
CANADA / JUDGMENT

D.A.C. v. K.J.

2021 BCSC 2479

COURT

Supreme Court of British Columbia

DECIDED

22 December 2021

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2021 BCSC 2479 D.A.C. v. K.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.A.C. v. K.J.,

2021 BCSC 2479

Date: 20211222

Docket: E59747

Registry: New Westminster

Between:

D.A.C.

Claimant

And

K.J.

Respondent

Before: The Honourable Madam Justice Norell

Reasons for Judgment

The Claimant, appearing in person:

D.A.C.

The Respondent, appearing in person:

K.J.

Place and Dates of Trial:

New Westminster, B.C.

November 15-18, 2021

Place and Date of Judgment:

New Westminster, B.C.

December 22, 2021

Introduction and issues

[1] These are reasons following the trial of this family law action. Although this action had a difficult beginning with many court attendances, to the parties' credit they have moved past these. The parties were both self-represented at trial but appear to have counsel retained in the background. At the commencement of this trial, both parties advised that they had nearly reached an agreement on most matters in issue, and together identified seven issues to which they thought they would not reach an agreement. By the morning of the third day of trial, they had a signed separation agreement except for those seven issues. By the end of the trial, only six issues remained.

[2] The issues the Court is asked to decide are:

- a) Division of the family home. The claimant has agreed to purchase the respondent's one-half interest in the family home. The issues are:
 - i. whether the valuation date should be February 2021 or the date of trial;
 - ii. whether future disposition costs should be deducted from the valuation; and
 - iii. whether there should be an unequal division as a result of the respondent's claim for occupation rent and the claimant's claim for home maintenance and his own rental expenses.
- b) Division of the parties' bank accounts and investments, and in particular whether the claimant's TFSA should be divided as of the date of separation or the date of trial.
- c) The Federal Child Support Guidelines [Guidelines] income of each of the parties for 2020 for the purpose of child support, and the amount of child support payable.
- d) The respondent's claim for spousal support. Entitlement, quantum, and duration are in issue.
- e) Whether a protection order should be made and if not, whether a conduct order should be made. The protection order was abandoned by the respondent by the end of the trial, but on condition that a certain conduct order be put in place.
- f) Whether the parties should use a computer software application for communication and scheduling of their children's activities.

- [3] The seventh issue which had been identified was the appointment of a parenting coordinator, but the parties have now agreed to a dispute resolution process in their separation agreement, and the appointment of a parenting coordinator if necessary.

Relationship and litigation history

- [4] The parties are now both 46 years old. They began living together in a marriage-like relationship in July 2003, and married in November 2006. They have two children, born in 2009 and 2011. They had a three-month separation in 2018 during which time they continued to reside together, but the respondent moved to another bedroom in their home. On May 1, 2020 the respondent left the family home with the children. The claimant now lives in the family home.
- [5] The history of this action up to early February 2021 is summarized in the decision of Justice Forth, indexed at 2021 BCSC 224, at paras. 18 to 26. It is not necessary to repeat it here. It is sufficient to say that there were numerous court applications, culminating in an order on February 11, 2021 by Justice Forth that the parties have 50-50 shared parenting time. I will summarize the history since then.
- [6] On February 24, 2021 the respondent appealed Justice Forth's parenting order, and on March 9, 2021 applied for a stay of the order. After two attempts to have this heard in general chambers, the matter was heard by Justice Forth. She ordered that the parties attend a mediation and the stay application was withdrawn. A previous protection order was varied regarding COVID-19 guidelines.
- [7] In April 2021, the parties attended a mediation. It was not successful.
- [8] On June 25, 2021, the respondent filed a notice of trial for November 15, 2021 for five days.
- [9] On July 19, 2021, the respondent filed a notice of application for an order that the family home be sold and she have conduct of sale. On July 20, 2021, the claimant filed a notice of application seeking an order establishing the value of the family home, an order determining the division of the home considering an excluded property claim and expenses, an order varying a previous child support order to take into account that there was now shared parenting, and other orders regarding exchanges of the children, travel and holiday time. Both applications were returnable July 30, 2021, but were adjourned on that date to be heard for a full day on the Port Coquitlam assize during the week of September 20, 2021.
- [10] On September 10, 2021, the respondent brought an application for another protection order which was granted on the same terms as the previous order but with a further exception for communication through real estate agents, notaries and financial advisors for the purpose of settling family finances. On October 21, 2021, Master Robertson issued an amended protection order correcting a clerical error. The September 10, 2021 protection order should have stated that the order was made by consent and on a without prejudice basis.

- [11] On September 20, 2021 Justice Brongers adjourned both applications that had been filed in July 2021, with costs in the cause, and according to the parties, stated that the issues should be addressed at the upcoming trial.
- [12] On October 1, 2021, the parties attended a trial management conference. Justice G.C. Weatherill ordered that the parties retain a joint expert to value the family home and that pending the decision of the trial judge, the cost will be shared.
- [13] On October 28, 2021, the respondent filed a counterclaim seeking orders formalizing the parenting arrangement schedule and providing for parenting arrangements during holidays, a parenting coordinator, retroactive and prospective child support, s. 7 expenses, retroactive and prospective spousal support, division of family assets, occupation rent of the family home, and a protection order.
- [14] That brings the history up to the trial of this action. In summary, the current status is that:
- a) For the past 10 months the parties have had a shared parenting arrangement on a 2-2-5-5 schedule, and have agreed for that to continue. Both now acknowledge the other is a good parent.
 - b) The parties have generally agreed to a 50-50 division of family property, subject to an agreed excluded property claim by the claimant.
 - c) The claimant is presently living in the family home and wishes to purchase the respondent's one-half interest. The respondent is renting, but wishes to purchase a home near the family home. The parties' children wish their parents to live in close proximity to each other so that they can ride their bicycles between the two homes.
 - d) The claimant's future work status is uncertain. He is currently on medical leave as well as suspended with pay.

Division of the family home

Valuation date

- [15] The parties obtained two joint appraisals of the family home. The first values the home as of February 16, 2021 at \$1.1 million. The second, by the same appraiser, values the home as of October 25, 2021 at \$1.235 million.
- [16] The claimant argues the lower and earlier valuation should be used to determine the purchase price for two reasons. First, the parties agreed in December 2020 to obtain a joint appraisal of the property. He states it was implicit in that agreement that he would be able to purchase the respondent's interest for that appraised value. He was prepared to purchase the family home in February 2021 after the first appraisal was obtained, but the parties could not reach an agreement. Although it was his belief the parties would act on the appraisal, he acknowledges that they did not reach an explicit agreement that the family home would be sold at that time to him. Second, he believes that the rise in value since the February 2021

appraisal is "unprecedented" and unlikely to last, and he would be paying a premium for the home. The claimant is not qualified to express an opinion on the future real estate market, but this is his fear.

[17] The respondent argues that the current valuation should be used for two reasons. First, it is more reflective of the current housing market into which she will have to buy. Their children have been very vocal about staying in the family home and living in a home with her that is near to the former family home. Second, while she agrees that the claimant wanted to buy her interest a while ago, they were never close to an agreement because there was an excluded property claim and property taxes and utility taxes that the claimant wished to subtract from the value, but documents supporting these were not produced by the claimant.

[18] I note here that the parties now agree that the claimant has an excluded property claim for \$107,400 which he had contributed to the family home.

[19] Section 87 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] states:

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
 - (i) an agreement dividing the family property and family debt is made, or
 - (ii) of the hearing before the court respecting the division of property and family debt.

[20] A court may depart from the trial date as the date of valuation only if it finds significant unfairness under s. 95 of the FLA: *Blair v. Johnson*, 2015 BCSC 761 at para. 69. This is because a "departure from the presumptive date for valuation of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA": *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76. Section 95 states that a court may order unequal division of family property if equal division would be "significantly unfair". To justify a reapportionment of family property requires something "objectively unjust, unreasonable, or unfair in some important or substantial sense": *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 2; *Singh v. Singh*, 2020 BCCA 21 at paras. 129-134.

[21] I am not persuaded that there is any significant unfairness in using the current valuation date. Therefore, the \$1.235 million valuation shall be used for the purpose of division. There was no agreement reached to use the earlier date, and the respondent intends to purchase and will have to buy into the current market. It is possible the market value of the family home may fall, but it also may rise. There is no expert evidence indicating which is more likely. Further, as in *Gilpin v. Gilpin* (1990), 50 B.C.L.R. (2d) 251 (C.A.), where the respondent had argued that the value of the matrimonial home may have fallen since the date of trial,

Justice Lambert stated at page 259 that he was sympathetic to the submission, but:
"Continuing fairness is impossible to achieve. Fairness at a particular point in time is the legislative goal."

Disposition costs

- [22] The claimant argues that eventually he will sell the family home, and the disposition costs should be divided and deducted from the purchase price. The claimant testified that the family home is too big for him alone, and too much upkeep. The design of the house makes it unsuitable for the creation of a basement suite that could be rented. He estimates that it will be six years until the children will graduate high school and go to university, and he will sell the family home at that time and move to something smaller. He states he is purchasing the respondent's interest because the children want to remain in the home and in the area where they have friends, and it is in their best interests. He offered to the respondent that she could buy his interest in the home, but she declined. He argues that not taking the expense into account would be an unequal reapportionment. At 7% on the first \$100,000 and 2.5 % on the balance, he calculates the disposition costs to be \$35,375.
- [23] The respondent does not agree the family home will likely be sold in six years. The youngest child is now only 10 years old and the children may reside with their parents when attending university. If the claimant sells the house he will make money as it is in a desirable location. She wants to purchase a home and it will have to accommodate the children as well.
- [24] Disposition costs may be considered in valuing family assets when there is appropriate evidence of timing of the likely disposition and the cost is not speculative: *Halpin v. Halpin*, 1996 CanLII 3370, 27 B.C.L.R. (3d) 305 (C.A.), at paras. 62-70; *Brand v. Brand*, 2008 BCSC 1541 [Brand] at para. 47. If a disposition will take place in the future, this can be accommodated by making a reasonable assessment of when the costs will likely be incurred and considering the present value: *Brand* at para. 53.
- [25] I accept the claimant's evidence that the family home is larger than what he requires or wishes, that he is purchasing this so the children can remain in their home, and that he will likely sell it when the children are grown. I do not agree that the youngest child will have graduated in six years. The youngest child was born in 2011, so the graduation will be in 2029, eight years from now. Both parties expect their children to attend post-secondary education. In my view, it is more likely the children will be dependent and living with their parents at least for some part of the year until the youngest is age 22, which is in 2033. That does not necessarily mean that the claimant will keep the family home that long. Considering all of these factors, I find that \$25,000 is a fair deduction for disposition costs, before division.

Occupation rent and home maintenance expenses

- [26] The respondent claims occupation rent for the time the claimant has lived in the home. The respondent vacated the home on May 1, 2020 with the children and it is not clear where she lived after that. She then rented a two-bedroom suite for \$1,850 per month as of September 1, 2020. The suite is not adequate. She shares a bedroom with one of the children. The respondent has spent \$27,750 on rent from September 2020 to the end of November 2021. No evidence was given of revenue that could be received from rental of the family home. I note this claim was not advanced, at least in the pleadings, until two weeks before trial. The respondent testified that the claimant had made a claim for maintenance expenses of the home when they were discussing the claimant purchasing the home earlier this year, after the first appraisal.
- [27] At the time the parties separated, there was about \$5,500 owing under the mortgage. The claimant has paid this, which has been accounted for between the parties in their settlement discussions.
- [28] The claimant argues that there was no ouster of the respondent and there was no event that obligated the respondent to leave the home. The claimant testified that this was not the first time the parties had separated. The respondent had consulted a lawyer and chose not to seek the claimant's input on how they would separate prior to leaving. She did not ask him if he would leave the family home. Immediately upon the respondent leaving, the claimant contacted her by email and proposed that she could return to the family home and he would move out, because he thought it was best for the children. He did not receive any response. These e-mails are in evidence. However, in one of her subsequent applications, although it was not heard due to time constraints, the respondent sought possession of the family home. As a result of the respondent's wish, and in the best interests of children, the claimant then rented other accommodation beginning July 1, 2020 with a one-year lease, and moved out. By September 2020, he became aware that the respondent had rented different accommodation. As a result, the claimant was able to terminate the lease and returned to the family home in October 2020. In total, he paid \$9,100 in rent.
- [29] Further, the claimant argues that if there is a claim for occupation rent, his expenses should be considered. The claimant testified that he paid property taxes of \$3620.88 in September 2020. However, I note that almost all of this had already been saved by the parties prior to separation and was in a bank account designated for that purpose. He paid property taxes of \$3965.73 in 2021. He also paid municipal utility taxes of \$820.15 in 2021. The 2020 utility taxes were paid prior to separation. He has also paid property insurance of \$949 in September 2020, and \$978 in September 2021. Since separation, he has done garden maintenance and upkeep. He has built a new retaining wall to prevent a pond from collapsing, constructed a river pathway, repainted the entire downstairs, replaced the kitchen faucet, and fixed the washing machine. If the 2020 property taxes are divided in half, the total expenses are $\$1,810.44 + \$3,965.73 + \$820.15 + \$978 + \$949 + \$9,100 = \$17,623.32$ not including the claimant's labour to maintain the family home.

- [30] In *Storey v. Terry*, 2020 BCCA 30, the appellant argued that the trial judge had ordered equal division of the family home without any reapportionment for the appellant's contribution to the expenses of that property after separation. The appellant argued the effect of the order was to unequally divide family debt. The trial judge considered the expenses incurred by the appellant, but also that the respondent had to provide for his own accommodation once he left the home, and the benefit the appellant received in residing in the home without paying rent to the respondent. The trial judge concluded that dividing the equity in the home would not result in a situation that was unjust in an important or substantial sense. The Court rejected the appellant's arguments, stating:
- [27] In my view, the judge did not err in taking these circumstances into account. The approach she took has been approved in this Court in *Stasiewski v. Stasiewski*, 2007 BCCA 205, and *Shen v. Tong*, 2013 BCCA 519. The proper approach to considering claims for occupational rent where one spouse leaves the family property was accurately summarized by Justice Fleming in *J.D.G. v. J.J.V.*, 2016 BCSC 2389:
- [226] At common law, a co-tenant is entitled to claim occupation rent when he or she has been ousted from property. Absent an ouster from the property, there is no claim. However, if the tenant in possession seeks to recover property expenses from the departed tenant, the court retains a discretion to set off occupation rent against the expense claim. There is no absolute right to such a claim or set off. Occupation rent is an equitable remedy (L.M.R. at paras. 27-29, 31, 32).
- [227] In *Stasiewski* the Court of Appeal held that in family proceedings occupation rent is not a stand-alone claim but should be considered in deciding whether to order an unequal division of family property. In *Shen v. Tong*, 2013 BCCA 519, Justice Smith in concurring reasons identified the objective of an award for occupation rent as doing what is "'just and equitable' between the parties, albeit within the parameters of s. 65(1) of the FRA" (at para. 94).
- [31] In this case, the claim for home expenses and the claim for occupation rent are factors to be considered along with all the other relevant circumstances as to what is just and equitable between the parties with respect to division of property. I have considered the amount of rent and other expenses incurred by each party, the benefit of living in the family home rent free but at the same time solely bearing the costs of the home, the circumstances with respect to the vacating and occupation of the home, and the timing of the claims by the parties. In my view, it would not be significantly unfair, and it would be just and equitable to order that there should be no unequal division based on the respective claims of the parties for occupation rent or expenses incurred. I therefore dismiss those claims by each party.

Division of liquid assets and investment accounts

- [32] The claimant created a summary of the parties' banking and investment accounts at separation and at trial. He reasonably based some of these on figures from the parties' F8 financial statements. To the extent that those figures differ from the actual bank statements which were in evidence at trial, I will use the more accurate figures. There are two types of accounts: first, what was referred to at trial as the "liquid" accounts; and second, what I will refer to as the "investment" accounts, which I have determined are the RRSPs and TFSAs.
- [33] The liquid accounts were regular banking and savings accounts used for living expenses during the marriage. The parties had a large number of these liquid accounts as they used them as a way of budgeting for specific expenses (e.g. property taxes, holidays). Automatic monthly deposits were made to those accounts during the year from the chequing accounts in to which the parties deposited their pay cheques. Post-separation, the parties continued to use these accounts in their own names for their own living expenses. The parties agree that these liquid accounts should be valued at the date of separation.
- [34] The investment accounts were RRSPs and TFSAs in each of the parties' names. The parties agree the RRSPs should be valued as of the date of the trial. However, the claimant wants to classify the TFSAs as "liquid accounts" and value those as of the date of separation. The reason for this is that the claimant's TFSA has risen substantially in value since separation, whereas the respondent's TFSA has not. It appeared at trial that the respondent's concern regarding this issue was the lack of documents explaining how the claimant now had only one TFSA account whereas previously he had two, and why there was a large increase in value. The claimant testified that he had merged the two accounts and that he had deposited post-separation income into the TFSA to increase its value. The banking records were produced, and with the consent of the respondent, filed as exhibits. Those banking documents confirmed the claimant's testimony. I am satisfied that the claimant: (a) merged the two TFSA accounts into one TFSA account; and (b) increased the value of the merged TFSA account with post-separation income by the net amount of \$9,000 (the \$16,000 withdrawal and the \$25,000 deposit).
- [35] Rather than classify the claimant's TFSA account as a "liquid account", in my view, the more appropriate way to analyze this is to recognize that the TFSA is an investment account, but that a large part of the increase in value since separation has been because the claimant deposited post-separation income into that account. Post-separation income should not be double counted as an asset to be divided: *Sanai v. Mahmoud*, 2017 BCCA 155 at para. 23. As a result, the investment accounts, which include both parties' RRSPs and TFSAs, will be valued at the date of trial. However, \$9,000 plus the amount I have estimated was earned on that amount at 5% per year for 18 months, for a total of \$9,675, will be deducted from the value of the claimant's TFSA before division.

[36] I find the liquid assets of the claimant as of the date of separation to be \$25,907.55. To arrive at this figure, I have taken the total in ex. 1 (\$51,269.71) and subtracted the two TFSA accounts (\$25,702.18) and added the share of the property tax account attributed to the respondent (\$340.02). The property tax account is a joint account, and the claimant later used these funds to pay the property taxes, and this was considered in the division of the family home. It is not part of the respondent's liquid assets.

[37] The figures for the respondent's liquid assets in ex. 1 need adjustment. The banking records for the date closest to the date of separation (ex. 11) show different figures, although in most cases except the chequing account, the amounts are not significantly different. For the reasons above, I have not included the \$340.02 in the property tax savings account or the TFSA in the respondent's name. The amounts in the different accounts are:

Jumpstart

\$2.04

Chequing

\$1,800.95

Holiday

\$1,057.75

Car

\$2,505.95

Baby bonus

\$863.11

Class B

\$349.09

Patronage

\$28.36

Total

\$6,607.25

[38] The net amount owing by the claimant to the respondent for the liquid assets is \$9,650.15 (\$25,907.55 less \$6,607.25 = \$19,300.30 divided by 2).

[39] The value of the claimant's debt to be divided as of the date of separation is \$2,423.46. The value of the respondent's debt to be divided as of the date of separation is \$0. The net amount owing by the respondent to the claimant is \$1,211.73 (\$2,423.46 divided by 2).

- [40] The current value of the claimant's TFSA is \$38,765.88. From this must be deducted the \$9,675 increase in value as a result of post-separation income plus interest, deposited to that account. The value for division is \$29,090.88. The current value of the respondent's TFSA is \$5,639.48. The net amount owing by the claimant to the respondent for the TFSAs is \$11,725.70 (\$29,090.88 less \$5,639.48 = \$23,451.40 divided by 2).
- [41] The value of the claimant's RRSP as of the date of trial is \$48,941.86. The value of the respondent's RRSPs as of the date of trial is \$1,123.16. The net amount owing by the claimant to the respondent to be completed by way of spousal rollover pursuant to the Income Tax Act is \$23,909.35 (\$48,941.86 less \$1,123.16 = \$47,818.70 divided by 2).

2020 Guidelines income and child support

- [42] From May 1, 2020 to October 16, 2020 the children resided solely with the respondent. On July 30, 2020, Master Muir found the claimant's Guidelines income to be \$84,603, and on that basis made a consent order that the claimant pay \$1,308 per month commencing August 1, 2020, with the issue of retroactive support to be adjourned generally. The parties advised that retroactive support from May 1, 2020 to July 31, 2020 was no longer in issue at trial. The claimant advised that Master Muir's order was based on what the claimant was actually earning at the time and not on his 2019 income. His 2019 income was about \$119,000 but this was because the claimant worked a lot of overtime. At the time of Master Muir's order, the claimant was suspended with pay from his job or on medical leave, and he could no longer work overtime.
- [43] As of October 16, 2020, the claimant had parenting time with the children but it did not reach the 40% threshold in the Guidelines for shared parenting to set off child support.
- [44] As a result of Justice Forth's order, as of February 15, 2021, the parties have had equal shared parenting. On March 1, 2021, the claimant unilaterally adjusted child support payable as of February 15, 2021 based on the new parenting arrangement and on what he estimated the parties' income was in 2020. At that time, the parties had not yet exchanged 2020 tax information. Commencing March 1, 2021, the claimant has paid \$445 per month in net set-off child support.
- [45] Child support is typically based on the income of the previous year, and adjusted to the new amount (if applicable) after income tax returns are filed by April of each year. This is also the arrangement the parties have made in their separation agreement.
- [46] Following the trial, upon closer review of the respondent's 2020 tax return it appeared she may have included periodic child support in her taxable income. This would not be taxable. In a memorandum to the parties I asked them to clarify the nature of this income and if they agreed what it was. At a subsequent trial management conference, the respondent confirmed that she had included child support in her taxable income as she was not aware it was not taxable. The claimant reasonably stated that he accepted that explanation, and I have therefore proceeded on that basis.

- [47] Based on the parties' tax returns, I find the parties' 2020 Guidelines income as follows: for the claimant, \$95,184 (line 150 income, less union dues); and for the respondent \$56,435 (employment income, less union dues). The parties thought the respondent did not pay union dues, but the dues are on her T4 slip for 2020.
- [48] Since February 15, 2021, the claimant has been paying child support based on a straight set-off of the amounts presumptively payable by each party pursuant to s. 3 of the Guidelines. However, s. 9 of the Guidelines provides that when there is shared parenting, further factors must be considered:
- s. 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.
- [49] The parties' separation agreement provides for a yearly exchange of financial information and that the parties "will agree to set child support at the median amount as provided by the Federal support guidelines until such time as another adjustment may be made". There is no median amount in the tables, and it may be this was the parties' way of accepting the table amounts and a straight set-off. I did not receive any evidence or submissions on this term, and neither party suggested that child support should be calculated other than as a straight set-off. However, I will consider s. 9 of the Guidelines.
- [50] The leading case on s. 9 is *Contino v. Leonelli-Contino*, 2005 SCC 63, which discusses the proper contextual approach to the analysis. Turning to s. 9(a), the Guidelines table amount payable as of February 15, 2021 is \$1,457 for the respondent and \$876 for the claimant, for a net amount of \$581 per month. With respect to s. 9(b), the "total cost of raising children", and "consequently, all of the payor parent's costs should be considered: at para. 52. Finally, s. 9(c), vests a "broad discretion for conducting an analysis of the resources and needs of both the parents and the children. A court must keep in mind the objectives of the Guidelines of a fair standard of support for the children and fair contributions from each parent, based on evidence, and the "standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances": at para. 68.
- [51] With those principles in mind, I have reviewed the parties' F8 financial statements with respect to their means, needs, and costs attributable to the children. There is nothing to suggest that one party is bearing unusual increased costs of shared parenting or unusual expenses. I have also considered the parties' assets and the relative standards of living of the children in the two households once property division takes place. I will return to the standards of living of the parties and children under spousal support. I conclude that there

should be no adjustment under s. 9 and that a straight-set off at this time is appropriate within the principles Contino.

- [52] The claimant has been paying \$445 per month. There is therefore a shortfall of \$68 for the one-half month of February 2021 and \$136 per month since March 1, 2021. The total arrears, assuming a \$445 payment was made on December 1, 2021 is \$1,428 owing by the claimant to the respondent.
- [53] In accordance with the parties' separation agreement, they will exchange their tax returns and assessments in the Spring of 2022 and if necessary adjust child support as of May 1, 2022 in accordance with the Guidelines.

Spousal Support

- [54] The pleadings of both parties claim spousal support. The respondent only advanced a spousal support claim in the pleadings, about two weeks before trial.
- [55] The respondent seeks spousal support at least until the children are adults, payable on a periodic basis. Given the uncertainty in the claimant's employment status, she would be agreeable to a review provision at some point in the future.
- [56] The claimant disputes entitlement to spousal support and if there is entitlement, makes submissions on quantum and duration. He argues that at the parties' current incomes, even if there is entitlement, the Spousal Support Advisory Guidelines [SSAG] indicate that either no or very little spousal support is payable.
- [57] The claimant's base income is currently about \$40,000 greater than the respondent's base income, so he does not seek spousal support at this time. However, there is significant uncertainty regarding his income for the future. The claimant is on medical leave and there is no expert opinion on if and when his condition may improve, although the claimant is optimistic he will improve. The claimant is also suspended with pay. His job security is at risk, and it is not known when that will be resolved. The respondent does not want a review provision at some point in the future as he wants to limit court appearances due to his health.

Legal principles

- [58] In determining entitlement to support, s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 [DA] states that the court must consider the following objectives:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [59] If entitlement is established, the court must consider the factors in s. 15.2(4) of the DA. These are the "condition, means, needs and other circumstances" of each spouse, including, the length of cohabitation, the functions performed by each spouse during cohabitation, and any order, agreement, or arrangement relating to support.
- [60] There are three bases upon which a spousal support award may be made: compensatory (economic advantage and/or disadvantage); non-compensatory (needs-based); and contractual: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715 [Bracklow] at paras. 15 and 49. In determining if there is entitlement to support, the court begins with the objectives of spousal support. No objective is paramount and all must be considered: *Bracklow* at paras. 35-37; *Moge v. Moge*, [1992] 3 S.C.R. 813, 1992 CanLII 25 [Moge] at 850-852. In this case, there is no contractual basis upon which to claim support, and the only potential bases are compensatory and non-compensatory.
- [61] Compensatory support is intended to provide for an equitable sharing of the economic consequences of the relationship or its breakdown. Both economic advantage and disadvantage are considered. The longer the relationship, the greater will be the presumptive claim to an equal standard of living upon its breakdown: *Chutter v. Chutter*, 2008 BCCA 507 [Chutter] at paras. 50-52; *Bracklow* at paras. 34 and 39; *Moge* at 861-863 and 870.
- [62] Non-compensatory support is intended to provide needs-based support where compensatory principles do not apply. Its goal is to narrow the gap between the needs and means of spouses upon marital breakdown. Need is a relative concept, and goes beyond the basic necessities of life. It is informed by the circumstances of the parties, including the length of the relationship and the standards of living enjoyed during and after the relationship: *Chutter* at paras. 54-59; *Bracklow* at paras. 36 and 41.
- [63] If entitlement is established, the SSAG provides a range of potential spousal support amount. In the *Spousal Support Advisory Guidelines: The Revised User's Guide*, by C. Rogerson & R. Thompson (Ottawa: Justice Canada, 2016) at 34, the authors note that in shared custody cases, there is a default range for amount which would leave the children in each household with roughly the same standards of living, and that this is consistent with statements in *Contino*. The amount which equalizes the net disposable income ("NDI") may be at the low or high range, and is not necessarily the mid-range.
- [64] NDI in each household is only one of the competing factors that are relevant to the exercise of discretion in the selection of support within the SSAG range: *Zilic v. Zilic*, 2021 BCCA 107 at para.198. In the *Revised User's Guide* at page. 45, the authors cite the following non-

exclusive factors to assist in determining location within the range, for both amount and duration: strength of any compensatory claim; recipient's needs; age, number, needs and standard of living of children; needs and ability to pay or payor, work incentives for payor; property division and debts; and self sufficiency incentives.

Income of the parties

[65] Although I must first consider entitlement as a threshold question, I will pause here to set out the parties' past and future anticipated incomes, and to discuss more fully the uncertainty regarding the claimant's income. The following is the line 150 income reported on the parties' tax returns in 2018 and 2019, and the Guidelines income for 2020:

Claimant

Respondent

2018

\$114,149

\$50,198

2019

\$119,585

\$53,010

2020

\$95,184

\$56,435

[66] The decrease in the claimant's income between 2019 and 2020 is a result of his suspension and medical leave. His base pay in 2019 was about \$95,000, and the difference between this and the \$119,585 he earned was overtime. Once he was suspended and on medical leave in 2020, he could no longer work overtime.

[67] The claimant estimates his income for 2021 will be between \$95,758 and \$106,000. The reason for the estimate is that there was recently a retroactive increase in salary. The claimant does not know when the retroactive amounts will be paid (in 2021 or 2022) or the exact amounts. The only information is an excerpt from what appears to be a collective agreement which indicates the total retroactive payment may be in the range of \$10,000. The claimant does know that the base pay effective April 1, 2022 will be \$106,576. He testified that if he is able to return to work, it is possible there may be a financial penalty, and there may be other conditions which would prevent him from working overtime, although for the reasons below he also no longer expects to work significant overtime.

- [68] The above estimates are on the assumption that the claimant will continue to be employed. I did not permit the claimant to enter in evidence a letter from a treating healthcare provider regarding his medical condition. This was first produced to the respondent during the trial, and did not meet the expert report requirements. However, the claimant did testify regarding the effect that the events of the last 18 months have had on his health. He is under the care of his family physician and specialists, and is prescribed medication. He described his symptoms. Although there is no expert medical evidence, after observing and hearing the claimant's testimony, I accept that he is on medical leave and that he is not intentionally underemployed or not employed. The respondent did not suggest otherwise. In addition, the claimant's suspension with pay is currently not resolved, and it is not known when it will be resolved.
- [69] If the claimant is able to return to work, the claimant states that he will not return to the former level of overtime that he worked in the past for the following reasons. First, his children are the most important thing to him, and he does not want to spend his parenting time working. Second, he previously worked overtime as he wanted to earn a certain amount of money because that is what made their family life comfortable. As a result of the recent raise, he is able to earn a sufficient amount without working overtime.
- [70] The claimant estimates the respondent's income for 2021 will be between \$66,480 and \$81,197. Based on a review of the respondent's paystub as of September 15, 2021, it appears her 2021 income will likely be in the \$82,000 range. The respondent does not disagree with these figures, but states that the increase is just for this year as a result of two extra payments made to her. The first is what she referred to as "Phoenix damages". When the collective agreement was renewed, employees were given compensation for the difficulties caused by the Phoenix payroll system from 2016 to 2020. In total she received \$2,500 for this in 2021. Second, she received retroactive pay increases going back to 2017, of approximately \$10,000. The respondent's seniority rank also increased this year, and this resulted in a pay increase. Effective January 2022, her salary will be \$66,687.

Entitlement to support

- [71] I turn now to entitlement and the objectives of spousal support.
- [72] The respondent's arguments on entitlement were more focused on need and the difference between hers and the claimant's income, rather than on a compensatory basis for support. The respondent generally agreed with the claimant's evidence regarding their work history and equal roles within the marriage. The respondent had two main concerns. First, her income has never been and likely will never rise to the level of the claimant's income. Although she has gained seniority and has been promoted by her employer, there is no expectation that she will get to the point where she will make \$100,000 per year. For a further promotion, she would need to have further qualifications and financial experience which she does not have. She testified that whereas the claimant has three university degrees, she has none. I note here that there is no evidence when the claimant obtained

those degrees, that he obtained them during the relationship, that they have contributed to his career, or that they would result in better job prospects at this stage of his life.

- [73] Second, the claimant is concerned that even with the equal property division, she will not be able to easily purchase a home near the family home so the children can travel between the two homes, and for childcare flexibility if the claimant returns to work. She states during the marriage the parties lived reasonably but not lavishly. She is living frugally now.
- [74] The claimant addressed both compensatory and non-compensatory based support. With respect to compensatory support, the claimant testified regarding the parties' roles during the relationship. The claimant described it as a "modern marriage" where both parties worked full time, and both equally shared childcare and household duties although the allocation of those duties changed over time.
- [75] The parties moved to B.C. from Quebec in 2005. When they met, the claimant was employed full time as a police officer and the respondent was employed full time as a receptionist. Up until 2020, the claimant worked as a police officer. In B.C., the respondent continued working as a receptionist until 2009 when their first child was born. After the birth of their first child, the respondent took a one-year maternity leave. After the birth of their second child, the claimant took a one-year paternity leave. The parties shared all responsibilities for the children's care. The respondent did more work inside the house and the claimant did more work outside the house. From 2011 to 2014, the respondent ran a day care from their home which allowed her to be home with the children and earn income. The claimant stated that at this point in time the respondent was caring more for the children than he was, but that this balanced out with later events. The respondent then closed the daycare and worked for a community centre providing youth programs. In 2016, the respondent commenced working full time for the federal government. In the six years prior to the separation, starting when the respondent was working outside the home, the claimant took on more childcare and household responsibilities. He could do this because of the flexible nature of his work.
- [76] The claimant testified that he never asked the respondent to stay home to look after the children. Because he had a steady and greater income this allowed the respondent to try different career paths until she settled on her current job. In the claimant's view the respondent's career has steadily progressed in terms of jobs and remuneration. He argues that self-sufficiency is already a reality for the parties.
- [77] The claimant testified that he has not advanced as much in his career because of the marriage. In order to care for the children, he made modifications to his job. After 17 years with the police he is still a constable. Prior to the respondent working outside the home, he had been working general duties for several years. As he was the senior constable, he was occasionally placed in the role of acting corporal. This gave him the experience that could lead to being promoted. When the respondent started working downtown for the federal government, and given her long commute and her need to leave their home early, the

parties decided in 2017 for the claimant to move from general duty to traffic. This provided a more reliable work schedule which allowed the claimant to take on more childcare responsibilities. The claimant liked working traffic and being with their children more, but there is little room for advancement in that position. The respondent does not recall this specific discussion. However, she agreed it was better for their family to have the claimant work in traffic because the hours were more predictable and the claimant could take on more childcare, so she would feel more comfortable taking a job in downtown Vancouver. She recalls the claimant being happy not to be in general duty any more as it can be quite intense.

- [78] With respect to non-compensatory, or needs based support, the claimant argues that the respondent does not have need. He testified that the parties lived frugally during their marriage and both worked hard to accumulate significant assets and pensions. The respondent will have greater than \$800,000 in assets and a pension after division. He argues that even if she uses a significant portion of the assets to purchase a home for herself, she should be able to afford a \$250,000 or \$350,000 mortgage. The respondent argues that just because there is a difference in their incomes does not mean there is entitlement.
- [79] The claimant argues that the parties' finances were not intertwined. They each had separate accounts. They each were responsible for different bills. The respondent paid her own personal expenses, such as for her cell phone, car, and gas. At separation, their lives continued on financially the way they were. I will address this argument now. I do not accept it. The fact that the parties paid different bills is simply a method dividing responsibilities and reflects that both had income. Further, the claimant's own testimony contradicted this. He testified that he regularly reviewed finances with the respondent and sought her input on investment decisions.
- [80] Finally, the claimant argues that if there is entitlement, all of the above factors support the low end of duration and quantum.
- [81] I find that the respondent has not established a basis for compensatory support. There is no evidence that the respondent gave up a career or job opportunities to raise the children or assist the claimant in his career. I acknowledge she ran a home-based daycare for a few years while the children were young, but there was no evidence that she gave up any other career plans, or more remunerative work to operate the daycare. The employer she had worked for prior to the birth of her children had become bankrupt and she could not return to that job. The respondent testified that she was busy operating the daycare, but there was no evidence of the income she earned. Once the youngest child was five years old, or perhaps even earlier, she closed the daycare and started working full time outside the home. The respondent and claimant have both worked full time throughout their relationship and equally took maternity and paternity leaves. I do not find that the respondent suffered an economic disadvantage from the marriage or its breakdown, or that she provided the claimant with an economic advantage as a result of the decisions made by the parties during the relationship.

- [82] I turn next to non-compensatory support. Need is a relative term and is informed by the length of the relationship and the standards of living enjoyed by the parties during and after the relationship. This was a longer relationship of 17 years, which weighs in favour of a roughly equal standard of living for at least some period of time after the marriage ended. The parties lived a moderate lifestyle during their marriage. The respondent is able to support herself, and is earning \$66,687 per year as of January 2022. Both parties have some debt. There has been a downward adjustment to her standard of living, as she no longer has the benefit of a portion of the claimant's higher income. She states she is living frugally now. She also is concerned that she may not have the ability to afford a home near the family home which would be in the best interests of the children. The parties have equal shared parenting and it is not desirable that there be a significant difference in the standards of living between the two homes.
- [83] The claimant refers to *Lee v. Lee*, 2014 BCCA 383 [Lee] where there was no compensatory basis for support, but the spouses had disparate earning abilities post-separation. The claimant argues that simply because the parties' incomes are different going forward, does not establish needs-based support. However, two distinguishing factors between *Lee* and this case are that in *Lee* the parties did not have any children, and the lower earning party had re-partnered with a new spouse who earned a good income. In contrast, in this case the parties have two children who are still young and there was no evidence the respondent had re-partnered. Further, in *Lee*, the court noted at para. 66 that:
- ... a party who experiences a marked decline in standard of living should receive some financial assistance (either in the form of re-apportionment of assets or maintenance) in adjusting to his or her new situation - hence the concept of a "transitional" award, which is recognized by the SSAG.
- [84] In *Lee*, the court accepted that a short transitional award would have been appropriate in that case.
- [85] In this case, given the length of the marriage, the \$40,000 difference in the base pay of the parties, the decline in the respondent's standard of living by not being able to share in the claimant's greater income, the shared custody, and that she wants to move and purchase a home, in my view the respondent has established a needs-based entitlement until the youngest graduates high school. I note that on the parties' F8, while the children's expenses are not significantly different, the personal expenses of the parties indicate the claimant spends about \$150 more per month on himself than the respondent. However, as discussed below, based on the incomes as presently known, the present award will be modest. That may change, up or down, depending on what happens with the claimant's employment status.

Quantum and duration

- [86] I have calculated the spousal support ranges for 2020 Guidelines income as follows: low \$0 (NDI of the respondent 46.5%); mid \$136 (NDI 47.3%); and high \$574 (NDI 50%) per month.
- [87] It is not yet known what the 2021 or 2022 incomes will be, but for illustration purposes only, I will make calculations based on different possible scenarios.
- a) for 2021: If it is assumed that the claimant's 2021 income will be \$96,000 and the respondent's will be \$82,000 (this includes the Phoenix damages and retroactive pay which she received) then: low is \$0 (NDI 49.4%); mid \$0 (NDI 49.4%) and high \$110 (NDI 50%). If it is assumed that the claimant's 2021 income will be \$106,000 (this assumes he will receive the retroactive pay in 2021) and the respondent's will be in the \$82,000 range, then: low \$0 (NDI 48.5%); mid \$0 (NDI 48.5%) and high \$294 (NDI 50%).
- b) for 2022: If it is assumed that the claimant's 2022 income will be \$106,000 and respondent's will be \$66,000, then: low \$0 (NDI 46.6%), mid \$89 (NDI 47.1%) and high of \$627 (NDI 50%). If the claimant's income will be \$116,000 (this assumes he will receive the retroactive pay in 2022), and the respondent's income in \$66,000, then: low \$0 (NDI 45.8%), mid \$330 (NDI 47.5%), and high \$800 (NDI 50%). If the claimant's suspension is not resolved favourably to him, then the figures could be significantly different.
- [88] I have also considered that: there is no compensatory claim; the equal division of property; it will be another nearly 20 years until both parties are of retirement age; and particularly with respect to duration, that their children are relatively young and the youngest will not graduate high school until 2029. With respect to this last factor, in my view, it is important that there not be a significant difference in the standard of living between the two homes, including not having the respondent to be frugal to herself in order to permit the children to enjoy a similar standard of living. In my view, the mid-point in the range is appropriate even though it does not produce 50% of the NDI, with a duration of seven and a half years, ending June 30, 2029 when the youngest child will graduate high school.
- [89] Based on the 2020 Guidelines income, and the above factors, I set spousal support at \$136 per month commencing November 1, 2021, until further order of the court or agreement of the parties. Given the significant uncertainty of the claimant's income, I order that the parties adjust spousal support to the mid-point in the range as of May 1 each year when they adjust child support. I have made the calculations for some of the possible scenarios in the future. If the parties' incomes turn out to be one or more of the scenarios above, spousal support may be \$0 commencing May 2022, and may be \$330 as of May 2023. This order is of course subject to the right of either party to make application to vary spousal support if they feel the conditions for variation in the DA come into existence. I am basing the present order on the assumption that the claimant will be able to return to work.

- [90] I have not awarded spousal support prior to November 1, 2021 as the claimant did not seek spousal support until shortly before trial. The respondent's pleadings sought retroactive support but she did not make any arguments with respect to this at trial. In determining whether to award retroactive support, the court considers the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support, and any hardship a retroactive award may occasion on the payor spouse: *Kerr v. Baranow*, 2011 SCC 10, at paras. 207-208; *McKenzie v. Perestrelo*, 2014 BCCA 161, at paras. 105-110. There is no presumptive entitlement to support and the respondent did not provide any reasons for the delay in seeking spousal support. There was no evidence of misconduct on the part of the claimant.

Protection Order/ Conduct Order

- [91] The parties agree that the protection order that was in existence as of the date of the trial expired on December 7, 2021. As noted previously, this was made by consent and on a without prejudice basis. At trial, the respondent initially sought a protection order or alternatively a conduct order. Neither party wishes to communicate except by email. The respondent stated she was pleasantly surprised that their negotiations had gone so well. She was concerned that the protection order addressed communication and physical restrictions. She wanted to have the physical restrictions continue. She noted that their separation agreement provides for her to do all the driving and picking up of the children, and to her mind, that is effectively a solution to her concern as the claimant then has no need to come to her home. She suggested that the driving arrangements for exchange of the children that are in the separation agreement become an order.
- [92] The claimant objects to both a protection order and a conduct order. The claimant stated the protection order has been a source of fear and stress for him. The claimant recounted how the respondent reported an alleged breach of the protection order when he felt he clearly was not in breach. The claimant does not wish to have contact with the respondent in person, by phone, or text. He only wishes contact through email. He is also not comfortable with both of them being in the same place. He submits that the parties have not had any problematic communications and he should be able to prove that his good behaviour is not a result of an order, and that the parties have been able to establish a better relationship. If there turns out to be a problem, either party could reapply for an order. If there is a conduct order regarding behaviour, he wants it to be mutual.
- [93] Pursuant to s. 183 of the FLA, the court may make a protection order if family violence is likely to occur. I have considered the factors in s. 184 of the FLA, and the evidence at trial, and conclude there is no basis for making another protection order.
- [94] Pursuant to ss. 222, 225 and 227 of the FLA, the court may make a conduct order for certain purposes. I am not persuaded that a conduct order is indicated. Both parties do not want to be in the same place at the same time, and neither want to communicate other than by email. Perhaps in the future they may feel otherwise. For now, both have followed this practice, and I agree with the respondent that he should be able to demonstrate his

behaviour is not the result of an order. There is no need to make an order restricting communications or to manage behaviours, and I decline to make such an order.

Computer software application

- [95] The respondent sought an order that the parties communicate with each other through a computer software application. The respondent had not personally tried this program, but her counsel had recommended it to her. She thought the benefits would be a written record of what was communicated, the program may have a filter if a party types something that may be inappropriate, and it would provide a mutual calendar. This was all hearsay from her counsel, and I have not considered it.
- [96] The claimant opposes this because: the parties' emails provide a record of their communications; they already have a family calendar set up through their oldest child's gmail account where they both have administrative access; a software program will not change how they communicate; the application would be an unnecessary expense; and the separation agreement already provides for activities and appointments to be entered into the gmail calendar.
- [97] I am not persuaded that an order to use the computer software application is indicated. There is no evidence that the parties' current arrangements of emails and a shared gmail calendar are not working satisfactorily, and the emails can simply be saved in one place.

Divorce

- [98] The parties both seek a divorce and that is granted effective 31 days after the date of these reasons.

Orders

- [99] I make the following orders:

1. The value of the family home for the purpose of division is \$1.235 million. Within the next 60 days, or such longer time as may be agreed to by the parties in writing, the claimant shall purchase the respondent's interest in the family home by payment to the respondent of \$551,300, calculated as follows:

\$1,235,000

- \$107,400 excluded property claim
- \$25,000 notional disposition costs

Total: \$1,102,600 / 2 = \$551,300

2. The respondent shall execute all documents necessary to transfer her interest in the family home to the claimant within the time period above, and upon payment of the \$551,300.

3. The respondent's claim for an unequal division of the family home based on occupation rent and the rent expense that she has incurred; and the claimant's claim for unequal division of the family home based on his expenses and labour for maintenance of the family home and rental expense he has incurred; are both dismissed.
 4. Within the next 30 days, the claimant shall pay to the respondent the sum of \$9,650.15 as the compensation payment for the liquid assets.
 5. Within the next 30 days, the respondent shall pay to the claimant the sum of \$1,211.73 as the compensation payment for debt.
 6. Within the next 30 days, the claimant shall pay to the respondent the sum of \$11,725.70 as the compensation payment for the TFSAs.
 7. Within 30 days, the claimant shall transfer to the respondent the sum of \$23,909.35 by way of spousal rollover pursuant to the Income Tax Act, R.S.C., 1985, c. 1 (5th Supp.).
 8. For the purpose of child support, the parties' 2020 Guidelines incomes are: claimant - \$95,184; and respondent - \$56,435. Pursuant to the DA, child support is payable by the claimant to the respondent in the amount of \$581 per month from February 15, 2021 until further order of the court or agreement of the parties in accordance with their separation agreement. Child support is payable for a child so long as the child is a child of the marriage as defined by the DA.
 9. Taking into account the amounts of child support already paid by the claimant, the arrears outstanding for the period from February 15, 2021 to and including December 1, 2021 is \$1,458. Within 30 days the respondent shall pay \$1,458 to the claimant.
 10. Pursuant to the DA, the claimant shall pay monthly spousal support to the respondent of \$136 commencing November 1, 2021 until further order of the court or agreement of the parties, and ending on June 30, 2029. The parties shall adjust spousal support payable as of May 1 each year at the mid-point of the SSAG range, based on their incomes from the previous year calculated in accordance with the SSAG.
 11. The respondent's claim for a protection order or conduct order is dismissed.
 12. The respondent's claim for an order that the parties use a computer software application, is dismissed.
 13. Subject to s. 12 of the DA, the parties are divorced from each other, the divorce to take effect 31 days after the date of this order.
 14. All other claims of the parties are dismissed.
- [100] The parties did not speak to costs. If the parties do not agree to each bear their own costs, the parties may make arrangements to speak to the matter through Supreme Court Trial Scheduling.

"Norell J."

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