

CANADA / JUDGMENT

Code v. McLeod

2023 BCSC 1686

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Supreme Court of British Columbia

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2023 BCSC 1686 Code v. McLeod

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Code v. McLeod,

2023 BCSC 1686

Date: 20230927

Docket: E211442

Registry: Vancouver

Between:

Laurissa Anne Code

Claimant

And

John Darcy McLeod

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Claimant:

M.E. Guy

C.M. Sheppard

Counsel for the Respondent:

T.K. Wolf

Place and Dates of Trial:

Vancouver, B.C.

May 2-5, 8-12, 15, 17-19, 2023

Place and Date of Judgment:

Vancouver, B.C.

September 27, 2023

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Introduction

- [1] The claimant, Laurissa Anne Code, and the respondent, John Darcy McLeod, lived together for at least part of a volatile, on again-off again relationship of more than seven years. They also had a real estate business partnership that ended along with their personal relationship in 2020.
- [2] The claimant now seeks child support for her three children from her previous marriage, as well as the return of, or compensation for, business assets she says the respondent retained when they separated. At the same time, she resists the respondent's claim that a vacation home she owns is family property in which he has an equal interest.

- [3] The claimant is 42 and the respondent is 57. Both are realtors. They met in or about 2007, when the respondent was the managing broker of the office where the claimant worked. In or around 2012, they formed a partnership within the real estate office to share listings and commissions.
- [4] The claimant testified that the partnership began when she was considering leaving the real estate business because her then-husband was objecting to her long work hours. The respondent persuaded her not to quit and suggested she find a partner to share the workload. The respondent says she told him that he would be the only partner she would want to work with. The claimant now characterizes these events as the respondent taking advantage of her vulnerability to insert himself into her successful practice.
- [5] A romantic relationship developed at around or shortly after the time the business partnership started. At one point, the claimant's then-husband assaulted the respondent, dousing the respondent with lighter fluid with the apparent intention of setting him on fire. Both parties separated from their former spouses in 2013.
- [6] The claimant and her husband were divorced in 2014. They had three children who are now aged 18, 15 and 12. At the time of separation, the claimant's husband was ordered to pay child support, but the claimant testified that she only received payments for a few months and nothing in the last eight years. Efforts by the Family Maintenance Enforcement Program ("FMEP") to collect support have been unsuccessful. The claimant understands that her former husband has no income and says he has seen the children only rarely since the divorce.
- [7] The respondent and his wife divorced in 2015 but did not settle all property issues until the following year.

Marriage-Like Relationship

- [8] Following her divorce in 2014, the claimant retained ownership of the townhouse that had been the family home. She testified that the respondent was there almost every night. He still had a separate residence, but she says they began talking about buying a house together.
- [9] In June 2015, the claimant and respondent co-signed a two-year lease on a house on Bosonworth Avenue in Maple Ridge ("Bosonworth") and moved into it in or about September 2015, after some renovations were completed. At about the same time, the claimant sold her former matrimonial home and says she did so partly in reliance on the respondent's promises that they would eventually buy a house together as a couple. This purchase never happened, and the respondent still owns his own former matrimonial home on Tamarack Lane in Maple Ridge ("Tamarack").

- [10] The respondent says that he initially lived at Bosonworth for only about nine months, until the spring of 2016. That evidence is supported by an email exchange in late May 2016, in which the parties agreed that the respondent would move out and the claimant would assume full responsibility for rent. The respondent says that, after he moved out, he and the claimant lived separate and apart until he moved back into Bosonworth in November 2017. Cohabitation then continued until May 2020.
- [11] The claimant testified that the relationship continued in the period between the spring of 2016 and November 2017, although with frequent fights and short-term breakups. During those breakups, she says the respondent would briefly return to his house on Tamarack, then occupied by his son and his son's partner, but would eventually return to Bosonworth, where he continued to keep clothes and other personal items.
- [12] The first issue in this case is the length of time the parties were "spouses" as defined in the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The definition of a "spouse" in s. 3 of the FLA includes a person who has "lived with another person in a marriage-like relationship" for a continuous period of at least two years. The section reads in full:

Spouses and relationships between spouses

3 (1) A person is a spouse for the purposes of this Act if the person

- (a) is married to another person, or
- (b) has lived with another person in a marriage-like relationship, and
 - (i) has done so for a continuous period of at least 2 years, or
 - (ii) except in Parts 5 [Property Division] and 6 [Pension Division], has a child with the other person.
- (2) A spouse includes a former spouse.
- (3) A relationship between spouses begins on the earlier of the following:
 - (a) the date on which they began to live together in a marriage-like relationship;
 - (b) the date of their marriage.
- (4) For the purposes of this Act,
 - (a) spouses may be separated despite continuing to live in the same residence, and
 - (b) the court may consider, as evidence of separation,
 - (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
 - (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.

[Emphasis added.]

- [13] Whether an unmarried person meets the definition of a spouse is important because, if they do, they become entitled to division of family property and responsible for division of family debt under s. 81 of the FLA. A spouse may also be liable to pay child support as a step-parent under ss. 146 and 147(4).
- [14] There is no dispute about the fact that the parties were in a marriage-like relationship from November 2017 to May 2020--a period of two and a half years--and therefore met the definition of spouses. There is also no dispute that they had lived together in a marriage-like relationship for an earlier, shorter period that ended in the spring of 2016 and which would not, in itself, have met the statutory definition.
- [15] The real question is whether the marriage-like relationship continued during the interim period between the spring of 2016 and November 2017. Counsel for the claimant concedes that, on the facts of this case, little turns on this issue for purposes of property division. But the length of the spousal relationship may be relevant to her claim for child support. The claimant argues that they were spouses for the entire seven years of their relationship, and a great deal of time at trial was taken up with that issue.
- [16] For the following reasons, I find that the marriage-like relationship that began by, at least, June 2015 was not interrupted by an unequivocal separation and continued, albeit with changing of some characteristics, until June of 2020.

A. Marriage-Like Relationship: The Law

- [17] In *Weber v. Leclerc*, 2015 BCCA 492 at paras. 22 to 25, the Court of Appeal said that the question of whether a cohabiting couple are in a "marriage-like relationship" is a question of mixed fact and law that requires a broad or holistic approach, not a "checklist" approach. The court must consider objective evidence along with evidence of the parties' subjective intention.
- [23] The parties' intentions - particularly the expectation that the relationship will be of lengthy, indeterminate duration - may be of importance in determining whether a relationship is "marriage-like". While the court will consider the evidence expressly describing the parties' intentions during the relationship, it will also test that evidence by considering whether the objective evidence is consonant with those intentions.
- [24] The question of whether a relationship is "marriage-like" will also typically depend on more than just their intentions. Objective evidence of the parties' lifestyle and interactions will also provide direct guidance on the question of whether the relationship was "marriage-like".
- [18] In *M.T.P. v. R.L.B.*, 2022 BCSC 156, the Court at para. 34 referred to some of the factors that may be relevant:

- a) the parties' intentions, particularly that the relationship will be of lengthy, indeterminate duration;
- b) whether there is financial interdependence;
- c) whether the parties resided together and if so, whether they did so in the nature of roommates or in the nature of a couple;
- d) objective evidence of the parties' lifestyle and interactions; and
- e) whether the parties engaged in sexual relations and were intimate in the sense of fidelity and sharing personal information.

- [19] An intention to separate does not need to be mutual but there may be a need for "compelling evidence of finality" in the form of a "direct statement" or "overt indication of an abandoned relationship," particularly where the relationship has been of long-duration. The question is when at least one spouse communicated an intention to separate permanently, and whether a spouse took an action that demonstrated an intention to separate permanently: *Quirion v. Lovett*, 2022 BCSC 1693 at paras. 65 and 66 [*Quirion*]; *Thompson v. Floyd*, 2001 BCCA 78 at paras. 31-32, 36.
- [20] When parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristics of marriage, including factors such as the intention to remain together, having sexual involvement, carrying on activities in public, sharing financial resources and sharing significant family events: *Quirion* at para. 72.
- [21] The definition of a spouse and its reference to a marriage-like relationship in the FLA is similar to that in the Wills, Estates and Succession Act, S.B.C. 2009, c. 13, and the court has relied on cases under the two statutes interchangeably: *Mother 1 v. Solus Trust Company*, 2019 BCSC 200 at para. 132 [*Mother 1*].
- [22] Although s. 3 of the FLA refers to a person having "lived with another person in a marriage-like relationship," the authorities make clear that the question of whether the parties were living under the same roof is not necessarily determinative. Parties who have never shared the same living space may, in some circumstances, still be found to be cohabiting in a marriage-like relationship: *Connor Estate*, 2017 BCSC 978 at paras. 45 to 47; *Hodge v. Canada (Minister of Human Resources Development)*, 2004 SCC 65 at para. 42.
- [23] In *Mother 1*, Justice Myers referred at paras. 133 and 134 to the concept of a marriage-like relationship as "elastic." He referred to a list of 22 factors grouped into 7 categories that may be considered, including living and sleeping arrangements, sexual and personal behaviour, household tasks, social activities, financial arrangements and community attitudes toward the parties. After an extensive review of the case law, Justice Myers said at paras. 143 and 144:

- [143] Having canvassed the law relating to the nature of a marriage-like relationship, I will digress to point out the problematic nature of the concept. It may be apparent from the above that determining whether a marriage-like relationship exists sometimes seems like sand running through one's fingers. Simply put, a marriage-like relationship is akin to a marriage without the formality of a marriage. But as the cases mentioned above have noted, people treat their marriages differently and have different conceptions of what marriage entails.
- [144] The difficulty has been the subject of academic comment. For example, Professors [Cossman] and Ryder write in *What is Marriage-Like Like? The Irrelevance of Conjuality* (2001) 18:2 Can. J. Fam. L. 269 at 280

While the notion of conjuality or marriage-like has become legally ubiquitous in the regulation of non-marital cohabitation in Canada, one searches in vain for legislative guidance on its meaning. It is not defined in any Canadian statute. The task of giving meaning to this crucial relational characteristic has been left to administrators, tribunals and courts. What is marriage-like like? Is there such a thing as a typical or standard marriage? Among the multitude and diversity of relationships between married men and women, can we identify common characteristics of their shared lives apart from the experience of having exchanged vows and signed forms in a religious or civil proceeding? Or, should we abandon the attempt to assign a fixed set of functional characteristics to the state of being married, and acknowledge that it is increasingly unintelligible to speak of a relationship as being "marriage-like"? The absence of a legislative definition suggests that the meaning of conjuality is either self-evident or difficult to pin down. The record of judicial attempts to grapple with the notion supports the latter conclusion.

- [24] Justice Myers noted at para. 148 that: "Marriage now being so multifarious, one cannot help but wonder if the concept of a marriage-like relationship has outlived its utility. An estate or family trial ought not to be an exercise in sociology in which leaps of judicial notice are often made." I agree with that observation but I am required, as was Justice Myers, to apply the legislation according to its terms and previous case authorities.

B. A Continuous Marriage-Like Relationship: The Law Applied to the Facts

- [25] In this case, there is no dispute that the parties lived together in a marriage-like relationship for at least nine months in 2015 and 2016, and did so again for a two-and-a-half-year period beginning in late 2017. The question is whether the relationship was sufficiently interrupted during the intervening period that it could fairly be called a separation.
- [26] If the period from mid 2016 to late 2017 is looked at in isolation, it may be argued that the relationship was more consistent with one of dating or "friends with benefits" than one that was fully marriage-like. However, in my view, that period must be considered in the context of what preceded and followed it.

- [27] The parties began a marriage-like relationship in 2015. The details of the relationship changed somewhat in 2016, but the parties remained close and retained at least some of the indicia of a marriage-like relationship, although they no longer spent as many nights under the same roof.
- [28] In late January 2017, the claimant and the respondent exchanged text messages about a trip to the Dominican Republic that the claimant and recently taken with a friend. When the respondent inquired about her meeting other men, the claimant responded that "we are not together anymore." And that trip did in fact result in the claimant having a brief relationship with a man she met in the Dominican Republic and later saw again in Las Vegas. The respondent also gave evidence of his brief relationships with other women during this time.
- [29] In an exchange of text messages on March 18, 2017, the claimant told the respondent that she loved spending time and working with him but "I don't want to be a couple." He replied that he wanted to be with her "forever." But six days before that exchange, the claimant and the respondent jointly entered into a pre-construction contract of purchase and sale of a townhouse, although they assigned that contract 10 months later and never became joint owners of the completed property.
- [30] On April 5, 2017, the respondent texted that: "I want you for me, I don't want to be with anyone else." The claimant replied: "I am sorry we have broken up. I am sorry it didn't work" and "this is what is hard about working with your ex."
- [31] In or about May or June 2017 (the date of the text is unclear), the claimant asked the respondent to stop his frequent texts to her and said: "I don't want to be in a relationship with you."
- [32] Asked about these messages in cross-examination, the claimant described this as a "rocky period" when she was trying to stop the respondent's constant approaches, and she was trying to convince herself they were no longer in a spousal relationship. But she said she still considered them to be a couple because they continued to regularly have sex. She also said he would come to her house and spend time with her children. The claimant's nanny at one point became upset about having to wash the respondent's clothes when she believed she had been hired on the understanding that only the claimant and her children were living in the house.
- [33] The respondent testified that during this period, he was trying to get back together with the claimant and continued to pursue her but she continued to say no. He agreed they still had sex but denied they did so as frequently as the claimant says they did. He agreed that he was sometimes at Bosonworth until late at night and spent the night there "a handful of times." He described their relationship during this time as one in which they resumed "dating," including attending social events together. The respondent also attended birthday parties for the claimant's children during this period and, at one point, joined the claimant and her children on a road trip to California. But the respondent maintains that this resumed "dating" did not amount to the continuation of their marriage-like relationship.

- [34] The claimant says she and the respondent consistently held themselves out as a couple from the outset of their relationship. She produced photographs of them together on a variety of occasions. Some occasions were clearly family functions that included the claimant's children. Others were social functions connected to the real estate industry.
- [35] Coworkers, who were also friends, described frequently visiting Bosonworth when both parties were present and giving every impression of being a couple. One of those coworkers, Lesley Tucker, said that even in the period following the middle of 2016, when the relationship appeared particularly "rocky" and "on and off," she remembers the respondent being frequently at Bosonworth and apparently going up to bed with the claimant at the end of the evening.
- [36] Another coworker, Susan Stewardson, said "everybody knew they were a couple, they lived together, came into office together, did family trips together."
- [37] A cohabitation agreement drafted in or around May 2018 refers to October 1, 2017 as the date the parties began cohabitation, but that agreement was never signed.
- [38] In sum, the respondent frequently stated his desire to be in a full marriage-like relationship. Although the claimant at times expressed the view that she considered the relationship to be over, her conduct and that of the respondent were not consistent with that stated intention. There is no sufficient evidence of finality to constitute a separation. Throughout the period when the respondent says they were separated, the evidence is clear that he was frequently at Bosonworth, and he agreed that the relationship continued to be sexual, at least on an intermittent basis. He continued to participate in some family activities with the claimant's children. The evidence of Ms. Tucker and Ms. Stewardson indicates the parties continued to appear to others as a couple.
- [39] In the context of this evidence, and having regard to the flexibility of the concept of marriage-like, I find that the marriage-like relationship that began by at least June 2015 was not interrupted by an unequivocal separation and continued, albeit with changing of some characteristics, until June of 2020.

Child Support

A. The Respondent was a Stepparent Under the FLA

- [40] Section 146 of the FLA defines a stepparent as "a person who is a spouse of the child's parent and lived with the child's parent and the child during the child's life." Sections 147 (4) and (5) then state:

147 (4) A child's stepparent does not have a duty to provide support for the child unless

- (a) the stepparent contributed to the support of the child for at least one year, and

- (b) a proceeding for an order under this Part, against the stepparent, is started within one year after the date the stepparent last contributed to the support of the child.
- (5) If a stepparent has a duty to provide support for a child under subsection (4), the stepparent's duty
 - (a) is secondary to that of the child's parents and guardians, and
 - (b) extends only as appropriate on consideration of
 - (i) the standard of living experienced by the child during the relationship between the stepparent and the step-parent's spouse, and
 - (ii) the length of time during which the child lived with the stepparent.
- [41] Although the respondent's pleadings refer to the limitation period in s. 147(4)(b), he does not rely on it because of the suspension of limitation periods that occurred during the COVID-19 pandemic.
- [42] The evidence supports a conclusion that the respondent was a step parent under the FLA.
- [43] In addition to living with their mother, the respondent played an active role in the children's lives. He vacationed with the children and the claimant, took the children skiing and celebrated their birthdays.
- [44] The respondent also helped support the children, at least by contributing to their private school tuition. The claimant said it was the respondent who first suggested private schooling when the oldest child was having difficulty in the public system. The respondent described that as a mutual decision. He initially paid half the fees and later agreed to pay the full amount as part of an agreement arising from a property purchase, which is discussed below. The respondent attended school events, and correspondence from the school was addressed to both parties.
- [45] Even after separation, the respondent continued to inquire about plans for the children's birthday celebrations and, at least occasionally, spent time with them in the absence of the claimant. For example, on February 10, 2021, he sent an email to the claimant thanking her for allowing him to take the children to school that day and said "I missed them a lot." On another occasion, he told the claimant that he loved the children "like I am the real dad."
- [46] The claimant testified that the children referred to the respondent as "dad." His evidence was that only the youngest did so, and only on a few occasions. In any event, I agree with the submission of the claimant's counsel that, in the absence of their natural father, the respondent was the significant male figure in the children's lives and assumed a parental role while the parties were together. In view of the ages of the children when the relationship began and when it ended, that parental role spanned a significant portion of the children's lives.

[47] I find that the respondent was a step parent under the FLA.

B. Determining the Quantum of Child Support

[48] The Federal Child Support Guidelines, SOR/97-175 [Guidelines], apply, by regulation, to determining child support under the FLA.

i. Determining the Respondent's Income

[49] Each party operates their real estate business through a personal real estate corporation ("PREC"), and the amount paid to them by the corporation as salary or dividend is not necessarily a reflection of their total incomes. For example, the employment income reported on the respondent's personal tax return for 2016 was more than \$350,000. After creating a PREC in 2017, his reported personal income for that year was approximately one tenth of what it had been a year earlier.

[50] In 2021, the first full year in which the parties were not sharing commission revenue and business expenses, the corporate tax return for the respondent's PREC showed revenue of \$356,350 and expenses \$383,026, resulting in net loss \$26,676. In the same year, the claimant's PREC had income of \$774,865 and expenses of \$512,902. In 2022, the respondent's PREC had income of \$330,557 and expenses of \$472,461. The respondent made no attempt to explain the large increase in expenses in 2022 when revenue was about the same as in the previous year. Comparable figures for the claimant in 2022 are not in evidence.

[51] The claimant argues that the respondent has charged virtually all or most of his personal living expenses to his company and asks that additional income be imputed to the respondent for purposes of child support.

[52] Section 18 of the Guidelines provides that where a spouse is a shareholder, director or officer of a corporation, the court may include corporate income in the spouse's income for Guidelines purposes. If the court does so, s. 18(2) requires non-arms length payments by the corporation, including payments for the benefit of the spouse, to be added back to income. The purpose of s. 18 is to prevent individuals from avoiding child support obligations by paying themselves a low income while accessing corporate funds to pay personal expenses. Section 19 contains a more general provision that allows the court to impute additional income to a spouse "as it considers appropriate" in a number of circumstances, including where "the spouse unreasonably deducts expenses from income."

[53] The court may use s. 19 even where a payor is a corporate shareholder officer or director under s. 18: *M.T. v. J.S.*, 2023 BCCA 64 at para. 10 [M.T.]. The Court in *M.T.* said:

Whether income is being imputed under s. 19(1)(g) or added back as an expense under s. 18(2), the same result obtains. In both cases, the concern of the court is to ensure that the spouse's Guidelines income reflects all of the money reasonably available for child support: [citation omitted].

- [54] I find that the respondent clearly uses his PREC to pay personal expenses, although it is not possible to examine each expense and determine a precise amount to be added back under s. 18(2). Imputation of additional income under s. 19 is the better approach on these facts.
- [55] The best evidence of the respondent's practice is found in the general ledgers for his PREC for 2020 and 2021, although the equivalent document for 2022 is not before me.
- [56] In 2021, the deductions from corporate income included \$30,000 in legal fees to the respondent's counsel in this action. The respondent also deducted "home office expenses" of \$30,000, including all mortgage payments, taxes and utilities on his residence, although he carried on business in a separate, rented real estate office.
- [57] The respondent deducted more than \$44,000 for meals, the vast majority of which was spent at fast food outlets and for food delivery services. Although I accept that a realtor may sometimes treat clients to lunch or dinner, those clients are unlikely to be impressed by a fast food hamburger. I find those expenses to be likely personal. Similarly, an \$11,000 expense deduction for "gifts to clients" includes expenditures at liquor stores, and I find it likely that at least some of those expenses were personal.
- [58] Although the respondent, as a realtor, could legitimately charge some vehicle and other transportation expenses to his business, the respondent deducted more than \$14,000 with no indication that amount was reduced to reflect personal use.
- [59] Corporate expenses also include prescription and medical expenses of \$7,400, and it is hard to see how that could be anything other than a personal expense.
- [60] When cross-examined about these expenses, the respondent could offer no explanation other than to say he simply provided a box full of receipts to his accountant, and he relied on the accountant to assume those deductions are proper.
- [61] The question here is not solely whether these deductions were proper according to the Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.). The question under the Guidelines is whether the business deductions include expenses which provide a personal benefit or constitute an ordinary living expense that would normally be paid from a party's employment income--expenses which would not be deducted from a salaried party's income should equally not be deducted when income flows through a corporation: M.T. at para. 15.
- [62] In M.T., the Court was dealing with a real estate agent whose claimed expenses included 50% of his restaurant meals; 50% of his golf and country club memberships; 90% of his car lease payments and car insurance; and 90% of his cell phone costs. The Court accepted that some such expenses were part of a real estate business, but added at para. 17 that they also provided a personal benefit and added back half of those deductions to the respondent's income.

- [63] Relying on *Mach v. Mach*, 2021 BCSC 1655 [Mach], counsel for the claimant submits that an amount equal to 25% of the respondent's PREC revenue be accepted as reasonable business expenses, and 75% of corporate revenue be included in his income for purposes of child support.
- [64] In *Mach*, the Court compared a PREC's gross revenue to expenses. The expenses generally equalled about 25% of revenue. The Court found 25% to be reasonable and did not add any of those expenses back to the respondent's Guidelines income: *Mach* at paras. 188-191.
- [65] *Mach* does not purport to establish a standard proportion of revenue to be considered reasonable expenses in all cases involving realtors. If there is a standard amount that could fairly be applied to all or most self-employed realtors, that would have to be established by expert evidence. No such evidence was put forward here.
- [66] However, the respondent clearly pays more purely personal expenses through his PREC than did the realtors whose incomes were at issue in *M.T.* and *Mach*. Even the obvious personal expenses in 2021 that I have referred to above exceeded \$100,000. It is impossible to review all of the other deductions in detail, but I find it likely that some personal expenses were included in other categories, particularly in light of the respondent's inability to explain why his total expenses, when viewed as a percentage of revenue, are so much greater than those of the claimant who is in the same business.
- [67] An imputation of income under s. 19 is necessary in this case because the evidence is not sufficient to precisely add back all specific expenses under s. 18. Doing the best I can with the evidence before me, I find it likely that at least \$150,000 in personal expenses were paid by the respondent's PREC in 2021, and I impute an additional income of \$150,000 to the respondent for that year. The respondent's personal income tax returns include some income from other sources, including payments for his work as a board member in professional organizations. When the imputed income is added to the total income from all sources, I find his total Guidelines income for 2021 to have been \$174,000.
- [68] The additional \$150,000 that I have imputed in 2021 is equal to approximately 40% of the PREC's total expenses. Applying the same percentage to expenses in 2022, I impute additional income of \$189,000. Adding that to other income in that year, I find the respondent's Guidelines income to be, in round numbers, \$250,000.
- [69] I have not considered the respondent's income in 2020. It is difficult to draw any conclusions from the income information of either party for that year because they practiced together, sharing income and expenses, for the first part of the year and were establishing their separate practices for the last four to six months. The evidence does not permit a division of income and expenses as between those two periods. Further, it is clear that the COVID-19 pandemic made 2020 an atypical year for the real estate industry.

ii. The Respondent's Support Obligations as a Stepparent

[70] Although the Guidelines must be considered, the court does not necessarily order the full table amount in the case of a stepparent. Section 5 of the Guidelines says:

Where the spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of a child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

That is consistent with s. 147(5)(a) of the FLA, which makes the stepparent's obligation secondary to that of the natural parent.

[71] The nature of the natural parent's obligations will inform the exercise of the court's discretion in relation to a stepparent, as will the guiding objectives of the Guidelines, including the establishment of a "fair standard of support for children." Primacy must be given to the children's standard of living. Where the biological parent fails to pay child support and/or is unable to do so, the stepparent may be ordered to pay the full table amount: *Duffy v. Boisvert*, 2017 BCSC 500 at paras. 39-42.

[72] Although the children's natural father has the primary responsibility to support the children, it is clear that he has failed to do so for many years. The claimant has sought help from FMEP, and I accept her evidence that those efforts have been unsuccessful. There is no evidence of any reasonable efforts that the claimant has failed to make in seeking support from the children's natural father.

[73] Having regard to the best interests of the children, the length of the marriage-like relationship, the ages of the children during that relationship and the absence of support from the natural father, I find there is no reason to depart from the Guidelines in setting the amount of child support that the respondent must pay.

[74] The Guidelines, in s. 4, also give the court discretion to depart from the table amount in respect of the amount by which a payor's income exceeds \$150,000. However, there is a presumption in favour of the table amounts in all cases, and there must be "clear and compelling evidence" for any departure from them: *Metzner v. Metzner*, 2000 BCCA 474 at para. 30. There is no such clear and compelling evidence here.

[75] Applying the table amounts to what I have found to be the respondent's 2022 Guidelines income, I order that he pay child support of \$4,362 per month, retroactive to January 1, 2022. I further order that he pay retroactive support for 2021 in the amount of \$3,176 per month, based on his income for that year. I make no retroactive support order for the last six months of 2020, for the reasons set out above at para. 69. Of course, the respondent will be at liberty to apply for a reduction in child support as and when any child turns 19 and fails to meet the extended definition of "child" in s. 146 of the FLA.

- [76] I also order that the respondent share the children's private school tuition as an expense under s. 7 of the Guidelines. I have found that 40% of the respondent's PREC expenses should be included in his income. For the purpose of determining the parties' respective contribution proportionate to their incomes under s. 7, the claimant's income should be calculated on the same basis.

Family Property

- [77] Section 81 of the FLA provides that, subject to any agreement or order stating otherwise, each spouse is entitled to an undivided one-half interest in family property. That entitlement exists regardless of any differences in their respective use of or contribution to the property. Family property is defined in s. 84 to include all property owned by either or both spouses at the date of separation. Family property does not include property acquired by either spouse before the relationship began, but does include the amount by which the value of such property has increased since the relationship began.
- [78] In this case, there are three real properties--two owned by the claimant and one owned by the respondent at the date of separation--but only one of them, referred to as the "lake house," was dealt with at any length at trial.
- [79] On February 10, 2016, during the marriage like relationship, the claimant entered into a pre-construction contract to purchase a townhouse on 240th Street in Maple Ridge (the "240th townhouse"). She says the respondent also agreed to buy a unit in the same development, but did not complete the purchase. The claimant's townhouse is now used as a rental property. It was purchased for \$378,000 and has an appraised value, as of April 4, 2023, of \$731,000.
- [80] The respondent continues to own Tamarack, the former matrimonial home to which he acquired full title when property issues with his former wife were settled. Its appraised value as of February 28, 2023 was \$1,015,000. That represents an increase of \$229,000 since November 1, 2017, but there is no evidence of its value as of mid-2015, when I have found the marriage-like relationship to have begun.
- [81] In June 2019, the claimant purchased a vacation property, which both parties refer to as the "lake house" in Scotch Creek in the North Shuswap region of British Columbia. The purchase price was \$1,203,000 and the current value is \$1,500,000.
- [82] There is evidence that, at the time the lake house was purchased, there was a \$240,000 down payment that included \$100,000 borrowed from a friend of the claimant. The respondent subsequently agreed to take on responsibility for paying that loan, but later agreed that he would instead pay the full amount of the children's private school tuition. The claimant now characterizes the respondent's involvement as "inserting himself into the transaction" when it had always been her intention to purchase the property on her own.

- [83] The claimant testified that she has always had a special affinity for the North Shuswap region, where she regularly vacationed as a child and during her marriage. The property she purchased was one in which she, the respondent and her children had rented for a vacation a year earlier.
- [84] The claimant seeks sole title to the lake house, relying on what she says was an understanding throughout their relationship that she and the respondent would maintain separate property, except for any assets that were specifically held jointly. The only joint purchase was the presale contract for a townhouse in March 2017, which was later assigned to other purchasers.
- [85] The claimant relies on the cohabitation agreement that was drafted in May 2018. That document does indeed state that only property placed in joint ownership or agreed in writing to be co-owned is to be considered family property and subject to division under the FLA.
- [86] The draft cohabitation agreement was never finalized or signed. The claimant says it still records a clear and long-standing verbal agreement that existed throughout the relationship. However, the fact the agreement was never signed is at least equally consistent with there being no mutual agreement about its terms. I find that although the parties may have discussed a possible separate property regime, the claimant has failed to prove a final agreement to that effect.
- [87] The claimant says that she initiated the purchase of the lake house because of her love for the region, and she has a strong emotional attachment to the property. She also says she contributed the majority of funds to its purchase and has since paid most of the money necessary for its upkeep.
- [88] Unfortunately for the claimant, none of that overrides the plain language of the FLA. The lake house was purchased during the relationship and, in the absence of an agreement to the contrary, each spouse is entitled to an undivided one-half interest, regardless of their respective contributions.
- [89] Section 95 of the FLA allows the court to make an order for unequal division of family property if equal division would be significantly unfair and sets out a list of factors that the court may consider in making that determination.

Unequal division by order

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:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [90] There is no evidence that any of those factors, or any comparable factors, apply here. While I understand the claimant's love of and emotional attachment to the property, that simply does not qualify as a reason for unequal division.
- [91] I interject here that the area where the lake house is located is known to have been severely affected by wildfires after the conclusion of the trial. Neither party has sought leave to introduce further evidence as to whether the house is still standing. Even if it is not, the land value and any insurance proceeds would remain family property.

- [92] Having found that there was no agreed-upon separate property regime, it becomes necessary to consider whether the claimant's 240th Street townhouse and the increased value of the respondent's Tamarack house since the relationship began must be divided as family property. For different reasons, neither party emphasized those matters at trial.
- [93] The claimant did not emphasize a claim to share in the increased value of Tamarack because it would have been inconsistent with her assertion that there was an agreed separate property regime. However, counsel stated in argument that she does not waive that claim in the event this Court does not find an agreement for separate property.
- [94] The respondent did not emphasize a claim to a full half interest in the 240th Street townhouse, presumably because that would have been inconsistent with his assertion about the length of the relationship. But again, there was no waiver of that claim if it is found to be consistent with the findings in relation to the other property.
- [95] Although the 240th Street townhouse and the increased value of Tamarack are family property, I find it unnecessary to order a division because, on the evidence put forward, their values are roughly offsetting.
- [96] The 240th Street townhouse has a current value of \$731,000 and is subject to a mortgage of \$409,000. According to the claimant's evidence and financial statement, which is not challenged, it was purchased with a down payment of \$105,000 that came from the sale of the claimant's former matrimonial home. That amount is excluded property under s. 85(1) (a) of the FLA. If the property were to be sold at the most recent appraised value, the net proceeds to be divided would therefore be approximately \$217,000.
- [97] Appraisal evidence shows that the value of Tamarack has increased by \$229,000 since November 1, 2017. The increase in value might be greater if measured from mid-2015, when I have found the relationship to have begun, but there is no evidence of the property's value as of that date.
- [98] In view of the similarity of the values that are in evidence, there will be no order for division of those two properties.
- [99] The parties will have liberty to apply for any orders as to how the division of the lake house property is to be affected, including whether by sale and division of the proceeds or purchase of one party's interest by the other.

Business property

- [100] In July 2015, the parties signed a partnership agreement. At that point they had been working as partners, sharing commissions, for more than two years. The claimant says that she was responsible for most of the commission revenue. I accept her evidence on that point, but that was at least in part because the respondent took on more administrative responsibility, including working with other agents in the realty office.

- [101] The partnership agreement provided that commissions would be shared either on a 50-50 basis or a 65-35 basis in favour of one party or the other, depending on the source of the client or client referral. Marketing and support service expenses were split evenly. The claimant says this evolved into a 50-50 split of all commissions as the parties intermingled their personal and business relationships.
- [102] The agreement could be terminated by either partner on 30 days notice, with provisions for division of the client database and completion of work in progress at the time of termination. A separate property staging business remained solely the property of the claimant.
- [103] In or around 2017, the parties opened a new office, operating under the name "Nest." That was a name registered with the Real Estate Association, but Nest is not a separate corporate entity. The parties also formed a company called "MyDesk," which holds the lease on the premises that is used by Nest. Because MyDesk was able to sublease part of the leased space to other users, Nest was able to operate virtually rent free.
- [104] The business partnership broke up in the summer of 2020, following the end of the personal relationship. The claimant moved out of the Nest office at the end of August 2020. The respondent remained in the office under the lease and continued to use the Nest name. The claimant says the respondent kept signage, goodwill, leasehold improvements and furniture, while she was required to establish a new practice in what she describes as inferior premises across the street.
- [105] The claimant seeks \$220,562 as compensation for the loss of her interest in Nest/MyDesk. That number is based on her calculation of start up costs, the value of the "free" lease to Nest and equalization of shareholder loans. In the alternative, she seeks an order for possession of Nest on paying to the respondent \$33,797 as repayment for his share of start up costs.
- [106] The partnership agreement makes no provision for division of Nest assets. Nest did not yet exist at the time the agreement was signed, and the agreement was not revised to provide for terms of division.
- [107] The first difficulty I have with the claimant's position is that it is arguable whether either party's interest in Nest/MyDesk is really family property under the FLA, and whether a proceeding under the FLA is the proper proceeding to deal with those interests. The parties do not need a decision under the FLA to establish the fact that they each owned a half interest in the business.
- [108] An interest in a business is family property: s. 84(2)(b) of the FLA. But the parties' partnership agreement was a purely commercial one that did not differ in any way from what might be entered into by two realtors who were not in marriage-like relationship. The parties could have updated that agreement to deal with possible division of subsequently acquired assets but did not do so.

- [109] More importantly, any division of or compensation for the loss of a business interest must be based on at least some expert valuation or accounting evidence that allows the court to place a value on the assets of the business. In the absence of any such evidence, I am not in a position to determine if the claimant's unilateral choice of methodology or her calculations are appropriate.
- [110] In any event, it is clear that most of the value of a real estate practice rests on its ability to attract clients, including repeat clients, referrals from former clients and general reputation and visibility within a community. That is presumably why the partnership agreement between these parties emphasized the source of each client as the basis on which commissions were to be divided.
- [111] On that basis, the claimant has lost nothing and, if anything, has benefitted from the breakup of the partnership. In 2021, her first full year of separate practice, the claimant's PREC had more than double the revenue of the respondent's. That is revenue she no longer had to share with the respondent.
- [112] Although the claimant may have a claim to some compensation for loss of access to Nest/MyDesk assets, the absence of valuation evidence leaves me unable to determine a value or make an order in that regard.

Summary and Orders

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

- The respondent will pay child support for the three children in the amount of \$4,362 per month, commencing October 1, 2023.
- The respondent will pay retroactive child support in the amount of \$91,602 for the period January 2022 through September 2023, and a further \$38,112 for the year 2021.
- The parties will share the children's private school fees as an expense under s.7 of the Guidelines in proportion to their respective income and the respondent will pay his share retroactive to September 1, 2020.
- The "lake house" property is family property to be divided equally. Subject to any agreement between the parties, they are at liberty to apply for an order for sale.
- There will be no order in relation to assets of Nest/MyDesk.
- In view of the divided success, parties will each bear their own costs.

"N. Smith J."

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