

CANADA / JUDGMENT

Crossley v. Vorell

2021 BCSC 2484

COURT

Supreme Court of British Columbia

DECIDED

22 December 2021

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2021 BCSC 2484 Crossley v. Vorell

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Crossley v. Vorell,

2021 BCSC 2484

Date: 20211222

Docket: E200566

Registry: Vancouver

Between:

Susan Crossley also known as Susan Elizabeth Crossley

Claimant

And

Kourosh Vorell also known as Kouroosh Vorell

Respondent

Before: The Honourable Justice Branch

Reasons for Judgment

Counsel for Claimant:

G. Thomas

Counsel for Respondent:

D. Labun

S. Currie (A/S)

Place and Date of Trial:

Vancouver, B.C.

August 16-20, 23-27, 2021 November 1, 2021

Place and Date of Judgment:

Vancouver, B.C.

December 22, 2021

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I. INTRODUCTION

- [1] In this family law case, virtually every issue remained in dispute at trial including, for example, possession of certain trees as well as the respondent's mother's amateur paintings.

II. FACTUAL BACKGROUND

A. The Parties

- [2] The claimant and respondent were born May 12, 1968, and October 11, 1964, respectively.
- [3] The claimant graduated from high school in 1986. She began a sciences program at the University of British Columbia, but struggled academically both there and later at Langara College. She decided to pursue a two-year Certified Dental Assistant program. She completed the program in July 1991. She worked full time as a dental assistant until the birth of the parties' first child in 2003.
- [4] The respondent is a software engineer. He completed his training in about 1992. Subject to a few limited periods, he has worked full time since then.
- [5] On September 26, 1992, before he met the claimant, the respondent purchased a property at 1372 Mary Hill Road, Port Coquitlam (the "Poco Property"). He purchased the Poco Property for \$210,000. As discussed below, there is some dispute as to whether the respondent's brother also held an equitable interest in this property.

B. The Marriage

- [6] The parties dated for about five years prior to getting married on September 9, 2001. They purchased a home for \$345,000 shortly before the marriage (the "Family Home"). The Family Home was purchased with a \$100,000 down payment and a \$245,000 mortgage. The down payment was funded in part by drawing \$76,613 of equity out of the Poco Property by increasing the mortgage on that property. There is some disagreement on how the balance of the down payment was funded. The respondent says he paid the balance himself. The claimant says that she contributed \$10,000 from her own savings.
- [7] Both parties attended the Poco Property periodically. However, there is a conflict between the parties as to how often the claimant attended and worked to maintain the Property.
- [8] On July 17, 2003, the parties had their first child, H.V. The claimant took a one-year maternity leave, and then returned to work 2-3 days per week. At the same time, she cared for H.V. and continued her work as a homemaker.
- [9] In August 2003, the Poco Property was refinanced, from which the respondent received \$92,874.54. The respondent states that he used \$18,000 to make a payment into a mortgage debt account. He says he also gave \$45,000 to his brother as a gift out of these proceeds.
- [10] The respondent admits that he told the claimant that he and his brother equally owned the Poco Property, but now says this was a lie. He suggests he told this lie in order to avoid an awkward discussion as to why he was giving such a large amount of money to his brother.
- [11] On May 22, 2008, the parties' second child, N.V., was born.

- [12] The claimant was primarily responsible for driving the children to school, activities, and appointments. The children are both good athletes. Both are involved in track and have played basketball on school and community teams.
- [13] The respondent refinanced the Poco Property again in 2008. The purpose of this refinancing was to pay down the remaining mortgage on the Family Home.

C. The Claimant's Cancer Diagnosis

- [14] In 2015, the claimant was diagnosed with metastatic neuroendocrine cancer, which caused tumors throughout her body. She has been advised that surgery is not recommended at this time. She has been undergoing other treatments however. She receives a monthly lanreotide injection. She takes naturopathic treatments. She says she suffers from "brain fog" and tiredness as a result of her illness and the treatments.
- [15] The claimant wrote an email to the respondent's sister providing an update on her status on July 28, 2017. The claimant wrote that she had "no more metastasis, and [bl]oodwork was all great... Everything is currently sitting stagnant." The claimant asserted that the positive report was simply based on the fact that she had received an ultrasound showing no cancer in her ovaries.
- [16] As a result of her illness, the claimant qualified for Canadian Pension Plan ("CPP") disability benefits. These are in the range of \$13,000 per year, with annual inflation increases. As a result of her disability, the claimant also received CPP benefits for each child of about \$250 per month per child. In August 2021, H.V. turned 18 years old. These child CPP payments now go directly to H.V.. The claimant continues to receive the CPP benefits for N.V.

D. The Claimant's Income

- [17] The claimant has done very limited paid work since her cancer diagnosis. She says she is restricted to a few days per month. Her annual income is as follows:

2017: \$13,730 (including CPP benefits of \$13,124.28 and \$605.34 in universal child care benefit payments)

2018: \$13,321 (comprised exclusively of CPP benefits)

2019: \$13,832 (including CPP benefits of \$13,627.56 and employment income of \$204.86)

2020: \$17,314.02 (including CPP benefits of \$13,886.52 and income of \$3,427.50).

- [18] For 2021, the claimant projects receiving \$13,886 in CPP benefits, \$4,200 in income, and \$4,750 in child CPP benefits

- [19] The claimant has been able to carry on with some volunteer activities.

E. The Respondent's Income

[20] The respondent's recent Line 150 income has been as follows:

2017: \$175,488

2018: \$154,130

2019: \$135,794

2020: \$163,640 (This includes employment income of \$166,692.02, which in turn includes a one-time payout in respect of certain stock-based compensation of \$16,419.64. The figure also incorporates a rental loss on an investment property of \$3,052.31. The respondent incurred union dues of \$472.50, which are allowable deductions under s. 1(g) of Schedule III to the Federal Child Support Guidelines, SOR/97-175 ("Child Support Guidelines").

[21] The respondent's anticipated 2021 income is \$145,625.14.

F. The Real Estate

[22] In terms of the parties' real estate holdings:

- a) On July 13, 2021, a joint appraisal was performed on the Family Home which yielded an estimated value of \$1,750,000 (the "Appraisal").
- b) The Poco Property was sold on April 7, 2015, for \$615,000, yielding net proceeds of \$347,982.90.
- c) An investment property at 945 Jarvis St, Coquitlam (the "Investment Property") was purchased for \$1,045,000 on June 30, 2015, using a mortgage of \$836,000 taken in the respondent's name. Title was in the name of the respondent. The property has been rented out. The mortgage sits at about \$722,000.

E. The Separation

[23] The parties separated on March 5, 2020 after 19 years of marriage. The respondent moved into a suite in the basement of the Family Home. There have been a number of troublesome incidents during this shared living situation. The claimant has called the police on at least two occasions to address concerns she had with the respondent's conduct. The respondent introduced a video in which the claimant yelled at the respondent through the closed door of his basement suite.

[24] H.V. now also has a poor relationship with the respondent. She resides almost exclusively with the claimant. She graduated high school in June 2021 and began attending Simon Fraser University this fall. She is now 18 years old.

[25] The parties' son, N.V., is 13 years old. N.V. lives with the claimant for four days a week, and with the respondent for three days a week.

[26] The respondent paid unallocated support over the first four months following separation in the amount of \$6,680. As of July 1, 2020, the parties entered into an interim without prejudice agreement whereby the respondent paid \$3,500 per month, with \$1,740 allocated to spousal support and \$1,760 to child support (the "Agreement"). The respondent has paid the agreed amounts since entering into the Agreement.

III. ANALYSIS

A. Divorce

[27] The requirements for the granting of a divorce have been met, and an order in the usual form may issue.

B. Going Forward Support

[28] There is no dispute that child and spousal support are payable on a going forward basis. Further, there was no dispute that the spousal support is payable both on compensatory and non-compensatory grounds. The only question is the appropriate amounts.

[29] Sections 8 and section 9 of the Child Support Guidelines apply in this case, as the children are collectively in a "hybrid" split/shared custody arrangement. The claimant has primary care of H.V. and the parties have shared parenting of N.V. The Guidelines provide as follows:

Split parenting time

8 If there are two or more children, and each spouse has the majority of parenting time with one or more of those children, the amount of a child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses.

Shared parenting time

9 If each spouse exercises not less than 40% of parenting time with a child over the course of a year, the amount of the child support order must be determined by taking into account

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared parenting time arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[30] Hence, the typical method for determining child support in this scenario involves first setting off the claimant's table amount of child support for one child against the respondent's table amount for two children. However, the court has discretion to depart from the resulting figure, after consideration of ss. 9(b) and (c) of the Child Support Guidelines.

[31] The Spousal Support Advisory Guidelines: The Revised User's Guide, by C. Rogerson & R. Thompson (Ottawa: Justice Canada, 2016) at 36 (the "SSAG User's Guide"), suggests the following approach in such cases:

(h) Hybrid or mixed custody

These are cases in which at least one child is in shared custody plus the split, sole or primary residence of the others. These are complex cases, but the software by and large solves the problems of calculation of child support and notional child support.

Because at least one of the children is in shared custody, the discretion of s.9 of the Child Support Guidelines is available in assessing child support. For a leading case on the calculation of child support in hybrid cases, see *Sadkowski v. Harrison-Sadkowski*, 2008 ONCJ 115. In turn, as with shared custody, that child support discretion can complicate the SSAG calculations. Any complications can be resolved by simply using the set-off to determine child support and then using spousal support to adjust, e.g. *T.L v J.L.*, 2014 ONSC 91.

As with split custody, there is no automatic extension of the range in the formula to include a 50/50 split of NDI, especially as there may be an odd number of children involved. If there is much movement between the homes, not just for the shared custody child, there may be a good argument in favour of equal living standards, e.g. *Ryder v. Walker*, 2015 ONSC 2332 (1 child primarily with mother, 2 shared, living standards should be "not too dissimilar").

[32] In order to begin the analysis, it is necessary to determine the appropriate inputs. There are several issues that divide the parties in terms of establishing those inputs:

- a) Should the claimant be attributed the full amount of income she is entitled to earn without jeopardizing her CPP disability benefit entitlement?
- b) Should the children's CPP benefits be considered in determining the claimant's income?
- c) Should the calculation be performed assuming that the claimant is entitled to the disability tax credit?
- d) What is the proper figure for the respondent's income?
- e) Should the respondent be required to provide security for his support obligation?

1. Imputation of Income to the Claimant

[33] The respondent seeks an imputation to the claimant of employment income of \$6,100 per year, on top of her CPP benefits. The claimant accepted that she is permitted to earn up to that amount without impacting her CPP disability benefits.

[34] As noted above, the claimant reported earning an additional \$3,427 in income in 2020 and \$2,100 to the mid-point of 2021. While the claimant does not accept that she is able to earn the maximum amount, she is prepared to accept that the Court should use \$4,200 for her annual employment income.

- [35] In *Hanson v. Hanson*, [1999] B.C.J. No. 2532, 1999 CanLII 6307 (S.C.), the court outlined the principles relevant to the imputation of income:
- [10] Section 19(1)(a) of the Guidelines requires that before income can be imputed, the court must find that the person is intentionally under-employed or intentionally unemployed. There has been some judicial debate about the meaning of the word "intentionally." Is bad faith required? That is, is a specific intent to evade child support obligations required?
- [11] No such requirement is found in s. 19 itself. The Court of Appeal's conclusion in *Van Gool* that the obligation to pay child support is based on capacity to earn, supports the view that bad faith is not required. To reach a conclusion that it is required would be to misconstrue the purpose of the Guidelines.
- [12] They are not designed to punish parents who try to avoid child support payments. Instead, the Guidelines are designed to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both parents after separation. (s. 1(a))
- [13] Therefore, bad faith is not required. The parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. The parent required to pay is intentionally unemployed if he or she chooses not to work when capable of earning an income.
- []
- [19] How does the court decide whether a person is earning to his or her capacity? The court should be provided with information about the parent's capacity to earn and the parent's present income earning situation. The two can then be compared.
- [20] There are two aspects to a parent's capacity to earn. The first is what the parent is capable of earning based age, education, experience, skills and health. The second is the job opportunities that are realistically available.
- [36] A summary of the relevant considerations is also found in the recent decision *Goldsmith v. Holden*, 2021 BCSC 1140:
- [13] In *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36, 37, the Court of Appeal summarized the principles for income imputation for purposes of child and spousal support as follows:
- a) there is a broad judicial discretion to impute income;
 - b) the party seeking to have income imputed to the other has the burden of establishing an evidentiary basis for such a finding; and
 - c) the test for imputing income for intentional underemployment 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.

[37] The respondent argues that the claimant is capable of earning \$6,100 per year given that:

- a) as early as 2017, the claimant was providing a positive report about her medical condition to others in the family;
- b) the claimant admitted under cross-examination that she performed some work at Dr. Azizi's office in early 2020 which was not included in her T4;
- c) Dr. Azizi's office was closed for part of 2020 due to the COVID-19 pandemic, which would have impinged on her employment prospects;
- d) although denied by the claimant, the respondent suggested that the claimant had performed other work "under the table" in the past, such as providing homecare to a neighbour. The respondent did not know the amount the claimant earned for this work, but said that she received envelopes of cash; and
- e) despite her claims of "brain fog" and tiredness from her cancer and associated treatments for cancer, the claimant has had energy to fulfill volunteer commitments.

[38] I find that the attribution should be limited to the \$4,200 proposed by the claimant:

- a) The respondent places too much weight on the claimant's 2017 email about her health condition. Advising that matters are "sitting stagnant" is not an unequivocally positive update, nor is it an admission as to her capacity to work.
- b) While I accept that there is some uncertainty about her total 2020 earnings, the \$4,200 is supported by the most recent relevant information, being her 2021 earnings.
- c) The claimant's evidence of physical and mental challenges was supported by her friend, Cara Dravenovic.
- d) There is little evidence that the respondent himself felt the claimant was not working enough during the years the parties were together following her diagnosis.
- e) The claimant reported that her volunteer activities were not particularly time-consuming or strenuous.

[39] I confirm that such attribution should be applied to all months since separation. There is no evidence that her condition was any better or worse in 2020. This determination will be relevant to the calculation of retroactive support below.

2. Consideration of Children's CPP Benefits

[40] As noted above, the claimant has been receiving benefits payable to the children as a result of her disability status since separation. The nature of such benefits is helpfully summarized in *Janzen v. Janzen*, 2014 BCSC 1374 [Janzen]:

- [38] CPP children's benefits provide monthly payments to the dependent children of disabled or deceased CPP contributors. The benefits are paid to the custodial parent until the child reaches the age of 18. If, between the ages of 18 and 25, the child is in full-time attendance at a recognized school or university, the benefits continue to be paid, but they are paid directly to the child.
- [39] Pursuant to Mrs. Janzen's agreement, the children's portion of her CPP disability benefits has been paid to Mr. Janzen for some time now. These benefits are a set amount.
- [41] Accordingly, the question becomes how should these benefits be factored into the determination of the claimant's income for child and spousal support purposes?
- [42] Section 16 of the Child Support Guidelines provides that, at first instance, support is calculated using the amount found at Line 150 of a party's income tax return. It was not contested that the children's CPP benefits do not need to be reported on Line 150: *Bourgeois v. Bourgeois*, 2020 NSSC 156 at para. 32. However, the respondent argues that there is scope to consider such payments given that in a hybrid situation, the court can consider the "means" of the parties, as noted above.
- [43] The respondent relies upon the Provincial Court decision in *B.M.W. v. C.P.T.*, 2019 BCPC 387 to argue that the children's CPP benefits should be added to the claimant's income. In that case, the court considered the children's CPP benefits in the calculation of support:
- [18] Also attached to Mr. T.'s materials are a 2016 T4A for received CPP benefits (CPP Child Benefit) payable to D.G.T., in the amount of \$2852.28 and a 2015 T4A for D.G.T. in the amount of \$2818.44. These payments have not been accounted for in Mr. T.'s financial statement, nor in the submissions before me and I do not know what has been done with this income. Such pension benefits are income of the child, but paid to a custodial parent for the benefit of a dependent child. The T4A is provided in the name of D.G.T., and therefore officially D.G.T.'s income. However this money is available to Mr. T. to be used for D.G.T.'s benefit.
- [19] How is this benefit to be construed? In *Wadden v. Wadden*[,] 2000 BCSC 960, the court considered an argument made by a father that his child support obligations should be reduced by the amount of the CPP child benefit received by the child (who was in that case in the custody of the mother). The Court held that such benefits are benefits belonging to the child and as such are not a relevant consideration in determining the table amount of child support -- that is, they are not to be included as income in the hands of the receiving parent.
- [20] However, the *Wadden* decision did not consider how such benefits are relevant to the determination of means under S. 9 of the Guidelines. S. 9(c) of the Guidelines provides that in a shared parenting arrangement, the court must take into account the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought. A person's means include not only income, but other benefits or resources available to him that improve or enhance his quality of life.

- [21] Under S. 9 of the Guidelines, I am obliged to consider the means and needs of the parents and the child in order to avoid a significantly different standard of living for the child in each household: *Contino v. Leonelli- Contino*[], 2005 SCC 63. While the analysis may start with a calculation of table child support for each party and a set-off of the difference, (if any,) that is not the end of the analysis. I have broad discretion to analyze the resources and needs of both parents and the child or children and to increase or reduce support above or below the table calculations of child support.
- [22] In *M.L. v. S.P.*, 2015 NBQB 249, Mr[.] Justice Landry held that although CPP child benefits cannot be included as income in the hands of the parent receiving the benefit for the purpose of determining table child support, the Court must take such benefits into account, as the child's income, in assessing the means of the child in shared parenting situations under S. 9 of the Guidelines.
- [23] In *Ladisa v. Ladisa*, 2004 CanLII 48170 (ON SC), Madam Justice Linhares de Sousa considered the receipt of the CPP Child Benefit by one parent or the other in a shared parenting arrangement in the context of S.9(c) of the Guidelines. She ordered that the parents must share equally any benefit received for any child in the shared parenting arrangement, and moreover that any parent receiving that benefit for a shared child must be accountable to the other for one half of that benefit. In my view, that is a sensible approach. In a shared parenting arrangement, the child's income should benefit him in both homes in which he resides -- not just in one home.
- [24] Accordingly, I will take into account that the CPP Child Benefit payable to Mr. T. for D.G.T.'s benefit should have been applied for his benefit in both of the homes in which he resides -- that is, it should have been shared equally between the parents throughout the entirety of the period since the parties began to share their parenting time with D.G.T. more or less equally, regardless of the table child support calculations. I take that into account in my considerations, both with respect to retroactive recalculation and with respect to future adjustments of child support.

[Emphasis in original.]

- [44] Although not bound by this decision, I find its analysis persuasive. I conclude that it is appropriate to adjust the child support payable to account for the enhanced means in the claimant's household created as a result of the receipt of these benefits. Given the hybrid situation, it would be quite complicated to calculate and direct a division of the children's CPP benefits. I find that it is more appropriate to consider these benefits as part of exercising my discretion in the establishment of the final amount payable. Based on the other findings in this judgment, a full inclusion of these amounts in the claimant's income would result in a reduction of the child support payable to the claimant of about \$50 per month. The going forward amount of such benefits is now only \$3,090 annually, as H.V.'s payments will be going directly to her.

- [45] I conclude that a full inclusion would also be unfair however given that: (1) these benefits do not qualify for Line 150 income inclusion, and (2) the amount payable arguably reflects, at least in part, increased expenses in the claimant's home associated with her being disabled. As such, I find that the appropriate approach is to only lower the child support amount payable to the claimant by ½ of the \$50 amount that would result from a full inclusion. As such, the reduction from the table amount otherwise applicable, reflecting the exercise of my discretion under s. 9 of the Child Support Guidelines, will be \$25 per month.
- [46] The claimant argues that any inclusion or consideration of the children's CPP benefits would be inconsistent with this court's judgment in Janzen. In Janzen, the court stated:
- [39] Pursuant to Mrs. Janzen's agreement, the children's portion of her CPP disability benefits has been paid to Mr. Janzen for some time now. These benefits are a set amount. Mrs. Janzen takes the position that these benefits should be included in a determination of his income for the purposes of calculating support.
- [40] In support of this position, she points to s. 6.3 of the SSAG which discusses the inclusion of various child-related government benefits and refundable credits in a party's income when using the "with child support formula". These various benefits and credits include the Canada Child Tax Benefit, the National Child Benefit Supplement, the GST credit (including any portion for the children), the refundable medical expense credit, the child disability benefit, and the various provincial benefit and credit schemes. She submits the benefits at issue are similar in nature to these and should be treated the same way.
- [41] Mr. Janzen submits that these payments are for the children and should, therefore, be excluded from his income calculation. Mr. Janzen points to two case authorities that he submits lend some support to his position.
- [42] In Sayong v. Aindow, [1999] N.W.T.J. No. 43, the court was called upon to determine interim child support. Both parties were self-represented. In this case, there were three children, one of whom lived with the mother and the other two lived with the father. In determining the parties' income, Mr. Justice Vertes specifically excluded CPP child disability benefits. He wrote at para. 10:
- [10] In calculating the respondent's income I have not included the amounts he receives as C.P.P. child disability benefits for Andrea. I have also not included any such benefits received by the applicant for Jelissa. Those payments are for the direct benefit of those children paid by the federal public pension programme. They are the child's so if the applicant is in receipt of a benefit for Jelissa then that should be turned over to the respondent since he is caring for that child. [Emphasis added]
- [43] In D.C.H.R. v. J.R., 2013 BCSC 1407, a disabled spouse sought spousal support. In determining the disabled spouse's income for the purposes of determining the amount of spousal support she would receive, Mr. Justice Melnick appears to exclude the children's portion of CPP disability benefits, when he wrote at para. 20:

- [20] At the present time, Ms. R.'s income consists of a Canada Pension Plan ("CPP") disability pension which is topped up by her long term disability for a total of \$1,600 a month (for 10 months of the year). For July and August of each year, her income is reduced from \$1,600 to \$760. Thus her total yearly income is \$17,520. She also receives a CPP benefit for each child of \$220 a month which will continue until each boy is 18 years of age.
- [44] Two Ontario cases provide additional guidance. In *Fraser v. Fraser* (2004), 8 R.F.L. (6th) 125, [2004] O.J. No. 3408 (S.C.J.), Mr. Justice Pierce considered whether the disabled husband's CPP benefits for the children ought to be included in his income. The children were 19 at the time of trial. In excluding these benefits from income, he held at para. 75:
- [75] In addition, Mr. Fraser receives a further CPP benefit for the parties' children of approximately \$400 monthly. This money was placed in an account for the boys' education and miscellaneous needs, such as clothing and spending money when they accompanied their father to Toronto on medical trips. The petitioner cannot withdraw these monies without the co-signature of the boys. Although the respondent does not agree with how it is spent, feeling it should be used exclusively for the children's education, the evidence is that it has been used for the children's benefit. It does not form part of the petitioner's income.
- [45] This decision is supported in another Ontario case - *Ross v. Gedcke* (2005), 25 R.F.L. (6th) 188, [2005] O.J. No. 5844 (S.C.J.). In discussing whether to include these benefits in calculating income for child support purposes, the court held at para. 48:
- [48] The case law is also clear that no "adjustment" in child support payable should or can be taken into account because Christopher and Carley (and Jonathan, before his death) received and still receive C.P.P. benefits directly. See *Blain-Hughes v. Blain* (1998), 1998 CanLII 14878 (ON SCI. 39 R.F.L. (4th) 327, [1998] O.J. No. 3011, 66 O.T.C. 1, 1998 CarswellOnt 2965 (Ont. Gen. Div.); *Vickers v. Vickers* (2001), 194 N.S.R. (2d) 268, 2001 NSCA 96, 606 A.P.R. 268, 201 D.L.R. (4th) 65, 18 R.F.L. (5th) 431. [2001] N.S.J. No. 218, 2001 CarswellNS 194 (N.S.C.A.) and *Fritschij v. Bazan* (2004), 183 Man. R. (2d) 98, 2004 MBQB 81, 2 R.F.L. (6th) 35, [2004] M.J. No. 123, 2004 CarswellMan 139 (Man. Q.B., Fam. Div.). The purpose of C.P.P. child benefits is to directly assist the child to compensate for his or her parent's diminished ability to earn Income. The payor may not take advantage of that separate or other support received by the children directly. [Emphasis added]
- [46] In this case, one of the children was under the age of 18.
- [47] In my view, the children's portion of Mrs. Janzen's CPP disability benefits should not be included in Mr. Janzen's income.
- [48] The SSAG provides three bases for including various child-related benefits in a spouse's income at s. 6.3;

Under the with child support formula, included in each spouse's income are the amounts identified for various child-related government benefits and refundable credits: the Canadian Child Tax Benefit, the National Child Benefit Supplement, the GST credit (including any portion for the children), the refundable medical expense credit, the Child Disability Benefit, and the various provincial benefit and credit schemes.

Under the Federal Child Support Guidelines, these benefits and credits are not treated as income for table amount purposes: see note 6 to Schedule I. There is some controversy about their consideration for section 7 purposes, or for the determination of undue hardship under section 10, with a number of judges now including them.

For lower-income custodial parents, typically the support recipients, these amounts are significant. As for payors, only low-income spouses obtain any of these, basically the GST Credit, and most of these low-income spouses will not be paying spousal support. In some circumstances, the custodial parent and recipient of these benefits and credits will also be the payor of spousal support.

We did consider backing out the child portion of these benefits, since the bulk of the benefits and credits are tied to the children of the marriage in the recipient spouse's care, e.g. the Child Tax Benefit, the child portion of the GST Credit, and the various provincial programs. The logic of doing so would be similar to that applied in respect of the spouses' child support obligations, i.e. to get at the remaining net disposable income available to the spouses as individuals.

In the end, we decided to include these child-related benefits in income under the with child support formula, for three reasons.

First, these benefits and credits reduce, sometimes dramatically, with increasing amounts of spousal support transferred to the recipient spouse, especially through the lower and middle income brackets. Including these benefits and credits in the recipient's income gives a much clearer picture of the impact of spousal support upon the recipient's actual net disposable income. Second, some fine lines would have to be drawn between child- and non-child related portions of these benefits and credits. A precise disentanglement would be complicated and for little practical gain. Third, for lower income recipient spouses, these amounts are sizeable, more than \$7,000-\$8,000 annually for two children. Their removal would produce significantly higher amounts of spousal support, which would cause significant hardship for payor spouses, especially those with lower incomes, unless the formula percentages were adjusted.

[49] A close review of these considerations demonstrates how the pension benefits at issue are distinct from the enumerated benefits and credits. In this case, these three considerations are not at play. First, there is no impact on the amount of the benefits due to spousal support. The benefits remain the same. Second, it is clear which portion of the benefits is for the child, so no complex disentanglement is required. The third basis relates to the more typical case where exclusion of the benefits from the recipient's income would result in higher amounts of spousal support payable. This hardship on the payor is what the exclusion seeks to avoid. Here, including the benefits (rather than excluding them), will

result in higher spousal support. Inclusion will create the hardship that is meant to be avoided.

[Emphasis added.]

[47] However, I find that Janzen is distinguishable from the present case:

- a) The court in Janzen could not avail itself of the discretion available under s. 9 of the Guidelines, as it was not a shared or hybrid custody situation: *B.P.E. v. A.E.*, 2016 BCCA 334 at paras. 21-24.
- b) The requested inclusion would have added to the payor's income in Janzen, not the payee's. The present case, to use the language in Janzen, is "the more typical case where exclusion of the benefits from the recipient's income would result in higher amounts of spousal support payable": para. 49. Hence, inclusion will not create the hardship on the payor that exclusion was meant to avoid.

[48] As such, I remain of the view that there should be some recognition of these CPP benefits as part of the determination of child support.

[49] The related question is how to address these benefits in terms of the determination of spousal support.

[50] The SSAG User's Guide states as follows at 18-19:

One child benefit issue has arisen recently, namely whether the Canada Pension Plan Disability child benefit should be included in a spouse's income for spousal support purposes. CPP pays a separate child portion/benefit to the custodial parent, on account of the disability of the child's parent. In our view, the answer should generally be "yes", consistent with the SSAG treatment of other child-related benefits for the children of the marriage/relationship

[51] I agree that some consideration of these benefits is also appropriate for spousal support purposes. There is again a discretion available to the Court to determine the appropriate amount. Full inclusion of these benefits into income would result in a reduction in the spousal support payable of about \$100 at the midpoint. Based on similar concerns, I will reduce the spousal support otherwise payable by only $\frac{1}{2}$ of this amount, or \$50.

3. Disability Tax Credit

[52] The respondent sought to perform the support calculations based on an assumption that the claimant was in a position to make use of the disability tax credit. However, her income tax returns reflect that she was not in receipt of such a credit.

[53] Alternatively, the respondent argued that the claimant should have applied for this credit, and hence the calculation should be performed as though she was in receipt of same. However, the respondent did not ask the claimant any questions as why she did not apply for this benefit. Nor did the respondent establish that (1) the claimant would be entitled to this credit, or (2) the qualifications for CPP disability benefits and the disability tax credit are identical.

[54] As such, I find there is insufficient evidence to justify calculating support based on an assumption that the claimant was in receipt of the disability tax credit when she was not.

4. Respondent's Income

[55] The parties' proposed figures for the respondent's 2021 income were very close. The claimant stated that the proper figure is \$147,075.50. The respondent says that the proper figure is \$145,625. Counsel struggled to determine why they were proposing different amounts. Both counsel start with the same \$148,097.64 base. The respondent then deducted \$2,000 for projected rental losses and \$472 for union dues. The claimant agrees with both those deductions. It appears that the difference between the parties may relate the claimant's treatment of the employer's contribution to the RRSP. However, I agree with the respondent that this is already incorporated into the \$148,097.64 starting point. As such, I direct that \$145,625 be used for the respondent's income for any going forward calculations.

5. Security

[56] The claimant asks for an order under s. 171 of the Family Law Act, S.B.C. 2011, c. 25 ("FLA"), that the respondent be required to maintain an existing life insurance policy to secure future support child and spousal support payments.

[57] Given that the respondent (1) is in good health, (2) has paid all of the sums due under the Agreement, (3) earns substantial employment income from a reputable company, and (4) the claimant would not be in dire financial circumstances without the support payments, I do not see a need for security: *R.E.Q. v. G.J.K.*, 2019 BCSC 1116 at paras. 141-149, *aff'd* on this point, 2020 BCCA 254 at para. 72.

6. Child Support Going Forward

[58] For the sake of convenience, I direct that the going forward amount payable under this judgment be effective from August 2021, as this was the month that the trial began, as well as the month that H.V. turned 18.

[59] Based on the findings above, I apply the following inputs:

- a) \$148,098 for the respondent's gross employment income, with a deduction of \$2,000 for the respondent's rental income losses, and a deduction of \$472 for the respondent's union dues;
- b) \$4,200 for the claimant's employment income; and \$13,887 for the claimant's CPP benefits.

[60] These inputs yield basic guideline calculations of \$2,107 for the respondent's child support payable, \$131 for the claimant's child support payable, and a set-off amount of \$1,976 net payable to the claimant by the respondent. Based on the analysis above however, I would reduce the child support payable by the respondent by \$25 per month to account children's CPP benefits, which reduces the amount payable by him to \$1,956 per month.

[61] The respondent sought a specific order detailing the conditions under which child support would terminate. I do not find that such an order is necessary. The obligation exists presently. As a matter of law, it will end when the children are no longer "children of the marriage", as defined in s. 2(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.).

7. Spousal Support Going Forward

[62] The respondent accepts that the claimant is entitled to spousal support on compensatory and non-compensatory grounds. The respondent also agrees that the payment period will be of indefinite duration. The only issue is the amount.

[63] The same assumptions noted above yields SSAG low, mid, and high support of \$2,220, \$2,631, and \$3,055 respectively. I find the mid-point to be appropriate in this case, subject to the adjustment to account for the children's CPP benefits. After applying that \$50 adjustment, the monthly going forward spousal support amount is \$2,581.

8. Review Right

[64] The respondent seeks a spousal support review either at his retirement, or if and when the claimant begins earning in excess of \$20,000 per year. I agree that there is a "genuine and material uncertainty" regarding the parties' finances in the future so as to justify such an order: *Joffres v. Joffres*, 2014 BCSC 1778 at para. 173.

[65] The respondent also sought certain directions as to imputation of income to the claimant that would occur any such review. I find that this is putting the cart well before the horse, and no such directions will issue.

C. Retroactive Support

[66] The claimant makes a claim for retroactive support. As noted, certain amounts were paid to the claimant, both voluntarily and pursuant to the Agreement, but the claimant says these amounts were lower than they should have been. There are a few issues that need to be addressed in order to properly assess this retroactive support claim.

1. Treatment of Stock Options

[67] The respondent seeks to reduce his 2020 income used for any retroactive calculation by suggesting that the stock benefits included within his Line 150 income should be treated as a family asset rather than income. He relies on the decision in *Diamond v. Berman*, 2020 ONSC 1566. The respondent accepted that there was no British Columbia case directly supporting this position. The claimant notes that *Diamond* (a) related to the treatment of

retroactive pay rather than stock options, (b) acknowledged that the determination depends on the degree of certainty as to the value and the date of entitlement and receipt of the benefit, and (c) in the final result, determined that the amounts should be included as income.

[68] For the purposes of child support, the benefit from any stock option is generally treated as income. The Family Law Sourcebook for British Columbia, loose-leaf, (Vancouver: CLEBC, 2020), §3.33, states as follows:

Where a parent has received, as an employee benefit, options to purchase shares of a Canadian-controlled private corporation and has exercised those options during the year, the profits realized from the exercise of the options can be added to the income for the year in which the options are exercised (Schedule III, s. 13). When there was uncertainty regarding prospective bonuses in the form of stock options and restricted share units, the court considered the average of the past three years' income in setting a Guideline income for child support. Over or underpayment would be mitigated by the annual review of child support (*Sarro v. Sarro*, 2011 BCSC 1010).

[69] Section 13(1) of Schedule III to the Child Support Guidelines provides as follows:

13 (1) Where the spouse has received, as an employee benefit, options to purchase shares of a Canadian-controlled private corporation, or a publicly traded corporation that is subject to the same tax treatment with reference to stock options as a Canadian-controlled private corporation, and has exercised those options during the year, add the difference between the value of the shares at the time the options are exercised and the amount paid by the spouse for the shares, and any amount paid by the spouse to acquire the options to purchase the shares, to the income for the year in which the options are exercised.

[70] For spousal support, the question is somewhat less clear. In *Sarro v. Sarro*, 2011 BCSC 1010, the court acknowledged that the child support formula was "intended to give the children the full benefit of the payor spouse's income", but that the approach to spousal support is more holistic: paras. 29-30. The SSAG User's Guide provides as follows:

Finally, there may be situations where the inter-relationship between property division and spousal support for spouses may mean a different, and lower, payor income is used for spousal support. See *Klefenz v. Klefenz*, 2015 NSSC 196 (payment on account of capital in share transaction included for child support, but not for spousal support). For example, if stock options are valued and divided as part of the property divisions, the same stock options may not be treated as income for spousal support purposes, even in cases where the stock options might be considered as income for child support purposes.

[71] In *A.L.J. v. P.N.A.J.*, 2017 BCSC 1738, the court addressed this issue as follows:

[75] The Father asserts that this court should apply a different income for purposes of determining spousal support as distinct from child support. He relies on *Sarro v. Sarro*, 2011 BCSC 1010 (B.C. S.C.) to support this argument. Counsel for the Mother asserts that *Sarro* is

distinguishable and ought not be applied. He points out that in Sarro, the court reasons (at para. 30) that the income excluded from income for spousal support was the income from stock options which were being divided between the parties; as the stock options were being divided, any income that the payor received from stock options would be identical to income received by the recipient from the recipient's share of the stock options. Further, counsel notes there was some uncertainty as to the amount of bonus income to be received by the payor, as well as an order that spousal support not be reviewed for 3 years. As such, the court in Sarro imputed a lesser amount of bonus income for spousal support than for child support which was reviewable annually. Counsel for the Mother argues that Sarro is also distinguishable from the instant case as the Father has rental and investment income but the Mother does not (other than possibly on a short-term basis until the Claimant is able to purchase a residence for herself and the children).

- [76] I am not persuaded on the facts before me that different income numbers should be used in this case for purposes of determining child and spousal support. I agree that the facts in Sarro are distinguishable. No specific asset has been divided in this case which would justify differential treatment of income for child support as compared to spousal support. The determination of income is generally to be treated the same for child and spousal support and is rooted in both considerations of reasonableness and the factors set out in the Guidelines for imputing income
- [72] As discussed below, I find that the respondent's stock benefits are not a family asset, and thus can reasonably be treated as income for support purposes. At this stage, the Court is only settling on a 2020 figure for the respondent's income in order to determine retroactive support. There is no issue about future uncertainty that calls for a different approach than that reflected in his income tax return. The respondent made it clear in his evidence that, as a result of the fact that his employer was bought out by another company, all of his accumulated and outstanding stock was "paid out in one payment". Hence, the benefits have already crystalized and been received. Further, it is not clear whether the benefit was received before or after separation.
- [73] I find that there is insufficient legal support, and insufficient evidence about the nature and timing of these stock benefits to justify differing from the claimed tax treatment of these amounts: *Palmer v. Palmer*, 2017 BCSC 989 at paras.186-189.

2. Income Levels

- [74] I find that the following are the appropriate income levels to use for the determination of the support properly payable for 2020.
- Claimant: \$4,200 in employment income, and \$13,887 in CPP benefits;
 - Respondent: \$166,692 in employment income, less \$3,052 in net rental income, and \$472 in union dues.

[75] These income inputs yield a 2020 DivorceMate calculation of \$2,314 in child support payable by the respondent, \$131 payable by the claimant, and a net amount of \$2,183. Applying the same \$25 reduction reflecting the CPP child benefits, the offset amount should be reduced to \$2,158.

[76] In terms of spousal support, the income inputs yield SSAG low, mid and high amounts of \$2,172, \$2,694, and \$3,213. Applying the same CPP analysis as above, this yields spousal support payable for 2020 of \$2,644 per month. In terms of January to August 2021, I would apply the same analysis as for the going forward amounts. Although the CPP child benefits payable were somewhat higher during this first part of the year, I do not find that this difference is sufficiently material to justify a different approach.

3. Conclusion on Amount of Retroactive Support

[77] The payment of child support was put in issue at the outset of this proceeding, and the Agreement was without prejudice to a later readjustment at trial. I find that fairness considerations support a retroactive award. I leave it to the parties to calculate the precise amount of retroactive support payable based on the findings above. If there is any dispute, the parties may set an appointment before the Registrar to determine the final amount payable.

D. Special Expenses

[78] In terms of past special expenses, the claimant reduced her claim to \$8,203.25 in final argument, an amount which simply represented the past counselling expenses for H.V. The respondent was prepared to pay \$694.

[79] The claimant notes that H.V. received counselling even before the parties' separation. The claimant's mother also provided her observations supporting H.V.'s need for counselling.

[80] Notably, the respondent's main concern was the counsellor's credentials and treatment focus, rather than a more fundamental objection as to whether counselling was necessary. The respondent has agreed to future counselling for both H.V. and N.V.

[81] I find that, given the conflict in the Family Home since separation, and H.V.'s strained relationship with the respondent, obtaining counselling for H.V. was reasonable. I find that the respondent should pay 90% of the \$8,203.25.[1] Although the claimant's mother paid these amounts, I find that there was sufficient evidence to support that this was a loan rather than a gift.

[82] In terms of going forward special expenses, the parties agreed on certain items, and I make the following additional orders to address those points on which the parties did not agree:

- a) Subject to the controls below, any special expenses will be paid on the following ratio: 89% by the respondent, 11% by the claimant.[2]

- b) The claimant proposed a floor of \$100 for the need to pay any net health expenses. I am content to have the order be effective from the first dollar, particularly as the settlement of such expenses will only happen in batches in any event.
 - c) The claimant proposed that counselling for both children be included to a maximum of 12 sessions per year. The respondent proposed that the number of sessions be as agreed by the parties, on certain additional terms. Given the difficulty the parties have had at agreeing to anything in this case, I find that maximum clarity and certainty is advisable. I agree to the maximum of 12 sessions per year, with any available insurance being used for these sessions before the balance is shared by the parties.
 - d) The claimant sought confirmation that H.V. could use her preferred counsellor of choice, Tanya Carroll. Rather than allowing the parties to continue to debate this issue, I confirm that H.V. may continue with Ms. Carroll, subject to H.V.'s consent.
 - e) The respondent was prepared to pay up to \$1,000 per year for track and field, but required that any program be associated with the children's schools. The claimant sought to expand this to include private athletic clubs. Given that the children have a history of participating in such clubs, and the respondent will still have the protection of the \$1,000 cap, I am prepared to expand the scope to extracurricular clubs.
 - f) The respondent was prepared to pay for tutoring for N.V., but not for H.V. I accept this limitation. H.V. is now in university, a stage where the use of private paid tutoring becomes less common or appropriate.
 - g) The claimant sought confirmation that the special expenses would include "graduation expenses". I am not prepared to make such an order, particularly given that there was some difficulty between the parties in the past as to the proper amount to expend on a graduation dress. Furthermore, the case law does not generally support including such expenses in any event: *M.A.M. v. D.L.L.*, 2018 BCSC 2114 at paras. 131-132; *Janmohamed v. Janmohamed*, 2016 BCSC 513 at para. 129; *M.E.K.F. v. F.F.*, 2015 BCSC 621 at paras. 89-91.
- [83] The parties proposed somewhat different terms in relation to the management and payment of any post-secondary expenses:
- i) The claimant sought to be appointed as joint administrator of the parties' RESP. As much as I have concerns about the parties' ability to work together, this concern does not rise to a level that would justify denying the claimant an equal say in the management of the RESP. The likelihood of conflict is also mitigated by the other terms below controlling and guiding the use of such funds.
 - ii) Both parties agreed that the children's CPP benefits be applied first towards any post-secondary costs for that child.
 - iii) The RESP will be the next source of funds for post-secondary expenses.

iv) The claimant sought a RESP withdrawal limit of \$7,500 per year per child, and a per child limit of \$30,000. I am prepared to impose a limit, but, in order to reduce the risk that there are unspent amounts at the end of the day, I would raise the limits to \$10,000 per year per child and a global limit of \$40,000 per child.

v) I find that the following term proposed by the claimant is reasonable:

Either party may open an additional RESP for either of the Children, and any use of an additional RESP to fund post-secondary expenses for a child. Any such funding for the child will be credited to the party who funded the RESP as that party's contribution to their proportionate share of any special and extraordinary expenses.

vi) Any residual amount of post-secondary payments will be paid in the same 89%/11% ratio determined above.

b) I agree with the claimant's proposal that the parties share the cost of up to two summer camps for N.V. equally.

c) I agree that the parties should not incur special and/or extraordinary expenses other than those set out above without written agreement of the other, but if the parties cannot agree upon any proposed expense, the dispute will be resolved by mediation, failing which either party is at liberty to bring an application to the court.

d) I agree with the claimant's proposal that the parties reconcile the expenses every fourth month, on the final day of the month, and any net amount payable by either party being payable by the 28th day of the next month. Reducing the number of financial interactions between the parties should hopefully minimize disputes.

E. Information Exchange

[84] The parties agreed to exchange certain information annually so that the need for adjustments could be considered.

F. Property Division

[85] There is another vast array of contested issues between the parties in relation to the division of property.

1. The Excluded Property Claim

[86] The claimant is prepared to accept an excluded property claim of \$76,613 arising from the respondent's interest in the Poco Property brought into the marriage.

- [87] However, the respondent argues that the proper excluded property figure is \$145,484, said to be comprised of the full \$100,000 down payment on the Family Home, and a further \$45,484 which he says is traceable from his Poco Property into the parties' Investment Property. He says that the bank statements, cross-referenced with the Purchaser's Statement of Adjustments for the Investment Property, should allow the court to trace certain proceeds of sale from the Poco Property into the Investment Property.
- [88] Addressing first the \$23,287 balance on the \$100,000 down payment on the Family Home, the claimant responds as follows:
- a) There is insufficient evidence supporting any additional excluded property claim;
 - b) She actually paid \$10,000 of the \$23,287 balance herself;
 - c) The presumption of advancement applies, such that if the respondent funnelled additional amounts into the Family Home or the Investment Property, it must be treated as a gift to the claimant absent evidence to the contrary;
 - d) Although the claimant is prepared to accept \$76,613 as an excluded claim, the claimant says that, if she is correct that the respondent's brother owned $\frac{1}{2}$ of the Poco Property, there is an argument that even this amount should be reduced. At a minimum, the claimant argues the fact that the brother owned $\frac{1}{2}$ of the Poco Property prevents acceptance of any further excluded property amount arising from the Poco Property, since there was insufficient equity in the Poco Property to support any additional exclusion.
- [89] I find that I must limit the additional excluded property claim on the basis of the first of these four grounds alone. It is the respondent's burden to establish an excluded property claim: FLA at s. 85. There was an inadequate paper trail to support a traceable amount from the Poco Property transaction into the Family Home or the Investment.
- [90] The challenges facing the respondent are reflected in his own written argument, where he acknowledges the various hoops he must clear to establish this claim, both with regard to the Family Home and Investment Property. Specifically, the respondent notes that if he is to succeed, the Court must accept that:
- a) there is proof of sufficient equity in the Poco Property to support the claim;
 - b) the presumption of advancement is rebutted;
 - c) the excluded equity in the Poco Property was not fully consumed when the respondent refinanced the Property in 2003 or in 2008; and
 - d) any remaining equity in the Poco Property can be traced to the Investment Property.
- [91] The evidence is simply not persuasive or conclusive enough to carry the day on these steps.

- [92] The respondent's position suffers in particular from a lack of evidence in relation to the equity in the Poco Property at the point of the various re-financings. The respondent sought to rely on historical bank appraisals, without calling these appraisers at trial. He also sought to rely on a 2008 property tax assessment. The appellant challenged the admissibility of those documents for this purpose.
- [93] The respondent did not cite any case in which a court relied on a bank appraisal as evidence supporting an excluded property claim, absent agreement of the parties as to its admissibility.
- [94] Although the court in *Bartch v. Bartch*, 2017 BCCA 94 at para. 28, acknowledged the ability of the court to reduce some of the formalities where the use of a joint expert is "inappropriate or impracticable", I find that condition was not met here. There was nothing stopping the respondent from seeking a proper expert appraisal of the value of the Poco Property at the relevant points in time.
- [95] In *Shih v. Shih*, 2017 BCCA 37, relied upon by the respondent, the court had the benefit of an actual transfer price as a basis to assess the fair market value of the excluded property.
- [96] I find that the bank appraisals are inadmissible for the purpose of establishing the equity in the Poco Property. Moreover, even if the appraisals and assessments were admissible, they would carry little weight, given that no properly qualified expert was proffered to support the appraisals.
- [97] There is more latitude for the admission of the property assessments: *B.L.S. v D.J.S.*, 2021 BCSC 1311 at para. 124; *Dosanjh v. Liang*, 2015 BCCA 18, paras.60-68. However its utility here is limited. The respondent relies on the bank appraisals with regard to the 2001 refinancing and 2003 refinancing, but relies on a property assessment only for the 2008 refinancing.
- [98] The complexity of the various refinancing transactions engaged in by the respondent results in a situation where I find that the evidentiary burden is not met. Although "precision" or "mathematical certainty" is not required, the ability to trace must still be established on a balance of probabilities: *Sophonow v. Sophonow*, 2021 BCSC 1863 at paras. 74-83. The evidence adduced by the respondent in support of this additional excluded property claim is variously inadmissible, inconclusive, or warranting little weight.
- [99] The presumption of advancement similarly makes it difficult to accept the respondent's additional excluded property claim. In *V.J.F. v. S.K.W.*, 2016 BCCA 186, the Court of Appeal confirmed that the presumption of advancement is still operative as between spouses: para. 74. In *Wickstrom v. Ng*, 2019 BCSC 1685, the court summarized the law as follows:
- [148] The burden of proof to show that a contribution to the purchase of a home from funds gifted to a spouse is excluded property rests with the respondent: see s. 85(2) of the FLA. In this case, the respondent did not act to protect his disproportionate investment in the family home by requiring the claimant to acknowledge that no gift of the excluded property was intended. The party claiming an exclusion of some property from an equal division

must prove the claim on the balance of probabilities: see *Shih v. Shih*, 2017 BCCA 37 [Shih], at paras. 42 to 44.

- [149] In *Shih*, the court said proof of an exclusion of property must be based on clear and cogent evidence. Absent documentary evidence, oral testimony must be scrutinized carefully although the court is permitted to draw reasonable inferences from less than certain evidence in order to do justice.
- [100] In *Namdarpour v. Vahman* 2019 BCCA 153, the Court of Appeal returned to this issue stating:
- [25] The presumption of advancement is an evidentiary presumption whereby in certain circumstances a gratuitous transfer is presumed to be a gift. The presumption has been recognized to operate in the circumstances of a gratuitous transfer from a married husband to his wife and from a parent to his or her minor child: *Pecore v. Pecore*, 2007 SCC 17 at paras. 27-41; *Kerr v. Baranow*, 2011 SCC 10 at para. 20. It is most useful where evidence of the transferor's intention in making the transfer is unavailable or unpersuasive, especially where the transferor is deceased: *Pecore* at para. 23.
- [26] Prior to this Court's decision in *V.J.F. v. S.K.W.*, 2016 BCCA 186, leave to appeal ref'd, [2016] S.C.C.A. No. 295, discussed below, there were conflicting lines of authority in the lower court concerning whether the FLA is a complete code with respect to property division or whether common law and equitable principles such as the presumption of advancement continue to apply.
- []
- [29] In *V.J.F.*, this Court addressed the two conflicting lines of authority and held that the FLA is not a complete code and that common law concepts such as gifts and evidentiary presumptions continue to operate under the statute. Madam Justice Newbury wrote:
- [74] With all due respect to the contrary view, I conclude that the new FLA scheme does not constitute a "complete code" that "descends as between the spouses" and eliminates common law and equitable principles relating to property. Rather, the scheme builds on those principles, preserving concepts such as gifts and trusts, and evidentiary presumptions such as the presumption of advancement between spouses. ...
- [Emphasis in original.]
- []
- [31] In *V.J.F.*, this Court reviewed the family legislation of other provinces and noted that other jurisdictions had expressly abolished the presumption of advancement to various degrees: see *Matrimonial Property Act*, R.S.A. 2000. c. M-8, s. 36; *The Family Property Act*, S.S. 1997. c. F-6.3, s. 50; *Family Law Act*, R.S.O. 1990., c. F.3., s. 14. In contrast, in British Columbia, the FLA does not abolish the presumption of advancement, but instead states in s. 104(2) that the rights arising under the division of property provisions "are in addition to and not in

substitution for rights under equity or any other law."

[32] Since V.J.F. was decided, some judges have remained reluctant to apply the presumption of advancement to issues of family property division

[33] Although the presumption of advancement continues to apply under the FLA. I would not overemphasize the role of evidentiary presumptions in the current property division scheme for a number of reasons, including the apparent context in which the presumption has its origins (the sometimes anachronistic notions of economic dependence), in contrast to contemporary circumstances.

[]

[35] The Supreme Court of Canada considered the presumption of advancement in *Pecore*, in the context of a contest between children over whether funds in a joint account should form part of an estate. The Court explained that regardless of the legal burden, the trial judge's role is to ascertain the transferor's actual intention. The presumption of advancement will determine the result only when evidence of the transferor's intent is unavailable or unpersuasive

[]

[40] These decisions emphasize that evidentiary presumptions operate only where the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer. In my view, the following principles can be discerned from the case law: (1) a conclusion about intention is only to be determined after consideration of "all the circumstances" of the case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those circumstances include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption operate.

[41] In this case, the judge first applied the presumption of advancement and then, in the alternative, considered the evidence regarding intention (RFJ at para. 73). That reverses the order in which he should have considered the matter. When he considered intent, the judge found cogent evidence of an intention to make a gift, consisting of "the way that both parties' settlement funds were used" (RFJ at para. 73). The resort to an evidentiary presumption was therefore unnecessary.

[101] Most recently, in *Sophonow*, the court stated:

[90] In V.J.F., the B.C. Court of Appeal noted that the FLA does not eliminate common law and equitable principles relating to property but, rather, builds on those principles by preserving concepts such as gifts and trusts and evidentiary presumptions. In short, the Court in V.J.F. held that the presumption of advancement between spouses continues

[102] In sum, the respondent had the onus to establish that the additional amounts were excluded assets and has failed to do so. The evidence as to intention, coupled with the presumption of advancement, only further validates this conclusion. Specifically, I find that the respondent had a donative intent with respect to any additional amounts that he now claims as excluded property. He never told the claimant that any additional funds that he was providing would be stamped as his own and be treated separately from her equal interest. He did not seek an agreement from the claimant to protect what he says was his own. In effect, the respondent did not provide any useful contemporaneous evidence of his intent. As the court noted in *Pecore v. Pecore*, 2007 SCC 17, the "traditional rule is that evidence adduced to show the intention of the transferor at the time of the transfer 'ought to be contemporaneous, or nearly so,' to the transaction": para. 56. The respondent has failed to produce such evidence, and his after-the-fact "evidence" does not persuade me of his intent at the time of transfer.

[103] As such, I restrict the respondent's excluded property claim to the agreed \$76,613.

2. Sale of the Family Home

[104] The parties agree that the Family Home cannot remain in the hands of both parties. The respondent seeks to purchase the claimant's interest in the Family Home for the price suggested by the Appraisal. The claimant is prepared to sell the Family Home, but argues that the Family Home should be put on the market, as the Appraisal is out of date.

[105] I accept the respondent's proposal. The parties spent a great deal of time and effort renovating the Family Home, and as such there is some benefit to allowing at least one of them to remain there to reap the benefit of those efforts, so long as the transaction occurs at a fair price. Section 97 of the FLA allows the court to direct that one party or the other have possession of any family asset.

[106] I do not accept the claimant's argument that the Appraisal is stale. The Appraisal issued on July 13, 2021. Virtually every appraisal would be stale by the time it was put before the court on the claimant's argument, given the need to provide proper notice of any expert opinion in advance of trial. There was no admissible evidence that the fair market value of the Family Home is materially different now than it was when the Appraisal was prepared.

[107] Section 87 of the FLA requires that the division of property take place at its "fair market value". It does not mandate that the court must rely on an open market sales process in order to derive that value. I find that the Appraisal is a reasonable basis upon which to determine the sales price for the claimant's interest in the Family Home.

[108] Given the ongoing tension in the Family Home, it is not in their interest--or their children's--that they be forced into a further delayed joint sales process that I expect will almost certainly result in further disagreements.

[109] I note, as well, that a sale to the respondent pursuant to the Appraisal price should avoid the need for either party to bear the expense of a real estate commission.

[110] The next issue that must be addressed in relation to the sale of the Family Home is the claimant's position that she would like the right to remain in the Family Home until after she has received her funds from the sale of both the Family Home and the Investment Property. However, she declines to pay rent during this period.

[111] I direct that the claimant may elect to remain in the Family Home for a maximum of 60 days after the receipt of the last of her funds from the transfer of both properties, but not awaiting the distribution of the holdback described below. If the claimant elects to remain in the Family Home for this additional 60 day period, there shall be an adjustment to the final equalization payment in the respondent's favour of \$2,000. Given the problems that the parties have had living under the same roof, I do not find it in the children's best interest for the present living arrangement to carry on any longer than necessary. That said, I do find that giving the claimant some time to find a new home is reasonable. However, the claimant cannot reasonably expect to live "rent free" after she has already been bought out.

3. Sale of the Investment Property

[112] The parties agreed that the Investment Property should be sold pursuant to a joint conduct of sale, with the net sale proceeds being divided equally, subject to the usual adjustments.

[113] There was only one point of departure. The respondent sought a \$20,000 tax holdback, whereas the claimant proposed that any holdback be estimated by a jointly retained accountant.

[114] To minimize the need for further interaction, expense and agreement, I am prepared to designate a fixed \$20,000 holdback.

4. RESPs

[115] The management of the RESP has already been addressed above in the context of the system for payment of the post-secondary special expenses.

5. Chattels

[116] The parties were largely agreed that each would keep the chattels presently in their possession, but sought specific directions on certain assets. In particular, the parties seek direction on various items of sentimental value to the respondent. I find as follows in relation to the points of departure:

- a) The respondent may retain the Cox Apple Pippin tree, the pine tree from the front garden, and the bulbs. It makes sense for these garden assets to remain with the Family Home that the respondent intends to purchase.

- b) The claimant will deliver to the respondent, to the extent they are in her possession and control:
- i) two paintings by the respondent's mother;
 - ii) two paintings gifted to the respondent by his university friend (one from a photograph, and the other of Mount Fuji); and
 - iii) the respondent's pre-marriage photo albums.

[117] There appeared to be agreement on all other chattels, but the parties may seek further directions if required.

6. Bank Accounts

[118] The claimant provided the following list of accounts:

Party name and bank account

Amount in account

Respondent's TD chequing #1192

\$5,226.83

Joint TD Bank account ending in 366

\$0.00

Respondent's BMO account ending in 190

\$3,731.27

Respondent's BMO account ending in 140

\$2,491.42

Respondent's Tax Free Savings Account ("TFSA")

\$29,107.47

Respondent's Tangerine savings account

\$72.61

Respondent's Tangerine TFSA

\$606.58

Respondent's RBC account ending in 838

\$365.91

Subtotal

\$41,602.09

Claimant's TD Bank account ending in 4734

Opened post-separation.

As of March 6, 2020, the balance was \$18.93

Claimant's TD Bank account ending in 4734

Opened post-separation.

As of March 6, 2020, the balance was \$5.

Claimant's RBC Savings account ending in 917

Opened post-separation.

As of March 6, 2020, the balance was \$10.79.

Claimant's RBC account ending in 450

Opened post-separation.

As of March 6, 2020, the balance was \$3,414.62.

Claimant's BMO TFSA

\$400 on date of separation. The funds have since been the claimant RBC account ending in 450.

Subtotal

\$3,814.62

[119] Pursuant to the claimant's analysis, the respondent has \$41,602.09 in bank accounts, and the claimant has \$3,814.62. Dividing the \$45,416.71 total would drive an equalization payment of \$18,893.735 in the claimant's favour in relation to these financial assets in isolation. I find that this approach is reasonable. The respondent was unable to adequately explain the basis for his calculation of a lesser figure.

7. Trip Refund

[120] The respondent seeks \$1,707 from the claimant as his share of a European trip purchased for H.V., but which was cancelled and refunded due to the COVID-19 pandemic. The claimant says that this refund is properly H.V.'s, and that there is still a plan for her to go on this trip in the future. I accept this position, and hence find no need for an adjustment.

8. Vehicles

[121] The respondent proposes to pay \$8,350 to equalize the value of the vehicles retained by each. The claimant says the proper figure is \$8,931, but offers no real explanation for the difference. I am prepared to use the respondent's figure as it appears to track the documents.

9. Income Tax Refund

[122] The respondent proposes to pay \$1,653 to the claimant representing half of his 2019 income tax refund. This is reasonable, and was not opposed.

10. Stock Options

[123] The respondent proposed to pay \$4,929 to the claimant, representing half of the after-tax value of the employee stock options he received in early 2020. For the reasons set out above, I have incorporated this amount into the respondent's income rather than treating it as an asset.

11. Mediation Credit

[124] The respondent asked to be credited with \$8,000 for a mediation funded by way of an advance payment. The claimant agreed to this credit.

12. Family Debt

[125] There was agreement that each party would retain any debt held in their names.

13. CPP

[126] The parties agreed that their CPP entitlement may be equalized on application by the claimant.

14. RRSP

[127] Although there were small differences between the parties figures on this point, based on my review of the records, the proper approach is for the parties to equalize their RRSPs by way of a tax-free spousal rollover after accounting for the following amounts:

- a) \$10,725 brought into the marriage by the claimant;
- b) \$53,163 brought into the marriage by the respondent; and
- c) \$11,011 contributed by the respondent to his RRSP after separation.

15. Section 211 Report

[128] I agree with the respondent that the \$16,800 cost of the s. 211 report can be dealt with as part of the disbursements within any costs agreement or order.

16. Final Equalization Payment

[129] I leave it to the parties to resolve the final equalization payment flowing from these reasons. If the parties are unable to agree, they may appear back before me.

F. Confidentiality

[130] The respondent made a request that the names of the parties be reduced to initials given the potential that use of the parents' names could identify their children. The claimant opposed this order.

[131] Given that no formal motion was brought for this order, I decline to grant it. While I recognize the respondent's concerns, the unfortunate reality is that when parties are unable to resolve their disputes privately and resort to the courts, they enter the public domain. Once in that arena, the parties' interests must be balanced against the open court principle. Absent some evidence of harm, this principle will not be displaced: *M. v. M.*, 2015 BCSC 1297 at paras. 7-9. However, I am mindful of the children's interests, and have exercised my discretion to use initials for their names throughout these reasons.

IV. CONCLUSION

[132] The parties will need to prepare a final comprehensive order consistent with these reasons. Given that the DivorceMate calculations used in these reasons are different from those proposed by either party, if the parties identify any mathematical errors, they may advise the court accordingly.

[133] If the parties are unable to agree on costs, then they may make written submissions of 15 pages or less on the following schedule:

- a) Claimant: 30 days from the publication of these reasons.
- b) Respondent: 30 days from receipt of claimant's costs submission.
- c) Claimant's reply: 15 days from receipt of respondent's costs submission.

"The Honourable Mr. Justice Branch"

[1] Based on the parties' 2020 incomes (\$163,640 for the respondent; \$17,314.02 for the claimant).

[2] Based on the going forward incomes (\$145,625 for the respondent; and \$18,087 for the claimant (\$4,200 for the claimant's employment income; and \$13,887 for the claimant's CPP benefits)).

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Prepared on 27 October 2026 · Esheria