceeded to decide the issue of spousal support in this case in accordance with the Divorce Act.
- [36] In *Leskun v. Leskun*, 2006 SCC 25, Justice Binnie described a review provision in a spousal support order as "a condition [attached to a s. 15.2 order] pursuant to s. 15.2(3) of the Divorce Act, that entitles one or other or both of the parties to return to court for a reconsideration of a specified aspect of the original order": (para. 36). A review hearing is distinct from a variation hearing because it does not require a preliminary threshold finding of a change of circumstances: *Morck v. Morck*, 2013 BCCA 186 at paras. 16-17.
- [37] Where a review is contemplated by an order or agreement, the agreement or order will usually define a period of time that must pass or an event or condition that must occur before a review is triggered. If the condition is met, the court moves directly into a consideration of the issues to be reviewed: *Jordan v. Jordan*, 2011 BCCA 518. Where the issues for review have been identified in an order or agreement, the court ought only to consider those issues on review: *Jordan* at para. 34.
- [38] In this case, pursuant to para. 15.5 of the Agreement, it is only the quantum, and not the duration of spousal support that is to be reviewed as of June 2021.
- [39] A review hearing generally entails a reconsideration of the issues under review. It is a hearing *de novo* in which it is appropriate for the court to consider the Spousal Support Advisory Guidelines [SSAGs] as well as the factors set out in section 15.2(4) and (6) of the Divorce Act: *Morck* at paras. 17-18.
- [40] Sections 15.2(4) and (6) address the factors to be considered on a review of spousal support:
- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
 - (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [41] The objectives of spousal support set out in the Divorce Act encompass both compensatory and non-compensatory grounds for support: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, [1999] S.C.J. No. 14 at paras. 34-43 and 49.
- [42] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse: *Chutter v. Chutter*, 2008 BCCA 507 at para. 50. Non-compensatory support is grounded in the "social obligation model" of marriage. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state: *Chutter* at para. 54.
- [43] If, on a review of spousal support, the recipient spouse establishes entitlement, either on a compensatory or non-compensatory basis, the court must then consider quantum of support.
- [44] Once entitlement is established on a review application, quantum may be determined with reference to the SSAGs: *Morck* at para. 17; *Domirti v. Domirti*, 2010 BCCA 472, at paras. 40-41.
- [45] In this case, the respondent framed the review solely in terms of the income of the claimant. The respondent submitted that a review of spousal support in this case should only entail an adjustment based on the parties' incomes and not a revisitation of the Divorce Act factors. This position is contrary to *Morck*, one of the cases relied upon by the respondent. While the limited entitlement to review under the Agreement (only quantum, not duration, is subject to review) may call for a more narrow approach, in my view it is still important to undertake a consideration of the question of spousal support quantum with an eye to the Divorce Act factors and the SSAGs.
- [46] This was a fifteen-year long marriage, during which the claimant had primary responsibility for looking after the children and the home, which enabled the respondent to build a business and develop his earning potential. The respondent obtained an economic benefit by virtue of being able to cultivate his career while the claimant maintained the home and the children. This is sufficient to establish a compensatory basis for spousal support.

- [47] In terms of non-compensatory factors, the claimant's financial circumstances are challenged. At separation, her income was extremely modest and it continues to be modest today. One of the post-separation points of contention between the parties was the claimant's decision, no doubt borne of economic necessity, to rent a small apartment that would require one of the sons to share a bedroom with her. She relocated to a larger home when the respondent objected to her subjecting the children to these living arrangements. Her current rent of \$3,300 per month appears to be beyond her means.
- [48] I am satisfied that, considering the Divorce Act factors, the claimant has a compensatory and non-compensatory basis for receiving ongoing spousal support. I must then consider quantum in light of the Guideline incomes of the parties. The parties agreed that spousal support would be in an amount above the low range and below the mid-range. The "with child support" formula under the SSAGs, based on the Guideline income of \$160,000 for the respondent and \$35,000 for the claimant, results in a "low" of \$1,298, "mid" of \$2119 and "high" of \$2,563.
- [49] The Agreement mandates a quantum of \$1,862 per month. Consistent with the Agreement, this is above the low-range and below the mid-range. Having considered the Divorce Act factors, which include a fair apportionment between the spouses of financial consequences arising from the marriage, the promotion of economic self-sufficiency, and respect for fairly negotiated family law agreements, I find it is appropriate to order that spousal support continue in the amount of \$1,862 per month pursuant to paragraph 15.3 of the Agreement.

Conclusion

- [50] In summary, I make the following orders:
- a) The claimant's Guideline income remains \$35,000 for 2021 and 2022.
 - b) There should be no retroactive reduction in child support payable by the respondent because T.W. is attending university and no longer living at home.
 - c) T.W.'s tuition and living expenses should be treated as a special and extraordinary expense and paid for by the parties proportionately in accordance with their Guideline incomes.
 - d) On review, the quantum of spousal support shall remain at \$1,862 per month.
- [51] As the substantially successful party, the claimant should receive her costs of the application.

"Francis, J."

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