

CANADA / JUDGMENT

Allan v. Allan

2024 BCSC 226

COURT

Supreme Court of British Columbia

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2024 BCSC 226 Allan v. Allan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Allan v. Allan,

2024 BCSC 226

Date: 20240212

Docket: E221006

Registry: Vancouver

Between:

Colleen Allan

Claimant

And

Ronald Allan

Respondent

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

Counsel for Claimant:

J. Cudmore

E. Davies, Articled Student

The Respondent, appearing in person:

Ronald Allan

Place and Date of Trial:

Vancouver, B.C.

September 11-15, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 12, 2024

Table of Contents

Introduction.. 3

Facts.. 3

Issues.. 6

Are the parties entitled to a divorce?. 6

What are family assets and family debts, and how are they to be divided?. 7

Condominium.. 7

Post separation payments on the family home. 8

Property in Arizona. 10

Ms. Allan's USD account with Vancity. 10

Bank accounts opened post separation.. 10

Pensions and other property owned by each of the parties. 10

Retirement accounts. 10

Honda CR-V.. 11

Silver and gold. 11

Cash on hand. 14

Summary of disputed family assets. 15

Are any spousal support obligations owed by either party to the other?. 16

Costs. 20

Introduction

[1] In this case the parties were in a long-term relationship, lasting 24 years. At the time of trial, the claimant Ms. Allan was 64 years old, and the respondent Mr. Allan was 65 years old. Ms. Allan seeks a division of family assets and spousal support. Mr. Allan also seeks a division of family assets, and spousal support. While Mr. Allan initially advanced a claim for child support for their two adult daughters, he abandoned this claim at trial. Ms. Allan seeks a divorce. Mr. Allan does not oppose the divorce per se, but states that the requirement to attempt reconciliation has not been met. However, he conceded at trial that the order for divorce should be made.

Facts

- [2] The parties were the sole witnesses at trial.
- [3] The parties met in 1996, both having been previously married. At the time they met, Ms. Allan was working as a child care aide at Creek View Day Care, and part-time at the BC Cancer Agency. Her hourly income was \$15.50 as a child care aide, and \$17 at the Cancer Agency. Mr. Allan was in school completing his computer science degree. Mr. Allan had custody of his two young daughters from his previous marriage.
- [4] The parties started living together in 1997 and were married in 1998.
- [5] In 1999 Mr. Allan was offered a job at IBM in Austin, Texas. They moved to Texas, where Mr. Allan earned \$61,000/year initially, and Ms. Allan became a full-time homemaker. On August 12, 1999, their child Michael was born.
- [6] In 2002, Mr. Allan's income increased to \$USD120,000/year, where it remained until 2010.
- [7] In 2002, Mr. Allan injured his back and began using opioids for the pain. In 2005, he was prescribed Suboxam as treatment for his resulting opioid misuse. He continues to use Suboxam to date.
- [8] In 2005, Ms. Allan began working part-time as a teacher at a preschool, making US\$15.50/hour.
- [9] In 2010, Mr. Allan stopped working for IBM, took four months off work, and then began working as a private computer programming consultant for a number of companies.
- [10] In 2013 the family returned to BC, and purchased a leasehold condominium in False Creek located at Mariner Walk, where they lived together until separation.
- [11] In BC, Mr. Allan worked for various companies, and earned approximately \$90,000 to \$100,000/year until approximately 2020.

- [12] In 2013, Ms. Allan completed an Orton Gillingham teaching course. She started tutoring at Little House Tutoring, earning \$20/hour, for approximately four hours a week. She worked with Little House Tutoring for approximately 1.5 years. In 2013, Ms. Allan also started tutoring privately, earning \$50/hour.
- [13] In 2020 and during Covid, Ms. Allan continued to work as a tutor and collected some CERB payments. Mr. Allan did not work, but collected CERB and received his US social security payment of \$1,328/month. Mr. Allan continues to receive \$1,328/month from this pension, and expects he will receive between \$500-\$600 in Canadian old age pension in the future.
- [14] In April 2021, Mr. Allan started working at ReelApps, with a salary of \$80,000/year. However, Mr. Allan had to reduce his hours due to physical disability, and ultimately had to retire from the position.
- [15] In May 2021, Ms. Allan began receiving her US social security payment, in the amount of \$606/month. Ms. Allan testified that she stopped receiving social security in May 2023 because she worked more than 45 hours in a month. When Ms. Allan is 66 years and 10 months old, she will be entitled to receive her Canadian and US pensions.
- [16] In November 2021 the parties separated. In December 2021, Mr. Allan moved to Arizona, into a small trailer he had purchased there in November 2021 for \$40,000. This purchase was funded in part with \$20,000 Mr. Allan removed from the parties' joint account. The remainder of the purchase price was obtained from various accounts owned by Mr. Allan. He was unable to specify exactly where the funds came from, but agreed he likely used his QTrade RRSP and eBay 401k accounts.
- [17] Ms. Allan disagreed with the purchase of the trailer which she felt was for his use only, and withdrew CAD\$20,000 from their joint account to provide her with funds equal to the amount withdrawn by Mr. Allan.
- [18] After separation, Ms. Allan continued to live in the home with their son Michael until 2023. The condominium was a leasehold from the City of Vancouver. In 2022 the lease was renegotiated and leaseholders were given the option of extending the lease for a further 20 years, for an upfront cost of approximately \$100,000. Ms. Allan felt she could not afford to pay the increased lease cost along with the existing mortgage. As a result, the house was placed on the market and sold, with a closing date of May 25, 2023. The net sale proceeds were placed in trust with counsel for Ms. Allan pending resolution at trial.
- [19] Ms. Allan began working part time at Safeway in 2022, where she worked 24 hours each week. She also worked at BC Place on weekends, continued tutoring, and worked at the BC School Board during the mornings of the work week. At one point she also worked at a bakery.

- [20] Ms. Allan reported income in 2021 in the amount of \$34,910, and in 2022 in the amount of \$37,085. At the time of trial, she anticipated her income in 2023 to be \$35,281. Ms. Allan agreed that she received cash for her tutoring during the marriage, which income was not reported. Mr. Allan alleges that her current reported income under-records her tutoring income, which is denied by Ms. Allan. I am satisfied that Ms. Allan has accurately reported her income since 2021.
- [21] Before addressing the outstanding issues, I will comment on the credibility of the parties. I found both witnesses to be credible witnesses at trial. Many of the issues with respect to Mr. Allan's credibility raised by Ms. Allan relate to his communications and positions taken immediately after separation, and during the course of this litigation. Mr. Allan was not represented by counsel, and clearly was caught off guard by Ms. Allan's decision to end the marriage. He was hurt and frustrated, and trying to manage the litigation on his own, from Arizona, where he was living in a small trailer without ideal communication facilities. I agree that many of his positions in advance of trial were not helpful, and some positions were based on facts he clearly knew to be untrue. At trial, he was clearly struggling with health issues and somewhat overwhelmed by the process. Notwithstanding his positions in advance of trial, I am satisfied that at trial he was a truthful witness, to the best of his abilities. He readily admitted the errors he advanced in some of his positions prior to trial. I make no adverse credibility findings against Mr. Allan.

Issues

[22] This litigation raises the following issues:

- a) Are the parties entitled to a divorce?
- b) What are family assets and family debts, and how are they to be divided?
- c) Are any spousal support obligation owed by either party to the other?

Are the parties entitled to a divorce?

[23] The requirements for an order for divorce have been met in this case. I order that, subject to s. 12 of the Divorce Act, the claimant and the respondent, who were married on April 11, 1998, are divorced from each other. The divorce is to take effect on the 31st day after the date of these Reasons for Judgment.

What are family assets and family debts, and how are they to be divided?

[24] The assets in dispute are the sale proceeds from the condominium, a car, a precious metals collection, the couple's RRSPs and 401ks, and cash held by the parties at the time of separation. In relation to many of the other family assets, the parties were able to reach agreement.

[25] There is no dispute on the basic underlying law, as summarized in *Zilic v. Zilic*, 2021 BCCA 107. The relevant principles for the case at bar include:

- a) the parties are entitled to an equal division of family property and are equally responsible for family debts,
- b) the presumptive date for determining the values of property and debt is the date of trial,
- c) an unequal division of property or debt may be ordered if it would be significantly unfair to one of the parties to order an equal division, and
- d) the court has wide powers to effect a division of property, including making determinations of ownership, and requiring the payment of compensation.

Condominium

[26] There is no dispute that the condominium is a family asset to be divided equally, subject to certain adjustments.

[27] Mr. Allan takes issue with the sale of the home. He argues that in 2021 Ms. Allan refused to sell the condominium at a time when he was asking her to reduce costs to allow him to retire. After their separation, which he characterizes as being excluded from the family home by Ms. Allan, he says Ms. Allan made the decision, without his agreement, to sell the home and put the sale proceeds in trust. Mr. Allan argues that while he supported the home being sold, he needed the sale proceeds to live on and did not agree with the proceeds being placed in trust. He asked for \$100,000 up front as a condition of obtaining his signature on the sale documents.

[28] Due to disputes between the parties regarding the sale of the condominium, Ms. Allan was required to obtain a court order setting out the terms of the sale. There is a dispute about whether Mr. Allan was advised of the hearing. He says he was not given an access link to the hearing, as he was living in Arizona at the time. It is clear that he did not attend the hearing and the order was made without his participation.

[29] On January 9, 2023 an order was made allowing for the sale of the condominium, and requiring Mr. Allan's cooperation in executing all required documents. The condominium was sold and, on June 2, 2023, the proceeds of sale in the amount of \$439,438.39 were placed in the trust account of counsel for Ms. Allan. Any issues regarding the process for the sale of the condominium are now moot.

[30] Subject to any adjustments, which I will discuss below, each party is entitled to 50% of the proceeds of sale of the condominium. I note that Mr. Allan disputes the failure of counsel to place the funds in an interest-bearing account. However, there is no evidence before me that counsel received joint instructions to place the funds in an interest-bearing account. As such, I make no adverse finding with respect to the decision of counsel to place the funds in a non-interest-bearing account.

Post separation payments on the family home

- [31] Mr. Allan paid the mortgage and expenses related to the condominium during the marriage, and up until the end of 2021.
- [32] Beginning in January, 2022, Ms. Allan paid the mortgage and property taxes on the condominium, without any contributions from Mr. Allan. In addition, she paid house insurance from December 2021 to May 2023.
- [33] Ms. Allan also paid a number of costs in relation to the sale of the condominium, including the cost of some repairs and upgrades required by the buyers, and the cost of cleaners.
- [34] In *Ebrahimi v Mineyee*, 2019 BCSC 379 the court found it would be unfair to divide the family home equally, given that the respondent incurred all expenses with the home after separation. The court required a distribution from the claimant's 50% share of the family home, to the respondent, of an amount equal to 50% of the debts paid by the respondent after separation, including mortgage payments, insurance payments, property tax payments, and repairs to the home.
- [35] I agree that the costs incurred in relation to the mortgage, property taxes, condo insurance, and strata fees are all family debts to be shared equally post separation.
- [36] Mr. Allan paid the mortgage, property taxes and strata fees in December 2021. These expenses paid by Mr. Allan post separation total \$2,085.89 (\$1,584 for mortgage principal, interest and tax account payment, and \$501.89 for strata fees).
- [37] Ms. Allan paid the following after separation:
- a) Mortgage and property taxes in 2022 - \$13,950
 - b) Mortgage and property taxes in 2023 - \$3756.12
 - c) Condo insurance December 2021 to June 2023 - \$1,265.13
 - d) Strata fees - \$8,778.04
- [38] In addition, Ms. Allan paid for repairs to the house and cleaning services in preparation for the sale of the condominium. These costs total \$1,000.39 and are family debts that are to be shared equally.
- [39] I am not satisfied that the refrigerator purchased by Ms. Allan post separation is properly a family debt and it will not be shared.
- [40] I find that Ms. Allan has incurred \$28,749.68 in family debts, and is entitled to repayment from Mr. Allan in the amount of \$14,374.84.
- [41] I find that Mr. Allan incurred \$2,085.89 in family debt, and is entitled to repayment from Ms. Allan in the amount of \$1,042.95.

[42] In summary, Mr. Allan must repay Ms. Allan the net amount of \$13,331.89 in relation to family debt, such amount to be deducted from his share of the proceeds of sale of the condominium.

Property in Arizona

[43] The parties agree that the property purchased by Mr. Allan will remain the property of Mr. Allan

Ms. Allan's USD account with Vancity

[44] The parties agree that Ms. Allan will retain her USD account at Vancity with no claim on the account by Mr. Allan.

Bank accounts opened post separation

[45] The parties agree that the bank accounts each of them opened by or after late 2021 will remain the sole property of the party owning the accounts. These include accounts each of them opened at Vancity, and any accounts opened by Mr. Allan in Arizona.

Pensions and other property owned by each of the parties

[46] The parties agree that each will retain their own pensions and any other property not specifically addressed in this decision, free of claims from the other party.

Retirement accounts

[47] While the normal presumption is that retirement accounts will be divided at trial, I am satisfied that would result in an unfairness in this case. At trial, Mr. Allan testified that he has liquidated most, if not all, of his retirement accounts to pay for his living expenses. Therefore, a division at trial would result in unfair advantage to Mr. Allan, and an unfair disadvantage to Ms. Allan. I am satisfied that the retirement accounts ought to be valued and split as of the date of separation.

[48] At the time of separation, Ms. Allan had a 401k account worth \$14,852.18, and an RRSP in the amount of \$45,376.44. Mr. Allan had a 401k account worth \$49,070.28, and an RRSP account worth \$56,491.24. The combined value of these accounts was \$165,790.14. Each party is entitled to 50% of the value of these accounts, or \$82,895.07.

[49] Ms. Allan is entitled to \$22,666.45, which represents her share of the family's retirement accounts, net of the accounts she held in her own name at the time of separation. Because Mr. Allan no longer has sufficient funds in his retirement accounts to roll-over Ms. Allan's entitlement, Ms. Allan will receive \$22,666.45 from her share of the proceeds of sale held in trust by her lawyer.

Honda CR-V

[50] Mr. Allan agrees to pay Ms. Allan \$5,000 from his notional share of the Honda CR-V, which is a family asset.

Silver and gold

[51] Ms. Allan seeks compensation for the collection of gold and silver Mr. Allan took to Arizona, which she values at CAD\$200,000.

[52] During the marriage, Mr. Allan was engaged in numismatics, buying and selling gold and silver coins, and also collected thin gold and silver bars. He kept some of the precious metals in the family home, and some in a safety deposit box. Both Mr. Allan and Ms. Allan had access to the safety deposit box

[53] On November 8, 2021 Ms. Allan went to the safety deposit box to satisfy herself the collection was still intact. She thought some thin gold bars were missing, but otherwise the collection was still there. She went back in December 2021, and the collection looked the same. Ms. Allan took photos of the coins which she found in the safety deposit box. When she went back to the safety deposit box in January 2022, all of the precious metals were gone, with the exception of coins belonging their son Michael. Later, Mr. Allan returned to Ms. Allan one coin that he had given to her when they were living in Texas

[54] At trial, Mr. Allan did not dispute that he took precious metals out of the safety deposit box in December 2021. He testified that he took bags of precious metals that he knew to be his, and he left coins which belonged to the children. He did not inventory the collection at that time. When he got to Arizona, he assessed the precious metals and was of the view that some were missing. He testified he did not know where the missing coins were, although he suspected they were with Ms. Allan. Mr. Allan produced photographs of all of the coins and metals he took with him to Arizona. He also testified that he sold coins worth approximately US\$4,000 to fund his living expenses in Arizona, after separation.

[55] Under cross examination, Ms. Allan was shown a photo of silver coins taken by Mr. Allan, and she agreed it might represent the coins she says were in the safety deposit box. No effort at trial was made to reconcile the photographs of the coins taken by Ms. Allan with those presented by Mr. Allan.

[56] Both parties testified that they thought some metals were missing from the safety deposit box. The evidence before me is too vague to allow for a finding that something was in fact taken, or by who such metals might have been taken, or what value such metals might have attracted. As such, the value to be attributed to the gold and silver owned by the parties will be based on the values presented by Mr. Allan in testimony at trial. Mr. Allan clearly had a much better understanding of the value of the coins than did Ms. Allan, who simply relied on what she was told by Mr. Allan.

- [57] In the fall of 2021, before their separation, Mr. Allan prepared two documents valuing the family's assets. On the first document, he valued the gold and silver at approximately CAD\$200,000. On the second document, he valued the gold and silver at approximately CAD\$143,350. On August 17, 2023, Mr. Allan swore a financial statement, where he stated his half share of the coin collection was valued at CAD\$52,000.
- [58] Ms. Allan takes the position in this litigation that the family's gold and silver is to be valued at approximately CAD\$200,000, based on the first spreadsheet prepared by Mr. Allan. Mr. Allan does not agree that the two documents he prepared in the fall of 2021 are accurate valuations. He testified that they were estimates at the time he made them. With respect to the first spreadsheet, which stated a value for the collection at CAD\$200,000, Mr. Allan testified he inflated the values to impress Ms. Allan with the value of the collection. The second document represents what he described as the spot price for the precious metals. He explained that the spot prices were his estimate of starting prices that he might ask for the precious metals if he had to liquidate them. However, he also testified that the market is highly volatile, and it is difficult to know what price the precious metals would actually sell for. In addition, Mr. Allan explained that there are costs associated with liquidation of these precious metals, which further reduces their asset value in the hands of the parties.
- [59] Under cross examination, Ms. Allan recalled that Mr. Allan created lists of spot prices so she could liquidate the metals if she needed to, and that Mr. Allan gave her the list as an intended as a starting place for getting a price. Ms. Allan also agreed the market for coins fluctuated, and agreed that when Mr. Allan prepared the documents, he was trying to impress her and make her feel secure.
- [60] I do not accept that Mr. Allan's first estimate of CAD\$200,000 is an accurate valuation. It was not prepared in the course of litigation, under oath, or in circumstances where the accuracy of the values ought to be imputed to Mr. Allan as an admission. Similarly, the second estimate Mr. Allan prepared in the fall of 2021 is not reliable as a valuation, but I accept that both parties understood it to reflect Mr. Allan's anticipated starting price in a sale negotiation.
- [61] Taking into account the value Mr. Allan attributed in his 2023 financial statement for 50% of the collection, the estimate of a starting price in a negotiation found in the second spreadsheet prepared by Mr. Allan, the fact that some costs would have to be incurred to liquidate the metals, and the considerable uncertainty as to the values that would be achieved on a sale, I assess the total value of these assets to the parties in this litigation, as at the date of trial, at CAD\$100,000. To this I add \$4,000 in respect of the coins which Mr. Allan says he sold post separation.
- [62] Mr. Allan must account to Ms. Allan in the amount of \$52,000 for her share of the precious metals. This will be accomplished by way of a deduction from Mr. Allan's share of the proceeds of sale of the condominium.

Cash on hand

- [63] Ms. Allan seeks compensation for cash in the amount of CAD\$57,439 (US\$46,699), which she alleges is a family asset Mr. Allan has kept for himself. This amount is based on the first spreadsheet of assets prepared by Mr. Allan in the fall of 2021. Both parties were questioned about the spreadsheet. The amount US\$46,699 was made up of three different unidentified line items: US\$34,334, US\$2,700, US\$9,000, and US\$665.
- [64] Ms. Allan testified that US\$34,334 represented the value of their joint Vancity USD account at the time the spreadsheet was prepared. Ms. Allan testified that her ROTH was deposited into that account in two tranches - one on October 2021 of just over US\$30,000, and one in November of just over US\$7,000. She understood Mr. Allan to be referencing this account when he included a cash amount of US\$34,334 in the spreadsheet. At trial, Mr. Allan was less clear about the source of the funds he referred to in the spreadsheet, but at one point he did state he understood it was the Vancity account.
- [65] Neither Ms. Allan nor Mr. Allan could identify the source of the three other smaller amounts (US\$2,700, US\$9,000, and US\$665).
- [66] The statement from the Vancity US account was tendered at trial, and it corresponds with the evidence at trial from Ms. Allan. By December, the value of the account was close to US\$40,000.
- [67] Both parties agreed that, before trial, the contents of the Vancity US account were divided equally. Mr. Allan testified that he took \$20,000 out of the account to purchase the trailer in Arizona, and Ms. Allan testified that she withdrew \$20,000 to match the withdrawal by Mr. Allan. On the parties' evidence at trial, I find that the US\$34,334 referenced in the spreadsheet has been equally divided prior to the trial.
- [68] As such, I find that Ms. Allan's claim to any cash retained by Mr. Allan must be reduced to US\$12,365. Essentially, Ms. Allan asks me to construe the spreadsheet prepared by Mr. Allan in the fall of 2021 as a kind of admission, and to find, in the absence of any other evidence, that Mr. Allan had such funds in the fall of 2021, and disposed of them or retained them for his sole use. I am not prepared to make such a finding, nor to make an adverse inference against Mr. Allan to support such a finding. While there was some evidence at trial as to the source of the US\$34,334 number, there was no evidence as to the source of the remaining figures. The evidence before me is simply too vague to support a finding, on a balance of probabilities, that Mr. Allan retained for himself family assets in the amount of US\$12,365.

Summary of disputed family assets

- [69] The parties are each entitled to 50% of the proceeds of sale of the family home, held in trust by Ms. Allan's counsel, subject to the following adjustments.

[70] The following amounts will be deducted from Mr. Allan's share of the trust funds, and will be transferred to Ms. Allan:

- a) \$13,331.89, in relation to post-separation costs incurred by Ms. Allan,
- b) \$22,666.45, in relation to retirement funds held by the parties at the time of separation,
- c) \$5,000, in relation to the Honda CRV, and
- d) \$52,000, in relation to the precious metals held by Mr. Allan.

Are any spousal support obligations owed by either party to the other?

[71] Spousal support is addressed in Division 4 of Part 7 of the Family Law Act, SBC 2011, c. 25 (FLA). Entitlement to spousal support is determined pursuant to s. 161, and the amount and duration of spousal support is determined pursuant to s. 162.

[72] Ms. Allan submits that she is entitled to compensatory support, although she also submitted that the court must look at both compensatory and non-compensatory factors in determining entitlement to spousal support. Mr. Allan also seeks spousal support, although he did not identify the basis for his claim (other than the fact he can no longer work).

[73] Section 161 of the FLA provides:

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[74] Section 161 mirrors s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). The case law developed in relation to the Divorce Act is clear that while the first two subsections address compensatory support, and the latter two address non-compensatory support, the court must consider all objectives: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 850-853, *Chutter v. Chutter*, 2008 BCCA 507 at para. 49.

[75] In this case, the parties had a long relationship, lasting 30 years. They maintained conventional gender roles, with Ms. Allan taking on the majority of the interior household responsibilities, and Mr. Allan taking on the primary bread winner role.

- [76] When they lived in Texas, Ms. Allan was a stay at home mother during their initial years, and Mr. Allan worked long hours in the tech field. He worked up to 60 hours a week, and his job required him to travel around the world. Mr. Allan testified that he was on a path to becoming an executive, but due to difficulties with their children, Mr. Allan quit his job which had a large impact on his career trajectory. Nevertheless, he continued working in the technology field, continued his education, and earned a good living both in the US and when the family returned to Canada.
- [77] When their children were young, Ms. Allan assumed primary responsibility for their care as a stay at home mother. Mr. Allan remained very involved in the children's lives, nevertheless, and in particular remained the primary decision maker with respect to his two daughters from his previous wife. When the couple's son began school in Texas, Ms. Allan resumed work part time at a preschool.
- [78] When the family returned to BC, Ms. Allan requalified as an Orton Gillingham instructor, and began tutoring children in reading and math.
- [79] In this case, it is clear that the parties arranged their lives such that Mr. Allan provided the majority of the financial support, and Ms. Allan provided most of the support in the home. She did some part-time work during the marriage, but her financial contributions were far outweighed by those of Mr. Allan.
- [80] Since separation, Ms. Allan has continued to tutor privately. For a time she worked at Safeway, at a bakery, at BC Place on weekends, and at the BC school board office some mornings. Ms. Allan has no health complaints which limit her ability to work.
- [81] Mr. Allan testified that, by 2020, his health was deteriorating to the point that he could no longer work as he had previously. He says in 2019 he told Ms. Allan that he needed to work less and he asked Ms. Allan to begin working more, and contribute financially in a more meaningful way given his health problems. He says that she declined, and within a year she advised she wanted to separate.
- [82] Ms. Allan agreed that Mr. Allan told her in 2019 that he wanted to retire, and that he was working less. She agreed that by the end of the time he was working, he was only working two hours a day. Initially under cross examination, Ms. Allan did not agree that Mr. Allan asked her to work more because he wanted to retire, but she did agree that he was downsizing and did not want to continue working. Finally, Ms. Allan did agree that in 2021 Mr. Allan asked her to get a job.
- [83] Mr. Allan testified that he suffers from extremely painful osteoarthritis that limits his physical abilities. He says the pain in his feet is so severe at times that he cannot sleep. He says his pain is getting worse and worse, and he suffers from random sweats and nausea. He says the pain in his arms is so severe that he can no longer write. He cannot type or play music for more than 30 minutes. His eyesight is fading and even with the strongest glasses he cannot see well enough to work.

- [84] Ms. Allan agreed that Mr. Allan complained of severe arm pain. She agreed he had pain and burning in his knees, and pain in his feet. She recalled him complaining about pain and stiffness in his hands and fingers, particularly when working on the computer, towards the end of their relationship. Ms. Allan agreed that Mr. Allan had been diagnosed with osteoarthritis eight or nine years ago.
- [85] It was clear to me at trial that Mr. Allan was not well, and struggled in his ability to manage a full day of trial. He struggled handling materials, reading, and standing. He was easily exhausted.
- [86] I find that Mr. Allan is no longer able to work due to his age and physical limitations. Mr. Allan's physical limitations in his ability to work were known to the parties by 2020, and his health has further deteriorated since that time.
- [87] In the case at bar, there is no question that both parties are in a worse financial position now than they were during the marriage. However, I am not satisfied their worsened financial position arises as a result of the breakdown of the marriage. Rather, I am satisfied that their worsened financial position has arisen as a result of Mr. Allan's health difficulties and his inability to continue working.
- [88] Ms. Allan relies heavily on the case of *Kim v. Sharp*, 2021 BCSC 1428 in support of her argument for an entitlement to spousal support. However, in that case the parties were much younger, in their forties. The husband did not persuade the court that he was unable to work. The court imputed an annual income to the husband of \$60,000, and found that the husband's earning capacity was higher than the wife's capacity. During the marriage, the wife in *Kim* did not work at all, but post-separation was able to retrain and obtain an annual income of \$42,000. The facts in the case of *Kim* are substantially different from the case before me.
- [89] In the case before me, the assets which the parties obtained during the marriage have been split equally. Ms. Allan seeks an unequal division of the funds held in trust, in her favour, to recognize her entitlement to spousal support. She relies on s. 95 of the FLA which allows for an unequal division of family property where the objectives of spousal support under s. 161 have not been met, and para. 156 of *Kim* where the court found an unequal division to be appropriate in circumstances where the wife would receive nothing under the SSAG due to the incomes of the parties.
- [90] I am not satisfied that such an order is appropriate in the case at bar. I cannot find that Ms. Allan is any worse off than Mr. Allan at the end of this long marriage. Their retirement savings have been equalized pursuant to the orders I have made. Mr. Allan is not in a better position than Ms. Allan, and has not gained any advantages through the marriage which were not shared equally with Ms. Allan.

- [91] Their income in their retirement years is much less than they enjoyed when Mr. Allan was able to work. However, that is not a function of the breakdown of the marriage. That is a function of their age and Mr. Allan's inability to work. If anything, Ms. Allan presently is in a better position than Mr. Allan, given that her health permits her to continue working. In the circumstances of this case, I do not find that Ms. Allan has established an entitlement to spousal support.
- [92] Mr. Allan seeks spousal support from Ms. Allan, given that he is no longer able to work. He did not articulate the basis upon which I would order Ms. Allan to pay spousal support.
- [93] Mr. Allan's present income was not entirely clear. He receives \$1,363 each month from US social security, and expects to receive \$500-\$600/month from Canadian old age pension when his eligibility is determined. As such, Mr. Allan's annual income is unlikely to be more than \$24,000. It was not clear from his evidence at trial how much money he still has in his 401k and RRSP accounts, although he submitted before me that he does not take anything out each month because there is not much left.
- [94] Since separation, Ms. Allan's annual income has exceeded \$30,000. Ms. Allan anticipated her annual income for 2013 to be \$35,281. In addition, she will receive old age benefits, both Canadian and US, shortly.
- [95] While there is a difference in income between the parties, I am satisfied that it is not significant enough to warrant any support orders.
- [96] In the circumstances of this case, I am satisfied that neither party has established an entitlement to spousal support, pursuant to s. 161 of the FLA or s. 15.2 of the Divorce Act. I decline to make any orders for spousal support.

Costs

- [97] The parties may make written submissions on the issue of costs, to be directed to me through the registry. I leave it to the parties to determine an appropriate schedule for the delivery of their submissions, provided all submissions are received within 60 days of this judgment.

"W.A. Baker J."

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