

CANADA / JUDGMENT

Townley v. Townley

2025 BCSC 2496

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 2496 Townley v. Townley

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Townley v. Townley,

2025 BCSC 2496

Date: 20251216

Docket: E110151

Registry: Kelowna

Between:

Michelle Jeannette Townley also known as Michelle Townley

Claimant

And:

Richard Townley

Respondent

Before: The Honourable Madam Justice Forth

Reasons for Judgment

Counsel for the Claimant:

D. Polley

Counsel for the Respondent:

T. Moore

Place and Dates of Hearing:

Kelowna, B.C.

April 30 and May 1 - 2, 2025

Place and Date of Judgment:

Kelowna, B.C.

December 16, 2025

Table of Contents

Introduction.. 4

Relevant Background.. 4

Issues. 6

Issue 1: Did the Parties Enter into a Binding Agreement in October 2020 that Varied the Child and Spousal Support Payable Pursuant to the Final Order?. 7

Factual Background. 7

Position of the Parties. 9

Legal Principles. 10

Analysis. 11

Issue 2: Did the Claimant Waive her Entitlement to Seek Child Support in the Months of October, November, December 2020 and January 2021 as a Result of Promises Made by the Respondent?. 11

Position of the Parties. 11

Legal Principles. 11

Analysis. 12

Issue 3: Did M.T.'s Change in Residence Qualify as a Material Change in Circumstances Triggering a Variation of Child Support?. 13

Factual Background. 13

Legal Principles. 13

Position of the Parties. 14

Analysis. 15

Issue 4: What Amount, if any, is Owed for Retroactive Child Support as of May 1, 2021?. 15

Position of the Parties. 15

Analysis. 16

Issue 5: What Amount of Spousal Support Is Owed From October 2020 to February 2021?. 17

Issue 6: Is a Retroactive Variation of the Respondent's Spousal Support Obligation back to March 2021 Warranted?. 18

Factual Background. 18

Positions of the Parties. 19

Legal Principles. 19

Analysis. 20

Issue 7: What Amount Should be Awarded for Retroactive Spousal Support to Date?. 21

Position of the Parties. 21

Legal Principles. 22

Analysis. 22

Issue 8: Is the Claimant Still Entitled to Spousal Support?. 24

Position of the Parties. 24

Legal Principles. 24

Analysis. 24

How much and how long should spousal support be paid?. 25

Position of the Parties. 25

Position of the Respondent 25

Position of the Claimant 26

Legal Principles. 27

Analysis. 31

Conclusion.. 32

Introduction

- [1] The respondent ex-husband applies to retroactively vary the quantum of child support and spousal support. He also seeks a determination of whether any further spousal support is payable, and, if so, in what amount and for how long. The claimant ex-wife seeks retroactive child support and the continuation of spousal support for an indefinite period.

Relevant Background

- [2] The parties were married on August 17, 1991. They separated on March 5, 2014 and were divorced by a final order dated April 15, 2019 (the "Final Order").
- [3] They have four children together. The two youngest addressed in the Final Order are K.T., born in 2001, and M.T., born in 2005. K.T. ceased to be a child of the marriage on April 4, 2020, when she turned 19 years old. The parties agree that M.T. is no longer a child of the marriage as of June 24, 2024.
- [4] The claimant is currently 57 years old. She completed her real estate course and obtained her real estate licence in August of 2018. As at the date of the Final Order, the claimant had just started her career as a real estate agent. She owns three properties in Kelowna, including two on Glenmore Road and Cameron Avenue, both solely owned by her and currently rented out. She also owns 50 percent of a property on Raven Drive where she resides with her current partner, who owns the other half. She has cohabitated with this partner since February 2020.
- [5] The respondent is 57 years old. He is an interventionist cardiologist. He lives on a property in Kelowna with his common law partner, who works as a nurse, and her two children.
- [6] The Final Order provided, in part:

The Respondent has a guideline income of \$670,000.00, and that, for the purposes of calculating support, the Claimant has a guideline income of \$25,000.00.

- 6. For so long as either of the Children are entitled to receive child support, the parties will exchange copies of:
 - (a) Their respective tax returns including all attachments;
 - (b) Notices of Assessment; and
 - (c) The most current year-end financial statements for any corporation in which either party has a controlling interest;

by no later than June 30 each year, commencing in 2019.

- 7. Commencing in 2021, on or before May 31 of each year, the child support payable will be reviewed and adjusted to ensure that it accords with the requirements of the FCSG, based on the parties' respective incomes. For the purposes of the review in 2021, the Respondent's income will be fixed at \$670,000.00, and the Claimant's income will be fixed at \$40,000.00, or her actual income, determined under the FCSG, whichever sum is greater.
- 13. Spousal support may be varied upon a material change in either party's circumstances at any time, upon application to the Court, but whether or not there has been a material change in circumstances, spousal support shall be fully reviewed on or after 30/June/2023.

14. Commencing on the 1st day of the month following the child, [K.T.], ceasing to be a child of the marriage under the Divorce Act, the spousal support payable by the Respondent to the Claimant will be varied to \$15,400.00 per month, and the child support payable for the support of the child, [M.T.], will be varied to \$5,400.00 per month, commencing on the 15th day of the same month.
- [7] When K.T. ceased to be a child of the marriage on April 4, 2020, the respondent's child support payments decreased from \$8,300 per month to \$5,400 per month, and his spousal support payments increased from \$10,500 per month to \$15,400 per month.
- [8] The respondent paid monthly child and spousal support in accordance with the Final Order until October 2020.
- [9] From June 12, 2020 to November 23, 2020, M.T. resided solely with the respondent. On November 23, 2020, M.T. returned to live with the claimant on a full-time basis.
- [10] The respondent alleges that the parties entered into an agreement whereby, starting October 2020 and through to February 2021 (the "October Agreement"), the respondent would pay spousal support only, in an increased amount of \$18,200 per month, and not pay or seek child support as M.T.'s residence had changed again for a period of three months.

Issues

- [11] The following issues will be addressed:
1. Did the parties enter into a binding agreement in October 2020 that varied the child and spousal support payable pursuant to the Final Order?
 2. Alternatively, did the claimant waive her entitlement to seek child support in the months of October, November, December 2020 and January 2021 as a result of promises made?
 3. Alternatively, did M.T.'s change in residence qualify as a material change in circumstances triggering a variation of child support?
 4. What amount, if any, is owed for retroactive child support?
 5. What amount of spousal support is owed from October 2020 to February 2021?
 6. Is a retroactive variation of the respondent's spousal support obligation back to March 2021 warranted?
 7. What amount should be awarded for retroactive spousal support?
 8. Is the claimant still entitled to spousal support? If so, in what amount and for how long?

Issue 1: Did the Parties Enter into a Binding Agreement in October 2020 that Varied the Child and Spousal Support Payable Pursuant to the Final Order?

Factual Background

[12] In October 2020, M.T. expressed her wish to permanently reside with the respondent. The claimant and respondent exchanged emails on this topic on October 5, 2020:

· October 5, 2020 at 6:24 a.m. - respondent advises that M.T. has been with him for almost four months and refuses to live elsewhere. He notes that notwithstanding his "hope that she will change her mind one day and live in a shared arrangement " this "does change [his] child support obligation". He wrote:

I will waive your child support obligation for me for [M.T.] - which can be reassessed next spring based on your 2020 income as per the court order. Should [M.T.] change her mind at any point in the future and live in a shared arrangement with both of us then after three months (to ensure she does not change her mind again) I would resume paying child support.

· October 5, 2020 at 10:46 a.m. - claimant responds with:

If child support is stopped then spousal support changes. If material changes in circumstances have occurred then an application must be made to the court in order to be reviewed. For now, I will accept \$18,800 for spousal support with no obligation for me to pay child support. If this is not agreeable then you can make the application to the court to review.

· October 5, 2020 at 1:07 p.m. - respondent advises he has spoken to Mark, his lawyer, who said "he would send a letter to Mr. Polley confirming what we agreed to". He advises he would be willing to settle at the high end of spousal support of \$17,117 and waive the claimant's child support while M.T. resides with him. He then states:

If [M.T.] returns to a shared living arrangement then I would resume payments as per previously (SS15.4k and CS 5.4k) after a three month change in living arrangements until further review [on] May 31 2021.

· October 5, 2020 at 1:59 p.m. - claimant responds advising that she "may consider agreeing to \$18,200 spousal support and no child support" to the respondent.

· On October 5, 2020 at 2:54 p.m. - the respondent states "I will pay you 18,200 SS effective this month and waive our child support". He further states "[i]f agreed to above I will have Mark draft a letter to Mr. Polley for our records and pay Marks fee for the letter." The subject line is: "Re: CS - where do we go from here?"

[13] There was no further response from the claimant on October 5, 2020 and the respondent did not instruct Mark, his lawyer, to prepare a letter to send to Mr. Polley, the claimant's lawyer. There was no correspondence between the lawyers in respect of changing the amount paid for spousal support, ceasing the child support, or any type of a waiting period for resumption of child support if M.T. changed her residence.

[14] The respondent paid the sum of \$18,200 per month to the claimant for October, November, December 2020, January, and February 2021.

- [15] On January 5, 2021, the claimant provided written notice of her demand that the Final Order be followed and have child and spousal support paid to her in accordance with its terms.
- [16] On February 21, 2021, the respondent emailed the claimant advising that he would change his spousal support to \$14,400 per month and child support to \$5,050 per month starting March 1, 2021 for four months until tax returns were complete.
- [17] Effective March 1, 2021, the respondent began paying support to the claimant of \$5,050 per month in child support and \$14,400 per month in spousal support.
- [18] On April 30, 2021, the claimant advised the respondent that she was willing to receive \$5,400 per month in child support and \$15,400 per month in spousal support based on M.T. residing with her since November 23, 2020. On the same day, the claimant advised that there was \$15,700 in arrears owed and that she would be applying to the Family Maintenance Enforcement Program (the "FMEP") to collect the arrears. The FMEP is now known as the Family Maintenance Enforcement Agency (the "FMEA").
- [19] On May 1, 2021, the respondent began paying child support of \$5,400 per month and spousal support of \$14,400 per month.
- [20] On June 22, 2021, the respondent received a letter from FMEP informing him that the claimant had enrolled in the FMEP and calculated the arrears owed of \$17,700 owed by the respondent to the claimant.
- [21] On July 1, 2024, the respondent stopped paying child support for M.T. since she turned 19.

Position of the Parties

- [22] The respondent submits that he and the claimant entered into a binding agreement with consideration when they agreed to vary the child support and spousal support. The claimant received consideration by the increased spousal support and being alleviated from the obligation to pay child support for M.T. while she resided with the respondent on a full-time basis. As such, any arrears accumulated from October 2020 to February 2021 should be cancelled.
- [23] The claimant submits that she told the respondent many times that a written agreement or court order was necessary to change his support obligations. If an agreement was reached, then the respondent would have his lawyer start the process of varying the Final Order. The Final Order was not varied and M.T. moved back to live with her in November 2020 on a full-time basis. The claimant argues that no steps were taken to record an agreement or to vary the Final Order. The claimant denies that she ever agreed to the respondent's proposal for a three month "make up" period until the return to the Final Order if M.T. moved back in to live with her.

Legal Principles

[24] An effective agreement requires a meeting of the minds on all essential terms: *Berthin v. Berthin*, 2016 BCCA 104 at para. 47, quoting from *Frolick v. Frolick*, 2007 BCSC 84:

If the parties fail to reach a meeting of the minds on the essential terms of their agreement, or fail to express themselves in such a fashion that the meaning of the terms they agreed upon cannot be reasonably divined by the court, then the agreement will fail for lack of certainty. However, the requirement of certainty of the terms is always balanced with the reality of transactional negotiations. Parties may intentionally leave gaps in the terms of an agreement to provide for future or mutually satisfactory accommodations. In those circumstances, the court should not apply the doctrine of certainty too rigidly so that the intentions of the parties to create a binding agreement are thwarted.

Lambert J.A. observed in *Griffin v. Martens* (1988), 27 B.C.L.R. (2d) 152 (C.A.) at ¶4: "As long as the agreement is not to be constructed by the court, to the surprise of the parties, or at least one of them, the courts should try to retain and give effect to the agreement that the parties have created for themselves."

[Emphasis in original].

[25] In *Berthin*, the Court of Appeal cited with approval the principle in *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont C.A.), at para. 48:

[W]hen the original contract is incomplete because essential provisions intended to govern the contractual relationship have not been settled or agreed upon; or the contract is too general or uncertain to be valid in itself and is depending on the making of a formal contract; or the understanding or intention of the parties, even if there is no uncertainty as to the terms of their agreement, is that their legal obligations are to be deferred until a formal contract has been approved and executed, the original or preliminary agreement cannot constitute an enforceable contract.

[Emphasis in original].

[26] The question for the Court is whether the parties reached an agreement on all matters that are vital to the agreement. In other words, if key terms were left open for negotiation, an intention to create legal relations will not be found: *Berthin* at para. 49.

Analysis

[27] In my view, the standard of certainty required for a valid and enforceable contract was not met. There is no evidence that the claimant agreed on key terms of the agreement, such as a three month pause in the respondent paying child support conditional on M.T. returning to live with the claimant. Furthermore, both parties communicated an intention to have their lawyers involved in reviewing any agreed upon terms and creating a formal agreement or variation of the Final Order. This did not happen. As such, I am unable to find that the

parties reached a consensus on the essential terms.

- [28] There is the further issue even if I had found that the parties intended to create an enforceable contract, a child's right to child support cannot be bargained away by a parent: *S.L.D. v. W.A.D.*, 2025 BCSC 865 at para. 69, citing *Kopp v. Kopp*, 2012 BCCA 140 at para. 37.

Issue 2: Did the Claimant Waive her Entitlement to Seek Child Support in the Months of October, November, December 2020 and January 2021 as a Result of Promises Made by the Respondent?

Position of the Parties

- [29] The respondent argues that the communications resulted in the claimant waiving her right to child support for the period of October 1, 2020 until February 2021. In support, he relies on the decision in *Boekhoff v. Boekhoff*, 2016 BCCA 33 where the Court of Appeal upheld a decision to cancel arrears based on a waiver of spousal support rather than enforcing an agreement.
- [30] The claimant's position is that there was no waiver. Unlike the decision in *Boekhoff* where the party accepted the varied support amount for 10 years, the claimant sent an email in early January 2021 insisting that the parties comply with the Final Order.

Legal Principles

- [31] At para. 39 of its decision in *Boekhoff*, the Court of Appeal provides that in limited circumstances, the law may hold a party to an agreement despite the absence of consideration through doctrines such as promissory estoppel or waiver. Promissory estoppel occurs where one party, by words or conduct, makes a promise intended to affect the parties' legal relationship, and in reliance on that promise, the other party acts to his or her own detriment. Waiver occurs where the evidence shows that the party said to have waived their rights had a full knowledge, and an unequivocal and conscious intention to abandon them. The common principle underlying these closely related doctrines is that a party should not be allowed to go back on a choice when it would be unfair to the other party to do so.

Analysis

- [32] As a general principle, the factual matrix presented to the Court cannot be ignored and provides necessary context. In *Boekhoff*, Mr. Boekhoff began to pay a lesser amount of spousal support, being \$200 per month, after a 2001 meeting, and continued to pay this amount on a monthly basis from 2001 to 2008. Ms. Boekhoff took no issue with the amount of the support payments for approximately 10 years, however, in September 2010, her counsel wrote to Mr. Boekhoff requesting the immediate reinstatement of the original support amount of \$800 and claiming arrears for the missed payments amounting to \$70,000, exclusive of interest: at paras. 8-9.

- [33] In response, Mr. Boekhoff's counsel took the position that the parties had come to an agreement respecting spousal support payments in 2001. Ms. Boekhoff took no further steps to collect the claimed arrears until she filed an application in March 2014.
- [34] The summary trial judge found that a contract had been made to reduce the spousal support from \$800 to \$200. On appeal, the Court held that there was no consideration paid for this reduction and the 2001 agreement was not a binding contract: at para. 36. However, it found on the facts of the case that Ms. Boekhoff waived her right to receive \$800 maintenance payments between January 2001 and March 1, 2014: at para. 41. As the Court of Appeal summarized, Ms. Boekhoff "consciously and unequivocally intended to abandon her right to full payment": at para. 43.
- [35] Furthermore, Ms. Boekhoff's waiver was not withdrawn until the filing of the March 2014 application, which constituted "an unequivocal withdrawal of the waiver": at para. 44.
- [36] On the evidentiary record before me, I am not persuaded that the claimant consciously and unequivocally intended to abandon her right to spousal and child support provided for in the Final Order. Nor do I find that she agreed to the proposed three-month hiatus that the respondent unilaterally imposed and enforced against her.
- [37] I see no basis for any type of waiver argument on the evidentiary record before me.

Issue 3: Did M.T.'s Change in Residence Qualify as a Material Change in Circumstances Triggering a Variation of Child Support?

Factual Background

- [38] M.T. moved in with the respondent on June 12, 2020, residing with him on a full-time basis. While she initially indicated that the move was permanent, she changed her mind and returned to live with her mother full-time on November 23, 2020.
- [39] From June to September 2020, the respondent paid \$5,400 of child support to the claimant in accordance with the Final Order. Starting in October 2020, the respondent increased the spousal support payments to \$18,200 but did not pay nor seek any child support from the claimant.

Legal Principles

- [40] Section 17 of the Divorce Act, R.S.C.1985, c.3 (2nd Supp.) [DA] provides for the retroactive variation of child support orders:

17(1) A court of competent jurisdiction may make an order varying, rescinding or suspending, prospectively or retroactively,

- (a) a support order or any provision of one, on application by either or both former spouses;
- (b) a parenting order or any provision of one, on application by

- (i) either or both former spouses, or
- (ii) a person, other than a former spouse, who is a parent of the child, stands in the place of a parent or intends to stand in the place of a parent;
- (3) The court may include in a variation order any provision that under this Act could have been included in the order in respect of which the variation order is sought
- (4) Before the court makes a variation order in respect of a child support order, the court shall satisfy itself that a change of circumstances as provided for in the applicable guidelines has occurred since the making of the child support order or the last variation order made in respect of that order.
- (6) In making a variation order, the court shall not take into consideration any conduct that under this Act could not have been considered in making the order in respect of which the variation order is sought.

(6.1) A court making a variation order in respect of a child support order shall do so in accordance with the applicable guidelines.

[41] Section 14 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines] addresses what constitutes a "change of circumstances" for the purposes of 17(4) of the DA:

- 14. For the purposes of subsection 17(4) of the Act, any one of the following constitutes a change of circumstances that gives rise to the making of a variation order in respect of a child support order:
 - (a) in the case where the amount of child support includes a determination made in accordance with the applicable table, any change in circumstances that would result in a different child support order or any provision thereof

[42] A child's change of residence, since the child support order can be a material change of circumstances within the meaning of s. 17(4) of the DA and s. 14 of the Guidelines, justifies a retroactive variation of the order and a consequential remission of arrears: *Tambellini v. Abraham*, 2013 BCSC 2318 at para. 53.

Position of the Parties

[43] The respondent asserts that the change in M.T.'s residence from mid-June to November 23, 2020, is a material change in circumstances as contemplated by s. 17(4) of the DA and s. 14 of the Guidelines. The respondent further relies on *Tambellini* for the proposition that a retroactive variation is appropriate in the circumstances.

[44] The claimant argues that M.T.'s change in residence was trivial and short-lived, insufficient to justify a variation. She points out that for the months that M.T. resided primarily with the respondent, there is no evidence that the respondent's actual expenses increased or that the claimant's expenses decreased. She further asserts that expenses relating to items

consumed by M.T. during this period (i.e. food and clothing) represent only a small portion of the overall expenses for which child support is paid, including housing and transportation appropriate for the child. These larger expenses continue for the parents even if a child is not in their care for a period of months.

Analysis

- [45] At issue is whether a temporary change in residence is enough to trigger a variation of child support. I accept that a few weeks and even a few months may not be sufficient but as of October 2020, M.T. had been living with her father on a full-time basis since June 12, 2020 and had indicated her intention that this living arrangement be permanent. If an application to vary had been brought in September or October 2020, I am persuaded that an order varying child support would have been made.
- [46] In all of the circumstances, I find that there was a material change in circumstances when M.T. moved to live with her father, ostensibly on a permanent basis.

Issue 4: What Amount, if any, is Owed for Retroactive Child Support as of May 1, 2021?

Position of the Parties

- [47] The respondent says that the amount of child support he paid from June to October 2020, while M.T. was living with him on a full-time basis, should be credited to him.
- [48] The claimant says that there should be no credit given on the basis that M.T.'s move to live with the respondent was only on a short-term basis, and that the arrears in child support owed for 2020 and 2021 are \$7,700 and \$5,900, respectively, for a total of \$13,700.

Analysis

- [49] As I have found no agreement and no waiver, but that a material change in circumstances did trigger a variation, it is my view that a fair and reasonable approach is as follows.
- [50] I will calculate an amount of child support that should be paid for the period beginning when M.T. moved in with the respondent in June 2020, until the respondent returned to paying the child support as required by the Final Order on May 1, 2021.
- [51] I accept that the claimant would have still had some costs associated with M.T. during the months that she resided with her father in 2020. However, as I have found above, a retroactive variation is necessary to reflect the material change in M.T.'s circumstances during the period from June 12 to November 23, 2020. In my view, a reasonable approach is that the respondent should be reimbursed for three months of child support that he paid, with the claimant owing no further amounts to the respondent for child support over these months.

- [52] As such, for July, August, and September 2020, the respondent should be reimbursed the \$5,400 that he paid in child support while M.T. was residing full-time with him, totalling \$16,200 owed by the claimant to the respondent.
- [53] In October and November 2020, the respondent did not pay any child support. I find that was appropriate since until November 23, 2020, M.T. resided with him on a full-time basis.
- [54] However, commencing in December 2020, the respondent was required to pay child support in the amount of \$5,400, pursuant to the Final Order. He did not pay any child support from December 2020 to February 2021. For this three month period, the amount of child support owed by the respondent to the claimant amounts to \$16,200.
- [55] As at the end of February 2021, each party owed \$16,200 to the other in child support arrears. Accordingly, these amounts are offset against each other and no order is made for the payment of retroactive child support by either party during the period of time from June 2020 to February 2021.
- [56] In March and April 2021, the respondent paid a monthly sum of \$5,050 in child support. Per the Final Order, he should have been paying \$5,400, being a difference of \$350 each month. The respondent therefore owes the claimant the sum of \$700 to account for the amount by which he unilaterally reduced the child support in March and April 2021.
- [57] In summary, I find the only child support arrears are owed by the respondent to the claimant in the amount of \$700.
- [58] The respondent made monthly child support payments of \$5,400 in accordance with the Final Order from May 1, 2021 until June 2024, when his obligation to pay child support ceased with M.T. reaching the age of 19. As such, there are no further arrears to be calculated.

Issue 5: What Amount of Spousal Support Is Owed From October 2020 to February 2021?

- [59] From October 2020 to February 2021, the respondent made spousal support payments of \$18,200 per month. In my view, and in light of my findings above respecting the parties' child support obligations during this period, he should have been paying spousal support as ordered in the Final Order, being \$15,400 per month. As such, for this five-month period, I find that he overpaid spousal support by \$2,800 each month, resulting in a total of \$14,000 owed by the claimant to the respondent.

Issue 6: Is a Retroactive Variation of the Respondent's Spousal Support Obligation back to March 2021 Warranted?

Factual Background

[60] The claimant obtained her real estate licence in August 2018. In February 2020, she repartnered with Callum Currie and they began living together. Mr. Currie has no dependents. There is limited information in the record regarding Mr. Currie's financial situation, but it appears that he owns or owned two properties in Vancouver. Additionally, the claimant reported on her tax returns that Mr. Currie, her common law spouse, had a net income of \$210,128 in 2024, \$97,757 in 2023, and \$110,965 in 2022.

[61] Two of the properties the claimant owns were acquired after the Final Order, being a condo on Glenmore Drive and a property on Raven Drive, the latter being owned together with Mr. Currie.

[62] The claimant pays Mr. Currie money for managing the real estate rentals.

[63] Since purchasing a home together, the claimant and Mr. Currie spent approximately \$1.2 million on renovations on their home to build a basement suite in it.

[64] The claimant asserts that her Guidelines income is:

2021 - \$109,051

2022 - \$77,439

2023 - \$155,272

2024- \$69,308

[65] These amounts do not include any capital gains nor any adjustments for business expenses claimed or rental income earned, which she writes off. The claimant's gross commission income was:

2022 - \$108,804

2023 - \$221,944

2024 - \$125,672

[66] If approximately 50 percent is added back for write offs for both her business and rental income, the amounts are:

2022 - \$167,467

2023 - \$308,028

2024 - \$143,274

Positions of the Parties

- [67] The respondent argues that a retroactive variation of spousal support going back to March 2021 is warranted considering the material change in the claimant's circumstances, being her repartnering, her increased income beyond what the parties contemplated at the time of the Final Order, and her ability to earn income through rental properties which she did not own at the time of the Final Order.
- [68] The claimant submits that there should be no variation in the spousal support paid until a full review takes place as required by the Final Order, being the end of June 2023.

Legal Principles

- [69] The analysis of retroactive variation of spousal support is governed by ss. 17(4.1) and (7) of the DA, which provide:

(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.

- (7) A variation order varying a spousal support order should
- (a) recognize the 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.

- [70] On an application to vary spousal support, the Court must determine first whether there has been a material change in circumstances since the making of the support order and then determine what variation of the existing order ought to be made in light of the change in circumstances: *L.M.P. v. L.S.*, 2011 SCC 64 at paras. 36, 47.

- [71] In *Boehmer v. Boehmer*, 2013 BCSC 1206, the Court found that the recipient's increase in income from \$12,000 to \$54,000, while the payor's income remained at \$120,000, was a material change in circumstances justifying a variation.

- [72] The recipient repartnering can amount to a material change in circumstances if such an event was not sufficiently within the contemplation of the parties at the time of the initial support order: *Redpath v. Redpath*, 2008 BCSC 68 at para. 46; *Clarke v. Clarke*, 2014 BCSC 824 at para. 29.

Analysis

- [73] I find that the combination of two factors, being the claimant's repartnering and increased income, including her rental income, amounts to a material change in circumstances. The combination of these factors justifies a review going back to March 2021. She has been able to accumulate properties and savings since the Final Order. Based on her latest sworn financial statement, the claimant's investments and financial assets total greater than \$600,000 and the combined value of her equity interests in the three properties she owns is approximately \$880,500.
- [74] The claimant repartnered in February 2020 and began living with Mr. Currie. She now has in Mr. Currie a partner who assisted her in purchasing another property, renovating that property to put in a basement suite, and in contributing to her monthly expenses. She also pays him to manage her rental properties.
- [75] The claimant relies on a term in the Final Order which provides that child support payments were to be determined by imputing the greater of \$40,000 or the claimant's actual income. This, according to the claimant, demonstrates that the parties did contemplate the possibility of the claimant earning income above the fixed amount of \$40,000. I do not accede to this submission. Notwithstanding that the Final Order left open the possibility of the claimant earning more than \$40,000 for the purpose of determining child support, I find that the very substantial increase in the claimant's income and the fact of her repartnering within the period set for review were unforeseen, or that the prospect of these changes occurring was at best speculative at the time of the Final Order: *Boehmer*, at para. 5. Accordingly, I have no hesitation in finding that with the repartnering and her increase in income, there has been a material change in circumstances warranting a review of the claimant's entitlement to spousal support.

Issue 7: What Amount Should be Awarded for Retroactive Spousal Support to Date?

Position of the Parties

- [76] The respondent submits that the amount of spousal support he should pay for the period for which he seeks a variation, being March 2021 to June 30, 2023, should be \$10,000 per month. He further seeks to continue to pay \$10,000 per month retroactively, and a termination of spousal support, either immediately or in two years.

[77] The claimant opposes any variation. Her position is that the amount of spousal support paid should remain as ordered in the Final Order retroactively. For future payments, she asserts that spousal support should be set at a range of \$25,178 to \$28,775, reflecting the mid to high end of permissible spousal support. She submits that such an order is appropriate in light of the market uncertainty and volatility that necessarily impacts her ability to earn income in the real estate business.

Legal Principles

[78] In L.M.P., the Supreme Court of Canada held at para. 50 that once a material change in circumstances has been established, the variation order should properly reflect the objectives set out in s. 17(7) of the DA, take account of the material changes in circumstances, and consider the existence of the separation agreement and its terms as a relevant factor. The Court should limit itself to making the variation which is appropriate in light of the change and should not approach the task as if it were an initial application for support.

Analysis

- [79] Given that a variation is sought on the basis of the change in the claimant's income, I will consider the actual reported income of the parties in conducting the variation, including that of the respondent. I will adopt the approach proposed by both parties, which was to use the average income of the parties over a three-year period from 2022 to 2024.
- [80] The claimant calculates her average income over this period as \$100,647. The respondent says the claimant's average of three years' income is \$129,006 without any addback, or \$206,256 with 50 percent add back for write offs relating to her business and rental income. I will use the figure of \$130,000 as a reasonable estimation of the claimant's average income.
- [81] The respondent's position regarding his own income, averaged over three years, is that it amounts to \$732,111. The claimant says that the respondent's income averages out to \$744,649. The source of this discrepancy is not entirely clear to me, but I find that the appropriate figure to use for the respondent's income is \$738,000, representing an approximate middle ground between the parties' proposed figures.
- [82] The respondent has made claims for some personal expenses such as auto and meals, which he says were necessary business expenses. Likewise, there have been deductions made by the claimant for business expenses attributed to her real estate business. For the most part, the claimant has written off her rental income against expenses, which she explained as accounting for property taxes, insurance, and strata fees which must be paid and may properly be deducted. In light of the parties' financial circumstances, and the limited scope of the Court's task in conducting a variation of spousal support on account of a material change, I am not prepared to undertake a forensic review of each of these expenses to determine their legitimacy. This is consistent with the pragmatic approach to determining

the average income of the parties I have followed: Clarke at para. 20.

[83] Accordingly, I find that the Guidelines income amounts for the parties for 2021, 2022, 2023, 2024 and up to the date of these reasons is for the claimant, \$130,000, and for the respondent, \$738,000. Based on the income of the parties on a without-child support basis, the range for the respondent's spousal support obligation to the claimant for the period in question is as follows:

low - \$16,434 per month;

mid - \$19,041 per month; and

high - \$21,648 per month.

[84] In considering the length of marriage and the economic impact on the claimant, I consider, in looking only at the Guidelines, that the mid point of \$19,041 per month is appropriate: D.M.B. v D.W.A.L, 2019 BCSC 4 at para. 26.

[85] However, in light of the facts that the respondent's income is well in excess of the upper bounds of \$350,000, that the claimant is now becoming established in her real estate business, she has repartnered, and has been able to amass both properties and other assets, the spousal support set out in the Final Order of \$15,400 per month continues to be a reasonable one up to the present.

[86] Since the respondent has only been paying \$14,400 since March 2021, he owes the claimant a further \$1,000 per month from March 2021 to date, being December 2025. This amounts to 58 months, or \$58,000, as retroactive spousal support owed to the claimant.

Issue 8: Is the Claimant Still Entitled to Spousal Support?

Position of the Parties

[87] The respondent submits that the claimant has met the test for self-sufficiency and is independent. She is now in a better position than she was during the relationship. He argues that any compensatory basis for spousal support has waned over the last 11 years and there is no longer a strong reason for any ongoing entitlement.

[88] In the claimant's submissions she asserts that her efforts to become self-sufficient following the breakdown of the marriage, and her relative success in these efforts, do not outweigh her entitlement to ongoing spousal support on a compensatory basis.

Legal Principles

[89] Where there is a material change in the recipient spouse's circumstances that was unforeseen when the obligation to pay support was agreed or ordered, the recipient spouse bears the onus of demonstrating that, despite the material change, there is a continuing need for spousal support: Clarke at para. 29. The ultimate question is whether the recipient has a continuing entitlement to compensatory support, and the extent to which economic

benefits conferred, and detriments received from marriage or its breakdown have been fully compensated by spousal support to date, is the dominant consideration: *Rozen v. Rozen*, 2016 BCCA 303 at para. 55.

Analysis

[90] I find that while the claimant has made good strides towards self-sufficiency, she remains entitled to spousal support. I am persuaded that the respondent's spousal support obligation was intended to and remains necessary "to compensate the claimant for establishing and maintaining the bulwark of the home and family support that permitted the respondent to pursue his career and to achieve his present income earning power": *Clarke* at para. 33.

How much and how long should spousal support be paid?

Position of the Parties

Position of the Respondent

- [91] The respondent's position is that the claimant should no longer be entitled to spousal support and that the objectives of spousal support have been met in the payments that the respondent has made for over 11 years since separation. He argues that she is not entitled pursuant to a needs-based analysis or a compensatory one. He points out that the claimant has been self-sufficient and her financial affairs have been increasingly intertwined with her new spouse over the past five years. The children of the marriage are all over the age of majority.
- [92] The respondent further submits that the exception to the Spousal Support Advisory Guidelines for incomes over \$350,000 should be considered (the "Floors to Ceilings Exception"). In the circumstances, where the claimant has an increase in income, a healthy asset portfolio, and has repartnered, then the Floors to Ceilings Exception should be considered.
- [93] The respondent relies on the case of *B.S.W., aka B.S.G. v. W.F.W.*, 2023 BCSC 1925, where both parties were lawyers with three children. The payor's income was \$650,000 and the recipient's \$202,000. The Court ordered a downward adjustment of \$500 to the support payment. Further reliance is placed on *H.S.S. v. S.H.D.*, 2016 BCSC 1300, where the Court found a strong compensatory claim based on a high needs child and a recipient who was still out of the workforce. The husband's income was \$3 million and the wife's \$150,000. The Court applied the Floors to Ceilings Exception and ordered \$40,000 per month rather than \$100,000 per month for a total of 10 years of support for the 14-year marriage.
- [94] The respondent further relies on repartnering cases to support the termination of support or limiting the duration of it. He submits that spousal support should be terminated, or in the alternative, reduced with an end date ordered, ideally within the next two years.

- [95] The respondent argues that the claimant's income should be analyzed pursuant to s. 19 of the Guidelines, which allows for the imputation of income. He submits that the claimant has the burden of showing that her expenses were reasonable and that she has not done so. He asserts that the claimant is writing off a substantial portion of her income and that the Court should add back 40 percent to 50 percent of her expenses to her income to reflect the personal benefit she receives from her business and rental income. The respondent submits that his income has remained relatively stable and that his income should be assessed at \$670,000 or less.
- [96] The respondent says that he intends to continue to work until his early 60s, if he remains healthy, and would like to retire before 65, given the demands of his job.

Position of the Claimant

- [97] The claimant does not dispute the legal principles applicable on a review of spousal support, being those set out in the cases cited by the respondent of *Morck v. Morck*, 2013 BCCA 186, *Domirti v. Domirti*, 2010 BCCA 472, and *Jordan v. Zanni*, 2024 BCSC 1452. However, she notes that the application of these principles must be informed by the unique facts and circumstances of the parties, and the relationship in each case. The claimant submits that the factors supporting her position that there is a compensatory basis for entitlement must also be considered on a review of spousal support.
- [98] In particular, the claimant points to several factual considerations in asserting that she is entitled to compensatory support until such time as the economic disadvantages to herself and the advantages to the respondent have been redressed. She argues that over the course of the 24-year relationship, she sacrificed career aspirations and opportunities to develop her own earning capacity in service of her role as a mother and homemaker. She further argues that her work in this regard conferred a significant financial advantage upon the respondent, who, during the first 16 to 17 years of the relationship when the couple had four children, pursued an education and training that resulted in a very successful career as an interventionist cardiologist.
- [99] Additionally, while the claimant has repartnered, she highlights that she and Mr. Currie shared equally the cost of purchasing and renovating their home, do not commingle their finances, and each contribute \$4,000 per month for shared household expenses. She says that without substantial financial support from the respondent, she would be forced to sell assets or convert her RRSPs to cover her monthly expenses.
- [100] As to the appropriate duration of support, the claimant relies on the length of the marriage, being 24 years, and the "rule of 65" under the Guidelines in arguing that spousal support should continue to be indefinite subject to a future review or termination order. She further submits that the respondent has failed to provide clear or compelling evidence to establish that the Floors to Ceilings Exception ought to be applied, other than the fact of his income being above the \$350,000 ceiling.

Legal Principles

[101] A review of spousal support is conducted pursuant to s. 15.2 of the DA, which provides:

Spousal support order

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

Interim order

(2) Where an application is made under subsection (1), the court may, on application by either or both spouses, make an interim order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse, pending the determination of the application under subsection (1).

Terms and conditions

(3) The court may make an order under subsection (1) or an interim order under subsection (2) for a definite or indefinite period or until a specified event occurs, and may impose terms, conditions or restrictions in connection with the order as it thinks fit and just.

Factors

- (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.

Spousal misconduct

(5) In making an order under subsection (1) or an interim order under subsection (2), the court shall not take into consideration any misconduct of a spouse in relation to the marriage.

Objectives of spousal support order

(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.

[102] The distinction between a variation and a review was set out by the Court of Appeal in *Morck*:

[16] The appellant is correct in drawing a distinction between a variation and a review of an order for spousal support. The former is governed by s. 17 of the Divorce Act. The existing order is assumed to be correct and, to justify a change, s. 17(4.1) requires the applicant spouse to establish that there has been a material change in the "condition, means, needs or other circumstances" of either party, which was unknown and unforeseen when the earlier order was made and, if known at that time, would likely have resulted in a different order: *P. (R.) v. C. (R.)*, 2011 SCC 65 at para. 25, [2011] 3 S.C.R. 819. If such a change is established, the court will consider the objectives set out in s. 17(7) to determine what an appropriate variation would be.

[17] By contrast, on an application to review an earlier order of spousal support, the applicant need not establish a material change in circumstances. Instead, the review is a hearing de novo, and treated as an initial application for support under s. 15.2 of the Divorce Act. This permits the court to adjust support in a manner that takes into account changes that may have been contemplated by the parties at the time the order was made, but were nevertheless uncertain. Because the issues on review are similar to those on an initial application, the Spousal Support Advisory Guidelines may be used for guidance: *Domirti v. Domirti*, 2010 BCCA 472 at paras. 32-36, 10 B.C.L.R. (5th) 281; and *Tedham v. Tedham*, 2005 BCCA 502 at paras. 22, 47 B.C.L.R. (4th) 254

[23] First, as the review is a hearing de novo, the reviewing court must make findings of fact and credibility. The trial court is better suited to do so in the first instance.

[103] In *H.S.S.*, the Court provided a detailed explanation of the nature and applicability of the Floors to Ceilings Exception:

[427] Section 11 of the SSAG describes a "ceiling" and a "floor", which is an "attempt to define the upper and lower bounds of the typical case, for which guideline formulas can generate acceptable results." The SSAG ceiling for a payor's income is set in s. 11.1 at \$350,000 gross annual income. Where the payor's income is well above the ceiling of \$350,000, the

formulas for amounts are no longer presumptive and different considerations may apply. However, this is not an "absolute" ceiling or a cap: *Smith v. Smith*, 2008 BCCA 245 at para. 31; *Hathaway* at para. 45.

- [428] In *Hathaway*, a recent decision of the Court of Appeal, the Court considered the two approaches outlined in the SSAG for circumstances where a payor earns more than \$350,000 and is also paying child support. The "minimum plus" approach is suggested where a payor's income is close to the "ceiling". The second approach is described as "one of pure discretion". The Court made the following observations on "the ceiling":
- [48] In *The Spousal Support Advisory Guidelines: A New and Improved User's Guide to the Final Version* (2010), the authors comment that "[t]he formulas are not to be applied automatically above the ceiling, although the formulas may provide an appropriate method of determining spousal support in an individual case, depending on the facts" (emphasis in original). The authors state that "[a]bove the ceiling, spousal support cases require an individualized, fact-specific analysis" (emphasis in original). Lastly, the authors note that "[f]ar too often, in these high-income cases, lawyers and judges fail to consider the SSAG formula ranges at all, in arriving at their conclusions." [Emphasis in original.]
- [429] The Court in *Hathaway* affirmed that when a payor spouse's income is above the "ceiling", and as long as a court exercises its discretion on a principled basis, the determination of an appropriate amount of spousal support may be a matter of pure discretion. On the other hand, the Court of Appeal also confirmed that it may be appropriate to order spousal support in an amount that reflects the SSAG formula. The "litmus test" is whether the spousal support award complies with the objectives of s. 15.2 of the *Divorce Act*: at para. 50.
- [430] In the final analysis, the ultimate determination of the appropriate amount of spousal support in high income cases is a matter of judicial discretion that is governed by the factors and objectives set out in s. 15.2(4) and (6) of the *Divorce Act*.
- [104] The overarching objective of the *Divorce Act*, with regard to compensatory support entitlement, is to ensure that spouses are compensated for economic hardship or disadvantages they experience as the result of the marriage or its breakdown. Although the doctrine of spousal support does not guarantee either party the standard of living enjoyed during the marriage, this standard is relevant to entitlement, as the longer the relationship endured and the closer the economic union, the greater the presumptive claim to equal standards of living upon dissolution: *Hathaway* at para. 52, citing *Moge v. Moge*, [1992] 3 S.C.R. 813 at 870, 1992 CanLII 25.
- [105] A general rule is that the duration of spousal support may be set at 0.5 years for each year of the relationship, with the presumption shifting to an indefinite period where the relationship was longer than 20 years: *Spence v Spence*, 2021 BCSC 2159 at para. 45. However, indefinite support does not necessarily mean permanent support, as variation or review may lead to time limits or even to the termination of spousal support where the circumstances warrant: *Jordan* at para. 41. In *Jordan*, the Court determined that while there

was a compensatory basis for entitlement, it was appropriate to order a transition period for the eventual termination of spousal support given that the recipient spouse had achieved some financial independence and the parties were nearing retirement: at para. 45.

[106] Another tool that may be used to enable a transition to self-sufficiency where the compensatory aspects of the original support award remain ongoing is a step-down approach, whereby spousal support payments are reduced year over year until their ultimate termination: Spence at para. 32.

[107] The step-down approach has been applied primarily in cases where the recipient spouse has repartnered, which reflects the concept of "merger over time"; to the extent there is a growing obligation on the new spouse, it is reasonable to reduce the obligation of the first paying spouse as time passes: Howell v Howell, 2025 BCSC 33 at para. 22.

Analysis

[108] I find that there remains a compensatory basis for entitlement. However, I do not find that the claimant's entitlement to spousal support ought to be permanent. The claimant is moving towards self-sufficiency as she establishes herself as a realtor, has repartnered, and is managing to accumulate assets and savings.

[109] In my view, the Court's order must balance the ongoing compensatory basis for spousal support, namely, the claimant's contributions to the marriage through child-rearing and maintaining the family home, both to the detriment of her own earning capacity and to the benefit of the respondent, with the reality that she has made commendable progress toward financial independence and is expected to continue on that path.

[110] Accordingly, following the authorities cited above, I find that the claimant is still entitled to spousal support, but the amount of her entitlement is to be stepped down annually, at a 20 percent reduction, over a transition period of five years, commencing in January 2026. This means that the respondent's spousal support obligation will be reduced annually as he approaches his retirement, while the claimant's self-sufficiency increases and her current relationship matures. For clarity, the claimant's entitlement to spousal support will be terminated as at the end of December 2030.

[111] As to the quantum of the claimant's entitlement going forward, I find that \$15,400 is an appropriate amount to be paid per month by the respondent to the claimant beginning in January 2026, having regard to the principles surrounding the Floors to Ceilings Exception. As the Court of Appeal clarified in Hathaway, this is a matter of pure judicial discretion, which must be exercised on a principled basis. In my view, this is a fair and reasonable starting point for the parties' transition away from spousal support, allowing the claimant to continue to receive compensation for the effects of the dissolution of the marriage, while also reflecting the steps she will continue to take toward self-sufficiency.

Conclusion

[112] The parties consent to an order that M.T. is no longer a child of the marriage as of June 24, 2024.

[113] The further orders made are:

1. The respondent shall pay to the claimant \$700 in child support arrears, being the amount by which he unilaterally reduced child support in March and April 2021.
2. The claimant shall pay to the respondent \$14,000 for the overpayment of spousal support for the period from October 2020 to February 2021.
3. The respondent shall pay to the claimant \$58,000 for the underpayment of spousal support for the period from March 2021 to December 2025.
4. The respondent shall make monthly spousal support payments to the claimant for a five-year period commencing January 1, 2026 and on the first day of each month thereafter as follows:
 - a. 2026 - \$15,400 per month;
 - b. 2027 - \$12,320 per month;
 - c. 2028 - \$9,856 per month;
 - d. 2029 - \$7,885 per month;
 - e. 2030 - \$6,308 per month.
5. The respondent's obligation to pay spousal support will be terminated by the end of December 2030, with the last spousal support payment being made on December 1, 2030.

[114] Since there was divided success, the parties will each bear their own costs for the application.

"Forth J."

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