
CANADA / JUDGMENT

B.B.S.G. v. E.K.G.

2020 BCSC 480

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 480 B.B.S.G. v. E.K.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.B.S.G. v. E.K.G.,

2020 BCSC 480

Date: 20200331

Docket: E172063

Registry: Vancouver

Between:

B.B.S.G.

Claimant

And

E.K.G.

Respondent

Before: The Honourable Justice Giaschi

Reasons for Judgment

The Claimant, appearing on own behalf:

B.B.S.G.

Counsel for the Respondent:

M. Wood

Place and Date of Trial:

Vancouver, B.C.

October 7-11 and

November 7 and 8, 2019

Place and Date of Judgment:

Vancouver, B.C.

March 31, 2020

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Introduction

- [1] The parties were married in India on July 1, 2005. They separated on August 5, 2017. There is one child of the marriage, SG, who was 11 years old as of the date of the trial. The claimant, B.B.S.G. ("BG"), is 45 years of age. The respondent, E.K.G. ("EG") is 34 years of age. The parties have resolved most issues relating to guardianship/custody, parenting time and parental responsibilities. The outstanding issues are:
- a) whether SG should reside with BG 4.5 days per week or 3.5 days per week;
 - b) the division of family assets and debts, mostly related to the net proceeds from the sale of the family home;
 - c) whether to impute an income to BG for support purposes;
 - d) whether BG is entitled to spousal support; and
 - e) the amounts of child and spousal support.
- [2] I note that BG requested an adjournment at the commencement of the trial. This was BG's second request for an adjournment. A similar request had been made on October 7, 2019 and was refused. His request for an adjournment before me was similarly refused on the basis that there had been excessive and unreasonable delay by him. In that regard, I note that the claimant did not provide a list of documents as required by the Supreme Court Family Rules and as was ordered by Master Muir on July 3, 2019. The claimant also failed to comply with the order of Master Muir that he file an updated financial statement.
- [3] BG was born and raised in British Columbia. He is of Indian descent. EG was born and raised in Punjab, India. The marriage between the parties was an arranged marriage. They first met in India on June 28, 2005, were engaged on June 29, 2005 and were married on July 2, 2005. BG remained in India for approximately 17 days after the marriage and then he returned to Canada. EG joined him in Canada in February of 2006.
- [4] At the time of the marriage, BG, who has a post-secondary degree in computer science, was employed with a company in tech support and EG was enrolled in an education program in India relating to airline tourism and hospitality management. Approximately two months after her arrival in Canada, once she had received a SIN card, EG obtained a minimum wage job at Tim Hortons and later at Safeway Starbucks as a barista.
- [5] The parties initially lived with BG's parents for several months. They later purchased a house together with BG's brother. The co-ownership with the brother ended in 2010 when the house was sold. The parties thereafter rented until January 2014.
- [6] EG became pregnant in 2007. SG was born in 2008.

- [7] Also in 2008, BG changed jobs and began working with another company, again in tech support and networking. He continued to work for that company, and was the main wage earner in the family until 2011 when his employment with the company was terminated and he received a settlement of \$28,900. BG has not worked since. His only source of income since 2011 has been disability benefits.
- [8] BG claims that he is completely disabled and unable to work. His medical issues are a result of various surgeries that he says were negligently done. The first surgery was around the time of SG's birth. BG testified that this first surgery damaged his rectal muscles, nerves and spine. He testified that for the next four or five years, he was in extreme pain and bedridden. He further testified to nine subsequent surgeries to attempt to correct the damage done during the first surgery. He testified that he has neurological symptoms, including peripheral neuropathy that became polyneuropathy and then small fibre neuropathy. He testified that he has brain issues, memory problems and dizziness and suffers from pain, sleeplessness and fatigue. At one point during his surgeries his intestine was removed and he now is required to use an ileostomy bag.
- [9] Regrettably, there is no expert evidence and virtually no documentary evidence before me of the details of BG's medical condition, the various surgeries, the progress of his condition or the nature and extent of his disability. The only documentary evidence is a Disability Tax Credit Certificate ("DTCC") of Canada Revenue Agency dated June 6, 2019. Part B of the DTCC is filled out by a medical practitioner, Dr. John Diggle, and indicates that BG is markedly restricted in bladder and bowel function at least 90% of the time and has been so since 2007. The DTCC also has a place for the medical practitioner to describe the effects of the impairment which contains handwritten comments, presumably of Dr. Diggle, however, the handwriting is illegible.
- [10] The lack of documentation regarding BG's medical conditions and procedures is undoubtedly because BG has never provided a list of documents in this matter as is required by the Supreme Court Family Rules and as he was ordered to do at a trial management conference held on July 3, 2019. At that conference, BG was also ordered to answer requests made by EG's counsel at his examination for discovery, some of which related to his medical issues. He did provide answers to the requests but the answers were, for the most part, not responsive, and did not result in the production of any useful documentation regarding his medical condition and procedures.
- [11] In April 2009, the parties were involved in a motor vehicle accident. BG had been driving and rear-ended another vehicle. EG was a passenger in the vehicle driven by BG and was injured in the accident. Her injuries consisted of concussion, neck pain, jaw dislocation, permanent hearing loss in left ear, migraines and depression. Due to the injuries suffered in the accident, she was off work until 2014. She received total temporary disability benefits totalling \$37,235. In 2011, she commenced an action against BG for the injuries she suffered in the accident. That action settled in December 2013 for \$231,828. The net amount received by EG after payment of lawyer's fees, disbursements and taxes was \$140,000. The settlement

amount was not broken down between pecuniary and non-pecuniary damages. In response to a request for a breakdown, EG's solicitor advised that \$40,000 of the total settlement amount was for past income loss.

- [12] On December 12, 2013, the net amount from the settlement, \$140,000, was deposited into a TD Canada Trust account. On December 24, 2013, a cheque from BG's parents in the amount of \$30,000 was also deposited into this account. It is disputed whether the TD account was a joint account and is also disputed whether the \$30,000 from BG's parents was a gift or a loan.
- [13] In January 2014, the parties purchased a house on 112 Street, Delta, British Columbia (the "Family Home") for \$450,000. The parties borrowed \$305,000 to finance the purchase. Of the balance, \$143,024 was paid by cheque drawn on the TD bank account. The house was registered in the names of both parties. The parties are not listed on title as joint tenants nor does the title indicate their respective percentage interests as tenants in common. At trial, no other evidence was led as to the percentage interests of the parties.
- [14] In September 2014, EG returned to work at Safeway. Since then, she has held various positions and her income has generally increased year after year, although she did suffer an injury at work in 2018 for which she received WCB benefits.
- [15] The evidence of the parties differed concerning who had primary responsibility for the care of SG and the division of domestic responsibilities in the years leading up to their separation. BG admitted that until approximately 2011 or 2012, EG was the primary caregiver of SG and did most of the cooking and cleaning. However, from that time onward, he said he was the primary caregiver and did most of the domestic chores. EG's testimony was diametrically opposed. She testified that until the date of separation she did all of the domestic work including cooking, cleaning, vacuuming, taking out the garbage, changing sheets and getting SG ready for school. She said that BG did some yard work, would occasionally make breakfast and would do the driving as she did not have a licence. She said that they both helped SG with his homework. I prefer the evidence of EG over that of BG. She gave her evidence in a clear and balanced manner and without exaggeration. In contrast, BG seemed to minimize as much as possible EG's contributions. Moreover, BG's evidence that he did all of the domestic chores was inconsistent with the nature and extent of the disability that he claims to have.
- [16] The parties separated in August 2017. Upon the separation, EG moved out of the Family Home. She had limited parenting time with SG until September 15, 2017.
- [17] On September 15, 2017, Justice Bowden ordered that the parties have interim equal shared parenting time with BG having parenting time from Saturday at 8:00 p.m. until Wednesday after school and EG having parenting time from Wednesday after school until Saturday at 8:00 p.m. Justice Bowden also ordered that EG pay interim child support in the amount of \$561 per month and interim spousal support in the amount of \$756 per month, commencing on October 1, 2017. Finally, Justice Bowden ordered that the parties obtain a s. 211 report, something that was never done.

- [18] On August 8, 2018, the parties entered into a consent order for the sale of the Family Home. The home was sold on November 29, 2018 for \$774,000. After payment of the mortgage, taxes, utilities and fees, the balance payable to the parties was \$450,886. From this amount, various credit card bills were paid leaving the amount of \$432,687.86, which is being held in trust.
- [19] From the date of separation until the Family Home was sold on November 29, 2018, BG lived in the Family Home. Subsequent to the sale of the Family Home, BG moved into a suite in his parent's house. BG claims that he pays rent to his parents of \$750 per month but he has provided no corroborating evidence of any sort of this alleged rental payment. In the absence of any corroborating evidence, which could be easily obtained, I do not accept his testimony that he pays rent of \$750 per month.
- [20] Pursuant to a consent order made on July 3, 2019, each of the parties received an interim distribution of \$50,000 from the funds held in trust leaving \$332,687.86 plus any accrued interest in trust for later distribution. The apportionment of these funds is a hotly contested issue.

Divorce

- [21] The parties are agreed that there should be an order for their divorce on the basis that the parties have lived separate and apart for a period of more than one year. A divorce will be granted on this basis.
- [22] The notice of family claim filed August 11, 2017, also claims divorce on the grounds that EG has committed adultery and has treated BG with emotional and mental cruelty. It is not necessary for me to address these grounds and I decline to do so except to state that the evidence does not establish EG has treated BG with physical, emotional or mental cruelty.

Custody/Guardianship/Parenting

- [23] The sole child of the marriage, SG, is currently 12 years of age. The current interim parenting arrangements were set by Justice Bowden on September 15, 2017. Those arrangements are that the parties have equal shared parenting time with BG having parenting time from Saturday at 8:00 p.m. until Wednesday after school and EG having parenting time from Wednesday after school until Saturday at 8:00 p.m.
- [24] Justice Bowden also ordered that the parties obtain a s. 211 report, however, this was not done.
- [25] In the notice of family claim, BG requested that he be given sole custody and guardianship of SG and that EG's parenting time be limited to brief periods every other weekend. At the trial of this matter, BG abandoned these claims. At trial, he said that he was content with joint guardianship but requested that his parenting time be increased by one extra day such that his parenting time will run from 8:00 p.m. on Saturdays to Thursdays after school as

opposed to the current arrangement which gives him parenting time from 8:00 p.m. on Saturdays to Wednesdays after school. He also requested that he be given the final say in the event of a disagreement over the health care of SG.

- [26] In her counterclaim filed August 22, 2017, EG requested that she be given sole custody and guardianship of SG. At trial, EG requested an order for joint custody and guardianship, shared parental responsibilities and continuation of shared parenting time as set out in the interim order of Justice Bowden. EG also requested specific orders in relation to school breaks and holidays and travel, which I will address.
- [27] Given the submissions of the parties at trial, the parenting issues concern only decisions respecting SG's health care and a minor adjustment of the current interim parenting time regime. Nevertheless, both parties gave testimony and made serious accusations concerning the parenting abilities of the other party. For example, BG testified that EG was neglectful of SG, was physically abusive to him and smoked marijuana in his presence. EG testified that BG is addicted to his prescription drugs, was very negative towards SG and has refused to permit SG to attend counseling that the school has recommended. I reject all of the allegations made by BG against EG as they were denied by EG and were not supported by any evidence other than bald allegations or hearsay. With respect to the allegations made by EG against BG, I reject the allegation that BG was abusive towards SG and reject any allegation or inference that he is currently addicted to and abuses his prescription drugs. BG admitted in cross-examination that he had been addicted to OxyContin but his prescription was changed to Methadone. With respect to the allegation that BG has refused to permit SG to attend counseling, on the evidence this appears to be more of a miscommunication with the school and between the parties.
- [28] In any event, I am satisfied that both parties are loving and caring parents to SG, have the ability to properly exercise their parental responsibilities and that it is in the best interests of SG that his time with each parent be maximized.

Custody/Guardianship

- [29] Although neither party has continued their request for sole custody or guardianship of SG, I am satisfied that joint custody is in the best interests of the child and that there is no basis for departing from the normal rule of shared guardianship under s. 39 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Accordingly, I order that there shall be joint custody of SG pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [DA] and shared guardianship pursuant to the FLA.

Parental Responsibilities

- [30] The only disagreement between the parties is in respect of SG's health care. BG submits that EG has not acted responsibly in relation to SG's health care and requests that he be given final say to make decisions concerning SG's health care. More specifically, BG testified that

EG refused to pay her share of a dental bill and he also testified that EG exposes SG to cats and dogs which causes severe allergic reactions in him. In her own evidence, EG testified that she does not have a cat or dog but that a tenant in another suite of her building has a dog. Further, she is aware of SG's allergies, which act up from time to time. She testified that she keeps his inhaler filled and that she takes him to see a doctor if she has a particular concern about his asthma.

- [31] Based on the testimony of EG, which I accept, I am satisfied that she has acted in a responsible manner when discharging her responsibilities as a parent in relation to the health care of SG. In my opinion, there is no basis for granting BG sole responsibility in relation to SG's health care.
- [32] Accordingly, the parties shall share all of the parental responsibilities under s. 41 of the FLA. The parties shall consult with each other regarding any important decision concerning SG and shall attempt to come to agreement on such decision. If they are unable to agree, they are to retain the services of a family justice counsellor. If, after meeting with the family justice counsellor they are still unable to agree, either party may apply to the court to determine the matter at issue.

Parenting Time

- [33] BG has requested that he be given one extra day of parenting time with SG. He submits that the extra day is required so that he can help SG with his school work and to learn Punjabi. He says that EG does not help SG with school work, does not pay for his school supplies and will not speak Punjabi with him. He also again submits that SG's allergies act up when he stays with EG making it difficult for him. I reject all of these allegations.
- [34] Section 16(10) of the DA provides that in making custody and access orders, the child should have as much contact with each parent as is consistent with the child's best interests. The FLA does not contain a similar principle but such a principle has been held to be a natural adjunct to the goal of maximizing the child's health and emotional well-being pursuant to s. 37(2)(a) of the FLA: *K.L.G. v. D.J.T.*, 2013 BCSC 1684 at para. 104.
- [35] I do not accept that there is any basis for increasing BG's parenting time. As I have indicated, I find that both parties are loving and caring parents and that it is in the best interests of SG that his time with each parent be maximized. I do not accept BG's evidence that EG does not assist SG with his schoolwork as this evidence must be based entirely on hearsay. I also do not accept his evidence that EG does not pay for school supplies but, in any event, this is not a factor to be considered in relation to parenting time. As for whether EG speaks Punjabi with SG, this is not relevant to parenting time. Finally, the allegations concerning SG's allergies have been addressed above.

- [36] Accordingly, I am satisfied that the current interim order in place for equal shared parenting time is entirely adequate and appropriate. However, that interim order does not address holidays. In my view, it is appropriate that there should also be equal shared parenting time during holidays. A parenting time schedule for holidays is set out in the Orders section of these reasons, which shall be applicable unless the parties otherwise agree.

Division of Family Assets and Debts

- [37] The main asset of the parties is the proceeds from the sale of the Family Home which are currently being held in trust and which amount to \$332,687.86 plus any accrued interest. EG submits that a large portion of the monies in trust can be directly traced to her personal injury settlement and is excluded property. In the notice of family claim, BG originally requested an order for an unequal division of family property, however, at the trial he requested that family property and debts should be divided equally. He disputes any claim by EG to excluded property. Thus, the main issue is whether part of the funds in trust are excluded property.
- [38] The other significant issue is whether the \$30,000 received from BG's parents was a gift or a loan. BG submits it was a loan whereas EG submits that it was a gift.
- [39] The third issue concerns the credit card debts of the parties that were paid off after the sale of the Family Home. BG submits that he is entitled to \$1,875 from the funds held in trust on the grounds that he had to pay for the costs of servicing the credit card debts before they were paid out.
- [40] Other property issues relate to a 2015 Jeep Cherokee, EG's pension and EG's jewellery all of which have been substantially agreed by the parties. The parties have agreed that the Jeep is to be the sole property of BG and that he is to be solely responsible for any loan payments. Concerning EG's pension, the parties have also agreed that this should be divided pursuant to Part 6 of the FLA. Concerning EG's jewellery, it was BG's evidence at trial that the jewellery had been stolen. In view of this evidence, I am prepared to order only that the jewellery be returned to EG by BG if it is located.

Is the Personal Injury Settlement Excluded?

- [41] Pursuant to s. 81 of the FLA, there is a presumption that each spouse is entitled to a one-half interest in family property regardless of their use or contribution to the property. However, s. 85 of the FLA provides that certain types of property are excluded. One such exclusion is compensation received in settlement of a personal injury claim to the extent the amount does not represent a loss to both spouses or lost income.

85 (1) The following is excluded from family property:

- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for

- (i) loss to both spouses, or
- (ii) lost income of a spouse;

[42] EG claims an exclusion from family property, pursuant to s. 85(1)(c) of the FLA, for that portion of her personal injury settlement attributable non-pecuniary damages. EG submits that \$126,600 of the settlement amount she received is excluded property.

[43] EG further submits that s. 85(1)(g) of the FLA applies to preserve the excluded status of the \$126,600 settlement amount as it was used to purchase the Family Home which was later sold:

85 (1) The following is excluded from family property:

- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

[44] Finally, EG submits in the alternative, that it would be significantly unfair to divide the settlement funds, given that BG was the negligent driver who injured her. She relies on s. 95 of the FLA.

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[45] BG submits that no amount of the personal injury settlement is excluded property. He says that the settlement proceeds were deposited into a joint bank account and were used to purchase the Family Home that was registered in both of their names. He submits that there was a gift of the settlement proceeds to him and relies upon the presumption of advancement.

[46] On the evidence before me, it is abundantly clear that the settlement amount paid to EG was compensation for injury or loss within the meaning of s. 85(1)(c) of the FLA. It is equally abundantly clear that the settlement funds can be directly traced to the Family Home and ultimately to the proceeds from the sale of the Family Home currently held in trust. What is less clear is what portion of the settlement amount is *prima facie* excluded from family property. In other words, what portion of the settlement was for lost income?

[47] I intend to address first what portion of the settlement funds is excluded property. I will then address whether those funds lost their excluded status when deposited into the TD account or used to purchase the Family Home. Finally, if the property derived from the settlement funds have lost excluded property status, I will address whether an unequal division of family property under s. 95 is warranted.

How much of the settlement was excluded property?

[48] The evidence discloses that the total amount of the settlement was \$231,828. Unfortunately this amount was not broken down between pecuniary and non-pecuniary damages. A letter dated December 9, 2013 from Ms. Simon, the lawyer handling the personal injury lawsuit for EG, provided no breakdown other than that the total settlement included sums recovered for subrogated insurers and doctors in the amounts of \$1,358.68, \$986.00 and \$5,585.20. The only other evidence of a breakdown in the settlement amount is an email dated June 6, 2018 from Ms. Simon responding to a request from EG for a breakdown. In this email Ms. Simon stated:

The documents that I recently provided outline the total settlement, with some amount broken down.

This was an all inclusive settlement and as such, there was no actual breakdown for the heads of damages. On review of my file materials I can advise of the following amounts:

a. Out of pocket expenses (special damages): \$25,893.79

Of that, \$10,000 was owing as subrogated interests or directions to pay (some amounts were negotiated to pay back at lower amounts as outlined in the correspondence sent to you)

b. Past income loss (net of taxes and TTD benefits paid) was @\$40,000.00

c. There was a large component for your non-pecuniary general damages and future care. There was some amount for your diminishment of future earning capacity as well. This was a hotly disputed item in the claim.

[49] Although no objection was taken to the admission of the letters and emails from Ms. Simon, I note that this evidence is hearsay. I nevertheless accept the evidence under the principled exception to the hearsay rule on the basis that Ms. Simon is a lawyer who had no motivation to misrepresent what transpired. It follows that I accept and find as a fact that \$40,000 of the total settlement of \$231,828 was for loss of income.

[50] As indicated, EG received the net amount of \$140,000 of which she submits that \$126,600 is excluded property. She arrives at this amount by first deducting the contingency fee of 33% from the \$40,000 amount that was attributed to lost income. Through this calculation she determined that \$26,800 [$\$40,000 - (0.33 \times \$40,000)$] of the \$140,000 received was for income loss. She then deducts this amount from the \$140,000 to arrive at a preliminary figure for excluded property of \$113,200 [$\$140,000 - \$26,800$]. She then increases this amount to \$126,600 by adding to it \$13,400, being EG's 50% share of the net amount received for past

income loss.

- [51] I do not accept EG's calculation of the value of the excluded property. In particular, the clear wording of s. 85(1)(c), requires that the amount attributable to lost income "of any spouse" must be deducted to arrive at the excluded property amount. It is not correct to add back EG's 50% share of the net amount received for past income loss.
- [52] In my view, the amount of the settlement that was excluded from family property was \$116,000. The net settlement amount, the amount actually received by EG after payment of all lawyer's fees, disbursements, taxes and subrogated amounts, was \$140,000. This amount represents 60% ($\$140,000/\$231,828$) of the total settlement amount. The portion of the net settlement amount that represents lost income must therefore be 60% of \$40,000 or \$24,000 ($0.60 \times \$40,000$). Therefore, the portion of the net settlement that was otherwise exempt from family property is \$116,000 ($\$140,000 - \$24,000$).

Was there a gift or advancement?

- [53] I now turn to discuss whether the \$116,000 lost its status as excluded property because it was deposited into a joint account or was used to purchase the Family Home.
- [54] A preliminary issue I must decide is whether the TD account into which the settlement was deposited was a joint account. EG says it was not whereas BG says it was. The problem arises because the December 2013 bank statement for the account in issue is addressed only to EG suggesting that she was the sole account owner. However, the statement for the next month, January 2014, is addressed to both EG and BG, suggesting that there was a joint account.
- [55] BG's testimony was that the account was always a joint account. During the course of his submissions, BG sought leave to introduce into evidence a letter from TD Bank dated November 5, 2019, which confirms that the account was opened in both names on January 25, 2012 and remained in both names until it was closed on April 27, 2015. Over the objections of EG, I allowed the letter to be entered as an exhibit.
- [56] EG had little knowledge of the family's finances or of banking and finances in general. Her evidence, which I accept, was that this was a traditional marriage with BG looking after all of the banking, finances and bill payments. She was aware that there were two bank accounts; one which she referred to as the joint account and the other which she referred to as the TD account. Her general lack of knowledge of finances extended to the TD account. When asked when it was opened, she replied that she could not recall but she thought it was opened after she received the settlement cheque. When asked why BG's name was added to the account in January 2014, she was unsure but assumed that it was for purposes related to the mortgage taken out to purchase the Family Property.

- [57] I am satisfied that the TD account was a joint account as confirmed by the November 5, 2019 letter from TD Bank. However, I am further satisfied that this was either unknown by EG when the settlement funds were deposited into it or, due to her lack of sophistication about banking and finance matters, she did not appreciate what this meant.
- [58] In view of my finding that the TD account was a joint account, I must now address whether the deposit of the personal injury settlement funds into that account amounted to a gift of the funds to BG. This brings into play the presumption of advancement and the law of gifts.
- [59] I have been referred to, and have reviewed, several authorities by EG's counsel, namely: *Namdarpour v. Vahman*, 2019 BCCA 153; *Shih v. Shih*, 2017 BCCA 37; *H.C.F. v. D.T.F.*, 2017 BCSC 1226; *Oleksiewicz v Oleksiewicz*, 2017 BCSC 228; and *Venables v. Venables*, 2019 BCCA 281. I intend to refer only to those cases that I found helpful and necessary to decide the issue before me.
- [60] *Shih* establishes that a claim to excluded property need merely be proven on a balance of probabilities, not to a certainty or with precision. Clear and cogent evidence is required and, in balancing the evidence, the judge may draw reasonable inferences.
- [42] In my opinion, the proper test for establishing a claim to excluded property under s. 85 of the FLA is the same as in any civil case - proof on a balance of probabilities. The requirement of certainty and precision in my view improperly tips the standard closer to the criminal standard of proof beyond a reasonable doubt.
- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.
- [44] However, in balancing the evidence as a whole, the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties.
- [61] In *Namdarpour*, the husband received a personal injury settlement of \$52,640 which he deposited into a bank account held jointly with his wife. Later, \$90,000 was withdrawn from the bank account to purchase a property in the names of both parties. At issue in that case, as in this case, was whether the settlement amount was excluded. At trial, it was held the presumption of advancement applied and the amount was not excluded. Alternatively, the trial judge was of the opinion that the husband intended the funds to be used for a family purpose and intended a gift of half the funds to the wife. On appeal, Justice Savage noted that the presumption of advancement is an evidentiary presumption that a gratuitous transfer to a spouse is presumed to be a gift. He also noted that the presumption is most useful when evidence of the transferor's intention is not available or is unreliable.

- [25] The presumption of advancement is an evidentiary presumption whereby in certain circumstances a gratuitous transfer is presumed to be a gift. The presumption has been recognized to operate in the circumstances of a gratuitous transfer from a married husband to his wife and from a parent to his or her minor child: *Pecore v. Pecore*, 2007 SCC 17 at paras. 27-41; *Kerr v. Baranow*, 2011 SCC 10 at para. 20. It is most useful where evidence of the transferor's intention in making the transfer is unavailable or unpersuasive, especially where the transferor is deceased: *Pecore* at para. 23.
- [62] Justice Savage further wrote that the presumption of advancement continues to apply under the FLA but stated that its role should not be over-emphasized.
- [33] Although the presumption of advancement continues to apply under the FLA, I would not overemphasize the role of evidentiary presumptions in the current property division scheme for a number of reasons, including the apparent context in which the presumption has its origins (the sometimes anachronistic notions of economic dependence), in contrast to contemporary circumstances.
- [63] At para. 40, Savage J. summarized the principles applicable, noting again that the presumption will only apply if the transferor's actual intention cannot be determined after consideration of all the evidence and circumstances, direct and circumstantial:
- [40] These decisions emphasize that evidentiary presumptions operate only where the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer. In my view, the following principles can be discerned from the case law: (1) a conclusion about intention is only to be determined after consideration of "all the circumstances" of the case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those circumstances include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption operate.
- [64] At para. 46, Savage J. also stated that the mere depositing of funds into a joint account is not, by itself, persuasive evidence of donative intent.
- [46] I am not suggesting that merely depositing funds to a joint account in any given case is alone persuasive evidence of donative intent. In this case, there was a pattern of activity in the use of the joint account, by both parties, with respect to excluded property, together with income-splitting on the use of the family asset purchased with the proceeds. In every case it is incumbent on the trial judge to ascertain the intention with which a transfer is made, using both the direct and circumstantial evidence available. The judge did this when he concluded there was donative intent. I would dismiss this ground of the cross appeal.
- [65] In *Venables*, the husband brought an existing home into the relationship and inherited money during the relationship. Both the home and the inherited money were put into the joint names of the parties. Upon the marriage breakdown, the husband sought to exclude

the value of the home brought into the relationship and his inheritance. At trial, the trial judge held the home and inheritance were not excluded property but also held that equal division of family property would be significantly unfair. On appeal, the wife argued, *inter alia*, that the trial judge erred in giving too much weight to the origins of the home and inheritance when assessing whether an equal division of family property would be significantly unfair. Justice Griffin stated, at para. 93, that the appeal raised two issues:

- [93] Two questions arise under the FLA when ownership of excluded property is transferred from one spouse's name to the other spouse's name, solely or jointly, and remains in that form of ownership at the time of separation:
- a) first, does the "excluded property" become "family property", or does s. 85(1)(g) apply with the result that it continues to be excluded property; and,
 - b) second, if it does become family property, on relationship breakdown, can the origins of the property that previously made it excluded property be considered as a factor that might make it "significantly unfair" to divide the family property equally, justifying judicial reapportionment of the family property under s. 95?
- [66] At paras. 94-95, Griffin J.A. reiterated that the answer to the first question depends on the intention of the transferring spouse:
- [94] This Court has already spoken on this first question in *V.J.F.*, which was followed in *Pisarski v. Piesik*, 2019 BCCA 129 and *Namdarpour v. Vahman*, 2019 BCCA 153.
- [95] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found that the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement that it is to remain excluded property, then it will become family property: *V.J.F.* at paras. 74-79; *Namdarpour* at para. 46.
- [96] The judge grappled with this issue and concluded that the respondent intended a gift when he transferred the Home and some of the Inheritance into his and the appellant's joint names. He thus concluded that what was formerly-excluded property became family property. The appellant does not challenge this finding and it is consistent with *V.J.F.* and subsequent authorities of this Court.

[Emphasis added.]

- [67] I will address the second question covered by *Venables* when I consider s. 95 of the FLA.

- [68] Based on the cases to which I have referred, I must determine whether EG intended to transfer an interest in her settlement funds to BG when she deposited them into the joint TD account or used them to purchase the Family Home. It is only if I am unable to determine her actual intention that the presumption of advancement will apply.
- [69] There is no direct evidence as to whether EG intended to transfer or gift an interest in the settlement funds to BG. However, this does not mean that I must conclude the presumption applies. It is not only direct evidence that I must consider in assessing her intention. Rather, I must consider all the circumstances of the matter including both direct evidence and circumstantial evidence. The circumstantial evidence is that EG had very little knowledge of the family's finances or bank accounts and relied on BG to do the banking. She also seemed to be unaware that the TD account was a joint account when the settlement funds were deposited into it. She assumed that BG's name was added to the TD account for mortgage purposes in relation to the purchase of the Family Home. Her knowledge was, in my view, not sufficient to support a presumption of a gift of a portion of the settlement proceeds to BG. Moreover, it must be recalled that BG was the individual that caused her injuries and was the defendant in the action that settled. It is, in my view, unlikely that she intended to gift a portion of the settlement funds to the very tortfeasor that caused the injuries for which she was being compensated.
- [70] Accordingly, considering all the circumstances, I find that EG did not intend to gift a portion of the settlement funds to BG by depositing those funds into the TD account.
- [71] I similarly find that there was no intention on the part of EG to gift a portion of the settlement funds to BG by using the funds to purchase the Family Home. I am of this view not only because it is unlikely she intended to gift a portion of the settlement funds to the tortfeasor that caused her injuries but also because there is no evidence that the parties had an equal interest in the Family Home. The parties did not hold title as joint tenants and there is no evidence of their percentage ownership as tenants in common.
- [72] EG submits, in the alternative, that the proceeds from the sale of the Family Home should be divided unequally on the basis that it would be significantly unfair to give BG a share of the property derived from the settlement funds when he was the tortfeasor. Given my finding above that EG did not intend a gift to BG of a portion of the settlement funds, I need not decide this issue. However, if necessary, I would have found that s. 95 of the FLA was engaged and that it would be significantly unfair. As held by Griffin J.A. in *Venables*, there is nothing in the FLA to prevent me from considering the origins of property that was previously excluded when determining whether an equal division of family property would be significantly unfair under s. 95 of the FLA:
- [97] The second question and central focus of this appeal is whether the origins of the formerly-excluded property can be considered by a judge in determining whether it would be significantly unfair to divide the family property equally, pursuant to s. 95 of the FLA.

- [110] I do not read into the silence of the FLA on the issue that the legislators intended that, once a spouse gifts excluded property to the other spouse, there can be no reapportionment of what is now family property to take into account the origins of the property. In determining the answer to this question, nothing in the legislation dictates that the contributions of a spouse to formerly-excluded property must be ignored in determining whether it would be "significantly unfair" to equally divide the family property.
- [111] In other words, I do not accept the appellant's argument that the sentiment "once a gift, always a gift" was intended to be reflected by the legislation. There is no language in the FLA that compels that result.
- [112] In not expressly dealing with the question of what happens when excluded property becomes family property, but by providing for reapportionment if equal division of family property would be significantly unfair, the FLA left it open to the court to consider, as a factor justifying reapportionment, the origins of family property as formerly-excluded property contributed by one spouse. The degree of attention paid to this factor will, as in all property division matters, depend on all the circumstances.

Was There a \$30,000 Loan From BG's Parents?

- [73] BG submits that the \$30,000 received from his parents in December 2013 to assist them with the purchase of the Family Home was a loan and is a family debt owing to his parents. EG claims that it was not a loan but a gift.
- [74] BG testified that the \$30,000 from his parents was a loan. However, he offered no documentation or any other evidence corroborating the existence of a loan. In cross-examination he admitted that there was no loan documentation and no written repayment terms. He also acknowledged that the loan from his parents was not included on his financial statement filed September 11, 2017, although he said that this was a mistake.
- [75] EG gave specific testimony of the day BG's parents gave them the cheque. She testified that the parents came to their house and presented them with the cheque for \$30,000 as a gift. She testified that that there was no discussion of it being a loan or it needing to be repaid. She further testified that she was surprised and pleased as BG's parents had refused to help them with the purchase of their first house.
- [76] I prefer the evidence of EG over that of BG in relation to the \$30,000 received from BG's parents. Her testimony is specific and is consistent with the lack of any documentation suggesting the existence of a loan. Her testimony is also consistent with the sworn financial statements of the parties, neither of which lists a \$30,000 loan from BG's parents. Finally, the parents were not called to testify that the money was loan.
- [77] Accordingly, I find that the \$30,000 received from BG's parents was a gift and not a loan and that there is no family debt owing to the parents.

Credit Card Debts

[78] At the time that the Family Home was sold, the parties had accumulated credit card debts that were paid from the proceeds of the sale. The credit cards and the amounts paid were:

- TD Visa ending in 2879 - \$7,402
- PC Mastercard ending in 1697 - \$3,689.00
- American Express - \$7,470

[79] BG submits that the bulk of the family debt was on his credit cards, the Mastercard and the American Express, and that his credit cards had higher rates of interest. He submits that he should be compensated for having to pay the higher costs of servicing his credit cards which he calculated at \$1,875.

[80] I decline to make the order requested by BG. There is insufficient evidence before me of the interest rates or costs of servicing of the different cards.

Income for Support Purposes

[81] The income of EG to be used for support purposes is not in issue. She has filed an updated financial statement and supporting documentation. Her line 150 income for 2018 was \$65,817.90 of which \$59,910.55 was employment income and \$5,907.35 was Workers Compensation benefits. She testified that she was off work and on Workers Compensation for a short period of time in 2018. I find that her income for support purposes is \$65,800.

[82] The income of BG for support purposes is very much in issue. BG submits that he is disabled and is not able to earn more than the \$11,000 per annum he currently receives by way of disability benefits. BG's financial statement, filed on September 11, 2017, discloses an income for support purposes of \$11,821.44. EG does not dispute that BG's income is \$11,800. However, EG says that BG is not disabled, is able to work and that an income should be imputed to him. She relies on s. 19 of the Federal Child Support Guidelines [Guidelines], subparagraph (a) of which entitles a court to impute income to a spouse who is intentionally under-employed or unemployed:

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

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

[83] The only evidence before me of BG's inability to work is his viva voce testimony and the Canada Revenue Agency DTCC dated June 6, 2019. With respect to the Canada Revenue Agency DTCC, I am of the view that this is not evidence of an inability to work. First, it is

entirely a hearsay document that is largely illegible. Second, at best it establishes only that BG is markedly restricted in bladder and bowel function at least 90% of the time. Third, there is no evidence before me as to how a determination is made under the scheme that a person is disabled or what level of disability is required to qualify for payments. Finally, qualifying for disability benefits is not the same as being unable to work.

- [84] In *Kular v Kular*, 2018 BCSC 1715, Justice Choi was faced with an issue similar to the one before me. She held that qualifying for disability benefits is not, by itself, proof of an inability to work for child support purposes:
- [29] I agree that Mr. Kular has not provided enough evidence otherwise to demonstrate that he cannot work at all. Being designated a person who qualifies for disability benefits does not mean he cannot work for the purpose of paying child support. I agree that his doctor's notes are inadmissible hearsay and do not amount to expert evidence (Taylor at para. 33). I agree with the comments of Mr. Justice Greycliff in Taylor at para. 34, that medical notes such as the one provided "are often made, at the request of a patient to a busy medical practitioner, for a purpose directed by the patient" and, in that sense, are often "self-serving self-reports". However, I also accept that Mr. Kular is suffering from one or more illnesses. Whether this renders him totally disabled from working is another question. [Emphasis Added]
- [85] I agree with Justice Choi that having been accepted for, or being in receipt of, disability benefits is not proof of an inability to work. Much more is required.
- [86] As I indicated elsewhere, there is no expert medical opinion evidence that BG is not able to work. There is also no documentary evidence of the details of his medical condition, the various surgeries that he underwent or of any planned treatments in the future. The only evidence that BG is not currently able to work is his own testimony to this effect. However, I find that his testimony lacked detail, clarity and consistency. Overall, I did not find his evidence as to his medical conditions to be credible or reliable.
- [87] This is not to say that I reject all of his evidence. I accept that following his surgery in 2008 or 2009, his medical problems became serious enough that for several years he may have been completely disabled and unable to work. However, I do not accept his evidence that he continues to be unable to work. As indicated, at best he markedly restricted in bladder and bowel function at least 90% of the time but, in cross-examination he conceded that individuals with an ileostomy bag can work. He also conceded in cross-examination that he enjoyed driving and could work for a ride sharing company or a food delivery company and that he could work from home developing software. There is further evidence that he engages in several sporting activities with S.G. such as basketball, tennis, soccer, Frisbee, football, long bike rides, walks and hikes. That he can engage in these activities is inconsistent with his alleged complete inability to work.
- [88] Considering all of the evidence, I agree with EG that BG is able to work, is intentionally unemployed and that an income must be imputed to him. The difficulty, however, is what that income should be. When he worked at the second company he earned approximately

\$26 per hour or \$54,000 per year. However, it is not clear that he would be able to find a job similar to the one he had at that company given that he has been out of the workforce for a long time. Although he has a college education and computer and networking skills, it is more likely that, for at least a period of time, he will be limited to jobs paying considerably less than what he made at the second company. If he was to obtain a job paying the minimum wage, his annual earnings would be approximately \$28,000 per year. This is the amount of income that I impute to him for support purposes.

[89] Therefore the income of the parties for support purposes are \$65,800 to EG and \$28,000 to BG.

[90] Further, given that I have imputed income to BG and expect that he will endeavour to find employment, it is appropriate that the parties should exchange their complete income tax returns and any notices of assessment or re-assessment each year. The parties shall do so by June 30 of each year.

Child Support

[91] Given the incomes for support purposes of the parties as determined above, child support pursuant to the Guidelines is payable by EG to BG in the amount of \$371 per month.

Spousal Support

[92] Spousal support is addressed in s. 15.2 of the DA and ss. 160-165 of the FLA.

[93] The objectives of an order of spousal support are set out in s. 15.2(6) of the DA and s. 161 of the FLA in almost identical wording. Those objectives, as expressed in the DA, are:

- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[94] The factors to take into account in determining the amount and duration of spousal support are set out in s. 15.2(4) of the DA and s. 162 of the FLA. Those factors, as expressed in the DA, are:

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- [95] Pursuant to s. 15.2(5) of the DA and s. 166 of the FLA, misconduct of a spouse is generally not a relevant consideration in determining spousal support.
- [96] The principles generally applicable to spousal support are summarized in *Chutter v. Chutter*, 2008 BCCA 507. There are three grounds for entitlement to spousal support; contractual, compensatory and non-compensatory. Contractual spousal support is not in issue here.
- [97] Compensatory support is intended to redress economic disadvantages that arose as a consequence of the marriage. Compensatory support was addressed in *Chutter* at paras. 50-53.
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow [v. Bracklow]*, [1999] 1 S.C.R. 420] at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success ([*Moge v. Moge*, [1992] 3 S.C.R. 813] at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

- [51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in *Moge* at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other

spouse" (emphasis added).

[52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

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. 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.

[53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:

[11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide*.

[Emphasis added by Rowles J.A., citations omitted.]

[98] Non-compensatory support is needs based support meant to narrow the gap between the needs and means of spouses. It was discussed in *Chutter* at paras. 54-55:

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (*Bracklow*, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (*Bracklow*, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[Emphasis added.]

[99] In assessing the "needs" of the recipient spouse, the standard of living enjoyed by the parties during the marriage must be considered as well as the standards of living after the marriage: Chutter at para. 60.

[100] In *Lee v. Lee*, 2014 BCCA 383, Justice Newbury, writing for the majority, noted that a spouse who experienced a marked decline in standard of living should receive some financial assistance upon marriage breakdown.

[66] At the same time, the case law of this province referred to above does indicate that a party who experiences a marked decline in standard of living due to divorce should receive some financial assistance (either in the form of re-apportionment of assets or maintenance) in adjusting to his or her new situation - hence the concept of a "transitional" award, which is recognized by the SSAG. Such awards have regularly been made in favour of women, but rarely in favour of men, perhaps reflecting that, as Rogerson suggests, "Non-compensatory support is significantly structured by social norms of what is fair and just. The economic dependency of husbands on wives is not reinforced and naturalized by strong cultural norms, as is the dependency of wives on husbands ...". (At 234-5.) It seems to me that, setting aside for the moment the support already paid by Ms. Lee from August 1, 2012 to June 1, 2013, Mr. Lee could have expected some transitional award, if only on the "principle" that what is sauce for the goose is sauce for the gander. As it is, Ms. Lee did pay a total of \$17,500 to Mr. Lee, presumably assisting him in adjusting to his new circumstances.

[101] BG, being self-represented, did not clearly articulate the basis of his alleged entitlement to spousal support. He submits that EG has the means to pay to support and that without spousal support his normal living routine will be difficult. He submits that he is required to pay \$750 per month in rent and has medical expenses of \$560 per month.

[102] EG submits that BG is not entitled to support on either a compensatory or non-compensatory basis. In respect of compensatory support, she submits that BG suffered no economic disadvantage or loss of economic opportunities as a consequence of the marriage and that his failure to work is self-inflicted and not due to his medical condition or the marriage. In respect of non-compensatory support she again submits that BG has the

ability to work but simply chooses not to and that requiring her to pay support would leave insufficient funds for her to support her own needs and those of SG. She further submits that BG's financial needs have not been proven by proper evidence. She challenges his expenses which have not been supported by a recent financial statement or other documentation.

- [103] I agree with EG that BG is not entitled to spousal support on a compensatory basis. There is no basis in the evidence for concluding that BG has been disadvantaged economically as a consequence of the marriage. He did not give up any educational or employment opportunities because of the marriage. He did not stay at home so that EG could pursue educational or employment opportunities. Rather, the evidence establishes that BG stayed at home because of his medical issues. Moreover, his response to those medical issues is the sole cause of his current employment status and any economic disadvantages. The gap between his income and EG's income is not due to the marriage or the marriage breakdown but is solely due to his decision to treat his medical issues as totally disabling, which I have found they are not.
- [104] Turning to non-compensatory support, despite the able arguments of EG's counsel, I am satisfied that BG is entitled to spousal support on a non-compensatory basis. I am of this view because of the income disparity between the parties and because of the relative needs of the parties.
- [105] It is clear on the evidence that there is a marked difference in the actual incomes of the parties. EG's 2018 income was \$65,800 whereas BG's 2018 income was only \$11,800 when the interim support payments are excluded. I accept that a disparity in income is not, by itself, sufficient to justify entitlement to support but this disparity is significant and must be considered together with other circumstances. The minimal amount of BG's income is one such circumstance. This income is not sufficient to provide the necessities of life for himself, let alone for both he and SG. The income that I impute to BG is also not sufficient to provide those necessities of life. The other significant circumstance is that BG has been forced to live with his parents since the Family Home was sold. This is not to say that I accept his testimony that he pays his parents \$750 per month for rent. I do not accept this testimony in the absence of corroborating evidence, which should have been readily available. However, the fact that he must rely on the charity of his parents is a relevant factor.
- [106] Concerning the needs of the parties, neither enjoys what might be described as a comfortable lifestyle and neither enjoys the standard of living that they had during the marriage. EG is required, by her own financial circumstances to live in a one bedroom apartment. She would like very much to move to a two bedroom apartment so that SG, now 12 years old, can have his own bedroom. EG's financial statement filed August 21, 2019 discloses that her annual expenses, including interim support payments, exceed her annual income by approximately \$20,000. BG submits that her expenses are exaggerated but I do not agree. Although there are certainly areas where savings can be had, such as

meals outside the home, vacations, private school tuition and entertainment, her overall expenses are not excessive or unreasonable. In all, her current income is not sufficient to meet her financial needs and her aspiration to obtain a two bedroom rental suite would seem likely to remain unfulfilled.

- [107] BG's financial needs are less obvious. This is because he has failed to file an updated financial statement and has filed minimal evidence as to his financial obligations or needs. Nevertheless, his original financial statement filed September 11, 2017 indicated that his monthly expenses were approximately \$5,200. However, \$1,600 of this amount was in respect of the Family Home which has now been sold. When the amounts related to the Family Home are excluded his total monthly expenses, based on the September 11, 2017 financial statement, are \$3,600 per month or \$43,200 per year. This amount does not include anything for rent, which at some point he will be required to pay.
- [108] The disparity in the incomes of the parties, even if income is imputed to BG, and the needs of BG entitle him to spousal support on a non-compensatory basis. The amount and duration of that support is to be determined by reference to the Spousal Support Advisory Guidelines ("SSAG"). The incomes of the parties for support purposes, as determined above, are \$68,500 for EG and \$28,000 for BG. The formulas under the SSAG provide that support should be in the range of between \$141 and \$785 per month with a mid-point at \$420. The duration of the award should be for a minimum period of six years from the date of separation and a maximum period of 12 years from the date of separation.
- [109] In my view, the amount of spousal support should be set at \$420 per month which is the middle of the range suggested by the SSAG. The financial circumstances and lifestyle of EG are not significantly better than those of BG. An award at the mid-range, given that BG is not currently paying housing costs, will maintain a rough equivalency in their respective standards of living.
- [110] With respect to the duration of the award, it should be set at six years, the low end of the range suggested by the SSAG. BG has a college degree and was the main income earner of the family until the onset of his medical difficulties. By August of 2023, which will be six years from the date of separation, he ought to be able to re-establish himself in the technology, computer and networking field or have found other employment that makes him self-sufficient.
- [111] Therefore, commencing on April 1, 2020, and continuing on the first of each and every month thereafter until and including August 2023, EG shall pay spousal support to BG in the amount of \$420 per month.

Miscellaneous Matters

- [112] BG claims that there are arrears of support owing by EG. EG admits that she paid \$10 per month less in support than she was supposed to do due to an error on her part.

[113] Given my determinations on the quantum of support to be paid by EG, the interim payments were higher than they ought to have been and any arrears due to EG paying \$10 per month less than she ought to have are cancelled.

Orders

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

- a) Subject to s. 12 of the DA, the claimant, BG, and the respondent, EG, who were married at Moga, Punjab, India on July 1, 2005, are divorced from each other, the divorce to take effect the 31st day after the date of this order.
- b) The parties shall have joint custody of the child of the marriage and shall be the guardians of the child under s. 39(1) of the Family Law Act, S.B.C. 2011, c. 25.
- c) The parties shall equally share all of the s. 41 parental responsibilities for the child under s. 40(2) of the FLA.
- d) The parties shall consult with each other regarding any important decision concerning the child and shall attempt to come to agreement on such decision. If they are unable to agree, they are to retain the services of a family justice counsellor. If after meeting with the family justice counsellor they are still unable to agree, either party may apply to the court to determine the matter at issue.
- e) Unless otherwise agreed by parties, the parenting time of the parties with the child shall be:
 - i) The claimant will have parenting time every week from Saturday at 8:00 p.m. until Wednesday after school;
 - ii) The respondent will have parenting time every week from Wednesday after school until Saturday at 8:00 p.m.;
 - iii) During school summer holidays and spring break:

[1] In odd numbered years,

- i. the claimant will have parenting time from July 1 to 15, August 1 to 15, and the first week of spring break, and
- ii. the respondent will have parenting time from July 16 to 31, August 16 to August 30, and the second week of spring break;

[2] In even numbered years,

- i. the respondent will have parenting time from July 1 to 15, August 1 to 15, and the first week of spring break, and
- ii. the claimant will have parenting time from July 16 to 31, August 16 to August 30, and the second week of spring break;

iv) During the winter/Christmas school holiday period:

- [1] In odd numbered years, the claimant will have parenting time from December 19 to 25 at noon and the respondent will have parenting time from December 25 at noon until December 31, and
- [2] In even numbered years, the respondent will have parenting time from December 19 to 25 at noon and the Claimant will have parenting time from December 25 at noon until December 31;
- v) The respondent shall have parenting time on Mother's day of each year and on her birthday of each year;

vi) The claimant shall have parenting time on Father's day of each year and on his birthday of each year;

vii) For Labour day, Remembrance Day and Family Day, the respondent shall have parenting time in odd numbered years and the claimant shall have parenting time in even numbered years; and

viii) For Thanksgiving, Easter holidays and Victoria Day, the claimant shall have parenting time in odd numbered years and the respondent shall have parenting in even numbered years.

f) The \$332,687.86 plus accrued interest, currently held in trust, shall be distributed to the parties as follows:

i) \$116,000 to the respondent, and

ii) The balance is to be divided equally between the parties;

g) The 2015 Jeep Cherokee is the sole property of the claimant and he is to be solely responsible for any loan obligations.

h) The respondent's pension is to be divided between the parties pursuant to Part 6 of the Family Law Act.

i) If any jewellery or other personal property belonging to the respondent is found by the claimant, it shall be immediately returned to the respondent;

j) The respondent is found to be a resident of British Columbia and is found to have a gross annual income of \$65,800 for support purposes;

k) The claimant is found to be a resident of British Columbia and is imputed to have a gross annual income of \$28,000 for support purposes;

l) The respondent will pay to the claimant, the sum of \$371 per month for the support of the child, commencing on April 1, 2020 and continuing on the 1st day of each and every month thereafter, for as long as the child is a child of the marriage or is otherwise eligible for support under the Family Law Act or until further Court order;

- m) The respondent will pay to the claimant for his support, the sum of \$420 per month, commencing on April 1, 2020 and continuing on the 1st day of each and every month thereafter until August 1, 2023, at which time spousal support will be terminated;
- n) On or before June 30 of each year, the parties shall provide each other with their complete income tax returns and any notices of assessment or re-assessment relating to the prior taxation year; and
- o) Any arrears of interim child or spousal support due to EG paying \$10 per month less than she ought to have pursuant to the Order dated September 15, 2017 are hereby cancelled.

Giaschi J.

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