

CANADA / JUDGMENT

Sekhon v. Sekhon

2021 BCSC 630

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 630 Sekhon v. Sekhon

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sekhon v. Sekhon,

2021 BCSC 630

Date: 20210408

Docket: E037094

Registry: New Westminster

Between:

Dhanjot Singh Sekhon

Claimant

And

Beant Kaur Sekhon aka Beant Kaur

Respondent

Before: The Honourable Madam Justice Horsman

Reasons for Judgment

Counsel for the Claimant:

G. Tiwana

Counsel for the Respondent:

S. Sihota

Place and Date of Hearing:

New Westminster, B.C.

February 3, 2021

Written Submissions Received:

February 26, 2021

March 22, 2021

Place and Date of Judgment:

New Westminster, B.C.

April 8, 2021

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INTRODUCTION

- [1] The parties have filed competing applications relating to past and ongoing child and spousal support payable by the claimant. The relief sought by the claimant included the reduction or cancellation of child and spousal support arrears that had accrued under a Final Order dated December 5, 2011.
- [2] In reasons for judgment dated September 25, 2020 [indexed at 2020 BCSC 1422 - the "First Judgment"], I addressed some but not all of the relief sought by the parties. I dismissed the claimant's application to reduce or cancel arrears, and also dismissed the respondent's application for an order that the claimant pay a fine in relation to his non-compliance with the support terms of the Final Order.
- [3] As set out in the First Judgment, I was unable to resolve the remaining issues raised without the further disclosure of financial information by the respondent. Accordingly, I ordered the respondent to produce, within 30 days:
- i. a sworn Form F8 Financial Statement, complete with attachments; and
 - ii. all mortgage documents related to the purchase of her townhouse, including the mortgage application.
- [4] I ordered that either party was at liberty to re-set the application down for re-hearing after 30 days to address the remaining relief sought. Both parties have now re-set their applications before me.
- [5] The respondent did not produce a sworn Form F8 Financial Statement or her mortgage documents within 30 days of the date of the First Judgment, as she was ordered to do. On January 21, 2021, almost four months after the First Judgment, the respondent produced a sworn Form F8 Financial Statement. She also filed an additional affidavit, sworn February 1, 2021, that attaches some documents related to the mortgage on her townhouse. In written submissions provided after the hearing, the respondent delivered further mortgage documents. However, she has still not produced the mortgage application, as required by my earlier order.
- [6] On October 16, 2020, the claimant filed an application for leave to appeal the order in the First Judgment dismissing his application to reduce or cancel arrears. On October 23, 2020, the claimant filed an online request to appear before me on what he described as a "hearing for reconsideration" of the issues of arrears, based on an "error in fact". By way of a memorandum to the parties, I directed them to schedule a half-day hearing to address all matters remaining outstanding, including the claimant's reconsideration application. In regard to the reconsideration application, the memorandum included the following direction:

To be clear, I do not intend this memorandum to convey any indication that I consider such an application to be properly before me. The claimant should consider, and be prepared to address: (i) the Court's limited discretion to re-open a concluded judgment in any circumstances, and (ii) the Court's discretion to decline to hear a re-opening application where an appeal has been filed that raises overlapping issues. On the latter point, see s. 17 of the Court of Appeal Act, *LLS America LLC (Trustee of) v. Dill*, 2017 BCSC 1782, *Roeder v. Lang Michener Lawrence & Shaw*, 2004 BCSC 80.

[7] Pursuant to this memorandum, a half-day hearing was scheduled on February 3, 2021, to address the outstanding issues, which are:

- i. the claimant's application for reconsideration of the First Judgment;
- ii. the claimant's application to terminate or vary spousal support, and to have the variation apply retroactively; and
- iii. the respondent's application to vary child support, and to compel the claimant to pay his proportionate share of s. 7 expenses.

[8] In addressing the remaining issues, I will adopt the same defined terms as are used in the First Judgment. For the reasons set out in the First Judgment (at paras. 20-23), I have concluded that the Final Order was issued pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA], rather than the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [Divorce Act]. As such, the parties' variation applications fall to be determined under the FLA.

FACTUAL BACKGROUND

The parties' marriage and the Final Order

[9] The parties were married in February 1999. I understand it to be common ground between them that the claimant left the family home in October 2009, and did not return. Both parties have used dates in October 2009 as the date of their separation for the purpose of their Spousal Support Advisory Guidelines [SSAG] calculations. The claimant was 35 years old at the time of the parties' separation, and the respondent was 37. Their two daughters were then aged 8 and 6.

[10] The Final Order was issued, by consent, in December 2011. There is limited evidence before me of the context for the Final Order, other than what is reflected on the face of the Order itself. The parties' incomes were determined as follows:

AND ON the Court being advised that the Claimant has an imputed income gross annual income of \$60,000 for the purpose of calculating child support and the Respondent has a gross annual income from social assistance benefits of approximately \$12,500 for the purposes of calculating child support pursuant to the Federal Child Support Guidelines;

- [11] The parenting arrangements in the Final Order anticipated that the claimant would have parenting time with the children every weekend, and the children would otherwise reside with the respondent.
- [12] The following are the provisions with respect to child and spousal support:
6. The Claimant Dhanjot Singh Sekhon shall pay to the Respondent Beant Kaur Sekhon for the benefit and maintenance of the Children child support in the amount of \$910.00 per month commencing on January 1, 2021 and continuing on the first day of each and every month thereafter until the Children are no longer children of the marriage BY CONSENT
 7. The parties shall share, in proportion to their respective incomes, any special or extraordinary expenses for the Children as may be agreed between them, with consent not to be unreasonably withheld, BY CONSENT.
 8. The Claimant Dhanjot Singh Sekhon shall pay to the Respondent Beant Kaur Sekhon for the benefit and maintenance of the Respondent spousal support to Ms. Sekhon in the amount of \$1,109.00 per month commencing on January 1, 2012 and continuing on the first day of each and every month thereafter, BY CONSENT.
- [13] The claimant suggests that his spousal support obligation under the Final Order substantially exceeds what he ought to have owed under the SSAG. The claimant's assertion that he has been overpaying spousal support since 2011 grounds many of his arguments on these applications. However, the respondent has located a copy of the clerk's notes from the hearing before Master Caldwell, as he then was, that led to the Final Order. The notes reflect the parties' agreement that the claimant will pay spousal support "in accordance with the mid-range of the [SSAG]". The respondent has also provided a DivorceMate calculation evidencing that term 8 of the Final Order did, in fact, reflect the mid-range of the SSAG on the parties' then-incomes.
- [14] In relation to property and debt division, the Final Order provided, by consent, that each party would retain assets and debts in their own name. There is no evidence before me that either party had significant assets at the time of the Final Order. By all appearances this was, and is, a family of limited means.

The claimant's circumstances after the Final Order

- [15] The claimant's employment history immediately following the Final Order is reviewed at paras. 29-30 of the First Judgment. As set out there, the claimant is self-employed as the owner/operator of a truck and trailer. He encountered financial difficulties in the years 2012 to 2014, resulting in the accumulation of support arrears. For the reasons set out in the First Judgment, I declined to reduce or cancel the arrears.
- [16] The claimant's self-employment income in the years 2016, 2017, 2018, and 2019, as reflected in his income tax returns, was as follows:

Net

Gross

2016

\$35,208

\$45,000

2017

\$38,208

\$48,000

2018

\$39,259

\$203,726

2019

\$38,867

\$182,167

[17] The claimant says that notwithstanding that he has earned net income of less than \$40,000 in each of the years 2016 to 2019, and expects to earn even less in 2020, he is prepared to have his gross income of \$60,000 imputed to him for child support purposes. His evidence is as follows:

My income is about \$60,000. I am content to continue to pay child support on \$60,000 for both my daughters. My tax returns show a lower income as I took the deductions I am entitled to. For the purposes of child support I am content with using my income of \$60,000 without the tax deductions.

[18] As explained later in this judgment (at paras. 30-31), the claimant suggested on his reconsideration application that the relatively higher gross income reported on his 2018 and 2019 tax returns is an error by his accountant in reporting the gross income of the claimant's employer rather than the claimant's gross income. The claimant's evidence is that his gross income in 2018 and 2019 was actually \$60,000.

[19] There is limited evidence in the record concerning the claimant's current personal circumstances, beyond his employment. In his F8 Financial Statement, the claimant reports that he owns no real estate. His reported assets consist of vehicles, with a total value of \$66,000, and bank deposits totalling \$2,000. The claimant reports unsecured debt in the amount of \$130,500, comprised of a vehicle debt, a debt to the Canadian Revenue Agency, and a personal loan from his father.

- [20] It appears that the claimant has re-partnered. There is no information in the application material about the length or nature of their relationship, or the financial circumstances of the claimant's new spouse.

The respondent's circumstances after the Final Order

- [21] The respondent deposes that she is employed by Natural Factors, a medications packing factory, and also works part-time at the Real Canadian Superstore. The respondent has a history of health issues, including autoimmune hepatitis. She deposes that she was hospitalized for almost two months in 2019, and had to go on disability from her job at Natural Factors. The respondent says that she remains on disability as of 2021. This is not corroborated by the disability records she has produced. The records show that in January 2019, the respondent's doctor, in response to a request from her disability insurer, recommended that she stay off work for a period of time. There is no more recent record of the status of the respondent's disability benefits. She does not report income from disability benefits on her 2019 tax return.
- [22] The respondent's employment income in the years 2017, 2018, and 2019, as reflected in her filed tax returns, was as follows:
- 2017 \$29,902
- 2018 \$25,016
- 2019 \$2,373
- [23] I presume that the respondent's reduced income in 2019 was a consequence of her health issues, although it is not clear why, in that event, she did not receive disability benefits. The respondent deposes that she earned \$25,000 in 2020, which includes disability benefits and her part-time work at the Real Canadian Superstore.
- [24] The parties' oldest child is now 20 years old, and the youngest is about to turn 18. The children continue to reside with the respondent. It appears that the oldest daughter is attending Simon Fraser University. There is otherwise very little information about the present circumstances of the children in the application record. The respondent asserts that the claimant has failed to pay his proportionate share of s. 7 expenses over time, including for university tuition. I address this issue later in this judgment in determining the respondent's request for an order that the claimant contribute to s. 7 expenses.
- [25] In 2018, the respondent purchased a townhome for \$799,000. She says she financed the purchase through down payment of \$200,000, and a mortgage of \$612,000 from the Toronto-Dominion (TD) Bank. The \$200,000 down payment was comprised of a \$100,000 profit the respondent earned on the sale of a townhouse she had purchased in 2016, and loans from family members. The respondent makes monthly mortgage payments of \$2,700. The outstanding balance on the mortgage is \$586,066 as of January 2021.

- [26] In her Form F8 Financial Statement, the respondent reports owning assets totalling approximately \$800,000, including her townhome. She has secured debt in the form of the TD mortgage. She also reports unsecured debt of approximately \$33,000, which includes some credit card debt and personal loans in the amount of \$20,000.
- [27] The respondent remarried in September 2019. She says her new spouse continues to live in India, as his sponsorship application has not been approved. The respondent deposes that the annual income of her new spouse is less than \$5,000. She has not provided any documents to corroborate his income, such as the sponsorship application itself. The respondent does not explain what skills, education, or training he possesses, or whether he owns assets.

ISSUE 1: THE CLAIMANT'S RECONSIDERATION APPLICATION

- [28] The claimant did not file a notice of application particularizing the relief sought on his reconsideration application or its legal basis. Counsel for the claimant suggests that a notice of application is unnecessary. I disagree. The claimant is applying for relief from the Court. This should be done by way of a notice of application. Among other considerations, the opposing party is entitled to notice of the relief sought and its factual and legal basis.
- [29] In the present case, the respondent had no advance notice of the basis for the request for reconsideration, other than the claimant's suggestion that there was a factual error in the First Judgment. Given the length of time that the issues raised by these applications have remained outstanding, it was in neither party's interest to order a further adjournment of the proceeding. I therefore directed that the claimant could provide his oral submissions on the reconsideration request at the hearing before me, and that both parties had leave provide further written submissions after the hearing. The claimant's submissions were to be provided first.
- [30] In his oral submissions at the hearing, the claimant argued that the factual error in the First Judgment was in the following paragraphs:
- [33] The claimant agrees that his annual income should be imputed at \$60,000 for the purpose of calculating prospective child support. He has been off work since March 2020 as a result of the COVID-19 pandemic, and is receiving \$2,000 per month through the Canada Emergency Response Benefit. He is hopeful he will return to work shortly and be able to resume his pre-COVID-19 income levels. The claimant's Line 150 income in 2017 and 2018 was \$38,208 and \$39,259, respectively. His gross income was considerably more, exceeding \$203,000 in 2018. That is only year for which the claimant provided a copy of his full tax return rather than a notice of assessment.

[34] I note that there is some disconnect between the claimant's tax records and his sworn evidence as to the gross income he estimates he earned in 2018. The claimant's evidence is that he earned \$5,000-\$6,000 per month in gross income throughout 2018, working for Heartland Transport (until April) and then G-Direct. That would put his gross income at between \$60,000 and \$72,000 for 2018, as compared to the \$203,000 reported on his tax return. The reason for this discrepancy is not apparent to me on the application material.

[Emphasis added]

[31] The claimant argued at the hearing that although a gross income of \$203,000 is reported on his personal tax return, this is in fact an error. The claimant stated that the \$203,000 is the gross income of the claimant's employer and not the gross income of claimant. The claimant says his accountant erred in reporting it as such. The claimant did not, at the hearing, point to evidence in the record that illustrated the error. Assuming this to be an error, the claimant did not explain why he believed that such an error was fundamental to the outcome of the First Judgment. It was anticipated that the claimant's written submission would particularize his position on these points.

[32] In his written submission of February 26, 2021, the claimant seemingly abandoned his argument that reconsideration was justified by the alleged factual error. The factual error is not mentioned. Instead, the claimant's written submission simply reargues the issue of the cancellation of arrears by reference to the well-established test. The claimant says the Court should have concluded that the change in the claimant's income was "significant and long lasting" within the meaning of the relevant authorities, and reduced or cancelled the support arrears. He argues that the test for the reduction or cancellation of arrears was misapplied here, which would constitute legal error.

[33] I am not prepared to entertain the claimant's attempt to reargue the issue of arrears. Quite apart from the claimant's extant appeal, the claimant's arguments do not demonstrate exceptional circumstances that would warrant re-opening. The discretion to re-open a concluded judgment is to be exercised sparingly and only when necessary to remedy what would otherwise be a miscarriage of justice: *Bajwa v. Habib*, 2020 BCCA 230 at para. 52. The claimant's wish to reargue the issue of support arrears is not a proper basis to permit re-opening. Furthermore, my order refusing to reduce or cancel arrears is presently under appeal. If the claimant believes there are legal errors in the First Judgment, his proper remedy is to pursue the appeal rather than to invite me to undertake a review of my own judgment at the same time that his appeal is pending.

ISSUE 2: SPOUSAL SUPPORT

Review or variation application?

- [34] Term 8 of the Final Order provides that the claimant shall pay the respondent spousal support in the amount of \$1,109 per month, commencing January 1, 2012, and continuing on the first of every month thereafter. The Final Order does not include either a termination date for spousal support or a date for a review of spousal support.
- [35] The claimant says the omission of a review date was inadvertent. In fact, he says, the parties intended the Final Order to provide for a review after five years. The respondent disagrees. She says that the parties intended spousal support to be indefinite, subject only to variation on the basis of a material change in circumstances.
- [36] In my view, the onus is on the claimant to establish that the Final Order does not reflect the parties' true agreement. The claimant's evidence, consisting only of his assertion that the parties intended a five-year review term, does not discharge that burden. I therefore proceed on the premise that the claimant's application is in the nature of an application to vary spousal support rather than a review.

Legal framework for a variation application

- [37] Section 167 of the FLA provides for the variation of an order for spousal support "prospectively or retroactively". The statutory test for variation under s. 167 is similar to that provided for under s. 17 of the Divorce Act. Before ordering a variation of spousal support, the court must be satisfied that one of the conditions listed in s. 167(2) is present. The claimant relies on s. 167(2)(a), which permits a variation where there has been a change in the "conditions, means, needs, or other circumstances" of either spouse. It is common ground between the parties that the claimant must establish that there has been a material change in circumstances since the Final Order.
- [38] Once the material change threshold is met, the court must determine what variation is appropriate in light of the change in circumstances. A variation should serve the objectives of spousal support that are set out in s. 161 of the FLA:
- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
 - (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [39] These grounds encompass both compensatory and non-compensatory grounds for spousal support. Compensatory support provides redress to the recipient spouse for any economic disadvantage arising from the marriage or the conferral of economic advantage on the other

spouse. Non-compensatory support is grounded in the 'social obligation model' of marriage in which marriage is seen as an inter-dependent union. Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse and not the state: *Chutter v. Chutter*, 2008 BCCA 507 at paras. 50-61.

- [40] The court must consider all of the objectives of spousal support in determining an application for variation. Continuing entitlement is always in issue, and a variation application can lead to a termination of support: *Rozen v. Rozen*, 2016 BCCA 303 at para. 23.

Material change in circumstances

- [41] The claimant cites three changes in the "condition, means, needs, or other circumstances" of the respondent, as set out s. 167(2)(a) of the FLA, that are said to cumulatively warrant a variation of the Final Order so as to terminate spousal support.
- [42] First, the claimant says that the respondent is able to work full-time. The claimant seeks to impute an annual income of \$30,000 to the respondent, which is the income she would earn in a full-time, minimum wage job. The claimant says that the respondent's ability to earn income at a full-time job is a material change in circumstances since the Final Order. The Final Order reflected that the respondent had, at that time, a gross annual income from social assistance benefits of approximately \$12,500. The respondent's inability to work was at least partly explained by the young ages of the children at the time of the Final Order. However, the children are now approaching adulthood.
- [43] Second, the claimant points out that the respondent was able to purchase a townhome in 2018. The townhome was financed in part, through a mortgage of over \$600,000. The claimant says that the respondent must be assumed to have significant income and/or assets to qualify for a mortgage in this amount. The claimant has been seeking the production of the respondent's mortgage application since last summer.
- [44] Third, the claimant says that the respondent's remarriage also constitutes a material change in circumstances since Final Order that warrants a change in spousal support.
- [45] In my view, there has clearly been a material change in circumstances since the Final Order that warrants a variation of spousal support. As the respondent herself concedes, she is capable of earning an income that is substantially greater than that reflected in the Final Order. The respondent has been able to purchase a townhouse by qualifying for a mortgage in the amount of \$600,000. She has remarried. The children are both entering adulthood.
- [46] The more difficult question is what variation is appropriate. This requires a consideration of the parties' current circumstances, as compared to 2011, and the objectives of spousal support listed in s. 161 of the FLA.

Variation of spousal support

The parties' incomes

- [47] I will begin with the question of the parties' current incomes, which is a central point of dispute between them. The claimant says the respondent is capable of earning at least minimum wage at a full-time job. He seeks to impute an income of \$30,000 to her pursuant to s. 19(1)(a) of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] on that basis that she is deliberately underemployed. The claimant says that the respondent has not provided medical evidence to show that she is currently disabled from working, either partially or fully. The fact that the respondent is able to qualify for a \$600,000 mortgage is, the claimant argues, further indication that she must have significant income and/or assets at her disposal.
- [48] The respondent also seeks to impute income to the claimant. She invites me to infer that the claimant is unreasonably deducting expenses from income, which justifies the imputation of income under s. 19(1)(g) of the Guidelines. She relies on the disparity between the claimant's net income and gross income, as reflected in his 2018 and 2019 income tax returns, to support an imputation of income. The respondent points out that nowhere in the claimant's material is there a clear accounting of the deductions that he is making to his gross income to arrive at his net income. The respondent proposes to address the lack of clarity by determining an annual income of \$100,000 for the claimant.
- [49] There are gaps in the evidentiary record that present challenges in assessing the parties' respective claims to impute income to the other. The gaps are not only on one side.
- [50] I agree with the respondent that the claimant's material does not clearly explain the reasons for the disparity between his net and gross income in 2018 and 2019. It is difficult to assess the reasonableness of his claimed business deductions. The claimant has produced a very large volume of material in relation to his employment income, but nowhere is the material synthesized in a manner that permits a clear understanding of the claimant's income tax records.
- [51] There are also issues with the respondent's application material. The respondent has only reluctantly produced material that is necessary to a determination of her income. She did not swear a Form F8 Financial Statement in time for the original hearing. The respondent only provided her Form 8 Financial Statement three months after the deadline set in the court order.
- [52] The respondent has never produced her mortgage application, despite that she has been specifically ordered to do so. This is most troubling. The only evidence before me by way of an explanation of the respondent's failure to comply with a court order is the following paragraph of her 3rd affidavit, sworn February 1, 2021:

I sought my mortgage application form from my bank but was advised that it would take several months and they would notify me when it was in. I still to date have not received a call from the bank.

- [53] The respondent does not provide any correspondence from the TD Bank confirming this advice. I am skeptical that it would take the TD Bank more than six months to provide a copy of a mortgage application that was signed in 2018. The respondent has managed to provide a wealth of extraneous bank records, including her mortgage loan agreement, pre-authorized debit agreement, mortgage disclosure statement, and current mortgage statements. The only document she apparently cannot provide is the one that would shed light on the financial resources she relied on to persuade the bank to lend her \$600,000.
- [54] As I have noted, these applications have been adjourned once for the purpose of the production of additional financial records. In my view, there is no utility to a further adjournment at this stage, given the parties' limited means. Neither party sought an adjournment, nor did they seek an order referring these applications to the trial list. The evidentiary record is sufficient to permit a fair determination of the parties' incomes, even if their incomes cannot be determined with precision due to the gaps in the record. A decision on the merits of the applications serves the objectives of the Supreme Court Family Rules, B.C. Reg. 169/2009, as listed in R. 1-3, including the just, speedy and inexpensive determination of every family case on its merits.
- [55] On the evidence before me on these applications, I impute an annual income of \$60,000 to the claimant, as he has proposed. I accept the claimant's evidence that his gross income in the years 2018 and 2019 was \$60,000, and that the gross income figures in his 2018 and 2019 tax returns are in error. This is consistent with the claimant's earning history. There is no other explanation for why the claimant's gross income would increase fourfold in 2018, while the nature of his business was unchanged.
- [56] As for the respondent, I find that her annual income for support purposes is \$25,000. To be clear, this is not an imputation of income to the respondent, but rather her actual income based on the most current information. The respondent's evidence is that she earned \$25,000 in 2020. This is consistent with her earnings over the past four years, with the unexplained exception of 2019 when she reports less than \$3,000 in annual earnings.
- [57] The question of how the respondent was able to qualify for a mortgage loan of \$600,000 on an income of \$25,000 remains unanswered. If a determination of the respondent's actual income was critical to the resolution of the spousal support issues, I would have required the respondent to produce the mortgage application, even if this meant a further adjournment of the hearing. However, for the reasons set out below, in my view a further adjournment is unnecessary. I can fairly determine the appropriate variation despite the respondent's failure to comply with the order.

What variation is appropriate?

- [58] This leads, then, to the question of the appropriate variation of the spousal support order. The claimant says that spousal support should terminate. Indeed, he says it should have terminated as of January 2017, and he seeks a retroactive order to that effect. The respondent says that the spousal support order should not be varied, but instead the court should set a review date in 2023. Alternatively, she says that support should be reduced but not terminated.
- [59] In my view, the circumstances as of the time the claimant filed his application in July 2020 warrant a termination of spousal support. My reasons for this conclusion are as follows:
- a) As of July 2020, the parties had been separated for 11 years, following a 10-year marriage. While I acknowledge that a court must be cautious in relying on SSAG calculations on a variation application, it is relevant to note that the SSAG suggest, in the parties' circumstances, a maximum duration of spousal support of 10 years from the date of separation.
 - b) Since at least 2017, the claimant has earned more income than was imputed to her in the Final Order, while spousal support payments remained at the same level.
 - c) Assuming that the claimant's spousal support obligation in the Final Order was based on both compensatory and non-compensatory grounds, the compensatory objectives have been met by the spousal support payments the respondent had received by the time the claimant's application was served.
 - d) Bearing in mind the limits of the evidentiary record before me, the respondent appears to be in a relatively better financial situation than the claimant, at least in terms of their respective assets. The respondent owns a townhouse that is valued at approximately \$800,000. She qualified for a substantial mortgage loan to make the purchase.
 - e) The respondent has remarried. Even if one accepts, at face value, her evidence that her new spouse is not presently contributing to her household expenses, that will no doubt change once he arrives in Canada. While re-partnering does not, in itself, constitute a material change in circumstances in every case, it may be significant to the question of ongoing need: *M.H.W. v. D.K.W.*, 2019 BCSC 1011 at paras. 30-33.
 - f) While it is clear that the respondent has suffered from health issues, the evidence does not support that she is disabled from working. The respondent has two jobs. She deposes that she continues to search for other employment that will more readily accommodate her health conditions.
- [60] For these reasons, I conclude that as a result of the material change in circumstances since the Final Order, the respondent is no longer entitled to spousal support on either compensatory or non-compensatory grounds. The spousal support term of the Final Order should be varied to terminate support.

Date of commencement of variation

- [61] The usual rule is that the effective date of a variation of spousal support is the date of the notice of the application seeking variation. The general rule is explained by the Court of Appeal in *Willms v. Willms*, 2020 BCCA 51 as follows:
- [28] In *Kerr v. Baranow*, 2011 SCC 10, Cromwell J., for the Court, described the approach that should be taken to applications for retroactive spousal support at paras. 207-212. He noted, at para. 208, while we should consider factors that apply in retroactive child support cases (the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse), "concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support".
- [29] The "application based" regime described in *MacKinnon v. MacKinnon* (2005), 75 O.R. (3d) 175 (C.A.) at para. 24, was recognized in *Kerr v. Baranow*. That regime is founded upon the rule that, in the absence of a reason to order otherwise, the date of effective notice of the application to seek a variation of spousal support should, as a general rule, be the commencement date of the variation. The interests underlying that regime were: giving certainty to the payor's legal obligations; and placing proper incentives on the applicant to proceed with claims promptly.
- [Emphasis in the original]
- [62] In the present case, the claimant seeks an order that the termination of spousal support is retroactive to January 2017. As I understand the argument, this is tied to his belief that the Final Order anticipated a review of spousal support after five years.
- [63] I have already explained my reasons for rejecting the claimant's argument that the Final Order provided for a review of child support. This is a variation application. It was filed in July 2020. There is no evidence in the record to indicate that the claimant communicated to the respondent his intention to seek a variation of spousal support prior to the service of the notice of application. There is, therefore, no reason to depart from the usual rule that any variation in spousal support is effective from the date of notice of the application.
- [64] The respondent raises a further objection to the claimant's application for retroactive spousal support. At the original hearing of these applications on August 31, 2020, counsel for the claimant confirmed, on questioning by the Court, that the claimant was applying to reduce or cancel arrears and not to retroactively vary the support order. The respondent argues that the claimant is bound by his election to pursue an application to reduce or cancel arrears rather than an application to retroactively vary the support order, which would have the practical effect of reducing or cancelling arrears.
- [65] It is not necessary for me to resolve this objection because, for the reasons I have already stated, I see no basis to depart from the usual rule that the effective date of the variation is the date of the notice of application. The order may be considered retroactive to the extent

that the variation is effective from a date in the past (i.e. as of August 1, 2020), however, this is fully justified in the circumstances. The length of time it has taken to resolve these applications is primarily a result of an adjournment that was necessitated by the respondent's failure to make proper financial disclosure.

[66] For these reasons, I conclude that the spousal support order is varied so as to terminate the claimant's obligation to pay spousal support after July 31, 2020.

ISSUE 3: CHILD SUPPORT

[67] The respondent applied for an order for retroactive child support on the premise that an annual income of \$100,000 should be imputed to the claimant as of 2017. I have already determined that claimant's income for support purposes is \$60,000. Thus, there is no basis to vary the child support order, retroactively or otherwise.

[68] The respondent also seeks an order that the claimant pay 70% of the children's post-secondary education expenses and special expenses within 45 days of proof of payment. She says the claimant has failed to contribute to the children's expenses over time. I do not understand her to be asking for an order for payment of retroactive expenses. No evidence has been provided to prove such expenses. The claimant denies that the respondent has ever provided him with receipts or proof of payments in relation to s. 7 expenses.

[69] The Final Order already included a provision requiring the parties to share, in proportion to their respective incomes, any special or extraordinary expenses for the children as may be agreed between them. In the absence of any evidence that the claimant has unreasonably refused to agree to the sharing of s. 7 expenses, I see no basis to vary the existing provision in the Final Order on the record before me.

[70] It may be that a Final Order designed to provide support for children who are 8 and 6 years old may be of increasing irrelevance to children who are 20 and 18 years old, and entering post-secondary programs. Given the limits of the record before me, I am not persuaded to vary the child support provisions in the Final Order for the reasons stated. However, I consider it appropriate to direct that either party can seek a review of child support after one year from the date of this judgment. A firm review date will hopefully ensure that any future review can be conducted on the basis of a more complete evidentiary record.

CONCLUSION/ORDERS

[71] In summary, I make the following orders:

- i. The claimant's application for reconsideration of the First Judgment is dismissed;
- ii. The claimant's application to vary the spousal support order is granted, and spousal support is terminated as of July 31, 2020;

iii. The claimant is entitled to reimbursement of any spousal support he paid between August 1, 2020 and the date of this judgment;

iv. If the claimant did not pay spousal support between August 1, 2020 and the date of this judgment, he is not liable to pay any spousal support arrears that accumulated in that period in relation to spousal support;

v. The respondent's application to vary the child support order is dismissed;

vi. The respondent's application to vary the order for payment of special and extraordinary expenses for the children is dismissed;

vii. Either party may seek a review of child support after April 1, 2022.

[72] Unless there are circumstances of which I am unaware, I consider it appropriate to order that the parties each bear their own costs of these applications, given the divided success. If either party seeks a different costs order, they may request a further hearing before me through Supreme Court Scheduling.

"Horsman J."

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