

CANADA / JUDGMENT

R.L.D. v. J.R.J.M.

2023 BCSC 299

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 299 R.L.D. v. J.R.J.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.L.D. v. J.R.J.M.,

2023 BCSC 299

Date: 20230309

Docket: E54441

Registry: New Westminster

Between:

R.L.D.

Claimant

And

J.R.J.M.

Respondent

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

The Claimant, appearing in person:

R.L.D.

Counsel for the Respondent:

M. Brandon

Place and Dates of Trial:

New Westminster, B.C.

January 10 - 13, 2023

Place and Date of Judgment:

New Westminster, B.C.

March 9, 2023

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I. INTRODUCTION

- [1] Prior to this family law trial, the claimant, R.L.D., and the respondent, J.R.J.M., resolved all issues relating to property division resulting from the end of their marriage. In this trial, the respondent seeks orders terminating his obligations to pay spousal support to the claimant and to pay child support for his step-son, J.D., who is now an adult. The respondent also seeks an order imputing income to the claimant for the purpose of calculating any amounts he may owe for past or future spousal support.
- [2] The claimant opposes the respondent's application to discontinue his spousal and child support obligations. She also seeks a retroactive award for both child and spousal support payments calculated on what she says the respondent actually earned in 2018 to 2021. The claimant also asks the Court to find that the duration of the marriage was ten years, not eight, as asserted by the respondent, because she says the parties lived in marriage-like circumstances for two years prior to moving in together.
- [3] Both parties seek an order for divorce pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

II. BACKGROUND

- [4] For context, I will provide a brief background of the parties, their relationship, and the claimant's child, J.D. I will refer to the parties and the claimant's child by their initials and have been intentionally vague on some details in an attempt to respect J.D.'s privacy.

A. The Parties

i. The Claimant

- [5] The claimant is currently 54 years old. Prior to meeting the respondent, the claimant was living with her son, J.D., who was born in April 2003. In her youth, the claimant was an elite level cyclist. She testified that she was a member of the junior Canadian Olympic development team. When she was in her twenties, while competing in cycling in Europe, she became ill with what she believes was a virus. As a result of the illness, she was forced to return to Canada and was never again able to compete in elite level sports. As I will discuss below, there was some evidence put before me that the claimant suffers from a form of myalgic encephalomyelitis/chronic fatigue syndrome, which she says historically impacted her ability to continue with higher education and currently impacts her ability to work at a job with regular hours.
- [6] The claimant testified that although she was a good student and had scholarship offers to attend the University of British Columbia, she decided to pursue cycling in Europe. After she became ill and returned to Canada from Europe, she attempted to attend Simon Fraser University, but found that her fatigue symptoms made it not possible to continue.
- [7] I was provided with only general evidence regarding the claimant's relationships prior to her relationship with the respondent. She had a daughter named K. with an individual approximately thirty years ago. She had a subsequent relationship with a Mr. D. in 2002 and 2003 that resulted in the birth of J.D. in 2003. I note that her daughter never lived with the respondent and there are no issues of support related to the claimant's daughter in the proceeding before me.
- [8] The claimant has worked in the fitness industry for almost thirty years. When she met the respondent in 2007, she was working as a personal fitness trainer. This work involved meeting and working out with clients at a gym and providing them with exercise programs. Except for a short stint working as a mystery shopper for Toronto Dominion Bank and selling artisanal frozen confections, that I will describe below, the claimant has generally only worked in the fitness industry.

ii. The Respondent

- [9] The respondent is 56 years old. He was married and divorced before marrying the claimant and has two adult-aged sons from that marriage. He has worked at the Cascadia Terminal as a grain handler in different capacities for the past thirty years. Cascadia Terminal is owned as a joint venture in part by a company called Viterra. As such, the respondent's employer is Viterra. His work is unionized.
- [10] When he met the claimant in 2007, the respondent was living in a condominium that he owned in Port Coquitlam, British Columbia. At the time, his two adult sons were living with him in the condominium.

iii. The Parties' Relationship

- [11] The parties met in November 2007, through a dating website. When the parties met, one of their main shared interests was working out and physical fitness. The respondent testified that in the beginning of the relationship they worked out five to ten times a week at a gym together. The evidence before me suggested that the relationship had some turbulence. The respondent proposed to the claimant at a B.C. Lions football game on November 2, 2007.
- [12] Due to difficulties in the relationship, the engagement was broken off several times. While there was some conflicting evidence regarding the engagement ring and the solidness of the engagement, I accept that the engagement was marked by some conflict and friction between the parties. This conflict resulted in the parties attending counselling sessions together.
- [13] As will be described below, the parties eventually moved in together to a house purchased in Maple Ridge on December 30, 2009. However, until they moved in together, the claimant lived at her cooperative housing with J.D. and the respondent lived at his condominium with his sons. While there was a disagreement as to the frequency of nights that the respondent stayed with the claimant from the time of engagement to the date they moved in together, I accept that he stayed at her apartment between two and five times a week, consisting of two or three days during the week and one or two days on the weekend. I also accept that the claimant stayed for a maximum of two nights total at the respondent's condominium from the date of engagement in November 2007, to when the parties moved in together in December 2009. I also accept that J.D. only visited the respondent's condominium once or twice during that time.
- [14] The parties moved in together at the end of December 2009. The respondent listed his condominium for sale in the fall of 2009 and I accept that the claimant was involved in staging the condo for sale and assisting the respondent with some aspects of the sale.
- [15] On December 7, 2010, the parties married in Hawaii, United States.
- [16] The parties agree that they separated on September 11, 2017.

iv. The Parties' Work During the Marriage

- [17] After moving in with the respondent, the claimant continued to work as a fitness instructor. There was conflicting testimony between the parties as to the rate the claimant charged her clients. The respondent testified that it was between \$65 and \$75 per hour for personal training at the gym. The claimant testified she charges her clients between \$50 and \$58 per session. She testified that she trains between two to three clients a day, five days a week, and sometimes one or two on the weekend. She trained clients at Platinum Fitness in Surrey and Snap Fitness in Maple Ridge. Her evidence was that when training a client at Snap Fitness, she paid the gym a \$10 fee per session. While the evidence of the respondent and the claimant differed slightly on the number of clients the claimant trained, I accept that she trained approximately 12 to 15 clients a week for a fee of between \$50 to \$58 per session. I also accept her testimony that during the COVID-19 pandemic, her work of fitness training

changed dramatically due to health restrictions on attending gyms.

- [18] In 2014, the claimant and J.D. started an artisanal frozen confection business. The claimant testified that she started it as a project for J.D., who was 11 years old at the time, after he became interested in business by reading a book titled "Kidpreneurs". The business of making the frozen confections and selling them at summer markets started as a hobby but grew in scale and size. There was conflicting evidence on the financial success of the frozen confection business. However, I accept that the company had gross sales of roughly \$10,347 in 2014, \$26,325 in 2015 and \$21,952 in 2016 for a total revenue of approximately \$59,000 over the three years it operated. The expenses incurred by the company were less clear as the documentation kept by the claimant appeared incomplete.
- [19] I note that there were never any income tax returns filed for the company by J.D., the claimant, or the respondent. The claimant testified that she did not file income tax returns because the company did not make any money and so she believed there was no requirement to file tax returns. As I understood her evidence, the claimant's reference to the company not making any money was in relation to profit, not revenue.
- [20] The evidence was that while the project started as a venture to get J.D. interested in business, the actual operations of the business were carried on by the claimant who, for instance, filled out all of the market applications, health forms, and business license documentation. She also spent many hours working by picking berries, making the confections and doing the administrative functions of the business. During the summer months, when the frozen confections were being sold at local food markets, the claimant was unable to run her fitness business.
- [21] The respondent was also involved in the frozen confection business, but primarily by providing financial backing. In 2015, the respondent spent \$5,800 for a van and contributed \$15,000 by withdrawing from his RRSP to purchase a machine that made the confections from Brazil that cost between \$30,000 and \$40,000. The respondent, despite working full-time during the week for Viterra, also worked at the weekend markets selling the confections.
- [22] The frozen confection business stopped operating after the summer of 2016. The respondent sold the van online and recovered some of his money. The claimant sold the confection-making machine for a loss. The respondent says he was not paid back for his investment in the business. The claimant says that she made no money from the business as every dollar of revenue went back into the business.

v. J.D.

- [23] J.D. Turned 19 in April 2022. He attends college in Vancouver in a business program and works part-time at a "big-box" store, where he earned \$14,538 in 2022. He lives with the claimant while he attends school. His biological father, Mr. D., pays \$260 of child support per month, but the claimant testified that he also contributes informally an amount of about \$500 per month for J.D. During the years J.D. lived with the claimant and the respondent, he spent three weekends a month with his biological father, Mr. D.
- [24] J.D. appears to be a very good and motivated student, and the claimant testified that he expects to attend two more years at college. There was no evidence that J.D. has applied for or obtained any financial assistance or student loans to complete his studies.
- [25] J.D. has had no contact with the respondent since the parties separated in September 2017. While there were pictures showing the respondent and J.D. together during the marriage, I accept that the relationship between the respondent and J.D. was not particularly close. The respondent testified that during the marriage he, the claimant and J.D. did things together, but he considered it a "toxic" family. He testified that after 2014, J.D. spent much more time with Mr. D. and less time with the respondent. As well, although the claimant testified that the respondent and J.D. did activities together, such as watching movies and playing sports, given there were very specific and isolated examples of such activities over the eight year relationship, I find that her evidence corroborates the respondent's view that he did not have a close relationship with J.D. during the marriage.

vi. Selling the Matrimonial Home

- [26] After the parties separated, the matrimonial home in Maple Ridge was sold. The proceeds of sale of \$209,565 were placed in trust and as part of the separation agreement were shared between the parties subject to certain additional expenditures. The result was that each party received \$104,900 from the proceeds of sale.

vii. Previous Court Orders

- [27] On March 9, 2018, Master Harper ordered that the respondent pay spousal support of \$2,000 per month and a retroactive support payment of \$8,000 (the "2018 Master Harper Order"). The respondent paid those amounts from the proceeds of selling the matrimonial home.
- [28] On November 2, 2018, Justice Riley ordered that the respondent pay \$1,712 in spousal support (the "2018 Riley J. Order"). This was at the high end of the range calculated under the Spousal Support Advisory Guidelines [SSAG]. Justice Riley also set child support for J.D. at \$284 per month. Justice Riley calculated the child support by determining what the respondent's child support payments would be under the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines], and deducting the \$260 amount of child support paid for J.D. by J.D.'s biological father, Mr. D.

[29] The trial in this matter was originally set to commence on April 4, 2019. However, the parties, having determined not to continue with lawyers, did not file the required documents and the trial date was rescheduled to this trial.

III. ISSUES

[30] There are five issues before the Court:

- a) Have the requirements of the Divorce Act been satisfied such that the Court may grant an order for divorce?
- b) What was the duration of the marriage between the parties?
- c) Should the respondent be required to pay spousal support to the claimant after May 1, 2022, and, if so, for how long and in what amount?
- d) Should the respondent be required to pay retroactive spousal support to the claimant and, if so, in what amount?
- e) Should the respondent be required to pay child support for the adult child of the marriage, J.D. after May 1, 2022, and, if so, for how long and in what amount?
- f) Should the respondent be required to pay retroactive child support for J.D. and, if so, in what amount?

[31] Underlying the spousal support issues is an argument raised by the respondent that the claimant has not properly stated her income for the purposes of calculating the support amounts. The respondent asks that the Court impute a minimum income to the claimant either on the basis that she is not reporting all of the income that she earns, or because she is capable of earning more income and is remaining intentionally underemployed. I will deal with the issue of whether income should be imputed to the claimant in my analysis of the spousal support issue.

IV. LAW AND ANALYSIS

A. Divorce Order

[32] The parties seek an order of divorce. Sections 8 through 12 of the Divorce Act set out the requirements that must be satisfied for the Court to grant a divorce. I conclude that those conditions are satisfied based on the following evidence presented at trial by the respondent, which was accepted by the claimant:

- a) While the date that the parties began living in marriage-like circumstances is in dispute, the parties agree that they were formally married in a ceremony on December 7, 2010, in Hawaii;
- b) the parties have been living separate and apart for at least one year since September 11, 2017;

- c) there is no collusion in relation to the application for divorce and the parties are not seeking the divorce for any improper purpose or on false evidence;
 - d) there is no chance that the parties will reconcile; and
 - e) there have been reasonable arrangements made for J.D.
- [33] Based on the foregoing, I am satisfied that the requirements of the Divorce Act have been met. Pursuant to s. 12(1) of the Divorce Act, the divorce will take effect on the 31st day after the issuance of this order.

B. Date of the Commencement of the Marriage

- [34] The parties disagree as to the date that their marriage commenced. The claimant argues that the parties began living in a marriage-like relationship from November 2, 2007, the date they were engaged. The respondent asserts that the marriage commenced on the date they moved in together at the end of December 2009.
- [35] The length of a marriage is a relevant factor in determining the appropriate duration of spousal support. Generally, under the SSAG, a spouse paying spousal support for a marriage of eight years will be required to pay spousal support in the range of four to eight years. However, for a ten year marriage, the SSAG suggests an appropriate duration of spousal support is in the range of five to ten years.
- i. Parties' Positions
- [36] The claimant submits that the following circumstances of the parties' living arrangement demonstrate that they entered a marriage-like relationship two years prior to the date they moved in together on December 30, 2009:
- a) the parties became officially engaged on November 2, 2007, demonstrating their commitment to each other;
 - b) the parties spent a large quantity of time together, and the respondent stayed over regularly at the claimant's place on most weekends and once or twice during the week. She testified that when the parties were not together they regularly talked on the phone;
 - c) the respondent purchased a high quality mattress for the claimant to have at her apartment;
 - d) when the claimant was unwell for an extended period of time over a number of months, the respondent bought her food, cared for her, and painted a room in her house; and
 - e) the parties were in a committed relationship and acted as a couple from November 2007, for example by attending counselling together to work on their relationship.
- [37] The respondent says that the date the parties began living in marriage-like circumstances was December 30, 2009, the date they moved in together. He asserts that the parties were generally in a loving relationship after their engagement, but says it was as boyfriend/girlfriend and not more. For example, while the respondent admits the relationship was

sexual prior to their formal marriage and that he often stayed at the claimant's apartment, the respondent says neither party kept personal belongings at the other party's house. He further says that during their engagement the parties frequently "broke-up" and required counselling. The respondent also notes that the parties' finances were kept separate, and he indicated on his tax returns that his status was "single" until at least after they moved in together. Finally, the respondent argues that neither party was involved in raising the other party's children until when they began cohabitating at the end of December 2009.

ii. Legal Analysis and Determination

- [38] Section 3(3) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], provides that a relationship between spouses begins on the date on which they began to live together in a marriage-like relationship, unless preceded by the date of their marriage.
- [39] Determining when parties begin to live in a marriage-like relationship is a fact driven exercise. Courts recognize that marriages can take many different forms and that "spouses" interact with each other in innumerable ways. Courts have therefore avoided rigidly applying a "check-list" approach in assessing the nature of a relationship. That said, courts have developed certain indicators that provide guidance in evaluating whether parties are acting in a marriage-like fashion. Such factors are "indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship.": *Weber v. Leclerc*, 2015 BCCA 492 at para. 25, leave to appeal to SCC ref'd, 36812 (21 April 2016).
- [40] More recently, Justice Schultes provided a helpful summary of the general principles of law that govern the marriage-like analysis in *Dey v. Blackett*, 2018 BCSC 244:
- [192] The determination of whether a relationship was marriage-like requires a "holistic approach", in which all of the relevant factors are considered and weighed, but none of them are treated as being determinative of the question: *Austin v. Goerz*, 2007 BCCA 586 at paras. 58 and 62.
- [193] While a "checklist" approach to this question is not appropriate, it can still be helpful during the analysis to consider the presence or absence of commonly-accepted "indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship": *Weber v. Leclerc*, 2015 BCCA 492 at para. 25. A frequently-cited authority has identified these indicators as including "shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple": *M. v. H.*, 1999 CanLII 686 (SCC), [1999] 2 S.C.R. 3 at para. 59, citing *Molodowich v. Penttinen* (1980), 1980 CanLII 1537 (ON SC), 17 R.F.L. (2d) 376 at para. 16 (Ont. Dist. Ct.).
- [194] While financial dependence was at one time considered an essential aspect of a marriage-like relationship, this is no longer so: *Austin* at paras. 55-56.

- [195] The intentions of the parties, particularly whether they saw the relationship as being "of a lengthy, indeterminate duration", will be important to the determination of whether the relationship was marriage-like. However, evidence of their intentions must be tested against objective evidence of their lifestyle and interactions, which will provide direct guidance on the nature of the relationship: Weber, at paras. 23, 24. In other words, "subjective or conscious intentions may be overtaken by conduct such that whilst a person living with another might not say he or she was living in a marriage-like relationship, the reality is that the relationship has become such": Takacs v. Gallo (1998), 1998 CanLII 6429 (BC CA), 48 B.C.L.R. (3d) 265 (C.A.) leave to appeal to SCC ref'd, [1998] S.C.C.A. No. 238, at para. 53.
- [196] In weighing the various factors, it is also an error to give undue emphasis to the future plans of a couple, in contrast to the current realities of their respective situations: Takacs at para. 58.
- [41] The claimant asserts that the parties were committed and living in a marriage-like relationship from the date they were engaged. As I understand her argument, one of the major factors she says supports that the parties were living as a married couple from the date of the engagement is that there was a dedicated intention that they would be committed in the future. As support for this she points to the fact that the parties attended counselling and attended church date nights, with a view to strengthening their commitment to each other, thus demonstrating their intention to be together.
- [42] While a court should consider the intentions of the parties, it must also test the evidence of those intentions by considering whether the objective evidence before it is consonant with the intentions: Weber at para. 23.
- [43] In my view, while the claimant may have had an intention or belief that the parties were committed and living in a marriage-like relationship after being engaged, it is not sufficient to establish that the parties were in such a relationship, after reviewing the objective evidence regarding how the parties conducted themselves. The objective evidence supports that the relationship took a significant, and more committed turn after the parties moved in together as I will now describe.
- [44] I base my conclusion that the parties were not in a marriage-like relationship until they moved in together on the following evidence, which I find as fact:
- a) there was no evidence that the parties co-mingled their finances in advance to moving in together. While the respondent paid for certain expenses, including a bed for the claimant's apartment, banking, credit cards and general finances were kept separate until at least 2009. I find that the respondent did not demonstrate consistent contributions towards the necessities of life for the claimant until December 30, 2009;

- b) the parties maintained separate households until moving in together, with the respondent residing at his condo and the claimant residing at her apartment. There was agreement that J.D. only visited the respondent's condo on one or two occasions. Further, the respondent testified, and I accept as a fact, that the claimant stayed at his condo at most for two nights before they moved in together;
 - c) the parties attended counselling after being engaged but before moving in together. While this shows a commitment to work on the relationship and continue in a committed relationship, it could also show the degree to which the parties were having difficulties in their relationship. I do not find that the fact of attending couple's counselling supports the claimant's argument that the parties were in a marriage-like relationship from 2007. Further, the respondent testified that the parties often broke up after the November 2007 engagement. In my view, this shows that the parties were not in a marriage-like relationship until late 2009;
 - d) the respondent did not report his status as married on his tax returns filed with the Canada Revenue Agency until at least the 2009 taxation year;
 - e) the respondent did not include the claimant, J.D. or K. as dependents on his health and benefits insurance at his work until at least 2009; and
 - f) while the respondent spent some time with J.D. from the engagement to the time J.D. and the claimant moved in with the respondent, I find that the respondent's conduct demonstrated he was not in a parental role after he and the claimant were engaged in November 2007. J.D. did not spend any time at the respondent's house. In my view, the conduct and attitude of both parties towards the other party's children demonstrates neither was involved in parenting the other's children until late 2009.
- [45] I find that the evidence overwhelmingly supports a conclusion that the parties' began living in marriage-like circumstances on December 30, 2009, the date that they moved in together in Maple Ridge. As the parties agree that the marriage ended on September 11, 2017, I conclude that the duration of the marriage was seven years, eight months and twelve days.

C. Spousal Support

- [46] There are two issues relating to spousal support in this trial: (1) whether the respondent should be relieved of paying spousal support to the claimant as of May 1, 2022; and (2) whether the claimant is entitled to an award of retroactive spousal support.
- [47] I will deal with each issue in turn. However, both issues require a consideration of the respondent's argument that the claimant has not reported her income accurately for the purposes of calculating spousal support. Thus, I will first address the issue of whether income should be imputed to her.
- i. Should Spousal Support Continue After May 1, 2022?

a) Parties' Position

- [48] The respondent argues that his obligation to pay spousal support to the claimant should end on May 1, 2022. He says that based on the 2018 Master Harper Order he paid \$2,000 per month retroactively from December 1, 2017 to November 30, 2018, for a total of \$24,000. He then paid \$1,712 per month pursuant to the 2018 Riley J. Order from December 1, 2018 to January 2023, for a total of \$85,600. He argues that his total payment of \$109,600 in spousal support over a period of 62 months is more than adequate and exceeds what he would be required to pay under the SSAG even for a longer time period. Further, he argues that given the eight-year duration of the marriage and the fact that the parties have now been separated for over five years, it is appropriate for spousal support to end.
- [49] The respondent also argues that the claimant has underreported her income for the purposes of calculating spousal support. He asserts that the Court should impute income to her to at least the level of minimum wage in British Columbia because she is either underreporting her income earned from her fitness business or is intentionally remaining underemployed. The respondent says it becomes even more apparent that he has overpaid spousal support if income is imputed to the claimant at an amount of the annual full-time minimum wage income of \$32,240, as opposed to the amounts she reported for 2018 to 2021 in the range of \$6,586 to \$18,079. I note that the amount of \$32,240 was provided by the respondent as amount of annual minimum wage in British Columbia and he has approximated the amount presumably upon a wage of \$15.65 per hour for 40 hours per week for 52 weeks.
- [50] The claimant asserts that spousal support should continue indefinitely. She says that she would be unable to support herself without continued spousal support given her income level and the expenses she regularly incurs. The claimant argues that she left her rent-controlled cooperative housing in 2009 to live with the respondent, and that in doing so she lost the ability to live in rent-subsidized affordable housing. Thus, in light of her current rental expenses of \$2,000 a month and the meagre annual income that she says she earns, the claimant says that she requires spousal support to survive.
- [51] The claimant also argues that she has a long-term debilitating health condition of myalgic encephalomyelitis/chronic fatigue syndrome which prevents her from working more hours or having a job in a traditional and inflexible workplace setting.

b) Legal Analysis and Determination

- [52] Counsel referred me to s. 15.2 of the Divorce Act, which governs an award of spousal support. However, given that this is an application to vary an existing spousal support award, s. 17 of the Divorce Act is the applicable section.
- [53] Section 17(4.1) of the Divorce Act sets out that before a variation may be made to a spousal support award, there must be a material change in circumstances:

17(4.1) Before the court makes a variation order in respect of a spousal support order, the court shall satisfy itself that a change in the condition, means, needs or other circumstances of either former spouse has occurred since the making of the spousal support order or the last variation order made in respect of that order, and, in making the variation order, the court shall take that change into consideration.

[54] Our Court of Appeal has held that s. 17(4.1) directs the trial judge to consider the change in condition, means, needs or other circumstances of the parties. This consideration includes any changes in a party's income and capital assets. It might also include the strength of a recipient's compensatory claim for spousal support where a payor's income is limited: *Walters v. Walters*, 2011 BCCA 331 at para. 36.

[55] If the threshold to vary spousal support is met, the court must consider the objectives of spousal support when determining an appropriate award. Section 17(7) of the Divorce Act sets out the objectives of spousal support:

17(7) A variation order varying a spousal support order should

- (a) recognize any economic advantages or disadvantages to the former spouses arising from the marriage or its breakdown;
- (b) apportion between the former 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 former spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each former spouse within a reasonable period of time.

[56] In *Hickey v. Hickey*, [1999] 2 S.C.R. 518, 1999 CanLII 691, the Supreme Court set out that a judge must consider all of the factors in s. 17(7) of the Divorce Act in exercising his or her discretion to vary a spousal support order:

[24] The objectives that guide the exercise of judicial discretion set out in s. 17(7), therefore, recognize the varying ends that an order for spousal support should serve, taking into account the nature of the marriage, its economic consequences, the consequences of its breakdown, and the situations of the parties before the court. In making an order that reflects them, a trial judge must consider all relevant facts and applicable factors.

[57] Moreover, ss. 15.2(6) and 17(7) of the Divorce Act set out identical objectives for spousal support, either in the first instance or during an application to vary. As such, the authorities referred to me by the respondent referencing s. 15.2(6) of the Divorce Act are of assistance. To that end, there are two approaches to spousal support, compensatory and non-compensatory: *Brisson v. Brisson*, 2012 BCCA 396 at para. 28.

- [58] Compensatory spousal support is generally related to the first two objectives of spousal support set out in s. 17(7)(a) and (b) (as well as s. 15.2(6)(a) and (b)). To reiterate, these factors are: to recognize an economic disadvantage to the spouse as a result of the marriage or its breakdown; and to apportion the financial consequences arising from the care of any child of the marriage.
- [59] For its part, the non-compensatory approach to spousal support is related to the factors in s. 17(7)(c) and (d) (as well as 15.2(6)(c) and (d)). These factors are: to relieve any economic hardship of the spouse arising from the breakdown of the marriage; and, so far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [60] Recently, Justice Fleming helpfully summarized the grounds for spousal support in *Jordan v. Jordan*, 2022 BCSC 1564:
- [131] Although the compensatory and non-compensatory grounds for spousal support are animated by different statutory objectives and different models of marriage or spousal relationships, the cases recognize that many claims involve aspects of both. The underlying goals of compensatory and non-compensatory spousal support are the equitable sharing of the economic consequences of a spousal relationship or its breakdown and narrowing the gap between the needs and means of the spouses.
- [132] Compensatory support is intended to provide redress for an economic disadvantage arising from the marriage or its breakdown (such as diminished earning capacity and lost career opportunities from taking on childcare responsibilities) or the conferral of an economic advantage upon the other spouse (such as enhanced earning capacity through career development) Either an economic disadvantage or an economic advantage may provide a basis for an award of compensatory spousal support. Both are not required.
- [133] Need alone may establish an entitlement to non-compensatory support. The concept of need, however, goes beyond the basic necessities of life and varies with the circumstances of the parties The same is true for self-sufficiency. In longer marriages, both need and self-sufficiency are measured against the marital standard of living or the payor's post-separation standard of living

[Citations omitted.]

- [61] As a starting point, other than giving up her rent-controlled accommodation when she moved in with the respondent in 2009 (which I discuss later in these reasons), I find that the claimant was not economically disadvantaged by her marriage to the respondent or by the breakdown of that marriage. She operated her personal fitness training business before the marriage, and continued to do so during the marriage, although she limited her involvement during her foray into the artisanal frozen confection business. There is no evidence before me that the claimant sacrificed career or educational opportunities because of the marriage.

- [62] In my view, any entitlement by the claimant to continued spousal support will be non-compensatory. In other words, I do not find that the respondent is required to compensate the claimant for sacrifices she made during the marriage. As will be discussed below, I agree that the purpose of the respondent's spousal support is to relieve economic hardship suffered by the claimant resulting from the breakdown of their marriage (s. 17(7)(c)) and to promote the economic self-sufficiency of both parties within a reasonable period of time (s. 17(7)(d)).
- [63] To that end, in *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC ref'd, 33002 (28 May 2009), Madam Justice Rowles described the approach to non-compensatory spousal support as follows:
- [54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. 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 (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.
- [64] I accept that the claimant will face some economic difficulty in the absence of receiving spousal support payments from the respondent. Yet, that finding, in itself, does not end the analysis, as the purpose of non-compensatory spousal support is to both relieve economic hardship and promote economic self-sufficiency within a reasonable period of time. These two factors must both be considered.
- [65] Before making the determination of whether continued spousal support is warranted, I must first address the respondent's argument that the claimant has failed to accurately report her income or is intentionally remaining underemployed. This is because my conclusion on whether I should impute income to the claimant will impact the reasonableness of the spousal support the respondent has paid to date, and will provide a more accurate view of whether spousal support needs to continue.
- [66] The claimant reported that she earned income of \$9,702 in 2018; \$6,586 in 2019; \$18,079 in 2020; and \$15,000 in 2021. This represents an average annual income over those four years of \$12,341.75 (i.e., \$49,367 / 4).
- [67] The respondent asserts that her reported income is unrealistic to the point of being suspect in that she is either not declaring all the income she earns or is intentionally being underemployed. In other words, the respondent says that either the claimant has underreported her income or could be earning more income than she does by taking on more or different work. The respondent argues that, at a minimum, the claimant's income should be set at the average minimum wage in British Columbia, which he says is \$32,240 annually.

- [68] The claimant argues that she only has experience in the fitness industry as a trainer. She asserts that her reported income is an accurate reflection of her net income after she deducts expenses. The claimant testified that the COVID-19 pandemic adversely impacted her business because gyms were closed due to health restrictions.
- [69] I accept that the COVID-19 pandemic would have had a negative impact on the claimant's business during 2020 and 2021. I note that in those years her income was higher than in other years because she received the Canadian Emergency Response Benefit ("CERB") during the pandemic. Leaving aside those years, I have difficulty reconciling the claimant's testimony regarding her business operations with the income she reported in 2018 and 2019.
- [70] The claimant testified that she charged clients \$50 to \$58 per training session. She testified that she would train two to three people five times during the week and sometimes one or two on the weekends. Using a very rudimentary calculation of revenue, based on four weeks of vacation and relying upon the averages of the number of weekly clients and the amounts she charged those clients as provided in her testimony, I would expect her to conservatively earn an annual revenue of \$31,104 (i.e., \$54 per session x 12 sessions per week x 48 weeks).
- [71] That said, I accept that the claimant would have expenses for her business. She testified that she was required to pay \$10 each time she visited a gym with a client. She testified she also had marketing fees and other business-related fees. However, I was not provided with documentation to support these claims, and to demonstrate that they were reasonable.
- [72] In *Weibe v. Treissman*, 2017 BCSC 1523, Justice Kent held:
- [94] The burden of proving the reasonableness of deductions from business income, whether in the context of self-employment or within a wholly-owned corporation, lies with the spouse making the deduction. It is the obligation of that spouse to fully disclose the financial information and documentation relied upon to justify the deduction of each expense. It is not the other party's responsibility to hire, nor is it the court's obligation to appoint, an accountant or other professional to assess and challenge the reasonableness of the deduction, although of course both are at liberty to do so in appropriate circumstances. For a recent affirmation of these principles, see *Cunningham v. Seveny*, 2017 ABCA 4.
- [Emphasis in original.]
- [73] In my view, the income reported by the claimant does not accord with the actual income she would have available to her for the purpose of supporting herself. In other words, I find that, based on the evidence before me, the claimant's reported income is lower than the income she actually earns.

- [74] The claimant testified that she does not want to do other work because she "loves working in the fitness industry", and because it is her field of training. The claimant further asserts that due to her health issues, including her diagnosis of myalgic encephalomyelitis/chronic fatigue syndrome, she is unable to work at a regular job. She says her health condition makes it necessary for her to have control over her hours.
- [75] In that regard, I found the claimant's evidence on her ability to work at a full-time job difficult to square with what appears to be a strong work ethic and diligent working history. While the evidence of her illness was not tendered as proper expert evidence, I accept that the claimant suffers from health issues that impact her level of energy. Accordingly, I accept that the claimant requires some form of flexible working arrangement because her health condition requires her to rest at times, and that doing so would be difficult to be on a regular schedule. That said, it appears that the claimant, by her own admission, is able to work full-time, or at least 30 hours a week. In an email dated December 6, 2017, she wrote the following to the respondent:

I continue to work almost full time hours anyways (including client sessions, driving time, prep time, researching injuries/health issues that my clients have, marketing doing nutrition programs, designing training plans, invoicing, answering emails, free introductory sessions etc., etc.) plus on top of that I have responsibilities as a single mom. My health issue is irrelevant when I continue to work about 30 hours a week for my business already. You would also have to subpoena [sic] about 30 different doctors including a number of naturopaths who are the doctors who work with those kinds of health issues, to get a picture of my health, but its pretty pointless for the purpose of proving that I can work full time when I actually am already working full time.

- [76] I reference this email because it corroborates the respondent's testimony regarding the amount of work that the claimant did while she operated the frozen confection business. The evidence before me was that during the market season, the claimant was the driving force behind running the business. This included picking berries, preparing the confections, organizing the attendance at weekend markets, and selling the confections at the markets. The claimant also conducted the marketing and accounting activities for the business.
- [77] Further, I note that I was very impressed with the claimant's intelligence and ability to put forward her case at trial. In representing herself, she was articulate, well-prepared, and well-organized. I acknowledge that the trial provided me merely a snapshot of her abilities, and that the qualities I observed may be difficult to translate into paid employment. Nevertheless, I found that the claimant possessed abilities and an acumen that I expect would be of value to many employers.
- [78] In light of the above-reviewed evidence, I find that one of two situations is occurring in the present case. Both scenarios affect how spousal support should be calculated, and are contemplated in s. 19 of the Guidelines. That provision allows a court to impute income to a spouse. Although the Guidelines formally concern child support, the test for imputing

income is similar in the case of both spousal and child support: *Healey v. Healey*, 2022 BCSC 2072 at para. 90, citing *Marquez v. Zapiola*, 2013 BCCA 433. As well, the SSAG directly incorporates as a starting point the methodology for defining income set out in the Guidelines: *T.N. v. J.C.N.*, 2015 BCSC 439 at para. 103.

- [79] As such, the first scenario set out in s. 19(1)(a) of the Guidelines allows a court to impute income if a spouse is intentionally under-employed or unemployed. This scenario applies if the claimant is reporting her income accurately as a fitness instructor in the annual range of approximately \$12,000. If this is the case, in my view the claimant is not making adequate efforts to become self-sufficient following the breakdown of the parties' marriage because she is continuing to operate and work in an unviable business. I also note that despite claiming that her myalgic encephalomyelitis/chronic fatigue syndrome diagnosis renders her disabled, on cross-examination, the claimant admitted that she has never sought any financial aid in the form of long-term disability assistance from the government. In my view, there are avenues for greater self-sufficiency available to the claimant that she has not pursued.
- [80] The second circumstance is addressed by s. 19(1)(g) of the Guidelines, which allows the court to impute income if the spouse unreasonably deducts expenses from income. In this scenario, the claimant earns more money and therefore has more money available for herself than reported. If this is the case, the spousal support paid by the respondent must be compared to the claimant's realistic economic reality.
- [81] Our Court of Appeal in *Jendruck v. Jendruck*, 2014 BCCA 320, emphasized the importance of the Divorce Act's objective that spouses strive for economic self-sufficiency after the breakdown of a marriage, and noted that a spouse who fails to do so must live with the consequences:
- [16] Consistently, the courts have affirmed and applied the objective in the Divorce Act of striving for economic self-sufficiency, while recognizing that attainment of full economic self-sufficiency may not be practicable. To the degree effort could be made by a party to contribute to his or her own support in the circumstances, and effort has not been made, the courts have said the consequences of that party's choice falls on them. The courts do not, and cannot, say a person must take up any particular employment. It is a free society in which people may choose how to spend their hours. However, where the effort to contribute to one's own support is deemed insufficient in all the circumstances, the court will place the consequence of the inadequate effort on the person whose choice it is, and may do so by the vehicle of imputing income for under-employment.
- [82] While one objective of spousal support under the Divorce Act is to protect the claimant from undue financial hardship, the support should not continue in my view when she is making insufficient efforts to become economically independent from the respondent. In the circumstances of this case, for the purpose of assessing spousal support under the SSAG, I find it appropriate to impute income to the claimant at the minimum wage in British

Columbia. However, I find that the amount of \$32,240 for annual minimum income proposed by the respondent is too high. Using the minimum wage of \$15.65 at 35 hours a week for 48 weeks results in an income of \$26,292 annually. In my view, the claimant is either currently earning minimum wage or more with her fitness business and not reporting it accurately, or has the capacity to earn at least a minimum wage in some other job. I have calculated the annual amount using a 35-hour work week, which is a mid point of the forty hours work week used by the respondent to calculate the annual wage and the 30-hour work week that the claimant said she stated she could work in her December 6, 2017, email to the respondent.

- [83] I conducted calculations under the SSAG to determine if the respondent's spousal support payments are generally in line with the SSAG, or as he argues, in excess of the SSAG. By my calculations, using the respondent's current salary of \$90,453 (\$92,952, less union fees of \$2,499) and the claimant's imputed income of \$26,292, on a "with-child" basis, the respondent spousal support would be in the range of \$342 to \$1,052, with a mid-point of \$672 per month. As such, the respondent's current monthly payment of \$1,712 and his previous monthly payment of \$2,000 greatly exceeds the spousal support suggested by the SSAG.
- [84] However, to take the analysis further, I conducted calculations under the SSAG to determine if the respondent's spousal support payments were generally in accordance with SSAG recommendations using both parties' actual reported income from 2018 to 2021. As set out above, the claimant reported incomes of \$9,702 in 2018; \$6,586 in 2019; \$18,079 in 2020; and \$15,000 in 2021. The average of the claimant's income for these four years is \$12,341.75.
- [85] The respondent reported incomes of \$92,237 in 2018; \$96,832 in 2019; \$102,795 in 2020; and \$96,810 in 2021. The average of the respondent's income between 2018 to 2021 is thus \$97,168.50. I have reduced this amount by \$2,400 to approximate the respondent's union dues, resulting in an average income adjusted for union dues of \$94,768.50.
- [86] Using the "with child" formula and averages of the reported incomes for the respondent and the claimant results in a range of \$929 to \$1,464 per month with a midpoint of \$1,187. As such, even if I were to calculate the spousal support based on the income levels reported by the parties, and taking the highest support award in the range on that basis, the respondent has still, by my calculations, overpaid his spousal support. Specifically, under this scenario, the respondent has overpaid by \$248 per month in respect of the 2018 Riley J. Order, and by \$536 per month in respect of the 2018 Master Harper Order. Totalled over the relevant 62-month timeframe, the respondent has paid spousal support in the amount of \$105,600, whereas--even taking the reported incomes at face value and applying the highest amount in the applicable range--he was only required to pay \$90,768 (i.e., \$1,464 x 62 months). This represents a difference of \$14,832.
- [87] In respect of whether the respondent's spousal support has been for a sufficient duration, the SSAG recommends a duration of spousal support for a period of four to eight years for a marriage lasting eight years. The respondent has been paying spousal support in excess of

the monthly amounts under the SSAG for almost five and one-half years, and has paid a total of \$105,600 of spousal support. Therefore, in my view he has amply satisfied his burden to relieve the claimant's economic hardship, and has done so for a sufficient time such that she should have been able to become economically self-sufficient.

- [88] The respondent asks to have the spousal support stop on May 1, 2022, and that the claimant be presumably responsible for paying back eight months of spousal support at \$1,712 per month, or a total of \$13,696. I agree that the respondent should no longer be required to pay the claimant any spousal support, but find that requiring her to pay back such a large amount from May 1, 2022, will create undue hardship upon her and would not foster the objectives and spirit of the spousal support regime.
- [89] As a result, I conclude that the claimant must repay the respondent for any amounts of spousal support paid to her from January 1, 2023, forward. I presume this will amount to a repayment of \$1,712 per month for three months (January 1, 2023, February 1, 2023, and March 1, 2023), for a total of \$5,136. To lessen the financial hardship on her in repaying these amounts, I order that she may repay these amounts in monthly installments of no less than \$290 per month for the next 18 months from the date of this order. While \$5,136 spread over 18 months is \$285.33 per month, I have increased the monthly payment slightly to account for the fact that the respondent is being delayed in receiving his full repayment for a year and a half.
- [90] Before leaving the topic of the claimant's entitlement to ongoing spousal support, I wish to address one argument she forwarded at trial that I consider to be a claim for compensatory spousal support. The claimant argued that when she married the respondent and moved in with him, she left her rent-controlled cooperative housing unit to live with the respondent. The evidence was that her rent at this cooperative housing, being approximately \$200 per month, was well below market value rent in Vancouver. She now has to pay considerably more for rent, in the range of \$2,000. The claimant testified that she is attempting to again obtain rent-subsidized rental housing, but is finding it difficult to do so as there are long wait lists. I accept that this increased rental expense has caused the claimant more hardship. However, I find two factors mitigate this argument.
- [91] First, the claimant provided no evidence of her efforts to find lower priced accommodation or rent-controlled housing. I took from her testimony that she had only recently been put on a waitlist despite being separated from the respondent since September 2017. In my view, while acknowledging that there are likely long waitlists for rent-controlled housing in the Lower Mainland, it appears that the claimant has not taken any serious steps towards finding such housing until recently. Taking more concrete steps towards finding affordable housing at an earlier stage would have represented a reasonable step towards establishing her economic self-sufficiency in a reasonable time, instead of relying upon the spousal support paid by the respondent.

[92] Second, as a result of being married to the respondent and having a share in the matrimonial home, the claimant benefitted economically from the division of property. In particular, the claimant received a portion of the sale of the family home in the amount of \$104,000. In my view, but for the marriage the claimant would not have had the opportunity to realize this source of equity appreciation if she had continued renting in the housing cooperative. In considering the totality of the circumstances, I find that the claimant's benefit from this equity, in combination with her receiving spousal support for the past five and a half years, has adequately compensated her for any economic disadvantage arising from the marriage or its breakdown under s. 15.2(6)(a) of the Divorce Act.

ii. Is the Claimant Entitled to Retroactive Spousal Support?

a) Parties' Position

[93] The claimant asserts that the respondent did not pay the required amount of spousal support under the SSAG because his obligations were not based on his actual income. She seeks an award that recalculates the amount owing under the SSAG using the respondent's actual income for the years since separation during which he has paid spousal support. In her calculations supporting her claim for retroactive amounts owing from 2018 to 2021, the claimant has combined the amounts of spousal support and child support. She says the shortfall, when these amounts are combined total \$39,432 for those years.

[94] The respondent argues that he paid the amounts required by the court orders and that those amounts greatly exceed amounts of spousal support he would be required to pay under the SSAG. In short, the respondent argues that there can be no retroactive spousal support owing because he has overpaid his spousal support to the claimant.

b) Analysis and Determination

[95] I find two problems with the claimant's argument, which prevent me from accepting it.

[96] First, using the numbers proposed by the claimant, I am unable to reproduce her findings in the SSAG. For example, for the 2019 year, the claimant uses her income of \$6,586 and the respondent's of \$96,832 on a "with child" formula. She says that this results in a high end SSAG amount of spousal support of \$2,615 per month. In my calculation, using her inputs, the SSAG amount is \$1,916 per month. In each of the years proposed by the claimant, I am unable to reconcile her calculations with the spousal support calculations under the SSAG. As such, I find her methodology of calculating her claim is flawed.

[97] Second, her calculations use the income she has reported, not the income amount I have imputed to her as set out above. While the claimant's apparent flawed calculation of the SSAG amounts would not prevent me from accepting that the respondent owed retroactive spousal support, based on the income I have imputed to the claimant, my calculations indicate that the respondent has always overpaid, not underpaid, spousal support.

- [198] I also note that the quantum of the support is an assessment of an amount determined to be necessary to accomplish the various objectives of spousal support, among them promoting the economic self-sufficiency of both parties and reducing the economic hardship of the spouse receiving the support. The SSAG recommendations are not to be slavishly applied, but do provide a useful guideline.
- [199] I find no basis to accept the claimant's claim that the respondent owes retroactive spousal support. Accordingly, I dismiss her application for retroactive spousal support from December 1, 2018 to the present.

D. Child Support

- [100] Like the issue of spousal support, there are two issues relating to child support before the Court. First, should the respondent be required to pay child support for J.D. after May 1, 2022? Second, should the court award an amount of retroactive child support? I will deal with each issue in turn.
- i. Should the Respondent be required to pay child support after May 1, 2022?
- a) Parties' Position
- [101] The respondent has been paying \$284 of monthly child support for J.D. pursuant to the 2018 Riley J. Order. He notes that the order of Riley J. was an interim order and therefore may be varied at trial. The respondent seeks an order that his obligation to pay child support for J.D. end on May 1, 2022, on the basis that J.D. reached the age of 19 in April 2022, and so is presumptively no longer considered to be a child of the marriage.
- [102] The respondent says that given that he has had no contact with J.D. since he separated from the claimant in September 2017, and had a limited relationship with him during the marriage, he should not be required to continue to pay for J.D.'s education. Further, the respondent argues that support for J.D. should first be sought from J.D.'s biological father, Mr. D., and then from the respondent as J.D.'s step-parent. Finally, he asserts that the claimant failed to provide sufficient evidence as to why J.D. is unable to support himself and requires continued support while attending post-secondary education, including any steps he has taken to support himself.
- [103] The claimant argues that until J.D. graduates from college he is still a child of the marriage despite being an adult. She argues that J.D. still lives with her and is dependent on the respondent's child support to continue attending his college program.
- b) Legal Analysis and Determination
- [104] The onus is on the claimant to prove that J.D. should still be considered a child of the marriage and that he is "unable" to withdraw from his parents' charge. Whether J.D. is unable to withdraw from his parents' charge must be more than a lifestyle choice to remain dependant. Courts accept that the pursuit of post-secondary education may constitute a

reason for the inability of an adult child to withdraw from his or her parents' charge, but a court must have regard to the surrounding circumstances; it is not sufficient merely to attend an educational institution to remain a child of the marriage: *W.P.N. v. B.J.N.*, 2005 BCCA 7 at para. 18.

[105] In assessing whether an adult child attending a post-secondary institution should continue to receive support, courts often refers to the so-called Farden factors, with reference to *Farden v. Farden* (1993), 48 R.F.L. (3d) 60, 1993 CanLII 2570 (B.C.S.C.). These factors were considered by our Court of Appeal in *Nordeen v. Nordeen*, 2013 BCCA 178 as follows:

[16] In determining whether pursuit of education is a valid reason for continued dependence, a court must consider two questions. The first is whether, considering all of the child's circumstances, the child's educational pursuits are reasonable. If they are, the court must also consider whether it is appropriate that the pursuits be financed by the parents. These questions can be complex and value-laden. In *Farden v. Farden*, (1993), 48 R.F.L. (3d) 60 at 64-5, Master Joyce (as he then was) set out a list of eight factors that may assist a court in making the determinations:

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
- (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (4) the ability of the child to contribute to his own support through part-time employment;
- (5) the age of the child;
- (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

[17] This Court has found the Farden factors to be useful indicators in deciding whether child support should continue to be paid in respect of a child over the age of majority who is attending a post-secondary institution (see, for example, *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 40; *W.P.N. v. B.J.N.*, 2005 BCCA 7 and *De Beck v. De Beck*, 2012 BCCA 465). It must be emphasized, however, that the Farden factors are neither a checklist nor a set of statutorily-mandated criteria. Rather, they are considerations for the court in assessing

whether the child's situation is consistent with the definition of "child of the marriage" in the Divorce Act.

[106] In this case J.D. is pursuing post secondary education. All of the evidence presented to me suggests J.D. is an excellent student who excels at his studies. He also has a part-time job at a "big-box" store where he earned \$14,538 in 2021. The claimant's testimony is that J.D. is responsible for paying his tuition costs at college as well as for his books and other expenses. J.D. receives some additional assistance for his car expenses from his biological father. There was no evidence as to whether J.D. applied for scholarships or financial aid or loans to fund his university education.

[107] Many Farden factors support finding that J.D. should continue to be considered a child of the marriage while he is enrolled in college in a full-time capacity. These include that he appears to be a good student and has a plan for continued academics. Yet, in my view, certain important factors indicate that the respondent should be relieved of his obligation to continue to pay child support for J.D.

[108] First, in the circumstances of this case it is relevant that the respondent is J.D.'s step-parent. Accordingly, pursuant to s. 147(5) of the FLA, his duty to provide support to J.D. is secondary to J.D.'s parents, being the claimant and Mr. D. Section 147(5) of the FLA provides:

147(5) If a stepparent has a duty to provide support for a child under subsection (4), the stepparent's duty

- (a) is secondary to that of the child's parents and guardians, and
- (b) extends only as appropriate on consideration of
 - (i) the standard of living experienced by the child during the relationship between the stepparent and his or her spouse, and
 - (ii) the length of time during which the child lived with the stepparent.

[109] The claimant did not present evidence of the difference in the standard of living experienced by J.D. now as compared to during the parties' marriage. However, I accept that, given the income reported by the claimant (albeit income that may have been unreported), even with J.D.'s salary, it is likely a lower standard of living.

[110] That said, J.D. is now an adult and has his own income, as well as receiving support from his biological father, Mr. D., in the amount of \$260 each month. Further, the claimant testified that Mr. D. provides an additional amount of money to J.D. in the amount of approximately \$300 each month for other expenses. Finally, the evidence before me suggests that J.D. and Mr. D. have an ongoing relationship and had a relationship during the years that the respondent and the claimant were married. Indeed, during that time J.D. spent three weekends per month and half of the holidays with Mr. D.

- [111] By contrast, the respondent testified that he has not seen J.D. since the parties separated in September 2017, and was never very close to J.D. As discussed previously, although there was some contradiction in the testimony of the claimant and the respondent on this point, I accept that while J.D., the claimant, and the respondent lived in the same house, the respondent and J.D. did some activities together but did not have a close bond. I also find that the evidence supports that the relationship between J.D. and the respondent has been unilaterally severed by J.D.
- [112] I also note that there was no evidence to suggest that any of J.D.'s academic plans were made while the respondent and the claimant cohabitated, and I accept that the respondent was not part of any decisions about J.D.'s post-secondary education. In my view, these particular circumstances favour a finding that the respondent should no longer be responsible for J.D.'s child support.
- [113] I am aware that the relationship between a step-parent and a child should not be evaluated solely on the nature of the relationship after the marital breakdown. As held by our Court of Appeal in *Shaw v. Arndt*, 2016 BCCA 78:
- [31] The unsatisfactory relationship is not an excuse for Mr. Arndt's failure to pay child support; nor is it a reason why Colby should not be regarded as a child of the marriage. Many parents or step-parents have troubled relationships with their children, but by virtue of their youth, children still have to be supported, in whole or in part, in obtaining training or degrees that will allow them to become self-sufficient. The final 'Farden factor' may justify the cessation of support in rare cases, but this case does not begin to approach the egregious circumstances in which a cut-off of support would be justified.
- [114] The view that the relationship between a parent and a child should not be determinative of whether a support obligation exists was echoed by the Supreme Court in *Chartier v. Chartier*, [1999] 1 S.C.R. 242, 1999 CanLII 707. There, Bastarache J., writing for a unanimous Court, held that while spouses can decide to divorce each other, they are not entitled to divorce their obligations to children of the marriage (at para. 32):

Once a person is found to stand in the place of a parent, that relationship cannot be unilaterally withdrawn by the adult. The interpretation of the provisions of the Divorce Act relating to "child[ren] of the marriage" should be "given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects": see Interpretation Act, R.S.C., 1985, c. I-21, s. 12. The reasoning in *Carignan* ignores one of the fundamental objectives of the Divorce Act as it relates to children. The provisions of the Divorce Act that deal with children aim to ensure that a divorce will affect the children as little as possible. Spouses are entitled to divorce each other, but not the children who were part of the marriage. The interpretation that will best serve children is one that recognizes that when people act as parents toward them, the children can count on that relationship continuing and that these persons will continue to act as parents toward them.

- [115] However, in *Chartier* the Court found that the step-father had acted as a father to the child "in every way" and was the "only father she knew". The evidence in the case at bar, however, is that the relationship between J.D. and the respondent was not particularly close during the relationship and that Mr. D. remained as J.D.'s father. The evidence indicated that J.D. spent the majority of weekends with his biological father and had, at best, a strained relationship with the respondent even during the marriage. Given the nature of the relationship between the respondent and J.D. during his marriage with the claimant and since separation, I find that it is appropriate that the respondent no longer be required to pay child support for J.D., once J.D. became an adult.
- [116] Moreover, as mentioned earlier, given that the respondent is J.D.'s step-father, s. 147(5)(a) of the FLA provides that his responsibilities for support should be secondary to Mr. D. While the Court has discretion to continue to require the respondent to pay child support to ensure that J.D.'s needs are met, on the evidence before me, I am not persuaded that sufficient efforts have been made to obtain that support first from Mr. D. or to show that it is unavailable.
- [117] By contrast the circumstances in the case at bar, in *Shaw* the child's biological parent was unable to provide support to the child due to his disability. The Court of Appeal considered the obligation of a step-parent and found that the focus of the inquiry of a court in drafting an "appropriate" order should be the needs of the child and the circumstances of the case:
- [20] With respect to the obligation of a step-parent, Bracken J. was obviously satisfied that Mr. Anderson is unable to assist in Colby's financial support. This being the case, the burden must fall on Mr. Arndt and Ms. Shaw. As stated in *H.(U.V.) v. H.(M.W.)* 2008 BCCA 177:

At the other end of the spectrum, where the three (or more) parents' Guidelines "contributions" together are needed to provide the children with a reasonable standard of living, then both the stepparent and the non-custodial parent(s) may well be required to pay full Guidelines amounts. Or, where one of the natural or adoptive parents is not present or is unable to pay any support, the stepparent may well have to pay his or her full table amount. The Legislature has left it to the judgment of trial and chambers judges in the first instance to fashion orders that are "appropriate" under s. 5. At the same time, the Guidelines system is not thereby jettisoned in favour of a 'wide open' discretion. The inquiry must, like the Guidelines themselves, focus on the children and their needs. [At para. 41; emphasis added.]

- [118] In the case at bar, Mr. D. appears to have capacity to pay child support for J.D. Indeed, he pays \$260 per month and an additional amount "in kind". There was no evidence regarding why the claimant had not pursued child support in a greater amount from Mr. D., other than her testimony that she was satisfied with the amount he was paying. The claimant did not put evidence before the Court of Mr. D.'s income in 2018, but in 2017 his reported employment income was \$71,118. In 2019, he reported employment of \$70,845. In my calculation, for his income in 2019, Mr. D. would be required to pay \$674 of monthly child support as opposed to the \$260 (plus the top up he pays informally). I find that in the

circumstances of this case, the claimant should look to Mr. D. for additional child support if so required for J.D. The respondent's lawyer put it in plain language during his submissions that by not pursuing Mr. D. for additional child support, the claimant was "leaving money on the table." In my view, given the constellation of circumstances in this case, the claimant, on behalf of J.D., should look for support from J.D.'s biological parent and no longer from the respondent.

[119] In summary, the following factors lead me to conclude that the claimant has not met her burden of establishing that the respondent should be required to continue to provide child support to J.D., now that he is an adult:

- a) the respondent is the step-father of J.D., and there was insufficient evidence regarding Mr. D.'s ability to contribute to J.D.'s support during his post-secondary education;
- b) there was no evidence to suggest that J.D. has taken steps to pursue other funding for his education such as loans or financial assistance. Further there was no detailed evidence regarding J.D.'s specific financial needs for continuing with his post-secondary education; and
- c) there has been no relationship between J.D. and the respondent since the parties separated in September 2017. As well, the evidence before me, which I accept, was that the relationship between J.D. and the respondent was never a close relationship during the parties' marriage.

[120] The respondent seeks to terminate J.D.'s child support effective May 1, 2022, the month after he became an adult. While I accept that the respondent should not be obligated to support J.D. now that he is an adult, I have concerns about requiring the claimant to repay an amount equivalent to 10 months of \$284 payments of child support and the impact it might have on the best interests of J.D. should the claimant be required to repay a lump sum of \$2,840.

[121] Accordingly, I order that the respondent is no longer required to pay child support for J.D., effective on the date of this order. For clarity, the respondent will not be required to make any child support payments, subject to an agreement between the parties or further order of the court after his payment for March 2023.

ii. Should the Respondent be required to pay Retroactive Child Support?

a) Parties' Position

[122] The claimant argues that since separation, the respondent has not been paying the proper amount of child support for J.D., and so should be required to pay a retroactive amount that is based on the respondent's income for 2018 to 2022.

[123] The respondent submits that the monthly child support he paid to date of \$284 was calculated incorrectly by Riley J. In particular, he says the approach taken by Riley J. was to determine what the respondent's child support obligation would be under the Guidelines,

and then reduce that amount by the child support contributions of J.D.'s biological father, Mr. D. The respondent says the proper approach should have been to determine what Mr. D.'s child support obligations would be and then augment any remaining support owed with payments by the respondent. To that end, the respondent emphasizes that the FLA provides that the primary responsibility for child support is with a biological parent and the step-parent's obligation is secondary.

b) Legal Analysis and Determination

[124] The leading case on the assessment of retroactive child support is *D.B.S. v. S.R.G.*, 2006 SCC 37. In *D.B.S.*, the Court cautioned that retroactive awards are not always appropriate, as they can impair the certainty and flexibility of prospective child support awards and can be unfair to a payor by disrupting a predictable status quo: at paras. 95 and 96. However, the Court held that retroactive child support awards should not be seen as exceptional because, in certain cases, such an award is the only manner to ensure that a child is returned to the support they are rightly due: para. 97.

[125] As a starting point, I am not satisfied that there is sufficient evidence that the respondent has not paid his full child support obligations. As set out above, the respondent is J.D.'s step-father and therefore, pursuant to s. 147(5) of the FLA, has only secondary responsibility for J.D.'s support. There was scant evidence regarding the basis for calculating Mr. D.'s child support of \$260 per month, and regarding the additional voluntary amount. I suspect that Mr. D. is not paying the amount required of him under the Guidelines, given that his income, at least in 2019, was \$70,845.

[126] Therefore, for reasons similar to those by which I found that the respondent was no longer responsible for continuing to pay child support for J.D., I find that he has no obligation to pay retroactive child support. Nevertheless, for completeness I will address the factors set out in *D.B.S.* in respect of whether retroactive child support is appropriate.

[127] Namely, in *D.B.S.* The Court set out four factors a court should consider to determine whether retroactive child support should be ordered:

- a) whether there is a reasonable excuse for why the support was not sought earlier: *D.B.S.* at para. 100;
- b) the conduct of the payor: *D.B.S.* at para. 105;
- c) the circumstances of the child: *D.B.S.* at para. 110; and
- d) whether an award of retroactive child support will cause hardship on the payor: *D.B.S.* at para. 114.

[128] In *D.B.S.*, the Court stressed that in considering whether to award retroactive child support, a court must be flexible and sensitive to the particular situation before it:

135 The question of retroactive child support awards is a challenging one because it only arises when at least one parent has paid insufficient attention to the payments his/her child was owed. Courts must strive to resolve such situations in the fairest way possible, with utmost sensitivity to the situation at hand. But there is unfortunately little that can be done to remedy the fact that the child in question did not receive the support payments (s)he was due at the time when (s)he was entitled to them. Thus, while retroactive child support awards should be available to help correct these situations when they occur, the true responsibility of parents is to ensure that the situation never reaches a point when a retroactive award is needed.

[129] I find that the claimant has not provided a reasonable excuse for why she has not sought retroactive child support earlier. Indeed, it appears to me to be a response to the respondent seeking to be relieved of his obligations to pay child and spousal support. The respondent has paid what has been ordered of him for child support pursuant to the 2018 Riley J. Order and the previous order of Master Harper. With respect to the second D.B.S. factor, I do not find that the respondent's conduct in the context of J.D.'s child support is blameworthy. In fact, given his role as a step-parent and what appears to be a lack of diligence by the claimant in pursuing Mr. D. for child support, I am satisfied that the respondent has likely paid more child support than required.

[130] As well, in regards to the circumstances of the child, there was no evidence before me that a retroactive amount of child support paid by the respondent would impact upon J.D.'s standard of living or his ability to continue with his studies. While the claimant said that the support was needed, there was no specific evidence of budgets or costs associated with school or how the child support would factor into J.D.'s ability to pursue his education.

[131] Finally, in respect of the respondent's ability to pay, given his salary, I find that he has the financial means to continue child support payments. However, I accept his testimony that he is living paycheque to paycheque because of the spousal support and child support he is required to pay.

[132] Given the totality of circumstances, and the assessment of the four factors set out in D.B.S., I conclude that the respondent should not be required to pay an amount of retroactive child support. The claimant has failed to meet the burden set out under D.B.S.

[133] I therefore dismiss the claimant's claim for retroactive child support.

V. ORDER

[134] As a result of the foregoing, I order:

- a) the interim order of Riley J. made on November 2, 2018, is varied to the extent required to implement the terms of this order;
- b) the respondent, J.R.J.M., is no longer required to pay spousal support to the claimant, R.L.D., effective as of December 31, 2022;

- c) the claimant, shall repay the respondent for the amount of spousal support paid by the respondent to the claimant from January 1, 2023 to the date of this order by paying monthly amounts of no less than \$290 on the first day of each month for 18 months or until the amount is repaid, commencing on the first day of April 2023, unless otherwise agreed to in writing by the parties;
- d) the respondent is no longer required to pay child support to the claimant for J.D. effective as of the date of this order;
- e) the claimant's application for retroactive child support is dismissed;
- f) the claimant's application for retroactive spousal support is dismissed; and
- g) the respondent's counsel will draft this order and the signature of the claimant is dispensed with.

VI. COSTS

- [135] The general rule in respect of costs is that the party who is substantially successful is entitled to his or her costs: *Gold v. Gold*, 106 D.L.R. (4th) 452, 1993 CanLII 1248 (B.C.C.A.) at para. 19. This general rule accords with Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR], that costs must be awarded to the successful party unless the court orders otherwise.
- [136] The respondent has had substantial success. However, I am mindful of the economic circumstances of the claimant and that any costs award could impact both the claimant and J.D. profoundly. For much the same reasons that I have spread the claimant's obligation to repay the respondent's overpayment of spousal support over an 18-month period and to not require her to repay amounts of overpaid child support, I find that the costs award should be mitigated against the claimant.
- [137] Pursuant to Rule 16-1(1)(c) of the SCFR, I award lump sum costs in the amount of \$4,000, payable by the claimant to the respondent. I recognize this amount is less than what might be ordered under the tariff for a three-day trial and its associated procedures. However, in my view, given a consideration of the issues and the circumstances of the parties, it is appropriate, as a large cost award could inflict excessive financial hardship on the claimant.
- [138] I will leave it to the parties to determine a schedule for the claimant to pay the cost awards, but expect that the respondent would have some consideration of the court's effort to spread the claimant's financial obligations over time. That said, the claimant must not unduly delay her requirement to pay costs.

VII. CONCLUSION

[139] If there are matters affecting costs or issues regarding the terms of the order that need to be brought before me, the parties may make arrangements through Supreme Court Scheduling to appear before me for those purposes within 20 days of the date of this judgment.

"Gibb-Carsley J."

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