
CANADA / JUDGMENT

Robertson v. Robertson

2021 BCSC 168

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 168 Robertson v. Robertson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Robertson v. Robertson,

2021 BCSC 168

Date: 20210203

Docket: E27533

Registry: Cranbrook

Between:

Rachel Robertson

Claimant

And

David Robertson

Respondent

Before: The Honourable Mr. Justice Blok

Reasons for Judgment

Counsel for Claimant:

A. Brunet

Counsel for Respondent:

J.M. Mitchell

Place and Date of Hearing:

Cranbrook, B.C.

October 22, 2020

Place and Date of Judgment:

Cranbrook, B.C.

February 3, 2021

I. Introduction

- [1] In 2018, the parties in this family case entered into a separation agreement that provided for, among other things, the payment of child support and spousal support. Their agreement provided for reviews of both child and spousal support based on, but not limited to, their earnings for the prior year. It also provided that spousal support would terminate on the happening of certain events, one of which was if Ms. Robertson lived in a marriage-like relationship for more than two years.
- [2] The parties have initiated the review process, but they have been unable to agree on the support amounts that should be paid by Mr. Robertson commencing July 1, 2019. The focus of the disagreement is on Ms. Robertson's income or, more accurately, her reasonable capacity to earn income, because Mr. Robertson maintains that Ms. Robertson has the capacity to earn more than double the amount she actually earns. Ms. Robertson submits that her earnings represent a reasonable amount of income in all circumstances.
- [3] Both parties agree that spousal support is to be terminated as Ms. Robertson has now been a marriage-like relationship for more than two years, but they disagree on the termination date.

II. Background

- [4] I will briefly review the general background. The parties began their relationship in 2001, when Ms. Robertson was 17 years old and in her last year of high school in Vanderhoof. Mr. Robertson was 28 years old. The parties began living in a marriage-like relationship in or around 2003, they married on August 7, 2004 and they separated on April 6, 2017.
- [5] The parties have two children: Macey, who is 12 years old, and Dawson, who is 10. They have a shared parenting arrangement on a week on/week off basis.
- [6] Ms. Robertson, who is now 36 years old, is a registered care aide. Her income in 2018 (that is, her line 150 income less union dues paid) was \$23,690. Mr. Robertson is 47 years old and is employed by the British Columbia Assessment Authority. His 2018 income, similarly adjusted for union dues, was \$93,907.

[7] As indicated earlier, the parties entered into a separation agreement dated November 19, 2018. That agreement set Ms. Robertson's income for support purposes at \$27,000 and Mr. Robertson's income for support purposes at \$90,852. Child support payable by Mr. Robertson was set at \$936 per month and spousal support payable by Mr. Robertson was set at \$966 per month.

[8] Spousal support was to continue until April 1, 2027, but would terminate earlier on the happening of certain events. For present purposes, the relevant event is "[Ms. Robertson] remarrying or living in a marriage-like relationship for more than two years".

[9] The separation agreement contains the following review provision:

4.9 Every year Rachel and David will exchange their Notice of Assessment for the previous tax year with one another by no later than July 1. The parties will review and adjust child and spousal maintenance based upon but not limited to their respective line 150 earnings for the immediately preceding year, the revised payments to begin on David's first pay period following July 1.

[10] The parties discussed support following the exchange of financial disclosure in the summer of 2019, but they could not agree. Counsel then became involved, but again the parties could not agree. This led to the filing of court applications by both parties, with Ms. Robertson filing first, though nothing turns on the order the applications were filed.

III. The Applications of the Parties

A. Ms. Robertson

[11] Ms. Robertson said she began her current employment in April 2017, so by the time of the separation agreement in November 2018 she had not had a full year's earnings reflected in any income tax return. She said the agreed income figure of \$27,000 was based on an estimate only.

[12] Through her counsel, Ms. Robertson outlined her work history, emphasizing that her employment consisted almost entirely of minimum wage jobs. These included work at a convenience store, fast food franchises, and a short (seven month) stint at a family-type restaurant. She had the couple's first child in April 2008. She returned to work at the restaurant for a brief period, but was then off work for their second child, who was born in December 2009. She did not have regular employment from that point until 2014, although she attempted two home-based ventures, neither of which succeeded.

[13] In 2014 she worked for a time as a server at a hotel restaurant, but these were evening shifts and proved difficult to maintain in view of Mr. Robertson's busy out-of-town travel schedule. Later in 2014, she worked for a few months as a server at a golf course. From October to December 2016, she worked part-time in a friend's cleaning business.

- [14] Ms. Robertson explained that Mr. Robertson did not want to pay for child care, which would have allowed Ms. Robertson to work full-time, unless it was "suitable work" that more than covered the associated child care expense. He nonetheless expected her to contribute to the household finances. He encouraged her to apply for a job at the local Liquor Distribution Branch outlet, but her application was unsuccessful.
- [15] Ms. Robertson began a college program as a health care assistant (or care aide) in the fall of 2016, after a course to upgrade her high school English. In her affidavit, she deposed that she struggled with "learning difficulties" during her school years and these struggles continued into adulthood. Nonetheless, she completed the health care assistant program in April 2017. She then found work at a long-term care home in Kimberley called The Pines.
- [16] Ms. Robertson started work as a casual employee, where available shifts are dependent on both the facility's needs and employee seniority. From October to December 2017 she had a temporary full-time "line", or position, filling in for a more senior employee.
- [17] In February 2018, she secured a permanent part-time position, but she kept it for just three months. The available hours were 22.5 hours bi-weekly, but its major drawback was its highly varying shifts (involving evening, nights and day shifts), all within brief rotations. This schedule proved very difficult for the couple's children, one of whom became particularly distraught at how little he was seeing his mother. Ms. Robertson was, by this point, living with her own mother, Sylvia Lizotte, who in her own affidavit noted that she had to spend a lot of time helping with child care. Ms. Lizotte also noted that the children were very stressed and anxious during this time. For that reason, Ms. Robertson returned to her casual line and turned down evening and night shifts when the children were in her care.
- [18] Ms. Robertson said the following about the difficulties associated with her working evening and night shifts and how that work affected the children:

When I tried this line [a part-time line involving a rotation of three different shifts] and the [temporary] full-time line in 2017, I was either not at home, or completely exhausted from a night shift. The children quickly became irritated by my work schedule. I could not help with homework, be present for dinner or breakfast, and on the occasions when I was, I needed to sleep to recover for my next shift.

During the 2017 three-month fulltime line, Dawson specifically told me how difficult it was for him to not have me present anymore. I could tell he was irritated and anxious. He would get upset quickly at small things that would not normally affect him.

- [19] Mr. Robertson's out-of-town work continued after separation and, during these absences, Ms. Robertson looked after the children. In 2019, Mr. Robertson was away on 21 days that fell within his usual parenting time.
- [20] In mid-October 2020, Ms. Robertson secured a temporary full-time line, though her status is still that of a casual employee.

- [21] Since commencing work at The Pines, Ms. Robertson has applied for nine separate positions (or lines). In each case, the position was filled by an employee who had more seniority than she did.
- [22] Ms. Robertson addressed the evidence that relates to the spousal support termination issue. She said she began a relationship with a Mr. Pallas in the fall of 2017, their relationship became more serious in summer 2018, and she moved in with Mr. Pallas at the end of October 2018. As proof of the latter, Ms. Robertson produced documents evidencing her rent payments, which show the last rent she paid was in September 2018, which was for October rent. At that point, she informed Mr. Robertson of her changed status. The affidavit evidence of Ms. Lizotte confirms the timing of these events.
- [23] In her legal argument, Ms. Robertson emphasizes that the review of spousal support is not limited to an examination of actual or potential line 150 earnings but, instead, the review of support is at large. In this regard, she emphasizes s. 15.2(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), which requires a court, when making a spousal support order, to consider "the condition, means, needs and other circumstances of each spouse". She also refers to s. 19 of the Federal Child Support Guidelines, which states that income may be imputed to an unemployed or underemployed spouse except where "the under-employment or unemployment is required by the needs of a child of the marriage".
- [24] Ms. Robertson says that, based on her "conditions, means, needs and other circumstances", and the "needs of [the] child[ren] of the marriage", she earned to her reasonable maximum in 2018, and so her adjusted line 150 income (\$23,690) should be used in calculating support. Alternatively, she argues that the Court could use the figure of \$27,000 that was attributed to her in the separation agreement.
- [25] Finally, Ms. Robertson submits that the end date for spousal support should be October 31, 2020, as this will mark two years from the time she began cohabiting with Mr. Pallas.

B. Mr. Robertson

- [26] Mr. Robertson submits that Ms. Robertson is intentionally underemployed. He says Ms. Robertson should be working full-time, whether at The Pines or elsewhere, and so income should be imputed to her at \$45,000 per year. His notice of application essentially joins issue with that of Ms. Robertson, except he maintains that:
- income of \$45,000 should be imputed to Ms. Robertson for 2018, 2019 and 2020; that is to say, for multiple years, not just for 2019;
 - spousal support should terminate at the end of April 2020; and
 - he should be reimbursed for the resulting support overpayment.

[27] Mr. Robertson bases his underemployment argument on information he has obtained indicating a high demand for care aides in British Columbia. His evidence consists of three items:

- a) a June 2018 internet article, attributed to the CBC, referring to a report by the B.C. Care Providers Association (BCCPA). The BCCPA report is quoted in the article as saying that the province is short about 2,800 caregivers for seniors in assisted living and home health care;
- b) a media release from the BCCPA dated October 31, 2019, indicating there are "at least 247" health care aide positions vacant in the area covered by the Interior Health Authority; and
- c) materials obtained by Mr. Robertson through a Freedom of Information and Protection of Privacy Act [FOIPPA] request, showing 22 positions of various kinds were posted in 2019 for care aides in public care homes in the Cranbrook and Kimberley area.

[28] Mr. Robertson lists a number of reasons why Ms. Robertson's evidence that the children's needs do not permit her to work more than she does ought to be treated with scepticism:

- a) though Mr. Robertson indicated to the claimant he was flexible with parenting schedules, Ms. Robertson never asked him for any change due to any issues with her work schedule;
- b) the claimant has not applied for any lines since January 2018. Although she deposed she had applied for nine lines, at least initially she failed to disclose that all of these applications took place in January 2018 or prior;
- c) she claimed in an affidavit that privacy restrictions imposed by her employer prevented her from disclosing information concerning open lines, yet he was able to get information on internal postings through a FOIPPA request;
- d) Ms. Robertson did not tell him the children were stressed or anxious until the discussion began about reviewing support, and the children never mentioned this to him;
- e) he asked Ms. Robertson to provide documentation concerning the alleged stress caused to the children, but she failed to respond; and
- f) Ms. Robertson managed to secure a temporary full-time line in October 2020, the same month that her spousal support income came to an end. He argues that this shows she could have worked more.

[29] Mr. Robertson notes that in 2018 Ms. Robertson worked an average of just 14 hours per week.

[30] Mr. Robertson argues that Ms. Robertson's entitlement to spousal support is not compensatory in nature, but instead is based on her need and on contract (the separation agreement). He says Ms. Robertson did not suffer any reduction or disadvantage in her ability to earn income due to her role in the marriage. In oral submissions, he added that, in the alternative, her compensatory claim is not strong. He submits that this should result in spousal support being set at the low end of the range set by the Spousal Support Advisory

Guidelines (SSAG).

- [31] In arguing that Ms. Robertson did not suffer any economic disadvantage from the marriage or its breakdown, Mr. Robertson refers to the following:
- a) despite his encouragement of Ms. Robertson to take education or training to enhance her career opportunities, she chose to work at minimum wage jobs for the first five years of their relationship, which took her up to the time she became pregnant with their first child;
 - b) save for two unsuccessful home-based ventures, she stayed out of the workforce between 2008 and 2012;
 - c) he took parental leave after the birth of each child and was an "active" parent;
 - d) Ms. Robertson's efforts tending to the home and children did not confer any advantage on him because he was already established in a career by the time the children were born; and
 - e) Ms. Robertson trained as a care aide and immediately secured work in an in-demand field shortly after separation.
- [32] Mr. Robertson also submits spousal support should have terminated in April 2020. He received hearsay information that Mr. Pallas was renovating his house by April 2018 to make room for the children and, based on that, he sought further information from Ms. Robertson. He received no reply. He also notes that Ms. Robertson has given inconsistent dates for the start of her relationship with Mr. Pallas, with her affidavits referring to dates of both September 2017 and August 2018. He submits that an adverse inference should be drawn against Ms. Robertson as a result of these matters.
- [33] Finally, Mr. Robertson submits that Ms. Robertson has not explained what she has done with the \$138,000 she was paid pursuant to the separation agreement, and she should have invested the money and earned interest income. Relying on *Kearns v. Kearns*, 2014 BCSC 929 [Kearns], Mr. Robertson says that an additional \$3,000 should be imputed as income to Ms. Robertson.

C. Ms. Robertson - Reply

- [34] In reply, Ms. Robertson said:
- a) she was instructed by her manager not to share any information about internal job postings;
 - b) the job postings obtained by Mr. Robertson pursuant to his FOIPPA request have a different format than the one she sees when she accesses the site internally, the suggestion being that the former are not necessarily positions that are available to her. The majority of the postings appear to be for "home care" rather than "end of life care", and Ms. Robertson's field is in end of life care. Home care work involves travelling to people's homes. The FOIPPA postings also do not reveal what shift rotations are involved with the postings or how much work is offered in those postings;

- c) Ms. Robertson did not disagree that she worked an average of 14 hours per week in 2018, but she noted the wide variation in hours worked throughout the year, from a low of 5.5 hours to a high of 66.5 hours in a two-week pay period. Ms. Robertson said that this sort of variability is to be expected in the case of a casual employee with little seniority;
- d) as to the supposed inconsistency in the start date of her relationship with Mr. Pallas, she said this relationship began on a casual basis in the fall of 2017, and it became a serious relationship in August 2018; and
- e) in Kearns, the case cited by Mr. Robertson, the recipient spouse acquired about \$677,000 in financial assets as a result of property division, which prompted the court to impute an additional \$10,000 in income to that party. Here, the sum involved is far less. From the monies Ms. Robertson acquired through the settlement agreement, she has purchased, among other things, a vehicle, and she has \$40,000 in savings left. She submits that this situation is unlike that in Kearns and so additional income should not be imputed.

IV. Discussion

- [35] The parties did not discuss in any detail the basis for the applications, other than to briefly refer to the separation agreement and to s. 4.9 of that agreement, which I reproduced earlier. Unusually, section 4.9 provides for a right of review of both spousal support and child support "based upon but not limited to their respective line 150 earnings for the immediately preceding year".
- [36] It is helpful, then, to address some of the legal principles applicable to support reviews. I will also review the principles applicable to the imputation of income.

A. Legal Principles

Nature of a Review

- [37] The nature of a review of spousal support has been the subject of appellate comment in a number of cases in recent years. The most recent Court of Appeal pronouncement appears to be *Helle v. Helle*, 2019 BCCA 97, where the court said:
- [15] In *Domitri v. Domitri*, 2010 BCCA 472, Smith J.A. described reviews conducted pursuant to such orders as follows:
- [39] [T]he focus of the review hearing before the chambers judge should [be] a "reconsideration" of the respondent's entitlement and quantum (amount and duration) of spousal support. The chambers judge [is] required to consider both these issues having in mind the guidance offered by SSAG
- [16] The distinction between reviews and variation applications was canvassed in *Jordan v. Jordan*, 2011 BCCA 518:

- [33] By comparison, the right to a review of a support order is created by a term or condition of an agreement or court order . A review hearing does not require a preliminary threshold finding of a change of circumstances, but the agreement or order will usually define a period of time that must pass or an event or condition that must occur before the right to a review is triggered. If the condition is met, the court moves directly into a consideration of the issue(s) to be reviewed and whether the evidence supports a change in the earlier order.
- [34] It is therefore important to clearly identify the issue to be reviewed so that the party seeking a change in the order does not interpret the review hearing as a right to reargue their position on the order sought to be changed. An ambiguous review provision may present difficulties, as occurred in *Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920, where Mr. Justice Binnie observed:
- [39] ...The more precise condition stated in the reasons of the trial judge was excessively broadened in the formal order. This resulted in a measure of avoidable confusion in the subsequent proceedings.

[References omitted.]

- [38] As noted earlier, the review provision here is unusual insofar as it provides for an annual review of spousal support (as distinct from child support) with, possibly, all factors in play. This type of uncertainty was discouraged by the Supreme Court of Canada in *Leskun v. Leskun*, 2006 SCC 25, where the Court said:
- [39] Willick and Choquette establish that a trial court should resist making temporary orders (or orders subject to "review") under s. 15.2. See also: *Keller v. Black*, [2000] O.J. No. 79 (QL) (S.C.J.). Insofar as possible, courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change of circumstances. If the s. 15.2 court considers it essential (as here) to identify an issue for future review, the issue should be tightly delimited in the s. 15.2 order. This is because on a "review" nobody bears an onus to show changed circumstances. Failure to tightly circumscribe the issue will inevitably be seen by one or other of the parties as an invitation simply to reargue their case. That is what happened here. The more precise condition stated in the reasons of the trial judge was excessively broadened in the formal order. This resulted in a measure of avoidable confusion in the subsequent proceedings.

[Emphasis added.]

- [39] The situation described in that quote also happened here, as Mr. Robertson argued that Ms. Robertson had not shown a basis for entitlement to spousal support.
- [40] However, in this case there is a question about the scope of the review, because the review provision says "the parties will review and adjust spousal maintenance" based on their prior year's earnings. At least arguably, this contemplates a review of amount only, not entitlement or duration. Although I conclude this is probably the better interpretation of this review clause, since the parties did not argue the point, I will proceed as though the

issues of entitlement and amount are in play, though not duration. Duration is essentially moot as both parties agree that spousal support is to be terminated, though there is a six-month difference between them on what they maintain is the appropriate termination date.

Imputing Income for Support Purposes

[41] Section 19 of the Federal Child Support Guidelines states:

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

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[42] In *Marquez v. Zapiola*, 2013 BCCA 433 [Marquez], described in *Willms v. Willms*, 2020 BCCA 51, as being "the leading case in British Columbia on imputation of income" (at para. 41), the court said:

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work.

[38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 29).

[Some references omitted.]

B. Analysis

Whether to Impute Income

- [43] I note, first of all, that Mr. Robertson has the burden of establishing an evidentiary basis for imputing income to Ms. Robertson: Marquez, at para. 36.
- [44] On the evidence, I am satisfied that Ms. Robertson's ability to work is constrained by the needs of the parties' children. In particular, I am satisfied that the needs of the children reasonably constrain her from accepting evening or night shifts when they are in her care. I note, as well, that the children are in Ms. Robertson's care more than half of the time because she looks after them during Mr. Robertson's frequent work-related travel absences. Finally, I note that Mr. Robertson continues to rely on Ms. Robertson to handle the children's activities and appointments, the latter being largely scheduled within Ms. Robertson's parenting time.
- [45] Mr. Robertson cited several cases that he suggests stand for the proposition that a mere preference to be home for the children after school is not enough. However, I conclude the cases are distinguishable.
- [46] *Lllewellyn v. Lllewellyn*, 2002 BCCA 182, involved a calculation of support arrears in a situation where one of the parties' three children went to live with his father (the payor parent) for two time periods, one lasting about a year and another lasting about six months. The father sought an abatement of arrears to reflect child support the mother should have paid had she worked full-time. The mother's employment appears to have been minimal. The court described the situation as follows:
- [30] Ms. McCrae works only enough to supplement her husband's income to meet the needs of the boys living with her because she believes that it is in the boys' best interests that she be a "stay at home" mother, as she was when married to Mr. Lllewellyn. This seems to be her general view of what is good for the boys, rather than a response to their particular needs. She led no evidence about any special need of [the children].
- [47] In the case at bar, Ms. Robertson is not a "stay at home mother", she is a working mother. The issue is not whether she should be working; instead, the issue is whether she should be doing shift work. The evidence satisfies me that the children's needs are such that they cannot be adequately met when she works afternoon or evening shifts.
- [48] In *Mahannah v. Mahannah*, 2012 BCSC 403, the payor parent, a pharmacist, worked approximately half time even though she had paid help to manage and run her household. The court found (at para. 124) that her part-time work was not required by any needs of the children but instead was:

Ms. Mahannah's personal choice. She preferred do to this, so that she had time free to pursue other activities: coaching volleyball, attending Landmark seminars and (more recently) travelling.

- [49] Again, that is not the situation here. To repeat, the issue here is not work in general, but shift work, and the manner in which shift work limits Ms. Robertson's ability to meet the children's needs.
- [50] Finally, in *McCaffrey v. Paleolog*, 2011 BCCA 378, the payor parent, a veterinarian, remarried and had two further children with her second spouse. She had obtained an order suspending her child support obligation for 15 months following the birth of the first of the younger children, and she sought a further 15-month suspension upon the birth of the second child. The court, while noting (at para. 49) earlier decisions stating "a desire simply to stay home with children is not sufficient to invoke the exception in s. 19(1)(a)", also noted it had "little or no information concerning the feasibility of in-home care, full or part time, or regarding the financial circumstances of the mother and her husband" (at para. 36). The court remitted the case to the trial court due to the inadequacies in the evidence relating to the needs of the younger two children.
- [51] In this case, I am satisfied there is sufficient evidence showing how evening and night shifts adversely affected the children, and thus how their needs were not met during the times Ms. Robertson worked those shifts.
- [52] Mr. Robertson made much of the evidence showing high demand and numerous job openings for care aides in British Columbia. I use the word "evidence" loosely, as I do not consider the material pulled from the internet to be admissible. The information derived from his FOIPPA may be somewhat more reliable, but is still hearsay. However, I recognize the difficulty Mr. Robertson may have had in obtaining admissible evidence on the subject (though I also note the opinion of a vocational consultant could perhaps have been used) and, for that reason, I prefer to address this point in terms of the value (or lack thereof) of the information within those documents.
- [53] Briefly put, the documents suggesting both demand and unfilled job positions are very lacking in specifics. A document showing 247 job vacancies within the geographical area of the Interior Health Authority, for example, could include vacancies in Williams Lake or Lytton, which is not at all helpful if one is looking for work in the Cranbrook area. Even the 22 FOIPPA listings, while geographically relevant, include 11 relief positions (meaning temporary) and 12 part-time positions (with no evidence that they offer more work than Ms. Robertson has at present). More importantly, they do not reveal whether the positions involve shift work. It seems likely that they do.
- [54] Ms. Robertson noted that the majority of the positions said to be available appear to involve home care, which is not the type of work she does. This evidence was not countered by Mr. Robertson.

- [55] In summary, Mr. Robertson's assertion that there are lots of jobs available to Ms. Robertson is so lacking in specifics that I am unable to discern whether there is, as he alleges, full-time work available in her field in the Cranbrook area that is suitable for her in terms of her ability to meet the needs of the children. In this regard, Mr. Robertson has not met the burden that was upon him.
- [56] I do note, however, that Ms. Robertson seems to have confined her work to just one organisation (The Pines). I appreciate that building up seniority at one organisation will benefit her in the long run (and, in fact, it will also benefit Mr. Robertson) as she will be offered more shifts as her seniority rises. It did strike me, however, that it was likely Ms. Robertson could also make herself available for at least some casual shifts at other organisations without making herself unavailable to accept offers of shifts at The Pines. For that reason, I conclude that her alternative position on income (\$27,000) is the appropriate figure to use rather than her adjusted line 150 income (\$23,690).
- [57] Finally, I do not accept that further income should be imputed to Ms. Robertson for an alleged failure to garner investment income on monies she gained in the property division. This case is nothing like Kearns. In that case, the amount of money available was \$677,000; here it is \$40,000. The investment income that might be gained from that sum is immaterial here.
- [58] For these reasons, I fix Ms. Robertson's income for support purposes at \$27,000.
- [59] Mr. Robertson argues that this sum should be fixed for 2018, 2019 and 2020. Ms. Robertson argued that only 2018 income was in issue. I find that income for both 2018 and 2019 are in issue, as Mr. Robertson included both these years in his notice of application. I decline to consider incomes for 2020, which Mr. Robertson also wanted included, as the year was not yet over when this matter was heard.

Child Support

- [60] I conclude it is best that child support for two years (2019 and 2020) be resolved at this time, although it appears there is no evidence of Mr. Robertson's 2019 income. Given that Mr. Robertson's income is readily identifiable, I leave it to counsel to identify that amount and agree on the corresponding amount of child support. They may address this issue further before me should they be unable to agree.
- [61] Accordingly, based on Guidelines incomes in 2018 of \$93,907.47 for Mr. Robertson and \$27,000 for Ms. Robertson, effective August 1, 2019 Mr. Robertson will pay monthly child support of \$1,014. Child support effective August 1, 2020 will be based on Mr. Robertson's adjusted line 150 income for 2019 and on a 2019 Guidelines income of \$27,000 for Ms. Robertson.

Spousal Support - Basis for Entitlement

- [62] As noted earlier, although the better view is that the review provision in the parties' separation agreement is intended to be a review of amount only, since the parties did not address that issue and since Mr. Robertson argued the issue of entitlement, I will address that issue.
- [63] Mr. Robertson maintains Ms. Robertson has no compensatory basis for spousal support; instead, he argues that her entitlement is only based on need and contract. He submits, in particular, that Ms. Robertson did not suffer any economic disadvantage from the marriage or its breakdown.
- [64] Mr. Robertson's argument does not stand up to scrutiny.
- [65] In response to questions from the bench, counsel for Mr. Robertson acknowledged that Ms. Robertson has been the primary parent of the children from birth. He acknowledged, or at least did not refute, the evidence of Ms. Robertson that during the relationship she looked after the household and attended to all appointments and activities of the children, and to this day she continues to bear the primary responsibility for the children's appointments and the like.
- [66] Mr. Robertson was critical of Ms. Robertson for not embarking on a career beginning in 2003, despite his encouragement, though he fails to mention that Ms. Robertson was just 18 years old when they began to cohabit and she was just 24 when their first child was born. Although it could be said that she suffered no disadvantage by reason of the marriage to that point, thereafter she was a stay-at-home mother. As a result, she had no real employment between 2008 and 2014, and thereafter she only had sporadic, part-time unskilled work until 2017. She then took training and began career-type work in April 2017.
- [67] The evidence satisfies me that the matrimonial arrangements between the parties were that Ms. Robertson managed the children and the home, engaging in only sporadic, temporary and unskilled employment, with Mr. Robertson working full-time. This left Mr. Robertson in a position to advance his own career, and to engage in his work-related travel, because Ms. Robertson was handling the primary responsibilities relating to the home and children.
- [68] Post-separation, Ms. Robertson continued and continues to be the parent with primary responsibility for arranging the children's appointments and related matters. Her career advancement continues to be constrained in favour of Mr. Robertson's, as demonstrated by the fact that in 2019 she looked after the children on 21 of Mr. Robertson's parenting days when he was away on work-related travel.
- [69] In *Marquez*, the Court of Appeal said:
- [33] Compensatory support recognizes the need to compensate a spouse for the economic disadvantages arising from the marriage and to account for the economic advantages that are conferred on a spouse as a result of the marriage (*Moge v. Moge*, [1992] 3 S.C.R. 813 at

864). The economic disadvantages typically include the assumption of primary responsibilities for child care and household management. Those functions often result in an impairment of that spouse's future economic opportunities. The economic losses to a spouse who has been out of the workforce for a lengthy period are, in most instances, a significant impediment to that spouse's ever realizing his or her maximum earning capacity (Moge at 861-863, and 867-868).

[70] Those comments apply here. Accordingly, I am satisfied Ms. Robertson has a readily identifiable claim for spousal support on a compensatory basis. She also has both a needs-based and contract-based entitlement to spousal support, as conceded by Mr. Robertson.

Spousal Support - Amount

[71] Mr. Robertson's argument that the amount of spousal support should be set at the low end of the SSAG range was based on the assertion that Ms. Robertson has no (or, alternatively, very little) compensatory entitlement to spousal support. My earlier rejection of that argument means that this is no longer a basis on which support would be ordered at the low end of the SSAG range.

[72] Ms. Robertson did not argue for a specific result, other than to proffer a DivorceMate printout indicating SSAG results using actual incomes, not any imputed income. The midpoint SSAG amount using those incomes was \$1,145. Using the \$27,000 figure for Ms. Robertson's income brings about a midpoint SSAG figure of \$960. The monthly spousal support payable under the separation agreement is \$966.

[73] As noted earlier, the authorities have made clear that review applications are different than variation applications. In *Morck v. Morck*, 2013 BCCA 186 [Morck], the court confirmed that the factors to be considered on a review are those set out in s. 15.2 of the Divorce Act:

[18] Sections 15.2(4) and (6) of the Divorce Act address the factors to be considered on a review:

(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.

[74] In accordance with those provisions, I have considered the length of time the parties cohabited (14 years), the functions performed by each party during cohabitation (as discussed earlier) and the spousal support that was agreed upon by the parties in their separation agreement (\$966 per month). Also as discussed earlier, I recognize that Ms. Robertson has a relatively strong compensatory entitlement to spousal support based on the parties' respective roles during their cohabitation, and she continues to be disadvantaged economically (to the advantage of Mr. Robertson) due to her greater child care responsibilities.

[75] Taking these factors into account, I conclude that spousal support should be set at a point somewhat higher than the mid-point result of SSAG. I fix spousal support at \$1,050 per month.

Spousal Support - Termination Date

[76] From the evidence, it is clear that Ms. Robertson began a marriage-like relationship when she moved in with Mr. Pallas at the end of October 2018. The matters raised by Mr. Robertson do not answer the evidence of both Ms. Robertson and Ms. Lizotte, and they do not provide any basis upon which I would draw an adverse inference against Ms. Robertson on the point.

[77] Spousal support therefore terminates on October 31, 2020.

V. Conclusion

[78] I conclude as follows:

- a) based on Guidelines incomes in 2018 of \$93,907.47 for Mr. Robertson and \$27,000 for Ms. Robertson, effective August 1, 2019, Mr. Robertson will pay to Ms. Robertson monthly child support of \$1,014. Child support effective August 1, 2020 will be based on Mr. Robertson's adjusted line 150 income for 2019 and on a 2019 Guidelines income of \$27,000 for Ms. Robertson;

- b) the parties have leave to address the matter if they cannot agree on the 2019 income of Mr. Robertson for child support purposes;
 - c) effective August 1, 2019, Mr. Robertson will pay to Ms. Robertson spousal support of \$1,050 monthly; and
 - d) Mr. Robertson's spousal support obligation shall terminate effective October 31, 2020.
- [79] Ms. Robertson has been successful on these applications and so she will have costs in her favour.

"Blok J."

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