
CANADA / JUDGMENT

A.K. v. N.K.

2012 BCSC 1499

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1499 A.K. v. N.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.K. v. N.K.,

2012 BCSC 1499

Date: 20121011

Docket: E110412

Registry: Vancouver

Between:

A.K.

Plaintiff

And

N.K.

Defendant

Before: The Honourable Madam Justice Ballance

Corrected Judgment: The Style of Cause of the judgment was corrected on the first page and in the Case Name at the top of each page on December 23, 2013.

Reasons for Judgment

Counsel for Plaintiff:

Todd Bell

Counsel for Defendant:

Mark Cochrane

Place and Date of Trial:

Vancouver, B.C.

September 19-23, 2011 and

January 11 and 13, 2012

Place and Date of Judgment:

Vancouver, B.C.

October 11, 2012

INTRODUCTION

- [1] The parties to this matrimonial proceeding were married in Kharkov, Ukraine, on November 5, 1976, when they were 20-year-old university students. They ceased cohabiting on January 1, 2009, after more than 32 years of marriage. At the time of trial, they were both 55 years old.
- [2] A triggering event occurred on July 20, 2010, in the form of a declaration made under s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"). The parties were subsequently divorced on September 1, 2010. They have two adult children: a daughter born in 1978 and a son who arrived in 1985.
- [3] The primary issues in dispute are the responsibility of the indebtedness incurred after separation, reapportionment of family assets and the duration, quantum and appropriateness of review of spousal support.

BACKGROUND

· Broad overview of the early days

- [4] In 1979, A.K., obtained a Master's degree in mechanical engineering in the Ukraine. Since then, he has largely been employed as an engineer. Within the same time frame, N.K. completed a 4-year program at a music college in the Ukraine which qualified her as a music teacher and accompanist.

- [5] The parties are industrious and hard-working. With the exception of maternity leaves taken by N.K. and a period where the parties' infant son was ill, N.K. was consistently employed at a wide variety of jobs in the Ukraine. She worked in a daycare, assisted in a community centre, was a piano accompanist, sang in a band in which her husband was a musician, and taught piano. Her work was not always full-time.
- [6] In 1991, the parties relocated to Israel. Although N.K. was not able to find employment in the music field, she worked "more than full time", as she put it, at an assortment of jobs, such as cleaning houses, babysitting, caring for the elderly and working in a delicatessen.
- [7] The parties immigrated to Canada in February 1993, when their children were 8 and 15 years old. N.K. initially worked in a retail store and cleaned the common areas of the buildings within the family's apartment complex. She was also a piano accompanist for two ballet schools. Within a short time, she began to work on a full-time basis exclusively for one of those schools, the Richmond Academy of Dance which required her skill as a piano accompanist at the concert level. She would remain in that position for the next 13 years.
- [8] For approximately two years after commencing her position at the Academy, N.K. continued to clean the common areas of her apartment complex. It is not disputed that her physical and psychological health was "great" during those years.
- [9] Soon after arriving in Canada, A.K. secured a job with Accurpress as a service technician, with the aspiration (which subsequently materialized), that it would eventually lead to an engineering position. Accurpress is a family-owned enterprise that operates a small number of production plants throughout North America.
- [10] As a result of their hard work and thrift, the parties were able to purchase a townhome on Blundell Road in Richmond, British Columbia (the "Matrimonial Property") in December 2000. They resided there together until A.K. left in late 2008, as detailed later in these Reasons.

· Employment changes in 2006

- [11] In the latter part of 2005, N.K. began to intermittently experience soft tissue pain and mobility restrictions in her right arm/elbow area for the first time. The increasing discomfort caused her to cancel her classes at the Academy over the Christmas break in the hope that her symptoms would abate with rest. However, they did not improve appreciably during that hiatus and she continued to suffer when she resumed work. Believing that her symptoms were treatable, N.K. attended physiotherapy and a chiropractor. She also wore an arm brace to provide extra support. Unfortunately, N.K.'s condition, which was subsequently diagnosed as a tendonitis/repetitive strain injury, persisted. N.K. is a gifted pianist and accompanist, and was highly thought of by the Academy. She enjoyed her work immensely and, until the development of her soft tissue impairment, had encountered no job performance difficulties.

- [12] In time, it became obvious to the parties that N.K.'s symptoms were significantly interfering with her capacity to carry out her job duties. Frustrated and in pain, N.K. and her husband jointly decided that she should leave her position at the Academy and take an indefinite break from work. A.K. assured N.K. that his income alone would be sufficient to support their needs. Feeling as though she had little alternative, N.K. reluctantly resigned in September 2006.
- [13] A.K.'s employment status also changed in 2006. In order to take advantage of preferred income tax treatment, he and a partner formed their own business called Challenger Automotive Corp. ("Challenger") part way through that year. Challenger's sole business was to work as an independent contractor for Accurpress. This new arrangement enabled A.K. to split a portion of the income derived from Challenger to N.K., as well as to their son, for tax purposes. Accordingly, although N.K. reported receipt of income from Challenger, at no time did she work for that entity.
- Marital disharmony and other events in 2008
- [14] Although N.K. was able to keep up with the housework, occasionally played the piano for pleasure, and was even able to ski once in a while after leaving the Academy, her compromised arm/elbow continued to bother her.
- [15] In 2008, N.K. underwent a series of rehabilitative laser sessions on her right arm. In her direct evidence, she complained that A.K. had "forced" her to attend, implying that he suddenly wanted her to get well and return to work, but when pressed in cross-examination, she retreated from that assertion. It is clear that in 2008, N.K. remained optimistic that her soft tissue symptoms would dissipate and willingly attended the laser therapy that A.K. had suggested, as well as other treatment modalities, such as acupuncture.
- [16] A.K.'s job required him to travel regularly. During the first part of 2008, he was on the road every month to Rapid City, South Dakota. In the spring, N.K. sensed a distance between herself and her husband. She eventually broached the matter with him, and he assured her that all was fine. As the weeks passed, N.K. grew increasingly uneasy and again confronted A.K. It was then that he confessed his romantic involvement with a woman, Y.B., who lived in Rapid City. It was an emotionally charged disclosure for both parties. Soon afterwards, A.K. told his wife that he had telephoned Y.B. and had "finished it." Evidently N.K. spoke to Y.B. as well.
- [17] The parties decided that they would take a previously scheduled vacation to Quebec in August 2008. During that trip, it became plain to N.K. that A.K. "was not with her", and when she pressed the point, he admitted that he was in love with Y.B. N.K. became distraught immediately. She was unable to sleep and ultimately suffered a panic attack that landed her in hospital during the holiday. I accept that N.K. had never before experienced psychiatric symptoms of that kind.

- [18] N.K.'s mood deteriorated after the parties returned from Quebec. She began to experience panic attacks several times a day throughout the fall of 2008. She also developed insomnia and was prescribed tranquilizers and other medications.
- [19] The parties committed to several sessions with a marriage counsellor in an attempt to salvage their marriage. I accept N.K.'s testimony that A.K. promised that he would no longer see Y.B., and informed the counsellor that he had severed all contact with her. As it turned out, however, he was not able to pull himself away and upon returning home from a business trip in December 2008, he announced to N.K. that he "needed space". A.K. proposed that he would move out of the Matrimonial Property with the idea that the parties would try to rekindle their relationship by dating one another. His request that she help him gather up furnishings for his new apartment, left N.K. screaming and in tears. Later that month, she attempted to do herself harm by consuming a handful of prescribed tranquilizers.

· Redemption of RRSPs and purchase of Nissan

- [20] Prior to their separation on January 1, 2009, the parties had shared one vehicle, which was leased by Challenger. A.K. had always handled the financial side of the marriage. He suggested, and I find N.K. agreed, that they would redeem their RRSPs in order to free up funds which would be used toward the purchase of a new vehicle for N.K. and to repay a debt of approximately \$17,500 that they owed to N.K.'s mother. Between late December 2008 and February 2009, A.K. collapsed the parties' three RRSPs, which yielded net funds of approximately \$31,670.
- [21] In December 2008, the parties purchased a Nissan automobile for N.K. The sources of the \$14,000 down payment were a charge of approximately \$1,000 against the parties' Visa Gold credit card, and \$13,000 drawn against their joint line of credit. The balance was financed by the dealer. Although they had anticipated applying some of the RRSP proceeds toward the purchase, that did not come to pass. The parties did, however, follow through with their plan to use \$17,500 of the redemption proceeds to retire their indebtedness to N.K.'s mother.

· Separation

- [22] When the parties separated effective January 1, 2009, N.K. remained in the Matrimonial Property, with most of the furnishings and household items. There was no cogent evidence about the value of those chattels. Given the parties' comfortable financial circumstances, I think it reasonable to infer that they had a minimum collective value of \$6,000.
- [23] A.K. moved into a rental apartment in Surrey, British Columbia, for a time, and eventually relocated to Bellingham, Washington, where he was joined by Y.B. and, later on, by her teenage son. His rent was approximately \$1000 per month plus utilities and related costs. N.K. resided in the Matrimonial Property, rent free, until it was sold roughly 21 months later.

· N.K.'s emotional health - 2009

- [24] Meanwhile, N.K.'s psychological state spiralled downward.
- [25] Olga Drigola and N.K. have been friends for more than 18 years. They chat almost every day. Ms. Drigola gave credible testimony about N.K. being an energetic and happy person with a supportive and caring husband before the summer of 2008. She became concerned about N.K.'s well-being in the summer of 2008. She noticed that N.K. was avoiding her telephone calls, and that when she did return one, she would simply say that "something happened" and that she did not feel well. N.K. eventually confided to Ms. Drigola that A.K. was involved with another woman and that she wanted their marriage to work because he was "her only love".
- [26] Ms. Drigola testified to the further dramatic change that her friend underwent starting in January 2009. By then, N.K. was spending most days laying in bed in her pyjamas with the covers drawn over her head. She neglected her personal hygiene, avoided her friends and lost a massive amount of weight. Ms. Drigola and other friends in their circle brought N.K. prepared meals and sometimes fed her "like a baby". All the while, N.K. was unable to get out of bed and made statements to Ms. Drigola like "I can't live without him" and "I have to get him back". She also expressed suicidal thoughts when she learned that A.K. and Y.B. had moved in together.
- [27] On an especially low day in February, N.K. parked her car on the top level of a retail parkade and sat there for hours in a self-destructive mindset contemplating jumping to her death. That episode led to her hospitalization in the psychiatric ward for nearly a week.
- [28] N.K. could not bear the thought of returning to the Matrimonial Property upon her discharge from hospital. Instead, she stayed with her close friend, Vita Chitnev, for a number of weeks. Ms. Chitnev testified that N.K.'s mood and entire demeanour had radically changed for the worse. She recalled that for much of the time, N.K. would rock herself back and forth, crying and repeating statements such as "'how am I going to live?" and "I don't want to live". She needed help to navigate even the most basic daily tasks, such as bathing and eating. In time, N.K. and Ms. Chitnev "practiced" visiting the Matrimonial Property for about an hour a day to smooth N.K.'s transition to return home.
- [29] Ms. Drigola further testified that from 2006 onward, N.K. complained to her about pain in her right forearm and elbow, and that she observed N.K. experiencing pain in that region on a number of occasions.
- [30] In the spring 2009, N.K.'s mother was admitted into palliative care with terminal cancer and died a few months later. I will pause here to observe that the intense bitterness N.K. continues to harbour towards A.K. seeped into most aspects of her testimony that touched on him, and was at the root of her unsubstantiated allegations concerning his concealed income sources, as discussed later in these Reasons. The depth of her scorn was powerfully revealed at trial when she rather matter-of-factly blamed A.K.'s withdrawal from the marriage for the onset of her mother's illness and death.

- [31] In May 2009, Dr. Yuriy Savchuk became N.K.'s family doctor. His medical records indicate that throughout May and persisting into August 2009, N.K. regularly complained of extremely low mood, poor sleep, poor appetite, daily anxiety, suicidal ideation and general depression, which she described as reaching back in time to January. She told Dr. Savchuk that she attributed her low psychological state to the fact that A.K. had "left her". She also periodically complained of right arm/elbow pain.
- [32] In August 2009, N.K. attempted suicide and was readmitted to the psychiatric ward for a six-week stay. Her uncontradicted evidence is that the incident was precipitated by her receipt of a letter from A.K.'s lawyer in relation to their separation, which made her feel hopeless, helpless, and wanting to die. She was under the care of a psychiatrist during the remainder of August and throughout September and October, and eventually enrolled in a psychiatric counselling program at the hospital.
- [33] After her discharge N.K. resumed seeing Dr. Savchuk about her anxiety and depression and her right arm/elbow complaints.

· Change in A.K.'s employment status in 2009

- [34] I accept A.K.'s evidence that in the aftermath of the downturn in the global economy, Accurpress advised that it would no longer deal with him through Challenger, but would be prepared to reinstate him as an employee. Interpreting this as an ultimatum of sorts, A.K. returned to Accurpress in the capacity of an employee in August 2009. He subsequently ceased being a shareholder in Challenger in 2010, at which time he transferred his shares to his partner for \$1.00. There is no evidence to discredit A.K.'s account of his shift in employment status or to suggest that his shares in Challenger had any greater value than \$1.00.

· N.K.'s new relationship

- [35] In October 2009, N.K. met D.D. They quickly forged a romantic relationship, which they have maintained to the present day. As far as N.K. is concerned, D.D. is a "miracle who saved my life".
- [36] N.K.'s depression began to lift soon after she met D.D. Throughout 2010, she consistently reported to Dr. Savchuk that her depression was improving and that her anxiety was dissipating. Ms. Drigola noticed that N.K. began to take better care of herself and started to venture out to shop and see friends and became more self-reliant. N.K. agreed that her mood gradually "got much better". As her psychological symptoms stabilized, the focus of her medical appointments increasingly shifted to her right arm/elbow dysfunction.

· Sale of the Matrimonial Property and N.K.'s subsequent living arrangements

- [37] The Matrimonial Property was sold on September 24, 2010. The net sale proceeds of \$371,090 were deposited into N.K.'s lawyer's trust account.

- [38] After all of the evidence had been adduced at trial, and before final argument had been heard, the parties agreed that \$200,000 of the sale proceeds would be distributed equally to them on a without prejudice basis.
- [39] After the sale, N.K. leased what she described as a "quite small" two-bedroom apartment on Moffat Road in Richmond, British Columbia (the "Moffat Apartment").
- [40] The parties' adult son resides with N.K. at the Moffat Apartment. In the spring of 2009, he left university, just two months shy of graduating from engineering, and has faced his own challenges with depression in recent years. Still, he has been an important source of emotional support to his mother in her dark times. At the time of trial, the son was working part-time as a bartender and volunteering with the Canadian Coast Guard, where he aspires to one day have a career. At some point, the son's fiancée, who is a student, moved into the Moffat Apartment. Neither she nor the son contributes to rent or other household expenses; however, they purchase their own food and the son pays for his car and cell phone.
- [41] N.K. is not troubled by the fact that her son does not pay rent, explaining that at present he "has his own demons". She also noted that in the upbringing of herself and A.K., it was customary for young adults to reside with their parents for little or no cost, and that the parties themselves had done so with each set of parents when they were starting out as a couple.
- [42] N.K. testified that in any event their son cannot afford to contribute financially. Her understanding from him is that his monthly earnings are about \$1,000 and from that amount, he is required to pay \$500 towards his student loan debt. A.K. attempted to impugn N.K.'s credibility by pointing to a statement of the son's bank account that recorded his student loan payments (or at least those coming out of that particular account) as less than \$500. The son did not testify. I find that nothing of importance flows from this line of questioning.
- [43] N.K. says that she does not know when or whether her current living arrangements at the Moffat Apartment might change. At present she plans to remain living there even after her son and his fiancée move out.
- [44] A.K. insists that N.K. is seldom at the Moffat Apartment and essentially lives with D.D. His suspicions about where she truly resides led him to retain a private investigation firm to conduct surveillance of N.K.'s comings and goings between February 18 and March 18, 2011. The surveillance focused on whether N.K.'s Nissan was parked near to D.D.'s apartment in the evening and early morning.
- [45] During that one-month surveillance period, the investigators looked for N.K.'s vehicle in the vicinity of D.D.'s apartment on 24 separate occasions. On 18 of those instances, they saw her car parked close to D.D.'s apartment at various times throughout the evening. On 11 of their 13 morning checks, they noted that N.K.'s car was parked outside D.D.'s residence, and that the air stem on the Nissan's driver's-side rear tire was in the same position as it had been the

previous evening, suggesting that her car had not moved during the night. Applying that logic, the investigation indicated that N.K. had stayed the night at D.D.'s apartment less than half of the time.

- [46] The investigators' findings based on the occasional spot checks they conducted of the secured parking area of the Moffat Apartment were inconclusive. They did not know whether N.K. had a dedicated parking spot there but noted that she did not have a parking pass displayed on the front dash of her vehicle. N.K. testified that she used a magnetic security card to access parking at the Moffat Apartment. As well, in her financial statement sworn on August 15, 2011, she reported a monthly expense of \$15 for a second parking stall at the Moffat Apartment, which she claims was to accommodate her son's car. It was not until the next day during her examination for discovery that she became aware that she had been under surveillance.
- [47] N.K. testified that there is no established pattern to her overnights at D.D.'s apartment or his infrequent stays at the Moffat Apartment. She explained that there had been a period when she spent five to seven days at D.D.'s during the week, but that their current routine is to spend no more than four nights together per week. N.K. testified that although she and D.D. share many common interests and spend considerable time together, they maintain their own friends and social lives and, to some extent, lead separate lives.
- [48] I accept N.K.'s uncontradicted testimony that she does not presently plan to move in with D.D. or take any steps to formalize their relationship. I am satisfied that N.K. has never contributed toward D.D.'s rent or the payment of his utilities, although she sometimes buys groceries which they consume at his residence. I accept also that they keep their finances separate and, for the most part, cover their own expenses. One exception is that N.K.'s travel expenses are generally covered by D.D. when she accompanies him to conferences that he attends. I conclude that N.K. and D.D. are not cohabiting at this time.

· The parties' incomes

- [49] A.K.'s T4 income from Accurpress in 2004 and 2005 was reported as \$92,433 and \$92,628, respectively. In 2006, his income for tax purposes was shown as \$73,611, derived partly from his Accurpress earnings and partly from Challenger.
- [50] In 2007, A.K.'s income was reported as \$67,968, and in 2008, it was \$80,324. He had taken advantage of the availability of income splitting with N.K. and his son in those years, and agreed that the annual amounts that they reported receiving from Challenger should be added to his income in the corresponding years.
- [51] A.K.'s evidence is that he accepted an annual salary of \$80,000 (USD) when he rejoined Accurpress midway through 2009. His income that year amounted to \$107,329 and consisted of three sources: \$23,000 in RRSP redemption proceeds; \$54,892 from Challenger; and \$29,437 from Accurpress.

- [52] In 2010 A.K. and Y.B. filed a joint U.S. tax return reporting their combined income at \$104,414 (USD). A.K. explained the breakdown of that figure as comprising his salary of \$80,000 and \$24,000 in Y.B.'s earnings. In his Canadian income tax return filed that year, A.K. reported income of \$82,391, which I accept represents the Canadian conversion of his \$80,000 (USD) salary.
- [53] At some point A.K. and Y.B. married, and in around 2011 they and Y.B.'s son moved to South Dakota. According to A.K., the cost of living is significantly lower there and his salary is considered to be "high income".
- [54] N.K. does not trust that A.K. has fully and accurately disclosed his post-separation salary and other alleged income sources, and suspects he is concealing and/or under-reporting his income. Her suspicions appear to rest on her knowledge that his income had been more than \$80,000 in the final years of their marriage, and the fact that he had not produced his recent paystubs to verify his remuneration. Copies of A.K.'s pay statements for August and September 2011 were ultimately entered as exhibits and confirm that A.K.'s annual salary is \$80,000 (USD). A.K. also produced a copy of a letter from his employer addressed to the U.S. Immigration and Naturalization Department stating that his annual salary is \$80,000 (USD). N.K. does not believe that the letter is authentic and supposed that A.K. may have forged it. She also ventured the suggestion that A.K. may work at a second job that he has not disclosed. N.K.'s assertions that A.K. receives salary in excess of \$80,000 (USD), or has income from a secondary employment or another undisclosed source, are plainly groundless.
- [55] Based on N.K.'s income tax notices of assessment, she earned \$25,311 in 2005 and \$22,110 in 2006, when she worked for only nine months. The evidence is not clear about whether she was attributed income from Challenger in 2006 and, if so, the amount. Also not explained is why in 2004, her income appears to about 50 percent less than her earnings in the two subsequent years.
- [56] N.K.'s 2007 income was reported as \$34,973 and as \$29,201 in 2008. Those amounts were allocated to her by Challenger as part of the family's income splitting arrangement.
- [57] Copies of N.K.'s filed 2009 and 2010 income tax returns were not in evidence. The income tax summaries that were in evidence do not indicate whether N.K. had reported any earned income during those years, as distinct from income connected to the redemption of the parties' RRSPs or receipt of spousal support. According to N.K.'s financial statement sworn on July 31, 2010 she expected to earn \$2,400 in 2010. In 2011 she swore two financial statements. In the first one, dated February 9, 2011, she anticipated annual income of \$3,100; in her subsequent statement sworn approximately six months later, she indicated an annual income of just \$780.

· Co-mingling of funds and the accumulation of debt

- [58] "I have a complex arrangement of accounts" said A.K. on cross examination. His declaration proved to be true.
- [59] At the time of separation, the parties had a joint line of credit (the "Joint LOC") and several bank accounts. Their joint chequing account was their primary operating account (the "Joint Account"). They also had a joint savings account and a USD chequing account (the "US Account"), both held in A.K.'s name alone.
- [60] After separation, A.K. opened two more bank accounts and established a second line of credit. Specifically, in March 2009 he and Y.B. opened a joint US chequing account with the Wells Fargo Bank (the "Wells Fargo Account"). In August 2009, he opened a new chequing account (the "New Account") and a separate line of credit (the "New LOC"), both solely in his name. N.K. likewise opened two new bank accounts in her name following the parties' separation.
- [61] Hundreds of pages of statements of the various bank accounts and the two lines of credit were admitted into evidence, and the parties testified about certain deposits and withdrawals. A.K. claims to have borrowed funds from Y.B., more or less on a monthly basis throughout 2009 and 2010 in order to meet the expenses of both households. He testified that those borrowings in 2009 amounted to \$7,500 and were nearly double that in 2010. A.K. did not reflect that indebtedness in his financial statement sworn on March 23, 2010; however, he included it in his two subsequent statements.
- [62] A.K.'s counsel prepared a helpful chart highlighting transactions of \$1,000 or more and recording the borrowings against the lines of credit. While it provided a general overview of the extent of the post-separation comingling of funds, the evidence does not permit a coherent analysis of the ins and outs of the various accounts, or of the way that the funds (including borrowed monies) were expended. Also lacking was evidence detailing the parties' credit card charges that were paid for by funds withdrawn from the Joint Account and the New Account. That said, the following financial picture can be reliably discerned from the evidence as a whole:
- The parties owed nothing on their Joint LOC at the beginning of 2008. As mentioned, near the end of December, A.K. drew the sum of \$13,000 against it to use as a down payment for the Nissan. It is common ground that debt is a family debt. Throughout 2009, A.K. made multiple draws against the Joint LOC resulting in an accrual of additional indebtedness of approximately \$14,000. The majority of those borrowings were deposited into the Joint Account.
 - The proceeds realized on the redemption of the parties' RRSPs in December 2008 and early 2009 (totalling approximately \$31,670) were deposited into the Joint Account. Of them, the sum of \$17,500 was used to discharge the parties' debt to N.K.'s mother, as stated previously.

- During 2009, the mortgage payments in respect of the Matrimonial Property totalling \$17,004 and related expenses (e.g., hydro, cable/internet, security, strata fees) of approximately \$5,076, and the son's university tuition were all paid out of the Joint Account. Also in that year, sizeable payments totalling approximately \$8,851 were made from the Joint Account to A.K.'s American Express credit card which he used mainly for business.
- N.K. agreed that she received the sum of \$24,000 in putative spousal support in 2009. It appears as though those payments were made out of the Joint Account, except for the sum of \$2,500, which came from the New Account.
- Between November and December 2009, A.K. drew \$5,007 against the Joint LOC to cover his legal expenses. He acknowledges that he is entirely responsible for that debt.
- Throughout 2009, the parties each charged goods and services against their Visa Gold credit cards. The evidence does not allow a parsing out of charges made by each party. Of note, however, is that those expenditures included Y.B.'s dental work, the sum of just over \$1,000 in payment of A.K.'s former legal counsel, and charges related to A.K.'s business travel and related expenses, for which he was subsequently reimbursed. Payments on that Visa account were typically made out of the Joint Account.
- Initially, A.K. deposited his income into the Joint Account and then would transfer a portion of it to his US Account, and typically from there, into the Wells Fargo Account. He used the funds in his Wells Fargo Account for his personal expenses and for a portion of the expenses attributable to Y.B. and her son. In 2009, he transferred approximately \$8,000 from the Joint Account to his US Account.
- Following A.K.'s reinstatement as an employee of Accurpress in August 2009, he bypassed the Joint Account altogether and arranged for his pay to be deposited, in part, into the Wells Fargo Account and, in part, into his US Account. A.K.'s intention was to cover the living and personal expenses of himself and his household with Y.B. from his Wells Fargo Account, and use the US Account largely as a clearing account to funnel varying amounts into the New Account. He sometimes also drew funds against the new LOC and deposited them into the New Account. The monies in the New Account were used to continue to cover the mortgage payments and associated expenses of the Matrimonial Property. In 2010, those payments totalled \$15,000. The funds in the New Account were also used to make payments to N.K., American Express and to reduce the debt on the New LOC.
- At the end of 2009, A.K. closed the Joint Account and stopped the borrowing against the Joint LOC in an attempt to further disentangle the parties' financial relationship. The final balance owing on the Joint LOC, in the amount of \$27,051, was paid from the proceeds of the sale of the Matrimonial Property in 2010.

- At no time after separation did N.K. deposit funds into any of the bank accounts, other than into her two personal accounts that she established post-separation, or make any direct payments against the Joint LOC, the New LOC, the Visa Gold balance, the American Express account or the mortgage or operating costs of the Matrimonial Property.
- From January to September 2010, A.K. paid N.K. very little (totalling only \$1,850) in the way of spousal support. Pursuant to a consent court order made on a without prejudice basis on September 1, 2010, he began to pay support in the amount of \$2,500 per month. There are no arrears.
- In 2010, A.K. paid additional income tax in the amount of \$1,483.98 attributable to the redemption of the parties' RRSPs.

[63] I will address the implications of the foregoing below in the context of the discussion concerning the division of family assets.

DISCUSSION

1. Division of Family Assets

- [64] Spouses are presumptively entitled to an undivided one-half interest in each of the family assets. This presumed equality can only be displaced where the court is satisfied that an equal division would be unfair having regard to the following criteria set out in s. 65(1) of the FRA:
- (a) the duration of the marriage;
 - (b) the duration of the period during which the spouses have lived separate and apart;
 - (c) the date when property was acquired or disposed of;
 - (d) the extent to which property was acquired by one spouse through inheritance or gift;
 - (e) the needs of each spouse to become or remain economically independent and self sufficient; or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse.
- [65] The question is not whether an unequal division would be fair. Rather, the proper approach is to assess whether an equal division would be unfair: *Mann v. Mann*, 2009 BCCA 181; *Whitaker v. Whitaker*, 2010 BCCA 248. The onus of demonstrating the unfairness rests on the spouse seeking reapportionment: *W. v. W.*, 2005 BCSC 1010.

- [66] Only the factors laid out in s. 65 are to be taken into account, and all of them are to be considered: *Girard v. Girard* (1983), 33 R.F.L. (2d) 79 (B.C.C.A.); *Kovacik v. Kovacic*, 1999 BCCA 564. Where the court concludes that, based on those statutory factors an equal division would be unfair, it must then determine the extent of any reapportionment with exclusive regard to those same considerations.
- [67] The majority of the s. 65 considerations reflect the notion of spousal contribution in the broad sense of the word (encompassing financial contributions or by way of child care, household management or other positive activities that promote the family unit) to the accumulation and maintenance of the family assets. However, reapportionment does not invite a forensic accounting style of analysis of contribution; a dollar in will not necessarily translate to a dollar out: *Vander Ende v. Vander Ende*, 2010 BCSC 597.
- [68] The economic independence and self-sufficiency of the spouses are also relevant factors in determining whether the presumed equal division would be unfair. They are to be measured by reference to the spouses' standard of living before separation, as well as their financial needs that emerge in the post-separation reality: *Fong v. Fong* (1983), 45 B.C.L.R. 222, 34 R.F.L. (2d) 337 (C.A.).
- [69] Because spouses acquire their prima facie equal interest in a family asset as a result of the triggering event, it is the circumstances in existence at that time that are considered in assessing whether an equal division would be unfair: *Blackett v. Blackett* (1989), 63 D.L.R. (4th) 18 B.C.C.A. The circumstances of each spouse, and not merely of the spouse seeking reapportionment, are taken into account. In terms of the valuation of the assets, the general rule is that valuation as at the date of trial applies unless the court exercises its discretion to use an earlier date (not sooner than the triggering event) in order to achieve fairness: *N.M.M. v. N.S.M.*, 2004 BCSC 346.
- [70] Although economic self-sufficiency is a consideration relevant to both reapportionment and spousal support, the court is required to address the division of property before it makes a determination about spousal support. This sequencing is important because the outcome of the division of property will affect the relative condition, needs and means of the parties: *Tedham v. Tedham*, 2005 BCCA 502, 47 B.C.L.R. (4th) 254 [Tedham]; *Chutter v. Chutter*, 2008 BCCA 507, 86 B.C.L.R. (4th) 233 [Chutter] at para. 75. The potential pitfalls arising from the legislatively intertwined concept of economic self-sufficiency were identified in *Foster v. Foster*, 2007 BCCA 83, 64 B.C.L.R. (4th) 259, where the Court of Appeal offered this caution at para. 50:

Combining the analyses tends to create confusion and to blur the distinctions between the factors relating to division of property (including reapportionment), and those relating to spousal support. It also creates a greater potential for double recovery.

- [71] The family assets in existence at the triggering event in the case at hand and their corresponding values then and at trial are as follows:

Asset

Value at

Triggering Event

Value at Trial

Matrimonial Property

371,090.00

(net)

371,090.00

(net)

Timeshares (x3)

10,000.00

11,000.00

(agreed collective value)

RRSPs

485.00

485.00

New Account

36.30

13.00

U.S. Account

2,269.28

4.66

Wells Fargo Account

9,796.56

6,150.00

Royal Bank account (opened post-separation by N.K.)

1,047.65

900.00

TD Canada Trust account (opened post-separation by N.K.)

2,041.16

300.00

Household chattels

6,000.00

6,000.00

2008 Nissan

14,000.00

14,000.00

Joint Account

0.00

0.00

CPP credits

unknown

unknown

Joint savings account

0.00

0.00

TOTAL

\$416,765.95

\$409,942.66

[72] Neither party has any pension entitlement beyond their CPP benefits.

[73] The debts of the parties are also to be considered in assessing the fairness of the division of property: *Stein v. Stein*, 2008 SCC 35. The statutory authority for doing so is rooted in s. 65(1) (f): *Mallen v. Mallen* (1992), 11 B.C.A.C. 262, 65 B.C.L.R. (2d) 241 (C.A.) [Mallen]. Debts incurred by one or both spouses before the triggering event are not required to be approached in the same way in every case.

- [74] Where the disposal of a potential family asset by a spouse shortly before the marriage breakdown or after separation produces unfairness, it may be a factor for reapportionment. Along similar lines, expenditures made by one spouse that deprive the other of a reasonable expectation that a potential family asset will be available for distribution on the triggering event might also be unfair. *Newson v. Newson* (1986), 2 R.F.L. (3d) 137 (B.C.C.A.); *G.(C.F.) v. G. (A.A.)*, 2006 BCSC 904.
- [75] N.K. seeks a 67/33 reapportionment in her favour of the family assets across the board, including the net sale proceeds of the Matrimonial Property. A.K. advocates an equal division of the assets, other than the bank accounts that the parties established individually after separation. With the goal of achieving equality, he proposes an in specie distribution of the three time shares to himself in exchange for N.K. retaining the Nissan and the household chattels, and with the added proviso that N.K. assume sole responsibility for the outstanding balance of the Nissan loan.
- [76] The essence of N.K.'s reapportionment claim is her need to become economically independent and self-sufficient. To a lesser extent, she also relies on the factors reflected in s. 65(1)(f). In that regard, she alleges that except for the sum of \$17,500 used to repay her mother, A.K. diverted the proceeds of the RRSPs to non-family purposes such as paying Y.B.'s dental costs and tuition fees and contributing to her living expenses and those of her son. N.K. makes a companion assertion about the destination of the approximate \$14,000 drawn against the Joint LOC post-separation. She argues that A.K.'s dissipation of the remaining RRSP funds and his unilateral accrual of indebtedness on their Joint LOC for non-family purposes is a full defence to A.K.'s contention that she is partially responsible for any draws against the Joint LOC (besides the \$13,000 used to purchase the Nissan), or toward any portion of the debt accumulated by A.K. on the New LOC. She also relies on the foregoing to support her position that A.K.'s purported indebtedness to Y.B. in the amount of \$22,500 cannot stand as a genuine debt. N.K. argues that to the extent that the total amounts disposed of by A.K. in supporting Y.B. and her son cannot be easily quantified, they are considerations that ought to be subsumed in the overall reapportionment analysis to her credit.
- [77] A.K. acknowledged that due to the movement and intermingling of monies among the various accounts prior to the triggering event, it is not possible to trace the disposition of the deposited funds, the borrowings against the lines of credit or the RRSP redemption proceeds, to the penny. The comingling of funds in this case and the limitations of the evidence relative to the various transactions impairs this Court's ability to confidently match the borrowed funds or remaining RRSP monies to their precise expenditures. It does not invariably follow, however, that A.K. wrongly dissipated or misappropriated potential family funds or that the post-separation increase of debt that he incurred was not used for family purposes.

- [78] There was no evidence to suggest that A.K. lived other than modestly from the time of separation onward. The parties remained linked financially for an extended period after separation when the available income, derived entirely from A.K.'s salary, the line of credit borrowings and RRSP funds, did not fully service their needs. I accept A.K.'s evidence that from the outset of separation, his income was not sufficient to cover the expenses of both households and that he experienced a shortfall each month, often as high as \$1,000, in meeting the ordinary expenses of himself and N.K. With the increased costs of running two households, A.K. used the funds at his disposal, including those borrowed against the Joint LOC and the New LOC, in a "from Peter to pay Paul" manner. I find that within this time frame A.K. regularly "borrowed" money from Y.B. in order to stay afloat. Yet, at the same time, he covered a substantial portion of Y.B.'s and her son's living expenses, including paying roughly \$10,000 for Y.B.'s aesthetician program. At the end of the day, the amounts that A.K. claims to have borrowed from Y.B. were in one way or another returned to her. There is no legitimate family debt owing to Y.B.
- [79] During final argument, I expressed to counsel my concern as to whether the source of some portion of the support payments made to N.K. was her own share of the family assets, or whether by assuming responsibility for a portion of the Joint LOC or the New LOC, she would be indirectly financing some or all of those payments. A.K. testified that he did not believe that had occurred, but candidly admitted that it was impossible to confirm that it did not happen. On my review of the evidence as a whole, I conclude that, in all likelihood, some degree of overlap inadvertently occurred.
- [80] The probabilities of the evidence satisfy me that, except for the borrowings against the Joint LOC to pay for A.K.'s legal expenses, the majority of the draws against the Joint LOC and the New LOC made after separation were applied to cover the preservation and maintenance of the Matrimonial Property and the costs associated with N.K. living there and the parties' personal living expenses. Accordingly, the lion's share of the post-separation incurrence of debt on the Joint LOC and on the New LOC as at the triggering date constitutes a family debt as the authorities have defined that concept: *Mallen; Bryan v. Chapman*, 2011 BCCA 278. The corollary is that only a relatively small fraction of that total indebtedness (in addition to the sum of \$5,007 that A.K. used to pay his former counsel) was not incurred for a family purpose.
- [81] I likewise conclude that A.K. spent substantially all of the remaining RRSP proceeds for the benefit of himself and N.K. (including the discharge of their joint indebtedness to N.K.'s mother) and that only a modest percentage was used for a non-family purpose and in a manner that deprived N.K. of a reasonable expectation that those funds would be available for division. In the overall analysis, it is a minor factor militating in favour of reapportionment to N.K.

- [82] N.K. contends that her earning capacity and prospect for self-sufficiency have been adversely affected by a constellation of factors. Included among them are her chronic tendonitis, the onset of her debilitating depression and anxiety in consequence of the marital breakdown and the residual symptoms she continues to experience, as well as the role she assumed of an at-home spouse in 2006 with A.K.'s approval.
- [83] N.K. tendered Dr. Savchuk's report written July 5, 2010 and his follow-up of June 18, 2011 as expert opinion evidence in relation to her medical condition and prognosis. The stated purpose of Dr. Savchuk's June 18 report was primarily to provide an update on N.K.'s ongoing disability from her job as a piano teacher. Dr. Savchuk also testified at trial.
- [84] Dr. Savchuk's diagnosis of N.K.'s right arm/elbow problem as chronic tendonitis, also referred to as lateral epicondylitis (tennis elbow), is not challenged. He explained that her condition is an inflammatory process of her tendon which is aggravated by certain repetitive movements of the right wrist and hand. N.K. testified that over time her left arm became uncomfortable as well. In Dr. Savchuk's opinion, the emergence of N.K.'s left arm discomfort is due to her overuse of that arm as a direct result of trying to rest her afflicted right arm/elbow.
- [85] In Dr. Savchuk's view, although N.K. is probably able to play the piano for short bursts of time, her physical condition prevents her from teaching piano professionally and generally interferes with activities of daily living. According to him, it is difficult to overcome an injury of this kind; ceasing the aggravating physical movements is crucial to a full recovery.
- [86] Dr. Savchuk considers it likely that N.K. will continue to experience soft tissue pain in her right arm in the future. He says that it can be expected to worsen when she carries out repetitive movements that engage the use of her arm in a particular way such as when lifting, typing and prolonged playing of the piano. At the same time, however, Dr. Savchuk agreed that he was not able to provide a firm prognosis of N.K.'s tendonitis even two years from now. He also agreed that the fact that N.K. used Advil to relieve her pain, and then only occasionally, rather than a prescription pain medication was a factor that indicated she experiences the milder side of pain and restriction of her right arm.
- [87] On November 15, 2010, N.K. was a passenger in a vehicle that collided with another car in an intersection. She complained to Dr. Savchuk of tenderness, pain and muscle spasms over the course of several visits into July 2011. Beyond that, there was no evidence about the aftermath of the accident including whether it aggravated her tendonitis or has in any way affected her ability to work.

- [88] Turning to N.K.'s psychological well-being, Dr. Savchuk noted that she has been diligent in taking her medications and that since taking them, her mood disorder has stabilized and she has regained function. Dr. Savchuk explained that despite N.K.'s progress, she still suffers from residual symptoms of major depression and anxiety that began when she and A.K. separated. Those symptoms include impaired memory, poor concentration, low energy and occasional anxiety attacks.
- [89] Both Ms. Drigola and Ms. Chitnev agreed that N.K.'s present emotional and psychological state is substantially better than it was in 2009, and that she is functional once again. Ms. Chitnev observed a notable improvement over the last six months in particular. She cautioned, however, that while N.K. appears to believe she is "okay", she behaves in ways that others consider to be unnatural and are uncharacteristic of her former self. Ms. Drigola testified that, despite N.K.'s improvement, she continues to complain of nightmares and worries about her right arm deficit. Both friends confirm that the subject matter of this law suit is a source of tremendous stress to N.K. N.K. herself agrees that is the case.
- [90] Dr. Savchuk opined that as at the time of trial, N.K.'s residual psychological symptoms precluded her from engaging in new employment opportunities. However, he candidly admitted that he was not able to predict the prognosis of her mood disorder or its effect on her employment over the long term. He also acknowledged that he is simply not qualified to offer a firm assessment of N.K.'s vocational prognosis.
- [91] It is clear that Dr. Savchuk's opinion concerning the link between N.K.'s psychological and physical symptoms and her employment capacity was being offered in broad terms in his role as N.K.'s general practitioner and without the benefit of specialized vocational training or of a functional or vocational assessment. Those are shortcomings that significantly detract from the weight to be accorded to that element of Dr. Savchuk's opinion.
- [92] The essence of Dr. Savchuk's opinion concerning the interplay between N.K.'s psychological symptoms and her employment future was that he simply could not predict it with confidence, one way or the other. By no means did he opine that N.K. is permanently disabled from work as a result of her ongoing psychiatric difficulties. Indeed, it is Dr. Savchuk's belief that, with the passage of time and by receiving psychotherapy, N.K.'s psychological health should continue to improve in the long term. With that objective in mind, he has repeatedly advised her to undergo psychotherapy. Pursuing that avenue does not seem likely. Since her depression and anxiety took hold, N.K. has seen at least three different psychiatrists and a psychologist, and has attended outpatient counselling. She claims that those sessions were "very bad" and "awful" experiences. N.K. declared that she does not "believe in psychiatry" and is adamant that she will not submit to further psychiatric treatment.

- [93] There can be no doubt that N.K.'s tendonitis caused her to resign from the Academy and that since 2006, it has precluded her from playing music at concert level proficiency and from undertaking similar positions as a professional piano accompanist and piano teacher of students studying at a competitive level.
- [94] However, the evidence fell way short of demonstrating that her condition has permanently disabled her from such employment into the future, or that it prevents her from being gainfully employed in all types of remunerative work. Certainly Dr. Savchuk's opinion did not go that far. Nor does the evidence establish that N.K. is disabled from all types of work due to her residual psychological symptoms.
- [95] In August 2010, N.K. applied for a CPP disability pension. I accept her evidence that she did so at the urging of A.K.'s counsel. Her application was denied on the basis that her physical and psychological condition as reported to that government agency did not meet the criteria of "severe and prolonged" within the meaning of the applicable legislation. N.K. did not appeal the ruling, and has not reapplied for benefits. The denial of disability benefits by CPP is not determinative of whether N.K. is able to work now or in the future for the purposes of this proceeding.
- [96] N.K. pinpoints A.K.'s affair and the entailing breakdown of the marriage as the sole trigger of her anxiety and depression. A.K., on the other hand, contends that N.K.'s depressed mood is the unfortunate result of a "perfect storm" of stressors, such as the breakdown of the parties' marriage, the terminal illness and death of her mother, their daughter's on-going battle with bipolar illness and the emergence of their son's depression and his dropping out of university. Dr. Savchuk confirmed that where the onset of depression is in reaction to a dominant situational stressor, the likelihood of a patient successfully addressing his or her compromised mental health is greater when that stressor has been eliminated or diminished. It is a rather common sense correlation.
- [97] I find that N.K.'s emotional and psychological symptoms manifested as a direct result of what was to her, A.K.'s unwelcome decision to end the marriage in order to pursue his relationship with Y.B. Her symptoms were most disabling during a crisis-like period which spanned from late December 2008, when it was clear that her marriage was over, until about the end of 2009, shortly after she met D.D. I find that once her compromised psychological state came about, other life stressors, connected to the members of her family as recited above, likely exacerbated her symptoms from time to time. N.K.'s psychological well-being continued to gradually improve throughout 2010. At the time of the triggering event, she was still experiencing residual symptoms and occasionally endured a spike in their intensity. However, she was no longer in the debilitating depths of her depression and had not been so for a considerable period of time. By then, pleasure and joy had returned to N.K.'s life. She was able to fall in love and maintain a new romantic relationship, and was well on her way to regaining her everyday functioning.

- [98] In sum, although N.K. suffered an emotional trauma that produced adverse lingering psychological effects and has tendonitis in her right arm/elbow, the preponderance of the evidence does not sustain a finding that she has little hope of finding suitable and reasonably remunerative employment. N.K. is an educated and intelligent woman with a long track record of commitment to work at an array of jobs. That said, balanced against those positive attributes is the reality that she has been out of the workforce for approximately 5 years, and is 55 years old. Additionally, even at the height of her career as an accompanist, her earnings were relatively modest when compared to A.K.'s salary. The most that she earned was \$25.00 per hour, which translated into \$25,311 in earnings in 2005, being the last full year that she worked full-time for the Academy. It is likely that those earnings represent the higher end of the range of annual earnings that N.K. could reasonably expect to achieve during the remainder of her working life. That amount stands in stark contrast to A.K.'s superior income and overall earning capacity.
- [99] A.K., also age 55, does not have any serious health problems or restrictions in his capacity to work. He plans to remain with Accurpress into the foreseeable future. Although he testified that a promotion or salary increase in the near future would come as a surprise, there is no question that his position with Accurpress appears to be secure and there is certainly no hint that his current salary might be reduced.
- [100] A. K. has remarried a younger woman who works at two jobs: as a waitress and as an aesthetician. He stands to benefit from the earning potential of his new spouse, possibly for years after his own retirement. The cost of living is lower in South Dakota where A.K. is considered to be a high wage earner, than it is in the Lower Mainland.
- [101] A.K. argues that it is preferable to address N.K.'s evolving psychological and physical health status and its impact on her capacity to work by way of a reviewable spousal support order rather than at the reapportionment stage. In my view, it ought to be considered in relation to both.
- [102] This was a lengthy marriage. Together, the parties acquired their assets through hard work and thrift. There was no significant imbalance of contribution to the marriage prior to separation. A.K. argues that N.K.'s post-separation enjoyment of the Matrimonial Property free of rent should be treated as a factor against reapportionment in her favour. I conclude that in this case it is more appropriate to take that benefit into account when addressing N.K.'s claim for retroactive spousal support.
- [103] In weighing the applicable factors in the context of the parties' circumstances at the triggering event, I find that N.K. has demonstrated that an equal division of the family assets would be unfair.
- [104] I order that the net sale proceeds of the Matrimonial Property be apportioned 65% to N.K. and 35% to A.K. N.K. is entitled to 100% of the Nissan automobile and the household chattels that have been in her possession since separation. A.K. is entitled to 100% of the three timeshares. The RRSPs are to be equalized in accordance with the spousal provisions

under the Income Tax Act. The funds on deposit in the New Account, the Joint Account (I recognize that the evidence points to a zero balance), and the US Account are to be shared equally. The parties' CPP credits are to be divided equally in accordance with the governing legislation.

[105] N.K. is to retain the two bank accounts that she opened post-separation (Royal Bank and TD Canada Trust) and A.K. is to retain his interest in the Wells Fargo Account that he holds jointly with Y.B.

[106] In the circumstances of this case, it would be inequitable to burden A.K. exclusively with the indebtedness on the Joint LOC at the time that it was closed or the \$2,434 balance owing on the New LOC at the time the consent order for spousal support was made. This is particularly so given that the \$13,000 draw made against the Joint LOC in December 2008, which is encompassed in the final balance owing, is clearly a family debt incurred with the approval of both parties. In fairness, A.K. should bear 55% of such indebtedness, subject to the \$5,007 adjustment being made against him, and N.K. should be responsible for 45%. The parties are to share equal responsibility for the amount owing on the car loan.

[107] N.K.'s debts for legal fees, dental work and her personal grooming, which total approximately \$14,750, are not family debts and are to be borne by her alone.

2. Spousal Support

· Overview and Entitlement

[108] N.K. seeks an order for indefinite spousal support on the basis that due to her health, she has no prospect of supporting herself. A.K. does not challenge N.K.'s threshold entitlement to receive support; however, he did not clarify upon which of the conceptual bases he concedes her entitlement. The main area of dispute relates to the quantum and duration of support and whether it ought to be subject to judicial review.

[109] Section 15.2 of the Divorce Act, R.S.C. 1985, c. 3, provides the legislative framework for spousal support. Section 15.2(4) directs the Court to take into consideration the condition, means, needs and other circumstances of each spouse, including:

- (a) the length of time they cohabitated;
- (b) the functions performed by each during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[110] Section 15.2(6) stipulates that the objectives of a spousal support order are to:

- (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.

[111] All of the objectives are to be taken into account.

[112] An order for reapportionment may fully address the factors and objectives of spousal support and thereby obviate the need for a support order: e.g. *Tedham*; *Chutter*. However, that will not necessarily be the case, and is not so here.

[113] Section 15.2(5) forbids the court from taking into account any marital misconduct on the part of the other spouse when making an order for support. However, the emotional consequences that flow from the misconduct, as distinct from the misconduct itself, may be "highly relevant" to the factors that are to be considered in determining the entitlement, duration and amount of support, especially the spouse's ability to earn income and achieve economic self-sufficiency: *Leskun v. Leskun*, 2006 SCC 25 at para. 21 [*Leskun*].

[114] The Supreme Court of Canada has articulated three conceptual models for determining entitlement to spousal support: non-compensatory (needs based); compensatory; and contractual: *Moge v. Moge*, [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 [*Moge*]; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577 [*Bracklow*].

[115] The three conceptual bases for support are not mutually exclusive and there is no single basis of support or single statutory objective that overtakes another. The basis of entitlement for spousal support, being contractual, compensatory or needs based, or a combination, will influence the quantum and duration of the award.

[116] The fundamental underpinning for an order of spousal support is the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown: *Chutter* at para. 49.

[117] It is settled that financial need alone of one spouse may be enough to establish entitlement to support: *Chutter*. It does not inevitably follow, however, that the quantum or duration of spousal support must fully address those needs: *Bracklow*; *T.N.P. v. R.P.*, 2004 BCSC 1627. In evaluating need, if the financial means are available, then the appropriate standard of living to look at is a reasonable standard, bearing in mind the standard of living enjoyed during the marriage. The notion of "need" extends beyond the basic necessities of life, and will vary according to the circumstances of the parties: *Chutter*, at para. 55

[118] In *Moge*, at para. 84, the Court spoke to the importance of the marital standard of living in lengthy marriages:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement [citations omitted]. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution [citations omitted].

[119] In my view, N.K.'s budget for her personal expenses and vacation, which combines to \$12,720 annually, is excessive in the circumstances. Otherwise, I find that her claimed expenses are not unreasonable. Moreover, as observed in *Cassidy v. McNeil*, 2010 ONCA 218 at para. 68, spousal support is based the concept of income sharing rather than a line budget.

[120] Although the family assets apportioned to N.K. can only assist her overall financial circumstances, the division of assets will not be sufficient for her to attain self-sufficiency. Additionally, it is unlikely that N.K. will be able to support herself in a way that is commensurate with her former lifestyle. Despite the reapportionment in her favour, N.K. is in need and is entitled to spousal support on that basis. She has not foregone a career opportunity or suffered any economic loss or hardship as a result of the marriage or her role taken in the marriage. I conclude that she is not entitled to spousal support based on the compensatory principle.

· Imputation of income to N.K.

[121] A.K. argues that income should be imputed to N.K. for the purposes of calculating spousal support.

[122] There is no statutory framework setting out the calculation of income for the purpose of spousal support. As Dardi J. explained in *L.F. v. B.F.*, 2012 BCSC 1073 [L.F.], at para. 153:

A determination of the parties' "means" is typically the basis for setting an income. If the court concludes that one or both of the parties' stated income does not represent their "means" or ability to earn income, the court can impute or attribute income at a level that reflects their means: *Holland v. Novotony*, 2009 BCSC 1754 at para. 150.

[123] A.K. submits that his former spouse is well enough to work as a piano teacher, at least 15 hours per week. Using an hourly rate of \$25 multiplied over 50 weeks per year, A.K. asserts that N.K. ought to be imputed a minimum annual income of \$18,750 (3 hours @ \$25 per hour x 5 days x 50 weeks), on a go-forward basis. He further contends that N.K.'s failure to appeal the CPP denial of disability benefits and her refusal to reapply ought to be punished by way of imputing an additional \$10,912 of income to her, meant to approximate the

disability benefits that she "ought" to have received. This component of A.K.'s argument is conceptually flawed and I reject it out of hand.

- [124] After leaving the Academy, N.K. did not work again until October 2008. At that time and, at Ms. Chitnev's urging, she agreed to give Ms. Chitnev's adult daughter basic piano lessons twice per week for a special rate of \$15 per hour. The daughter is now pregnant and attends only once per week. Two other piano students referred to N.K. by Ms. Chitnev came and went in 2009. Also that year, another of N.K.'s friends arranged for her to work in a retail dress shop. N.K. found it difficult to iron the merchandise and carry the dresses around the store. She resigned after two weeks.
- [125] Before N.K. was hospitalized in 2009, she posted advertisements at community centres and sent out a flurry of resumes to music schools. There was no evidence about the number of resumes, what positions she was applying for and whether she followed up on any of them. I accept her evidence that she was not thinking clearly about much of anything that year, including her job prospects and how to go about finding employment.
- [126] At some stage in 2009, N.K. twice tested her ability to resume her position as an accompanist at the Academy. She says she was not able to play for more than 15 or 20 minutes on either occasion. I believe her.
- [127] N.K. claims to not believe in using the newspaper or Craig's List as a means of finding music students. In the summer of 2009, one or more of her friends placed an advertisement of piano lessons on Craig's List, on her behalf. N.K. received two responses but did not reply to either of them. She explained that her inaction was due, in part, because she was still suffering from depression and panic attacks which impaired her ability to cope with everyday living and made her teaching availability unreliable. I accept that as a valid explanation as it pertains to that timeframe.
- [128] In terms of N.K.'s current capacity to teach piano, she testified that because she is not able to demonstrate the difficult pieces, she cannot teach students who wish to play at a concert or competitive level. For the same reason, she claims that she is not able to work at a music school. As far as N.K. is concerned she can only give private lessons to adults who wish to play casually, for fun and would charge those pupils \$25 per hour. She was firm, however, that she would not be physically able to teach piano 20 hours per week, which she says is considered the equivalent of full-time work for a music instructor. She also testified that she is not currently looking for music students because she has been kept busy by this lawsuit and the trial, adding that she does not know "when I will be free". When asked at trial where she envisions herself in six months' time, N.K. answered that while she was unsure of her future, she hoped to recover after this trial. In a similar vein, she is hopeful that she will be able to take on additional students after the trial. I take from that that N.K. regards herself as able to instruct a greater number of students than the one or two she currently has.

- [129] Since separation, N.K. has earned extremely low wages from teaching piano. Despite the paltry income that it generates, N.K. does not see herself working in any job other than teaching piano, asking: "Why should I do any job, if I have my profession and I love it?" She is plainly not receptive to the idea of pursuing any other employment options and has no willingness to turn her mind to retraining prospects or vocational counselling.
- [130] The circumstances surrounding the marriage breakdown were emotionally devastating to N.K. and precipitated an unwanted cascade of psychological symptoms that were debilitating for a time. The psychological sequelae she suffered adversely impacted her ability to become self-sufficient. Her symptoms have gradually improved and, although they have lingered, they were significantly improved at the time of trial.
- [131] I do not accept N.K.'s assertion that she has no realistic prospect of obtaining any form of gainful employment for the rest of her life. The stubborn fact is that she has not taken reasonable steps to actively look for appropriate employment or to pursue further vocational training. N.K. must concentrate more wholeheartedly and with genuine effort on securing remunerative employment commensurate with her skills, experience and education, and with the overall objective of becoming more economically self-sufficient to the extent practicable in her overall circumstances.
- [132] In my view, N.K.'s less than diligent and less than reasonable efforts in the months leading up to trial justify the Court imputing an annual income to her starting in 2012 in the amount of \$8,000. I attribute to her an employment income of \$10,000 for 2013 and \$12,000 for 2014.

· Quantum of support

- [133] As N.K. has established entitlement to spousal support, reference to the Spousal Support Advisory Guidelines is appropriate. Both counsel have provided a number of DivorceMate calculations, each using assumptions that favour their respective clients. I have performed a calculation using the "without child support" formula for a payor earning \$82,391 and a recipient with the employment income that I have imputed to N.K. Based on those calculations, N.K. would be entitled to indefinite support ranging between \$2,325 and \$2,968 for 2012; \$2,262 and \$2,891 for 2013; and \$2,200 and \$2,814 for 2014. I conclude that she is entitled to the mid-point of the range in each of those years. Accordingly, I order that, commencing January 1, 2012, N.K. is awarded monthly support of \$2,712. She is to receive spousal support in the amount of \$2,639 per month for 2013 and the sum of \$2,566 per month in 2014.

· Review of support

[134] I am mindful of the observations made by the Court in *Leskun* concerning the limited usefulness of reviewable spousal support orders. In my view, the changing circumstances of N.K.'s health, principally her evolving psychological well-being, and its consequent effect on her earning, is a genuine and material future uncertainty, and supports the making of a reviewable order. I order a review of the quantum and duration of spousal support on either party's motion after November, 2014. I am seized of that review.

[135] The parties are to exchange their income tax returns by May 31 each year and provide copies of assessments and any reassessments within 21 days of receipt.

· Retroactive support

[136] N.K. seeks an order for retroactive spousal support on the basis that she earned no income and ought to have been paid the sum of \$3,074 per month throughout 2009, and \$3,004 for 2010 forward. On this footing, she calculates a significant shortfall in spousal support, broken down as follows: \$12,888 in 2009; \$23,748 in 2010; and \$6,552 for 2011 and January 2012.

[137] In determining whether retroactive support ought to be ordered, the court is to consider whether the spouse seeking such support has already enjoyed the financial advantages that he or she would have received from that support, the conduct of the payor, the reason the recipient spouse has delayed seeking support, and any hardship on the payor spouse that may be occasioned by granting the award: *Kerr v. Baranow*, 2011 SCC 10.

[138] A.K. contends that a retroactive order is not justified in this case. In support of his position, he points to the fact that he shouldered all of the costs of the Matrimonial Property, including the mortgage and utilities, from the date of separation until September 2010. Although there is legitimacy to A.K.'s assertion, it must not be overlooked that some of those payments were covered by a portion of the RRSP proceeds that belonged to both parties and in part by drawing against their Joint LOC and the New LOC, in respect of which N.K. is assuming 45% responsibility. Consequently, it is not accurate to say that A.K. alone covered those expenses.

[139] N.K. had exclusive use of the Matrimonial Property for nearly 21 months after separation. Although A.K. has not advanced a claim for occupational rent during that period, as a matter of fairness, N.K.'s rent free use is a relevant consideration in assessing her entitlement to retroactive support: *L.F.* at para. 193.

[140] Another important factor is that N.K.'s financial needs were extremely modest throughout 2009, such that by September that year she amassed significant savings of approximately \$12,000. I note too that during the entire period in question, she did not accrue any significant personal debt except for approximately \$7,000 in dental work and undisclosed amounts in legal fees. Additionally, the payments of putative spousal support made to N.K. prior to the consent court order (or at least the majority of them which were paid in 2009) were received by her on a tax-free basis. That benefit is real and must also be taken into

account.

[141] There is no conduct on the part of A.K. that would militate in favour of a retroactive award. On the other hand, a modest award would not pose a financial hardship to A.K. or otherwise impair his ability to pay the support I have ordered on a prospective basis. In all the circumstances, an award of \$5,000 of retroactive spousal support is appropriate, and I make that order.

· Other matters

[142] At trial, A.K. testified that he would not be prepared to restore N.K. as an irrevocable beneficiary of his life insurance policy. In light of A.K.'s unwillingness, N.K. seeks an order that A.K.'s support obligations be binding upon his estate for the duration of N.K.'s life, in the event that he predeceases her. I am not persuaded that such an extraordinary order is properly made in the case at hand, particularly given my order that spousal support is subject to judicial review, and decline to grant it at this time. However, N.K. has liberty to reapply at the time of review.

[143] If the parties are unable to agree on costs, they may file written submissions implementing a timetable of their choosing that incorporates a final deadline of January 30, 2013.

____ "Ballance J." ____

Ballance J.

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