

CANADA / JUDGMENT

B.S.W. v. W.F.W.

2024 BCSC 299

COURT

Supreme Court of British Columbia

DECIDED

22 February 2024

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2024 BCSC 299 B.S.W. v. W.F.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

B.S.W. v. W.F.W.,

2024 BCSC 299

Date: 20240222

Docket: E213300

Registry: Victoria

Between:

B.S.W. aka B.S.G.

Claimant

And:

W.F.W.

Respondent

Before: The Honourable Mr. Justice Verhoeven

Supplementary Reasons to B.S.W. v. W.F.W., 2023 BCSC 1925.

Supplementary Reasons for Judgment re: Post Judgment Application of the Claimant

Counsel for the Claimant:

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C. Lewis

Counsel for the Respondent:

R. Faber

Place and Date of Hearing:

Victoria, B.C.

February 14, 2024

Place and Date of Judgment:

Victoria, B.C.

February 22, 2024

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I. Introduction

[1] Reasons for Judgment in this family law action were released November 2, 2023, and are indexed at 2023 BCSC 1925 (the "RFJ").

[2] On December 1, 2023, the claimant filed a notice of appeal, relating to the retroactive and prospective spousal support aspects of the decision.

[3] On February 1, 2024, the claimant filed a notice of application seeking various orders said to be clarifying, or if necessary, reconsidering or reopening the trial to ensure that the order reflects the intention of the court.

[4] No order has been entered with respect to the RFJ.

II. Legal Principles

[5] A judge is not functus officio until the court's order is entered, and then only with respect to the issues resolved in the formal order: *Bajwa v. Habib*, 2020 BCCA 230, at para. 46, citing *Harrison v. Harrison*, 2007 BCCA 120 at para. 29. The trial judge had jurisdiction to re-open the trial "in a proper case": *Bajwa*, para. 46. However the discretion to reopen the case prior to entry of the order is not "unfettered". As with any exercise of discretion, it must be exercised judicially, in a principled and consistent way: *Bajwa*, at para. 51, citing *Hansra v. Hansra*, 2017 BCCA 199.

[6] The discretion to reopen should be exercised sparingly and only when it is probable that a miscarriage of justice would occur unless the trial is reopened: *Bajwa*, para. 52.

[7] In *Bajwa*, at para. 48, the court states:

Trial judges have a broad discretion to re-open a trial after judgment has been given, but it is a discretion that should be exercised rarely and only when the interests of justice clearly require prolonging the litigation in order to avoid a miscarriage of justice. For example, the discretion to re-open may be properly exercised by a trial judge who is satisfied that his or her original judgment contains material errors that may be corrected by further submissions, or where evidence has been overlooked or misconstrued, or where the law has been misapplied, or where the reasons for judgment failed to address an argument advanced at trial: *Grewal v. Grewal*, 2016 BCCA 237 at para. 86.

[8] An appeal is not a bar to a judge reconsidering an unentered order: *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 1529 (CanLII), at para. 12, citing *Sharp Electronics of Canada Ltd. v. Ono*, [1982] B.C.J. No. 470 (Q.L.) and *Constantinescu v. Barriault*, 1996 CanLII 3561. But it is not open to a party to reargue the law and apply new argument to the facts when the matter is under appeal: *Gregory v. British Columbia (Superintendent of Motor Vehicles)*, 2016 BCSC 1619, at para. 14, citing *Bx Department Store Ltd. v. Non-Marine Underwriters (Attorney)*, [1986] B.C.J. No. 2344 (S.C.).

III. Analysis

A. Property Division - Vehicles

[9] The substantial issues relating to property division at trial were:

1. The claimant's claim for separate property based on section 92 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], or alternatively her claim for unequal division of family property and family debt pursuant to section 9 of the FLA, based upon the asserted agreement under section 92; and

2. The claimant's claim for excluded property under section 85, in respect of a pre-relationship RRSP, and certain gifts and inheritances.
- [10] The claimant did not succeed on the first issue. The respondent did not challenge the claimant's evidence with respect to the asserted exclusions, or the exclusions themselves.
- [11] In the RFJ I also referred to certain other property division issues. Among these, I referred to the vehicles owned by the parties, and stated:
- [140] The claimant has three vehicles, a 2016 Honda Pilot, a 2006 Jeep TJ, and a 1972 Volkswagen bus, that she values collectively at \$42,000. The respondent has a 1999 Dodge pick-up truck, a 1998 Yamaha motorcycle, five dirt bikes and a trailer and a homemade boat of unknown value. He values these vehicles collectively at \$31,000 in his F8. On equal division of family property, a compensating payment is required to make up the difference.
- [12] My reference to the three vehicles owned by the claimant relied upon the claimant's closing submissions at trial, and a table provided to the court at that time, which, based upon the evidence at trial, listed the value of the claimant's vehicles at a total amount of \$49,801:
- a) 2016 Honda Pilot - \$18,656;
 - b) 2006 Jeep - \$11,145; and
 - c) 1972 VW Van - \$18,000.
- [13] These vehicles were shown on the table as being in the possession of the claimant. These values were used in the table to indicate the amount of the compensating payment that could be payable by the claimant, depending on the decision of the court.
- [14] The claimant's most recent pre-trial form F8 financial statement which was in evidence at trial indicated that she owned these same three vehicles, valued at \$42,000. This is evidently the value that I erroneously referred to in para. 140.
- [15] The claimant's F8 indicated that she claimed the Jeep and the VW Van were not family property. Her F8 valued them at \$10,000 and \$18,000, respectively.
- [16] The respondent's pre-trial form F8 financial statement listed his vehicles at a net collective value of \$23,000. This is the amount that was used in the claimant's table. The claimant's submissions at trial adopted the respondent's sworn evidence as set out in his F8 regarding the vehicles he owned and their values. There is no contrary evidence on this point.
- [17] The claimant's table supported a possible equalization payment of \$216,347, to be paid by the claimant. I made a reference to that amount in para. 170 of the RFJ, but without making a final determination as to the actual amount of an equalization payment that is required.

- [18] The claimant points out that the table provided on her behalf in her closing submissions was in error, in that she had claimed that she had purchased the Jeep and the VW Van from the respondent post-separation, and so the claimant's table was not in conformity with the evidence at trial.
- [19] In the RFJ, I did not deal with these claims for separate property. I may have been led into error by overreliance on the claimant's table provided during closing submissions, which, as noted, showed all three vehicles as being held by the claimant, and subject to compensating payment for equalization purposes.
- [20] The claimant points out that the evidence at trial indicates that she purchased the 1972 Volkswagen from the respondent in July 2020, post-separation. Part of the consideration at that time was the transfer to him of her 2006 Jeep. In addition she paid the respondent \$5,000. However in 2021 she purchased the Jeep from him, for payment to him of \$20,000. The respondent agreed with this in cross-examination. In his closing oral submissions he conceded that it would be unfair to the claimant to have to account for the value of the Jeep, since she bought it from him post-separation for \$20,000.
- [21] In summary, in calculating the equalization payment required (which has not yet been finally determined), and contrary to para. 140 of the RFJ, the claimant's 2006 Jeep and 1972 Volkswagen should not be taken into account. Those are separate property belonging to the claimant, which she purchased from the respondent post-separation, as the respondent acknowledged at trial.
- [22] Therefore, contrary to para. 140, a small payment to equalize the values of the vehicles is due from the respondent to the claimant. His vehicles are valued at \$23,000. Her vehicle (2016 Honda Pilot) is valued at \$18,656, on the evidence at trial. The respondent is required to pay the claimant \$2,172 in order to equalize the value of the vehicles.
- [23] I am satisfied that re-opening to address this relatively minor amount is appropriate. There was a minor and inadvertent error in the table I was provided on the claimant's behalf during closing submissions, which implied that the two vehicles were family property subject to division, when that was not consistent with the evidence. In addition the values I referred to in para. 140 are erroneous. It would be inequitable to make an order that is contrary to the evidence at trial, and incorrect in law.
- [24] This relatively minor adjustment affecting the compensation payment due does not affect the reasoning I expressed at para. 170 of the RFJ.
- [25] This adjustment is not unfair to the respondent. He was given notice of the claimant's claim for separate property with respect to the two vehicles, and did not contest the transactions and values that she relies on.
- [26] On this application, respondent's counsel points out that the transfer documents indicate the VW and Jeep transactions were gifts, made for no consideration, and suggests that the evidence about the transfers was therefore somewhat unclear. (The respondent was self-

represented at the trial. Counsel for the respondent on this application was not counsel at trial, and therefore had limited information as to the evidence at trial, such as the concessions of the respondent on this matter.) The values stated on the forms is not consistent with the undisputed evidence of the parties at trial. I must infer that false declarations were made in order to avoid payment of provincial sales tax. In any event there is no doubt that the two vehicles are the separate property of the claimant.

B. Retroactive s. 7 expense child support claim of the claimant

- [27] The claimant applies for determination of the amount of retroactive s. 7 expenses to be shared by the parties.
- [28] The claimant's notice of family claim filed April 23, 2021 includes a claim for payment of special and extraordinary expenses for the three children. At trial, the claimant adduced a table and some supporting documentation for past s. 7 expenses that she had incurred. The total of the claims under s. 7 as set out in the table is \$199,388. The claims are made with reference to the years 2019 to 2023, which suggests that some part of the expenses claimed relates to time pre-separation. The largest items are for or in connection with private school education for the children. So for example \$67,559 is in relation to private school tuition and related expenses for A at St. Margaret's school. \$27,812 is for private school tuition for B and C at St. Patrick's. The respondent contributed to part of the St. Patrick's tuition for the 2002-2023 school year. \$21,503 relates to private kindergarten fees for 2019 to 2021. \$32,000 is for the cost of private child care provided by Ms. Hutson. \$44,327 is for the cost of various extra-curricular activities such as music lessons and sports. \$6,187 is for medical and dental expense.
- [29] The parties made no meaningful submissions regarding specifics of the s. 7 claims at the conclusion of the trial. The claimant sought an order that the respondent reimburse the claimant for his proportionate share of s. 7 expenses from June 1, 2021 to the date of trial, but without providing further specifics of the claim.
- [30] In the RFJ I made no specific reference to assessment of retroactive s. 7 expenses. In para. 239 I made a passing reference to the need to determine retroactive spousal support with reference to the annual incomes of the parties and the relevant child support and special expense amounts.
- [31] At trial, the claimant adduced a binder of documents including a table and various supporting documents relating to several financial matters, including her s. 7 claims. The binder was marked as exhibit 49. She acknowledged that not all supporting receipts or documentation was included in the binder. She asserted that other receipts had been provided to the respondent at trial in a folder of documents, for his review. I understood that this folder was provided to the respondent during the trial.

- [32] The claimant's table and binder also includes a further section of children's expenses described as "other children's expenses" which add to \$77,216. I infer that the claimant is not claiming these as s. 7 expenses. I received no submissions regarding these amounts. On their face all or nearly all of these expenses would not qualify as shareable s. 7 expenses. \$30,000 is for RESP contributions made by the claimant. RESP contributions are not s. 7 expenses: *D.P.R. v. L.L.R.*, 2015 BCSC 2317, at para. 149; *Pereverzoff v. Pereverzoff*, 2017 BCSC 687, at para. 96. (I ruled that the RESPs in this case were to be held by the claimant for the benefit of the children: para. 143.) \$25,033 is for children's clothing, shoes, "gear", and toys and books. Most or all of this would probably not qualify as special or extraordinary expense. \$22,183 is for the cost of life and disability insurance in relation to the claimant, for the benefit of the children. While this expense might have been prudent for the protection of the children, it does not fit within any s. 7 category.
- [33] The respondent asserts that the claimant did not produce all relevant supporting documentation for the s. 7 claims at trial. He acknowledges that he cross-examined the claimant only minimally at trial with respect to this claim, but contends that he was handicapped by non or late disclosure of the back-up documentation, or a misapprehension as to the claim being made. He asserts that the claims were unproven at trial, which explains why there were no detailed submissions as to what expenses are to be shared pursuant to s. 7. He contends that no further submissions or evidence should be allowed, and the claims should simply be denied. Alternatively, he contends that a reference to the Registrar would be the fairest way to deal with the matter. This, I observe, would likely amount to a hearing de novo on this issue.
- [34] In my view it is in the interests of justice to allow the trial to be re-opened in a limited way to deal with the retroactive s. 7 expense claims of the claimant. The claim was pleaded, presented at trial, and not ruled upon. In addition, in paragraph 364 of the RFJ I granted the parties general liberty to apply in relation to issues I may have overlooked. This is such an issue.
- [35] It is not efficient or necessary for the matter to be referred to the Registrar. As the trial judge I have a significant body of evidence with which to assess the claims. However, I will require appropriate submissions from the parties regarding the claims.
- [36] The evidence at trial could have been more complete, in relation to receipts for the expenses claimed. I am concerned that the respondent may not have had a full opportunity to review whatever documentation the claimant may be able to produce in this respect. At the same time, the claimant should be given an opportunity to put forward receipts for any contested expenses before the court.

- [37] However any further expense records adduced and the submissions are to be limited to the claims presented at trial as set out in the exhibit 49 table and binder under "s. 7 expenses", and, also, to the expenses incurred by the claimant after June 1, 2021. This date accords with the claimant's closing submissions, as well as the timing of the physical separation of the parties in May 2021, as noted in the RFJ at para. 78.
- [38] In summary the claimant may adduce expense receipts not included in exhibit 49, in order to support the claims set out in section 7 of the binder. No other additional evidence will be allowed.
- [39] I direct as follows:
- a) The claimant will file and deliver her submissions and additional evidence, if any, within 14 days of the release of these reasons;
 - b) The respondent's submissions will be filed and delivered within 14 days after the claimant's materials are filed; and
 - c) The claimant may file and deliver reply submissions within 7 days thereafter.
- [40] I would of course be grateful for a Scott schedule or schedules delineating the items in dispute, their amounts, and appropriate references to the evidence.
- [41] I expect to be able to deal with the matter on the basis of the parties' written submissions. However either party may apply for an oral hearing.

C. 2023 incomes of the parties

- [42] I set out my findings as to the incomes of the parties at para. 210 of the RFJ. For the trial year, 2023, I relied on the evidence of the parties as to their expected annual incomes for the year.
- [43] The parties now have information as to their actual incomes for 2023. They agree that their actual incomes should be used for purposes of calculation of spousal support and child support.
- [44] Based upon the new evidence, the claimant's 2023 income for support purposes was \$651,428. The respondent's income was \$217,081.
- [45] Despite these adjustments, neither party seeks to vary the amount of prospective spousal support I ordered (para. 235) of \$3,850 per month.

D. Retroactive spousal support - determination of amount

- [46] In the RFJ, I dealt with the question of the amount of retroactive spousal support only briefly. I stated:
- [238] The respondent's counterclaim, claiming spousal support, was filed June 23, 2021. This should be the date for the commencement of retroactive spousal support.

- [239] The claimant is ordered to pay retroactive support from July 1, 2021 to the date of these reasons. The precise amount to be paid will have to be calculated with reference to the annual incomes of the parties and the child support and special expenses amounts. The amount of spousal support should be that which achieves the 55/45 sharing of NDI that I referred to previously.
- [240] The parties will have liberty to apply in the event that they are unable to determine the amount payable.
- [47] In their closing submissions the parties did not provide me with illustrative Divorcemate calculations relating to retroactive child or spousal support.
- [48] I determined the prospective amount of spousal support of \$3,850 per month based upon a number of factors, including the modest strength of the respondent's spousal support claim, and the illustrative Divorcemate calculations provided by the claimant. On those calculations, \$3,850 per month was about \$500 below the low end of the Spousal Support Advisory Guidelines [SSAG] range. I noted that this would result in sharing of the net disposable incomes of the parties at about 55% to the claimant, and 45% to the respondent.
- [49] My reference to the same 55/45 NDI sharing in para. 239 was intended to reflect that the available income should be equitably shared, but tilted in favour of the claimant. I expected that the amount payable would continue to be below the low end of the SSAG range. However, my reference to 55/45 did not take into account that the illustrative calculations I was provided for prospective spousal support assumed that custody of B and C was shared, and that the claimant would be paying substantial child support.
- [50] However, after separation and prior to late May 2023, the children were in the primary care of the claimant. This did not change with the order made by Justice Steeves on November 8, 2021. The respondent made some child support payments in 2021. After the parties received the report of Dr. Korpach in April 2023, they agreed to implement her recommended parenting schedule, which provided for shared parenting for B and C. At trial the claimant testified that she was paying child support of \$1,604 per month.
- [51] The claimant has now adduced Divorcemate calculations for the 2021-2023, the years in question, which show that if the 55/45 NDI split is adhered to, the claimant would be paying spousal support far in excess of the high end of the SSAG ranges. So for example for 2022, on the incomes set out in the RFJ, together with assumed s. 7 expenses, on the illustration provided the respondent would pay base child support of \$3,537 and \$850 for s. 7 expenses. The claimant's spousal support payment at 55/45 would be \$13,928 per month. The low end of the SSAG range for that year would be \$1,897 per month. The high end would be \$2,530. Clearly, in referring to sharing of NDI at 55/45 for retroactive spousal support, I was not aware as to the actual consequences of that.

- [52] The respondent contends that the 55/45 ratio as referred to in the RFJ should prevail, notwithstanding the submissions I have now received. That result would not be reasonable or fair, and not consistent with my RFJ, taken as a whole.
- [53] Reopening in relation to this issue is necessary in the interests of justice in order to clarify or correct the reasons for judgment in this respect.
- [54] A fair and reasonable approach is that which respects the SSAGs, and is consistent with the RFJ in relation to spousal support. The prospective spousal support order I made of \$3,850 per month was set at \$500 below the low end of the SSAGs, which indicated an amount of \$4,349. This amounts to 88% of the low end of the SSAG range.
- [55] I make a similar order with respect to retroactive spousal support payable by the claimant, which is therefore to be calculated at 88% of the low end of the SSAG range applicable. Once again if the parties are unable to settle the amounts payable and the terms of the order they have liberty to apply.

E. Retroactive Base Child Support

- [56] I referred to retroactive base child support in the RFJ, as follows:
- [376] Child support is also payable by both parties on a retroactive basis. Child support payments are payable commencing June 1, 2021. Child support will be calculated based upon the income of each party for the year in question, and the parenting schedule in effect at the time.
- [Emphasis added.]
- [57] As noted, the evidence at trial was that the parties had mutually agreed to implement a shared parenting schedule for B and C as recommended by Dr. Korpach following release of her report, dated April 16, 2023, and that parenting of B and C was shared, within the meaning of s. 9 of the Child Support Guidelines, although the summer parenting schedule was somewhat unclear, as Dr. Korpach merely stated that holidays and vacation time for B and C be "essentially shared". (See RFJ paras. 9, 230, 242, 276-277, 327, 340-341, 361, 366-375). As noted, the claimant was paying child support to the respondent on the basis of shared parenting of B and C.
- [58] On the hearing of this application, I was advised that after the conclusion of the trial in August 2023, the claimant took the position that the parenting schedule imposed by Justice Steeves remained in effect, and therefore all three children were primarily in her care for the purposes of s. 9 of the Child Support Guidelines. In my view, although the order of Justice Steeves was not varied, in the circumstances of this case the actual parenting arrangements the parties agreed to should prevail, in relation to calculation of retroactive child and spousal support. For these purposes, consistent with the evidence at trial, parenting of B and C was shared as of June 2023. This is simply a matter of clarifying the basis of the order for retroactive child support.

[59] My reference in para. 273 to Justice Steeves ordering equal parenting was in error. At para. 33 his reasons for judgment stated that the respondent would have equal parenting time with B and C immediately. However, the schedule ordered did not provide for equal parenting time. All three children were in the primary care of the claimant until the parties varied the parenting schedule by agreement after receiving Dr. Korpach's report.

F. Timing of claimant's current spousal support payments

[60] The claimant seeks an order that she be permitted to defer payment of the monthly spousal support payments of \$3,850 per month until she receives her annual bonus pay in July 2024. She argues that on the basis of her base salary for 2024 and the respondent's similar current annual salary, pursuant to the SSAGs, no spousal support would be payable. She does not seek to vary (other than on appeal) the order for payment of spousal support of \$3,850 per month. She argues that she has no financial assets to draw upon in order to pay the equalization payment she must make, and the payment of spousal support prior to July would increase her financial difficulties. The respondent opposes this request, noting that the claimant has not paid spousal or child support or for equalization of property since the release of the RFJ. He says he is in financial distress as a result. He notes that spousal support must be periodic in order to be deductible to the claimant, and that the claimant could reduce the CRA tax withholdings on her monthly salary by notifying her employer of her spousal support obligations.

[61] The order the claimant seeks is exceptional. Support is usually paid monthly. The amount is determined on the basis of annual incomes, so I put little weight on the amount of the claimant's income for January to June. Despite their high incomes, both parties seem to be short of funds. I am not persuaded that the claimant's circumstances are worse than the respondent's, or that the respondent should be required to wait for payment of spousal support. The fact that this could cause tax problems is another factor against allowing the claimant's application in this respect. Therefore spousal support will be paid in accordance with the RFJ.

G. Costs of the proceedings

[62] As to costs, in the RFJ I stated:

[384] Subject to the matter of offers to settle under the Rules, the respondent has been substantially successful and is awarded costs.

[63] There were no offers to settle under the Rules.

[64] The claimant seeks reconsideration of the conclusion I reached reflected in para. 384, above, that the respondent had been substantially successful. As I understand the claimant's submissions, she contends that neither party achieved substantial success, and there should be no award of costs to either party.

- [65] As the parties have had no opportunity to address costs, it is appropriate that the matter be reconsidered.
- [66] However, having reconsidered the matter, I remain of the view that the respondent was substantially successful at trial, and should be awarded costs.
- [67] There were three substantial issues at trial:
1. property division, and, in including, in particular, the claimant's arguments that the parties had an agreement for separate property, enforceable under section 92 of the FLA, and her related argument that equal division would be substantially unfair;
 2. the respondent's claim for spousal support; and
 3. parenting issues.
- [68] The respondent was substantially successful on all three of these major issues.
- [69] The property division issues focused on the claimant's arguments under section 92 and section 95 of the FLA. Large proportions of the evidence at trial related to these issues. This is reflected in the RFJ. These issues were dealt with at paras. 10-76; 85-126; and 148-171 of the RFJ.
- [70] The claimant points out that she was successful in achieving exclusions for gifts and inheritances, and, at \$750,500, this was a large and important matter. This issue was not contested by the respondent (para. 133 of the RFJ). The issue took up relatively little trial time.
- [71] The claimant points out that the respondent failed in his claim for occupational rent. This too was a minor issue, and was dealt with briefly in the RFJ, at paras. 172 and 173.
- [72] The second major issue had to do with the respondent's claim for spousal support. This issue also occupied a substantial amount of time at trial. In order to address it, the entire history of the parties' relationship including their career decisions and finances had to be considered (although much of this was also relevant to the property division issues, and to some extent, the parenting issues). The respondent was successful. The claimant was also unsuccessful in persuading me that her post-separation increase in income should not be taken into account.
- [73] The parties agree that parenting issues occupied a substantial portion of the time at trial. The claimant argues that the parties had essentially agreed to implement Dr. Korpach's recommendations. She argues that the result at trial was very similar to her proposed parenting order provided to the respondent June 8, 2023, well before the commencement of the trial. She argues that the respondent did not provide a meaningful response to that proposal until after the commencement of the trial, and therefore when the trial commenced, she was unsure as to the respondent's position regarding the parenting issues.

- [74] However, there were in fact major parenting issues in dispute at trial, and the respondent succeeded on the major issues in dispute. As I noted at paras. 243 and 280, the respondent accepted the recommendations of Dr. Korpach, and the conclusions set out in her report. However, while she largely accepted Dr. Korpach's recommended parenting schedule, the claimant rejected a number of Dr. Korpach's findings and conclusions. She had significant criticisms of Dr. Korpach's report.
- [75] At para. 280, I stated:
- [280] As noted, while the claimant largely accepts the recommendations of Dr. Korpach, she disagrees with a number of opinions and rationales Dr. Korpach relies on as set out in her report. In particular, she suggests that I should be cautious in accepting Dr. Korpach's opinions about the parties and children and avoid a judicial finding that assigns blame upon her for the disrupted relationship between A and the respondent. She contends that Dr. Korpach's report and testimony was unbalanced, and favoured the respondent. She notes that Dr. Korpach recommended the schedule sought by the respondent, and states that she did not interview the parties' long-standing nanny of eight years, and their family doctor.
- [76] This position necessitated a detailed review of Dr. Korpach's report and recommendations, the evidence she relied upon, and the evidence at trial relating thereto. The claimant required Dr. Korpach to attend trial for purposes of cross-examination. The claimant challenged a number of important findings Dr. Korpach made. She asserted that Dr. Korpach was biased against her, and that her report was unfair. She asserted that Dr. Korpach exaggerated the difficulties the children were having, and disagreed with Dr. Korpach's criticism of her parenting (RFJ, paras. 280 - 300). I rejected the claimant's contentions. I also rejected her submission that a number of key conclusions she made that supported her recommendations (RFJ, paras. 297- 300).
- [77] A major issue between the parties had to do with where the children would attend school, and who should have decision-making authority in that respect. The schools issues had been the subject of an unsuccessful interlocutory application brought by the claimant and heard by Justice Baird August 10, 2022. Justice Baird was of the view that the schooling issues should await Dr. Korpach's report, and if necessary, the trial.
- [78] The claimant did not agree with Dr. Korpach's recommendations in this respect. I adopted Dr. Korpach's recommendations.
- [79] The claimant argued for an adjustment in the parenting schedule for C. I also rejected that submission: (paras. 341-343).

- [80] There were other much less significant issues as to which the results were generally mixed. These included: guardianship on death; rights of first refusal for parenting time; the respondent's suggestion of a "guillotine" style order in relation to parenting of B and C (RFJ para. 360); date of separation; and the claimant's submissions regarding the calculation of base child support (paras. 365 - 374 RFJ.)
- [81] In summary, I remain of the view that the respondent was substantially successful at trial.
- [82] I am not overlooking the fact that the claimant's claim for retroactive section 7 child support remains to be decided, and that the amount at issue is substantial. However, in my view, the result with respect to that issue would not materially affect my conclusion with respect to substantial success at trial.
- [83] In the alternative, the claimant argues that her June 8, 2023 proposal as to parenting, while not an offer to settle within the meaning of the Rules, should nevertheless be taken into account, and should result in a denial of costs to the respondent. However as I have already stated, the position of the claimant at trial concerning parenting issues and the report of Dr. Korpach is the reason that parenting remained a major issue at trial. Also, the June 8 proposed order dealt only with parenting. The claimant does not rely on pre-trial offers regarding property division or spousal support. I am not persuaded that the claimant's pre-trial position is relevant to my determination of costs.
- [84] The claimant further argues that, while both parties are lawyers, the respondent is an experienced barrister and was able to represent himself at trial. She argues that an order for costs in the respondent's favour would upset the balance between the parties. The claimant makes no detailed financial submissions on this point. I am not persuaded that there are circumstances in this case that would justify departing from the usual order. Both parties, but particularly the claimant, earn very good incomes. The claimant's financial difficulties caused by the divorce and the litigation are not exceptional or even unusual.

IV. Costs

- [85] Success on this application has been divided, therefore there is no order as costs of this application, and each party will bear their own costs.
- [86] I rejected the respondent's contention that the claimant's retroactive section 7 claims were dismissed at trial. His position in this respect was not reasonable. The final outcome of that issue will result in a separate order for costs. The claimant also succeeded in relation to the issue regarding calculation of retroactive spousal support. However she failed to persuade me that ongoing spousal support should not be paid monthly. The claimant has failed to persuade me that she should not pay costs of the proceedings generally. The issue regarding the vehicles was minor. Adjustment of the parties' 2023 incomes was agreed to.

V. Other Matters

- [87] As there are aspects of the trial order that remain to be resolved (including retroactive spousal support and child support), the parties have liberty to apply if they are unable to agree on the terms of the final order. In particular the matter of retroactive s. 7 expenses is to be dealt with in accordance with my directions set out above.
- [88] The respondent states that although the RFJ were released November 2, 2023, the claimant has made no payment of child or spousal support, or for division of property, and that until there is an entered order, he is unable to enforce payment. He is therefore anxious to settle and enter an order as soon as possible. I agree that every effort should be made to do so.

"Verhoeven J."

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