

CANADA / JUDGMENT

B.K.W. v. S.J.H.

2022 BCSC 1445

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 1445 B.K.W. v. S.J.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.K.W. v. S.J.H.,

2022 BCSC 1445

Date: 20220819

Docket: E191780

Registry: Vancouver

Between:

B.K.W.

Claimant

And:

S.J.H.

Respondent

Before: The Honourable Madam Justice Morellato

Reasons for Judgment

Counsel for the Claimant:

B.J. Ingram

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M. Brandon

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Place and Dates of Trial:

Vancouver, B.C.

November 3-5, 2021

January 11, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 19, 2022

I. INTRODUCTION

[1] The parties in this family law matter began living together in a marriage-like relationship on April 15, 2011. There are two children of the marriage: a son, who was born December 4, 2011 and a daughter, who was born September 20, 2013. The parties were married on July 7, 2014, separated on April 18, 2019 and divorced on November 4, 2021. The claimant mother ("Mother" or "Ms. W") is 34 years old and the respondent father ("Father" or "Mr. H") is 45 years old. The parties have resolved their parenting-time issues through mediation and have shared an equal parenting arrangement since September 2020. The issues before the court relate to:

1. the proper amount of child support to be paid by each party;
2. whether Ms. W is entitled to spousal support and, if so, the appropriate amount to be paid by Mr. H;
3. whether Mr. H's down-payment of \$115,883.93 on the former family home remained excluded property, or was a gift to the marriage and is therefore family property; and,
4. whether the former family home, in which Mr. H resides, ought to be sold at this juncture or at some point in the future.

[2] I will address these issues in their respective order, along with others relating to the division of family debt.

II. ISSUES TO BE DETERMINED

A. Imputing Income for Child Support

- [3] The Father acknowledges his obligation to pay child support but argues that the Mother is capable of earning more income than she has earned since the separation. He asserts the Mother is not meeting her financial obligations to support their children. The Father argues the Mother has been, and continues to be, underemployed.
- [4] In *Willick v. Willick*, [1994] 3 S.C.R. 670 at 689-690, the Supreme Court of Canada has underscored that child support orders: 1) are child-centered, not parent-centered; 2) require consideration of the children's needs as the priority, including the relative ability of each parent to pay; and 3) reinforce the joint obligations of parents to financially support their children. In *Kerr v. Baranow*, 2011 SCC 10 at para. 208, Justice Cromwell affirmed that child support is the right of the child, not of the parent seeking support on the child's behalf. Further, the basic amount of child support depends on the income of the payor and not on a highly discretionary balancing of means and needs.
- [5] Recently, in *Michel v. Graydon*, 2020 SCC 24 at para. 10, the Supreme Court of Canada summed up the principles governing child support orders that had been set down previously in *D.B.S. v. S.R.G.*, 2006 SCC 37; the Court in *Michel* reaffirmed that:
- Child support is the right of the child, which right cannot be bargained away by the parents, and survives the breakdown of the relationship of the child's parents (para. 38);
 - Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together (para. 38);
 - The child support owed will vary based upon the income of the payor parent, and is not confined to furnishing the "necessities of life" (paras. 38-45).
- [6] In this light, I must assess the income of each parent so that the parties may apply the Federal Child Support Guidelines, SOR/97-175 in order to discern their respective obligations to pay child support.
1. Income of the Father
- [7] Mr. H has been employed with BC Emergency Health Services for many years as a paramedic. From 2018 onward, Mr. H has been working as a paramedic practice educator, which he describes as a "multi-factorial position"; that is, he works a third of his time as a paramedic, a third of his time developing curriculum for paramedics, and a third of his time teaching paramedics.
- [8] Mr. H's income and income earning potential is not disputed. The evidence establishes that he earned the following total income, in what is commonly referred to in the authorities as "line 150 income" (currently, line 15000 in Canadian income tax return forms):

2016: \$212,926.69

2017: \$215,253.71

2018: \$238,949.41

2019: \$182,028.43

2020: \$139,695

- [9] At the first part of the trial in early November 2021, Mr. H provided documentation which confirmed his "year to date" accumulated pay for 2021 was \$134,836.
- [10] Mr. H testified that he worked a great deal of overtime prior to 2019 to pay for significant renovations to the former family home. Accordingly, his income in prior years was higher than usual as the parties wished to renovate their home without incurring significant debt. In 2019, Mr. H's income was elevated because he receive a lump payment from his employer to representing holiday pay.
- [11] Mr. H explained that his base full-time pay is between \$115,000 and \$119,000, working on a four day on and four day off schedule. He explained that, because he has been sharing his parenting time on an equal basis since September 2020, his focus has shifted to spending more time with the children. As such, he has continued to work full-time but has chosen to not work as much overtime. I accept his evidence in this regard. I find he worked significant overtime prior to the parties' separation, in order to generate extra funds to cover the cost of renovating and repairing the family home.
- [12] The parties agree that Mr. H's 2021 income should be set at the same level as his 2020 income. I am of the view, in light of the entirety of the evidence before me, that this is a reasonable assessment and that child support should be set according to this income level, at \$139,695 for both 2020 and 2021.

2. Income of the Mother

- [13] Ms. W was working full-time as an emergency care dispatcher when the parties met. She continued to work full-time until the birth of her children. Ms. W returned to work part-time following her maternity leaves, after the birth of both the children, and she was working part-time when the parties separated.
- [14] After the parties separated in April 2019, Ms. W applied for and succeeded in obtaining a full-time position on July 15, 2019, again with Emergency Health Services. However, due to the stress of the separation, Ms. W went on sick leave shortly after being hired for this position. She provided her employer with medical certificates and notes for most of her absences.
- [15] The parties' separation was very difficult and high conflict. The conflict between them led to a period where Mr. H did not see the children, and this significantly impacted his relationship with them. There were accusations of parental alienation, followed by am custody dispute that has since resolved.

- [16] Ms. W went on stress leave until September 30, 2019, worked for five weeks full-time from October 1, 2019 to November 5, 2019, and then went on stress leave again from November 7, 2019 to September 30, 2020. She returned to work for approximately two and a half months and worked full-time from October 1, 2020 to December 14, 2020. She went on stress leave again on December 15, 2020 and resigned her position in February 2021.
- [17] In February 2021, Ms. W enrolled in a medical office Assistant program, which she testified was seven to eight months in length, part-time program. She anticipated employment start dates in January or February of 2022.
- [18] With the Court's unopposed leave, following closing submissions, in a letter dated January 18, 2022, counsel for Ms. W advised that Ms. W "is currently unemployed" and, further, that she had received a "casual" job offer from the City of Surrey at a Communications Centre at \$29 per hour, although with no guaranteed minimum hours. Counsel advised that in order to secure the position, Ms. W was required to complete training; however, she tested positive on a rapid COVID test and could not participate in the training as originally scheduled. Ms. W was awaiting instructions on training availability at the time of her counsel's January 2022 letter. Counsel confirmed in this letter that Ms. W had completed the Medical Office Assistant program and was awaiting dates for a Hospital Unit Clerk program to begin; she hoped to work while waiting to start her next course and "potentially work some hours when enrolled in the course."
- [19] Ms. W earned the following line 150 income from 2016 to 2020:
- 2016: \$39,481.11
- 2017: \$35,564.21
- 2018: \$33,247.98
- 2019: \$29,618.93
- 2020: \$62,327.74
- [20] Ms. W received sick benefits in 2020. She submits that, while her line 150 income was \$62,327.74 in 2020, her income for that year was really \$28,170.03. She explained that her employer sent her a letter on September 14, 2021 that stated it had erroneously "overpaid" her in 2020 and was seeking recovery from her in the amount of \$34,157.71. She testified she is not capable of paying this money back, does not intend to do so, and that her union was assisting her with the issue.
- [21] Counsel for Ms. W submitted that her income for 2021 should be imputed at \$35,000, which he submits is consistent with her prior years' earnings.
- [22] Mr. H submits that Ms. W's income earning capacity is much higher than \$35,000 per year and that this Court should impute her income equivalent to what she was capable of earning in her former position as an emergency medical dispatcher, working full-time. Mr. H says

that he is not seeking any imputation of income until September 2020, which is when the parties entered a shared parenting arrangement. He asserts, however, that from that point onwards Ms. W was capable of working full-time and, under her collective agreement, she was entitled to an hourly rate of \$39.44 per hour or \$71,787 per year (\$39.44 x 1820 hours). While the collective agreement provides that her hourly rate would increase an additional 2% to \$40.22 as of April 2021, Mr. H is seeking Ms. W's income to be imputed at the lower annual income of \$72,787.

- [23] Counsel for Mr. H underscores that Ms. W is currently in good health and is not seeking "stress counseling" or taking sleep medications, as she once did. He also emphasizes that Ms. W left her full-time position voluntarily in February 2021.
- [24] I have considered Ms. W's evidence that, while she initially loved the work she did as an emergency medical dispatcher, over time her "love for that work wasn't there." She found dealing with emergencies more stressful and no longer looked forward to going to work. She therefore sought a career change and registered for a medical office assistant program in 2021 and also a three month long hospital clerk program. Ms. W testified that she hoped to work in a hospital with this training.
- [25] When imputing income, it is axiomatic that the Court is not limited to what a party actually earns but must consider the party's capacity to earn income: see *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37; *Van Gool v. Van Gool* (1998), 64 B.C.L.R. (3d) 94 (C.A.); *Barker v. Barker*, 2005 BCCA 177 at para. 19. If a party is unreasonably underemployed (that is, not employed in a position commensurate with her earning capacity) it may be appropriate to impute income for purposes of a support order: *Hsieh v. Lui*, 2017 BCCA 51 at para. 47.
- [26] The reasons of this Court in *Hanson v. Hanson* (1999), 92 A.C.W.S. (3d) 1024 (B.C.S.C.), are also of assistance in discerning whether income should be imputed to Ms. W. In that case, the legal principles set out by Madam Justice Martinson may be summarized as follows:
- i. Section 19(1) of the Guidelines allows the Court to impute such amount of income to a spouse as it considers appropriate in the circumstances.
 - ii. Imputing income is the way in which the Court gives effect to the legal requirement that a spouse must earn what the spouse is capable of earning.
 - iii. The Court must consider not only the amount of income a spouse actually earns, but "the amount of income a spouse could earn if working to capacity."
 - iv. Bad faith is not required. The spouse required to pay is intentionally under-employed if that spouse chooses to earn less than he or she is capable of earning.
 - v. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the spouse are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.

- [27] In *Marquez* at para. 38, our Court of Appeal reasoned that the test for imputing income for under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of age, education, health, work history and work availability: see also *Zilic v. Zilic*, 2021 BCCA 107 at para. 19. In addition, our Court of Appeal (in *Watts v. Willie*, 2004 BCCA 60 at para. 16 and *Beissner v. Matheusik*, 2015 BCCA 308 at para. 44) has endorsed the factors set down by the Manitoba Court of Appeal in *Donovan v. Donovan*, 2000 MBCA 80 at para. 21, which may ground an imputation of income on the basis of underemployment or unemployment:
1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (*Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.)).
 2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
 3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.
 4. Persistence in unremunerative employment may entitle the court to impute income.
 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
- [28] While persistence in pursuit of an unremunerative, unproductive, or unrealistic career path may justify the imputation of income, where the party's choice of career remains commensurate with the above-listed factors, the Court need not conscript a party into a specific line of work. This principle was affirmed by the Court of Appeal in *Jendruck v. Jendruck*, 2014 BCCA 320 at para. 16:
- [16] Consistently, the courts have affirmed and applied the objective in the Divorce Act of striving for economic self-sufficiency, while recognizing that attainment of full economic self-sufficiency may not be practicable. To the degree effort could be made by a party to contribute to his or her own support in the circumstances, and effort has not been made, the courts have said the consequences of that party's choice falls on them. The courts do not, and cannot, say a person must take up any particular employment. It is a free society in

which people may choose how to spend their hours. However, where the effort to contribute to one's own support is deemed insufficient in all the circumstances, the court will place the consequence of the inadequate effort on the person whose choice it is, and may do so by the vehicle of imputing income for under-employment.

- [29] I have considered these principles in reaching the conclusion that it would be both reasonable and fair to impute income to Ms. W at approximately \$55,000 annually, working full-time, from 2021 onward. Ms. W is a bright, healthy woman in her prime. While imputing an annual income of \$55,000 at this time may be somewhat conservative, it is in my view a fair and reasonable assessment.
- [30] I appreciate that Ms. W would be earning over \$70,000 a year if she continued to work as a medical emergency dispatcher. However, I do not find it reasonable or fair to impute income at this level; this would either effectively require Ms. W to do a job that she was very unhappy doing and did not find fulfilling, or discount Mr. H's child support obligations on that premise. Employment as a medical office assistant or hospital clerk is remunerative, productive, and realistic. Her choice to pursue this career path is reasonable. Furthermore, I am not persuaded, given Ms. W's education level and work experience, that there is a reasonable prospect of her finding another full-time job at the \$70,000 level or higher.
- [31] The evidence before me demonstrates that Ms. W is now able to work full-time and that she has the capacity to earn significantly more than \$35,000 per year. However, she ought not be at a financial disadvantage for choosing to go back to school, now that the children are older, to increase her skill set so that she has the ability to adjust her career path to do fulfilling work.
- [32] Accordingly, with a view to the evidence that the medical office assistant program is a part-time, seven to eight-month course, I agree with counsel for Ms. W. that her income ought to be imputed at \$35,000 for 2021. I am also of the view that a reasonable assessment of Ms. W's income, once she has completed her additional course work, ought to be significantly higher; at that juncture, she will be more employable and will have the capacity, in my view, to earn more working full-time.
- [33] In reaching the \$55,000 figure, I have not only considered the factors enumerated in the authorities cited above, but also the entirety of the evidence before me, including but certainly not limited to, her job offer in 2022 (albeit on a casual basis) of \$29 per hour. While that last job offer is in no way conclusive in regard to her annual income earning potential, it at least indicates that Ms. W is capable of competing for jobs that earn significantly more than the \$35,000 she asserts is an appropriate income to impute.

3. Conclusions Regarding Child Support

- [34] In light of the above, I find Mr. H is to pay child support based on the following income:

2019: \$182,028.43

2020: \$139,695

2021: \$139,695

- [35] Mr. H's income will be imputed at no less than \$139,695 for 2022, or according to his line 15000 income for 2022, which even is higher.
- [36] I find Ms. W must pay her portion of child support, and that it is to commence on October 1, 2020. Her 2020 income shall be based on her actual income of \$62,327.74. While Ms. W has yet too pay back the sum of \$34,157.71 to her former employer, should this occur, the parties are to address this matter by adjusting future support payments accordingly. For present purposes, however, her 2020 income is assessed at \$62,327.74 for child support purposes.
- [37] In 2021, her income is imputed at \$35,000 for that year. In light of her decision to complete a three-month hospital clerk program in 2022, which requires significantly less time off work, I am of the view that a higher income ought to be imputed to Ms. W in 2022 than in 2021, but at an amount that is lower than the full \$55,000 which I have assessed she would be capable of earning if employed full-time. In light of the evidence as a whole, I am of the view that Ms. W should be imputed an income in the amount of \$45,000 for 2022. The parties' portions of section 7 expenses will be pro-rated accordingly.
- [38] Both parties are to exchange their income tax returns and notices of assessments by no later than June 15th of each year, so long as their children remain children of the marriage.
- [39] I should note that Mr. H has been making support payments pursuant to the without prejudice consent order of Justice Kent dated September 11, 2019. The order did not specify whether the payments were child or spousal and simply stated that Mr. H was to pay \$2000 per month, in two equal installments, on the 1st and 15th of each month, commencing September 15, 2019. The parties are to adjust the amounts owing based on these reasons for judgment and what Mr. H has already paid in support payments.

B. Spousal Support

- [40] Ms. W started working as an emergency care dispatcher soon after she graduated from high school. She started dating Mr. H, who worked for the same employer, when she was 22 years old. The parties started living together in April 2011. As noted earlier in these reasons, Ms. W went back to work part-time after the birth of their first child and second, and she was working part-time in April 2019 when the parties separated.
- [41] Ms. W began a relationship with Mr. R in the fall of 2018, before the parties separated. Ms. W and Mr. R have remained in a committed relationship ever since. Mr. R found and paid for an apartment for Ms. W immediately after the parties' separated. Ms. W did not stay in the apartment long before she decided to move in with her parents. Mr. R also moved into Ms. W's parents' home. Mr. R paid \$700 a month in rent while living there. Ms. W testified that she and Mr. R moved out of her parents' home and have been living together in their own residence since January of 2020.

[42] Ms. W testified that Mr. R has been supporting her financially and has also paid for the cost of her medical office assistant and hospital clerk programs. Mr. R testified that he was "generous" to Ms. W and her children, confirming that he contributed to their "food, clothing and other activities." He also confirmed that he would continue to pay for her expenses.

1. Legal Framework

[43] When determining whether a claimant is entitled to spousal support, the Court must consider the objectives that underlie spousal support awards, as enumerated in s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. A spousal support order 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.

[44] Sections 160 to 162 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] also provide direction. As noted by Griffin J.A. in *Zilic* at para. 21, these sections largely overlap with those in the DA; the conceptual bases underlying both statutes are the same.

[45] The case law further informs the grounds on which entitlement may be established. These are summarized in *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 25-27:

[25] Canadian courts have recognized three distinct bases upon which a spouse may be entitled to an award of spousal support: compensatory, non-compensatory, and contractual.

[26] Compensatory entitlement will arise where, as a result of the parties' roles during the marriage, one spouse has suffered economic disadvantage or has conferred economic advantages on the other. Most often, such entitlement will arise where one spouse has sacrificed career opportunities in order to take on more of the family's household or child-rearing responsibilities. Upon the dissolution of the marriage, the spouse who has given up opportunities may be entitled to spousal support, either to compensate for diminished earning capacity, or to share in the augmented earning capacity of the other spouse. The main goal of compensatory spousal support is to provide for an equitable sharing of the economic consequences of the marriage (see *Moge v. Moge*, [1992] 3 S.C.R. 813 at 858-66).

- [27] Non-compensatory support entitlement focuses on the needs of the spouses and on their respective means. It is based on the idea that spouses, by virtue of marriage, have some ongoing responsibility to care for one another. The degree to which non-compensatory principles will apply will depend on a close examination of not only the means and needs of the spouses, but also of the nature of the marital relationship and its duration (see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, particularly at para. 53).
- [46] In this instance, Ms. W does not assert a contractual entitlement to spousal support. She asserts her entitlement both on a compensatory and non-compensatory basis.
- [47] I have considered the circumstances of the marriage, as well as Ms. W's age, skills, education and opportunity for retraining, including her realistic job opportunities: *Tedham v. Tedham*, 2005 BCCA 502 at para. 33. I am also mindful that self-sufficiency is only one factor to be considered in assessing entitlement to spousal support and that no single objective is paramount: *Moge* at 852.

2. Discussion

- [48] Ms. W is entitled to compensatory spousal support. I am satisfied that Ms. W has been economically disadvantaged and suffered financial consequences as a result of the marriage and its breakdown, although to a lesser degree than those cases where the stay-at-home parent does not work at all and such an arrangement continues until the children are virtually grown. Nevertheless, the parties had an arrangement, prior to their separation and until their children were seven and five respectively, where Ms. W was primarily responsible for caring for their two young children and worked part-time, while Mr. H, who earned a significantly higher income, went to work full-time in a highly skilled profession. The arrangement between the parties allowed Mr. H to pursue and advance his career. For example, Mr. H testified that his hourly wage increased in 2018 when his job developed to include an educational component.
- [49] While Ms. W worked part-time after both her maternity leaves, she was at home and took care of the children most of the time when Mr. H was working; this was particularly the case when Mr. H was working considerable overtime hours. It is clear that by caring for the children while Mr. H was the primary income earner, Ms. W experienced a diminished earning capacity. In addition, she was not in a position to readily consider alternate careers or further education during this period in their marriage. Furthermore, this arrangement between the parties supported Mr. H's efforts in 2018 to increase his hourly income and move into a partially educational role at work. Accordingly, I have no difficulty finding Ms. W is entitled to compensatory spousal support.
- [50] I should also note that there is a non-compensatory basis for spousal support arising from Ms. W's stress leaves following the parties' separation. Although she has since recovered, the compensatory basis for spousal support continues.

[51] Mr. H's income for purposes of assessing spousal support ought to be based on his income as I have discussed above:

2019: \$182,028.43

2020: \$139,695

2021: \$139,695

[52] In light of the evidence before me, and consistent with my analysis earlier in these reasons, Mr. H's income will be imputed at no less than \$139,695 for 2022 or, alternatively, according to his line 15000 income for 2022, whichever is higher.

[53] I find that Ms. W's income, and imputed income for spousal support purposes, is as follows:

2019: \$29,618.93

2020: \$62,327.74

2021: \$35,000

2022: \$45,000

[54] The evidence established that Ms. W earned and received \$62,327.74 in 2020 from her employer. As noted earlier in these reasons, while she testified that her employer was seeking to recover the sum of \$34,157.71, she also testified that she was not financially able to reimburse these funds, and that she did not intend to pay the money back. Based on the evidence before me, I see no principled basis upon which I may reasonably assess her income at \$28,170.03 for 2020. While it seems unlikely that Ms. W will be required to pay back the sum of \$34,157.71, should this occur, the parties are to address this matter by adjusting future support payments accordingly. For spousal support purposes, however, her 2020 income is assessed at \$62,327.74.

[55] Ms. W's income for 2023 will be based on her income at that time, working full-time.

[56] I conclude that Ms. W's spousal support should continue until the economic consequences flowing from the marriage and its breakdown are redressed: *Tedham* at paras. 58-60; *Chutter v. Chutter*, 2008 BCCA 507 at para. 79; *Parton v. Parton*, 2018 BCCA 273 at para. 45. In discerning the appropriate duration of spousal support, the question of when the economic consequences of the marriage are redressed is informed not only by length of marriage, but also by the parties' respective ages, their health and other circumstances particular to the parties.

- [57] While the parties were together for a significant period of time, theirs was not an entirely traditional marriage in the sense that Ms. W is still in her early 30s, went back to work soon after both children were born and worked at a relatively high paying job before and during the marriage. Indeed, she was able to upgrade her job to full-time work within three months of the parties' separation, although she took a considerable leave of absence due to stress, and then decided approximately a year and a half later to resign from the position.
- [58] I have also considered that Ms. W is now re-partnered to Mr. R who has confirmed, as has she, that he is now paying for her expenses and also contributing to the children's expenses. Given the evidence as a whole, I find that Ms. W's reduction in her standard of living was ameliorated from the time she separated from Mr. H; Mr. R has assisted Ms. W financially since then.
- [59] I do not agree with Mr. H that Ms. W's re-partnering effectively disentitles her to spousal support: see *Morigeau v. Moorey*, 2015 BCCA 160 at para. 37-39. I remain mindful that the law requires compensatory spousal support to continue until the economic consequences from the dissolution of the marriage are redressed; on my assessment of the evidence as a whole, that has not yet occurred.
- [60] Nevertheless, this is not a situation where Ms. W will continue to suffer the economic consequences flowing from the marriage and its dissolution on a long-term basis. She is young, healthy, re-partnered and has completed a course of studies which has recently added to her skill set. Because the children remain relatively young, Ms. W's career sacrifice (for which she must be compensated) was relatively brief. This is not analogous to a relationship where one partner essentially takes on child-rearing responsibilities from birth until high-school graduation. As a result, the duration of the compensatory payments ought to be shorter in comparison.
- [61] Having carefully considered the guiding authorities and the specific circumstances before me, I am of the view that spousal support should be four years in duration, ending on the fourth anniversary of the parties' separation, on April 18, 2023, and that the spousal support payments should be set at the mid-range of monthly support based on the Spousal Support Advisory Guidelines. I have reviewed the low, mid-range, and high-end amounts of spousal support for the periods in question; I am satisfied that payments at the mid-range, rather than at the low or the high-end of the range, will better ensure that the economic consequences of the marriage are redressed fairly and not excessively.
- [62] In light of the above, the parties are at liberty to agree, in writing, to a lump sum spousal support payment should they choose to pursue this option. If the parties come to such an agreement, the lump sum may be paid from the proceeds of the sale of the former family home. Otherwise, spousal support must be paid as set out above.

C. Is the Down-payment Excluded Property?

- [63] When the parties started living together, Ms. W moved into Mr. H's townhouse, which he had purchased previously, on his own. In 2014, Mr. H used the equity from the sale of the townhouse to purchase the former family home, and contributed \$115,883.93 as the down-payment.
- [64] Mr. H testified that he has never had an intention to gift the down-payment to the marriage or to Ms. W. He explained he took comfort from the fact that Ms. W had been in a prior relationship and did not seek any compensation for any equity in the property she owned with her previous partner after she separated from him. Both Mr. H and Ms. W testified that in that prior relationship, Ms. W had contributed toward the mortgage and her name was on the title to that property. Nevertheless, she advised Mr. H that she signed over her interest in that property to her previous partner, asking for no money in return.
- [65] Mr. H further testified although he did not discuss his intentions not to gift the down-payment to the marriage, he took comfort from Ms. W's previous approach with her former partner, and he thought that approach would carry forward into their relationship. Mr. H also testified that he was aware of the new FLA and he understood that "what you came in with, you leave with." He recalled discussing the matter with some concerned friends at the time of the 2014 purchase.
- [66] Ms. W confirmed that the parties did not discuss whether the down payment would become a family asset. She also confirmed she is on title to the former family home as a joint tenant and that she signed the mortgage documents. She recalled a discussion with Mr. H about buying a new home "probably a couple of months before my maternity leave was almost up"; the parties discussed their need for a larger home and "getting an au pair from Canada." Ms. W added that they "obviously needed a house that would fit an au pair." Ms. W testified that the parties had a joint bank account and that her wages went into that account. She added that, at the time the parties purchased the home, they were doing so as a young family, for the family's benefit.
- [67] It is admitted that the \$115,883.93 used for the down-payment on the former family home was derived from Mr. H's previously excluded asset. The issue that arises is whether these monies lost their excluded status when they were used to purchase the former family home.

1. Legal Analysis and Discussion

[68] Section 85 of the FLA defines what is excluded property as follows:

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

- (a) property acquired by a spouse before the relationship between the spouses began;
- (b) inheritances to a spouse;
- (b.1) gifts to a spouse from a third party;

- (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;
 - (d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;
 - (e) property referred to in any of paragraphs (a) to (d) that is held in trust for the benefit of a spouse;
 - (f) a spouse's beneficial interest in property held in a discretionary trust
 - (i) to which the spouse did not contribute, and
 - (ii) that is settled by a person other than the spouse;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

[emphasis added]

[69] The onus is clearly on Mr. H to establish, on a balance of probabilities, that the down-payment remained excluded property after it was used as a down-payment on the former family home: FLA, s. 85(2).

[70] In *Venables v. Venables*, 2019 BCCA 281 our Court of Appeal identified two questions that arise under the FLA when excluded property is transferred from one spouse's name to the other spouse's name, solely or jointly:

[93]

- 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?

- [71] The Court in Venables, notes that it addressed the first question in V.J.F. v. S.K.W., 2016 BCCA 186, leave to appeal ref'd [2016] S.C.C.A. No. 295; and also, in Pisarski v. Piesik, 2019 BCCA 129 and Namdarpour v. Vahman, 2019 BCCA 153.
- [72] V.J.F. affirms that the presumption of advancement continues to apply under the FLA. The presumption of advancement is a common law evidentiary presumption, which provides that a gratuitous transfer to a spouse is presumed to be a gift: Hopson v. Hannon, 2020 BCSC 794 at para. 157. However, the presumption only applies in those circumstances where, on the evidence before it, the Court is not able to discern the intent of the party transferring property.
- [73] In light of the prevailing authorities, the Court in Venables reasons that it is the intention of the party transferring ownership that is key in determining whether the property in question remains excluded property:
- [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.
- [emphasis added]
- [74] The Court in Namdarpour at para. 40 provides guidance on the question of how intent at the time of transfer is to be determined, including the principle that the presumption of advancement only operates if a court is unable to reach a conclusion regarding the transferor's intention on the available evidence:
- (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.
- [75] The authorities clearly require that I review the entirety of the evidence surrounding the use of the excluded \$115,883.93 to determine whether Mr. H intended to make a gift when the transfer was made. I have done so, and have come to conclusion that Mr. H did not intend to gift the down-payment to the marriage.
- [76] I have carefully considered the evidence of Ms. W and the submission of her counsel that Mr. H must have had a donative intent in light of the surrounding circumstances, including the following: the parties were raising a young family and were purchasing a home that would accommodate their plans as a family; Ms. W contributed to the family's expenses; Ms.

W was on title; and Mr. H could have, but did not, confirm his intention not to gift the down-payment in writing. Having reviewed the evidence and submissions in this regard, I am nonetheless satisfied that Mr. H did not intend to gift the \$115,883.93 but rather intended that what "was his" remained his. His testimony on the issue of his intent in this regard was clear, reliable and compelling; it was not shaken under cross-examination or compromised by a consideration of the evidence in its entirety.

- [77] How Ms. W had handled property in her prior relationship is not evidence of Mr. H's intent to transfer or not transfer the beneficial interest in the down payment to Ms. W. However, the fact that Mr. H relied on Ms. W making no issue of property division in her previous relationship may in part explain his failure to communicate or record his intention not to gift the down payment to the parties' marriage.
- [78] Ms. W is entitled to an equal share in the increase in the couple's rising equity in the former family home: FLA, s. 84(2)(g); however, in light of the evidence as whole, Mr. H has met his onus of establishing, on a balance of probabilities, that he had no donative intent to convert the \$115,883.93 into a family asset.

D. Pensions, RRSPs, RESPs and Other Property

- [79] The parties are agreeable to the division of each of their pensions using the date of co-habitation on April 15, 2011 and the entitlement date of April 18, 2019, in accordance with Part 6 of the FLA. I so order.
- [80] For greater clarity, the pensions to be divided are: 1) both Ms. W's and Mr. H's Public Service Pension Plan (British Columbia), registered under the BC PBSA with plan number P085496; and 2) both Mr. W's and Mr. H's Ambulance Paramedics Supplemental Pension Plan (British Columbia), registered under P085793. The administrative and legal cost of dividing these pensions will be shared equally by the parties.
- [81] Mr. H also agrees to convert existing RESPs into two separate RESPs, one in each parties' name. I so order.
- [82] Mr. H also agrees to an equal division of RRSPs with the exception of the sum of \$39,996.39, which was the approximate value of all his RRSPs at the date of co-habitation. This is also consistent with the applicable case law: FLA, s. 85(1)(a); *Appleby v. Marshman*, 2018 BCSC 212 at para. 93. Ms. W is seeking a roll-over of half of the non-excluded RRSP; I so order.

E. Family Debt

- [83] As of January 10, 2022, Mr. H claims that Ms. W must pay her one-half share of the mortgage payments, property taxes and property insurance to Mr. H that he has paid since May 2019, in the amount of \$30,740.48. Their expenses have continued to accrue. They are necessary expenses.

[84] Ms. W argues that because Mr. H has chosen to stay in the former family home, he should bear the sole burden of all home-related expenses post-separation. Notably, Ms. W's application to force the sale of the former family home was dismissed by Master Muir on September 9, 2020.

[85] Mr. H testified that post-separation the children became alienated from him. Mr. H explained that while the abusive language and aggressive behaviour towards him from the children, particularly in regard to his oldest child, has subsided and improved, the restoration of his relationship with the children is ongoing. He remains concerned that if the children are uprooted from their home, they will "back-slide".

[86] Mr. H notes that it was the opinion of Dr. England in her s. 211 report of February 12, 2021 support his concerns about the detrimental effects of moving:

the writer recommends that Mr. [H] retain the marital home and choose schools for the children to attend that are close to the home. These recommendations are made in order to support the more fragile relationship that the children have with their father.

[87] Mr. H submits that being able to remain in the former family home while the children have been gradually re-introduced into his life contributed to the strengthening of their relationship with him. In addition, he states that supporting the improved and improving relationship with his children is also in their best interest.

[88] The evidence before me establishes that it has been in the children's best interest to continue living in the former family home since the parties began an equal-time schedule in September of 2020. In this case, I am satisfied that the once-fragile bond between Mr. H and his children has been strengthened by their continuing to live in the former family home with Mr. H; the children have benefitted as a result.

[89] During the separation, Ms. W's rental costs have been paid largely if not entirely by Mr. R. She was not ousted out of the former family home but left voluntarily.

[90] The FLA, provides that family assets as well as family debts are to be shared equally, unless it would be significantly unfair to do so: FLA, ss. 81, 86, and 95; see also *H.K. v. W.K.*, 2017 BCSC 1817 at para. 221; *Kalmiakov v. Shylova*, 2016 BCSC 2095 at para. 100. Despite having been incurred post-separation, these debts were incurred for the purpose of maintaining family property and constitute family debt. In light of the evidence as a whole, I am not able to conclude that it would be significantly unfair to require Ms. W to pay her half-share of the family debts. Furthermore, as noted, I am also satisfied they were also incurred in the children's best interests. Accordingly, Ms. W must pay her one-half share of the mortgage payments, property taxes and property insurance to Mr. H, that he has paid since May 2019.

- [91] While Mr. H is currently resisting the sale of the former family home, he acknowledged during his testimony that its sale would be inevitable. The parties agree that any family debt properly owing may be deducted from the proceeds of sale of the former family home. Accordingly, Ms. W's portion of the debts relating to the mortgage, property taxes and insurance will be paid out of her half-share of the family home.
- [92] Mr. H paid \$5,938.55 for the parties' s. 211 report. He is requesting that this cost be equalized. Ms. H has agreed to do so. Indeed, I see no reason to conclude that it would be significantly unfair to require Ms. W to pay half of this cost. Accordingly, Ms. W must pay \$2,969.28 to Mr. H; this sum may be deducted from her share of the proceeds of sale of the former family home.
- [93] Mr. H also seeks compensation for Ms. W's post-separation VISA expenses of \$5,974.21, to be paid from her share of the proceeds of sale of the former family home. This admission was included in the Notice to Admit of the respondent and was not denied. Further, VISA statements were tendered in support of this particular claim. Accordingly, Ms. W must pay this sum from her half portion of the proceeds of sale of the former family home, as requested by Mr. H.
- [94] In addition, Mr. H seeks compensation for Ms. W's half-share of the cost of a reunification counsellor, Dr. Bolgar, who has assisted with the reparation of the relationship between Mr. H and his children. The cost of Dr. Bolgar's services has been \$2,655.00 to date; this fact was also included in the Notice to Admit of the respondent and was not denied. This is an important and reasonable expense to be shared in the best interests of the parties. Accordingly, Ms. W must pay \$1,327.50 from her half portion of the proceeds of sale of the former family home.

F. Sale of Former Family Home

- [95] As discussed above, Mr. H resisted the sale of the family home. Ms. W seeks an order for the sale of the home, underscoring that reunification counseling began in December 2019. I agree with Ms. W that the sale of the former family home cannot be delayed indefinitely.
- [96] In a letter dated January 7, 2022, Dr. Bolgar writes:
- [The children] continue attending therapy with me, and they present settled in the routine of alternating between their mother and father on an equal [basis]. They also show acceptance and a reasonably positive relationship with their father.
- [97] Dr. Bolgar also added that the children reported having connections to their friends in the neighbourhood, feeling comfortable in their home, and proud of the rooms that they decorated with the father after their relationship was re-established.
- [98] As regards the sale of the matrimonial home. Dr. Bolgar writes:

Both Mr. [H] and Ms. [W] told me that the matrimonial home is going to be sold for their divorce to be finalized and Mr. [H] will have to move. In consideration of the children's age and the significant changes they have already experienced in their lives during a relatively short period, it is my recommendation that the time when this happens is planned with caution.

[99] Dr. Bolgar added:

As it is often the case with sensitive children who experience changes in their lives, when they experience additional stresses, they often show behavioral or [academic] setbacks. [The oldest child] already has some challenges with learning in school and he has the tendency to react with aggression towards his sister when he feels frustrated.

[100] At trial, Mr. H remained concerned that his relationship with the children would be destabilized if the family home was sold. He asserted that living in the family home with the children during his parenting time was an important part of the reunification process. He was amenable to the prospect of working with Dr. Bolgar and the children to prepare for a move to a different home. He testified that he would like to try to buy-out Ms. W's half-interest in the home but was doubtful he could afford to do so, although he stated he might be able to do so, depending on the outcome of this case.

[101] In this light, and although Mr. H also stated at trial that he thought the sale of the family home was inevitable, I am prepared to provide Mr. H with the opportunity to buy-out Ms. W's half-interest in the former family home, providing he does so at fair market value and in a timely manner. The fair market value must be based on an updated appraisal. If Mr. H does not have the financial means to purchase Ms. W's interest in the former family home, it must be sold.

[102] If Mr. H wishes to at least attempt to finance the purchase of Ms. W's half-share in the former family home, he is to arrange an appraisal of the formal family home within 45 days of the release of these reasons for judgment. He must then advise Ms. W of his decision to either buy out her interest in the former family home or sell it.

[103] As it is by no means certain that Mr. H will be financially able to purchase Ms. W's share of the former family home, and in light of Dr. Bolgar's caution, if and when it is determined that the former family home is to be sold, the children must be advised of the upcoming change in a manner that is supportive and sensitive to their emotional needs and concerns. At the trial of this matter, the parties were agreed that they would seek the assistance of Dr. Bolgar in ascertaining how best to advise the children of this move and, also, in supporting them through this period of transition.

- [104] Dr. Bolgar suggested that, if the children move into a new residence with their father, this be done during their summer holidays as this would be least disruptive. Accordingly, the parties are to arrange their affairs such that the former family home is put up for sale in or about the spring of 2023, with the intention of facilitating a sale, and a move before the end of next summer. This arrangement, in my view, will facilitate the children's healing process as well as their reunification with their father.
- [105] The parties are at liberty to discuss and agree upon an alternative time-frame for the sale of the former family home, on the condition that they consult Dr. Bolgar and the children as discussed above. The transition to a different home must be arranged as smoothly as possible for the sake of the children. If the parties are able to agree in writing to sell the property sooner than next summer, they are free to do so.
- [106] As success between the parties is divided, they will each bear their own costs.

"MORELLATO J."

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