
CANADA / JUDGMENT

D.L.A. v. N.W.A.

2026 BCSC 7

COURT

Supreme Court of British Columbia

DECIDED

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2026 BCSC 7 D.L.A. v. N.W.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.L.A. v. N.W.A.,

2026 BCSC 7

Date: 20260106

Docket: 138079

Registry: Kelowna

Between:

D.L.A.

Claimant

And:

N.W.A.

Respondent

Before: The Honourable Justice D. MacDonald

Reasons for Judgment

Counsel for the Claimant:

J.C. Chandler

Counsel for the Respondent:

B.S. Coen

Place and Dates of Trial:

Kelowna, B.C.

June 23-27, June 30,

and July 2-3, 2025

Place and Date of Judgment:

Kelowna, B.C.

January 6, 2026

Table of Contents

Overview.. 4

Background and the Marriage Breakdown.. 4

History of Proceedings. 6

Issues to be Resolved.. 8

Divorce. 9

Credibility. 9

Parties' Positions. 9

Legal Principles. 10

Analysis. 11

Child Support. 11

Parties' Positions. 11

Legal Principles. 12

What is a "child of the marriage"? 12

Income for child support purposes. 14

Are LOAs included in income?. 16

Analysis. 18

Is M.A. a "child of the marriage"? 18

Should the LOA be included in Mr. A's income?. 18

What is Mr. A's income for child support purposes?. 20

Retroactive Child Support 24

Prospective Child Support 24

Family Property. 25

Division of Property. 26

Parties' Positions. 26

Legal Principles. 26

Analysis. 27

Canada Pension Plans. 28

RRSPs. 29

RESP. 30

Mazda Vehicle. 30

Jeep Wrangler.. 31

Keystone RV Vehicle. 31

Dodge Vehicle. 31

Deep River Property. 31

Line of Credit. 32

Wise Account. 32

Miscellaneous Accounts. 33

Spousal Support. 33

Parties' Positions. 33

Legal Principles. 34

Analysis. 37

Misconduct 37

Ms. A's income. 39

Duration of spousal support 42

Retroactive Spousal Support. 43

Costs. 43

Overview

- [1] This is a family law dispute between the claimant, D.L.A., and the respondent, N.W.A. The dispute resulted in an eight-day family trial which took place in Kelowna, British Columbia. Both parties were represented by counsel.
- [2] The parties were in a relationship for 28 years and have two adult children. The parties began living together in approximately August of 1995. They were married on February 14, 1999. In April of 2023, the parties separated.
- [3] Since August of 2023, the parties have pursued legal action seeking to resolve their issues. They have agreed that their oldest son is no longer a child of the marriage, that Ms. A is entitled to spousal support, and that I should grant them a divorce. The outstanding issues relate to the determination of the parties' incomes, the division of family assets and debts, the quantum of spousal support, child support for the younger son, and costs. The primary area of contention is the living out allowance ("LOA") which Mr. A received from his employer. The question is whether any or all of the LOA payments should be included in Mr. A's Guidelines income.

Background and the Marriage Breakdown

- [4] Ms. A was born in 1975 and lives in Kelowna, British Columbia. Mr. A was born in 1970 and lives in Deep River, Ontario.
- [5] The parties have two children:
 - i. Q.A., born in 2001 (age 24); and
 - ii. M.A., born in 2004 (age 21).
- [6] After a long marriage, the parties separated on April 22, 2023 when Mr. A sent an email to Ms. A describing the breakdown in their marriage and confirming their separation. Ms. A continues to live in the rented family home with the children.
- [7] Q.A. graduated from high school in 2020 and has worked on a full-time basis since graduating. Q.A. lives with his girlfriend in the basement suite of the rented former family home located in Kelowna. Q.A. pays Ms. A \$1,000 per month in rent to live in the basement suite. The rent for the entire home is \$3,200 per month.
- [8] M.A. graduated from high school in 2022. M.A. is currently taking a reduced courseload at the University of British Columbia, Okanagan Campus and is expected to graduate in April of 2026. While in school, M.A. works part-time (approximately 24 hours per week) which is all he can handle while studying. When M.A. is not in school over the summers, he works full-time (40 hours per week). His hourly rate is between \$18 and \$19. M.A. also lives in the family home and, by agreement, he is not expected to pay rent while attending university.

- [9] Prior to the commencement of the relationship, Ms. A had addiction issues. She was no longer using when the parties met. However, she has suffered from mental health issues throughout the relationship for which she has sought professional help.
- [10] The parties had a moderate lifestyle, and they struggled financially for most of their relationship. They purchased three homes using money from an inheritance Mr. A received when his mother passed. Later, they were forced to declare bankruptcy and ultimately lost their last home.
- [11] Mr. A worked various jobs throughout the relationship. He was a personal banker with CIBC, he sold tanks for a sewage treatment plant, he was a salesperson at a computer store, and he started his own computer company. In 2010, Mr. A decided to change his career and trained to become a red seal electrician, following which he worked for five years in the oil fields.
- [12] Ms. A has a grade 12 education. During the relationship, she worked in several part-time jobs, typically receiving the minimum wage. Her jobs were always short-term until she obtained a full-time job at Dyck's pharmacy in August 2023, which she left due to medical reasons. Ms. A is currently employed on a full-time basis as a medical office assistant at a medical clinic. She has worked for well over a year in this position and is earning the most she has earned since being married.
- [13] In 2020, Mr. A obtained full-time employment as a red seal electrician where he continues to work. Mr. A's employment is located far from his (now former) home in Kelowna and his employer paid him a LOA as compensation for expenses incurred while residing in Ontario for work. The LOA ceased when he relocated permanently to Ontario post-separation.
- [14] During the parties' relationship, Ms. A was primarily responsible for the care and upbringing of the children; Mr. A was the primary income earner.

History of Proceedings

- [15] Given the contentious nature of the procedural history in this case, I will set it out in some detail. However, it is primarily relevant to the costs aspects of this award.
- [16] On August 22, 2023, Ms. A filed a notice of family claim. On September 25, 2023, Mr. A accepted service of the notice of family claim. On October 10, 2023, Mr. A filed a response to family claim.
- [17] On October 18, 2023, the parties filed a s. 91 consent order under the Family Law Act, S.B.C. 2011, c. 25 [FLA], restraining the parties from disposing of family property pending trial.
- [18] On October 19, 2023, Justice Morellato conducted a judicial case conference and made the following consent orders:

- a) An interim order, without prejudice, that Mr. A pay Ms. A the sum of \$4,000 per month in spousal support and \$1,000 in child support for the support of M.A., commencing on October 23, 2023, and every month thereafter on the 23rd by e-transfer.
 - b) On or before December 19, 2023, the parties will exchange lists of documents.
 - c) Ms. A will place Mr. A's personal property in the garage of the family home for Mr. A to collect on October 20, 2023, and the remainder of Mr. A's personal belongings to be picked up on December 10, 2023.
 - d) On or before November 19, 2023, Ms. A will provide Mr. A a proposal on how Mr. A may collect any further personal property he requires.
- [19] On October 23, 2023, Mr. A paid Ms. A \$5,000, minus "deductions for expenses" he had previously paid.
- [20] On November 3, 2023, Ms. A filed and served a notice of application seeking relief, including orders for interim child and spousal support commencing on August 1, 2023, and arrears for the period of August 1, 2023, to November 30, 2023.
- [21] On November 20, 2023, the parties attended chambers for the application, but the matter was not heard. The application was adjourned several times until it was ultimately heard on May 30, 2024. At that time, the application was adjourned so that the parties could narrow the issues.
- [22] On December 3, 2023, on a without prejudice basis, Mr. A transferred the sum of \$2,742.16 to Ms. A. This was the remainder of the \$5,000 he was to pay on October 23, 2023, for child and spousal support.
- [23] On February 1, 2024, Ms. A filed an amended notice of family claim which revised the date of separation from July 1, 2023, to April 22, 2023. Between May 7, 2024, and November 14, 2024, Ms. A filed a number of applications, most of which were dismissed.
- [24] The trial was set for December 9, 2024, but did not proceed because no judge was available.
- [25] On April 23, 2025, Associate Justice Schwartz made several orders with regards to the exchange of evidence, list of documents, agreed statement of facts, and so forth in preparation for the trial in June.
- [26] The eight-day trial took place from June 23, 2025, to July 3, 2025.

Issues to be Resolved

- [27] The issues to be resolved are the following:
- a) Should Mr. A be required to continue to pay child support for M.A.?
 - i. Is M.A. still a child of the marriage?

- ii. If M.A. is a child of the marriage, how much child support should Mr. A be required to pay?
- iii. Should Mr. A be required to pay retroactive child support for M.A. from October 1, 2023, to June 23, 2025?
- b) What is the total amount of Mr. A's income?
- i. Should the LOA in whole or in part be included in Mr. A's income?
- ii. If not, should the living out expenses Mr. A incurred in Ontario constitute family debt?
- c) What is the quantum of spousal support Mr. A should be required to pay Ms. A?
- i. What is Ms. A's income?
- ii. Should the rent she receives from Q.A. be deducted from Ms. A's income?
- d) How should any rent from the family property located in Deep River, Ontario, be treated?
- e) Should there be an unequal division of family property in favour of Ms. A?

Divorce

- [28] Both parties claimed a divorce. They agree on the separation date of April 22, 2023, and that there is no possibility of reconciliation. A certificate of marriage has been filed as well as the clearance certificate. In addition, the evidence establishes jurisdiction and grounds. I am satisfied that the requirements for a divorce have been met.
- [29] Therefore, subject to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), the claimant, D.L.A., and the respondent, N.W.A., who were married on February 14, 1999, in Lillooet, BC, are divorced from each other. The divorce will take effect on the 31st day after the date of this Judgment.

Credibility

Parties' Positions

- [30] Mr. A takes the position that Ms. A made several false allegations that undermine her credibility, such as:
- a) Mr. A cut Ms. A off financially in 2023 while she was on vacation in Las Vegas.
 - b) Mr. A cut Ms. A off financially in September of 2023.
 - c) Mr. A's conduct increased the cost of the litigation.
 - d) Mr. A's conduct caused Ms. A to take time off work between September of 2023 and April of 2024.
- [31] Ms. A submits that Mr. A is not a reliable witness in that "he will say what he needs to make the trier of fact believe the purported [income] reduction".

Legal Principles

- [32] Since this is a highly contested family law matter, credibility plays an important role in the assessment of the evidence. This task is nuanced and fact specific: *L.C. v. Y.S.*, 2023 BCSC 422 at paras. 51-57.
- [33] The assessment of a witness' credibility involves a consideration of the trustworthiness of the witness' testimony based on their sincerity and the accuracy of their evidence. Ultimately, the validity of the evidence depends on whether it is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.
- [34] In *Gichuru v. Smith*, 2013 BCSC 895 at para. 129, *aff'd* 2014 BCCA 414, Justice Adair articulated a number of factors that affect the assessment of reliability and credibility. These factors include:
- a) the witness's ability and opportunity to observe events;
 - b) the firmness of the witness' memory;
 - c) the witness' ability to resist the influence of interest to modify their recollection;
 - d) whether the witness's evidence harmonizes with independent evidence that has been accepted;
 - e) whether the witness changes their testimony during direct and cross-examination;
 - f) whether the witness' testimony seems unreasonable, impossible, or unlikely;
 - g) whether a witness has a motive to lie; and
 - h) the demeanour of a witness generally.
- [35] As stated in the leading case *Faryna v. Chorny*, [1952] 2 D.L.R. 354, the test of the truth of a witness's testimony is its "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable" in the circumstances.

Analysis

- [36] I have approached the assessment of the credibility of the parties with the above principles in mind. I do not place much weight on the parties' demeanor; rather, I focus on whether the parties' evidence harmonizes with independent evidence that I have accepted to come to my conclusions. While both witnesses were generally reliable and credible, I found Ms. A tended to exaggerate her evidence to put Mr. A in a bad light. I found Mr. A to make reasonable concessions and to be fair in his comments about Ms. A.

Child Support

Parties' Positions

- [37] Mr. A takes the position that MA is no longer a child of the marriage.
- [38] Mr. A's annual gross income including his project allowance bonus is \$176,104.80. In addition to his annual income and bonus, Mr. A's employer provides him with an LOA payment as compensation for work-related travel and living expenses while working away from home. LOAs are employment programs to incentivise employees to work away from home by giving payments ("LOA Payments") to ensure employees are not out of pocket for living expenses incurred while working away from home ("LOA Expenses").
- [39] Ms. A argues that there has to be credible evidence of Mr. A's reduction in income (i.e., the loss of his LOA). She says it is telling that Mr. A's highest income was earned the year he separated from her and that his income subsequently went down. Ms. A says that Mr. A claimed he had lost his LOA on numerous occasions throughout this litigation, often in the face of an application or pending trial. Ms. A contends that Mr. A's motivation to make Deep River his primary residence was to stop receiving LOA payments and therefore, lower his support payments to her.
- [40] Ms. A asks this Court to add back to Mr. A's income the LOA for the purposes of calculating child and spousal support. Ms. A argues that if the LOA is not added to Mr. A's income, then "the question becomes whether or not the debt accumulated for expenses incurred in Ontario constitutes family debt. An alternative is that some of the debt constitutes debt accumulated for LOA, and some of the Respondent's income also includes LOA." She also argues "in the final alternative, or in addition, there should be an unequal apportionment of assets in favour of [herself]."
- [41] Mr. A submits that if I am to add any of the LOA Payments to his income, the LOA Expenses should be deducted from his LOA Payments for each period and, at worst, only one half of any LOA Payments received should be included in his gross income for the purposes of support.

Legal Principles

What is a "child of the marriage"?

- [42] Under the Federal Child Support Guidelines, SOR/97-175 [Guidelines], the court has a broad discretion to calculate a payor's income for child support purposes. Pursuant to s. 2(1) of the Divorce Act, a "child of the marriage" means a child of two spouses or former spouses who, at the material time,
- (a) is under the age of majority and who has not withdrawn from their charge, or
 - (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;
- [43] Pursuant to s. 146 of the FLA, "child" includes a person who is 19 years of age or older and unable because of illness, disability or another reason, to obtain the necessities of life or withdraw from the person's parents or guardians. Post-secondary education may constitute

a reason for an "adult child" to remain a child of the marriage within the language of s. 2(1) of the Divorce Act: *Neufeld v. Neufeld*, 2005 BCCA 7 at para. 18. Nevertheless, attendance at a post-secondary institution is not, in and of itself, sufficient: *Neufeld* at para. 18. The court must also be satisfied that the child's educational pursuits are reasonable and, if so, it is appropriate that the pursuits be financed by the parents: *Nordeen v. Nordeen*, 2013 BCCA 178 at para. 16. The Court in *Nordeen* helpfully set out a number of factors to consider when making this determination:

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
 - (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
 - (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or simply going to college because there is nothing better to do;
 - (4) the ability of the child to contribute to his own support through part-time employment;
 - (5) the age of the child;
 - (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;
 - (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation; and
 - (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.
- [45] Where an adult is pursuing first level post-secondary education and is making reasonable career choices, the party applying for child support does not typically face an onerous burden to establish that the adult remains a child of the marriage: *Nitchie v. Nitchie*, 2014 BCSC 468 at para. 19.

Income for child support purposes

- [44] The Guidelines have a comprehensive code for determining income. I must first determine whether the payor's reported income reflects their true earning capacity. If I believe the payor is underemployed or not disclosing their full income, I may impute a higher income based on what they could reasonably earn.

- [45] Section 16 of the Guidelines provides the framework for determining a parent's annual income. The general rule is that child support is based on the payor's total actual income and on the payor's maximum earning capacity. A payor's annual income is generally determined using the Line 15000 of the payor's T1 General or T4 form issued by the Canada Revenue Agency (the "CRA"), subject to the adjustments available under Schedule III.
- [46] The FLA, through Part 4 of the Family Law Act Regulation, BC Reg 347/2012, incorporates the Guidelines. Section 19 of the Guidelines provides this Court with the discretion to determine that a payor's income is more than their reported total income on a tax return. The court may to impute income where a party is intentionally unemployed or underemployed. Under s. 19(1)(a) of the Guidelines, the court considers a party's capacity to earn income and whether the party is earning to their capacity: *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37. The standard is one of reasonableness: *Marquez* at para. 37.
- [47] The above principles were confirmed in *Willms v. Willms*, 2020 BCCA 51 at para. 41. In British Columbia, it is not necessary for a party alleging unemployment or underemployment to show that their former spouse is intentionally avoiding support obligations: *Barker v. Barker*, 2005 BCCA 177 at paras. 18-19. Imputing of income for unemployment or underemployment only requires a finding that they are not earning to capacity: *M.C.V. v. F.V.*, 2018 BCSC 96 at para. 153.
- [48] Retroactive child support will depend on the date a recipient provides effective notice of their intention to seek child support payments from the payor: *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 118, 105-109. Since the notice of family claim was filed within a few months of separation, eligibility for retroactive child support is not in issue.
- [49] Section 3(2) of the Guidelines provides two approaches outlined in (a) and (b) as to the amount of support for "adult" children:

Child the age of majority or over

- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
- (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.
- [50] As set out in s. 3(2)(b) of the Guidelines, this Court may find the table amount to be inappropriate having regard to the condition, means, needs and other circumstances of the "adult child" and the financial ability of each parent to contribute to the support of the child.

- [51] The more closely the adult's circumstances resemble those of a minor child living at home, the more likely it is that the judge will apply the Guidelines amount. If an adult child is attending a post-secondary institution, s. 3(2)(b) may be more appropriate. The Guidelines do not contemplate a student's contribution but this is a valid consideration in determining the amount of support the "child" requires: *J.C.W. v. J.K.R.W.*, 2024 BCSC 139 at para. 49; *Neufeld* at para. 42.
- [52] In terms of misconduct in the context of child support, *D.B.S.* does not provide much clarity as to what constitutes "blameworthy conduct." The Supreme Court of Canada defined blameworthy conduct in terms of the payor prioritizing their own interests over those of the child and the child's right to an appropriate level of support.
- [53] The party seeking to impute the income bears the onus of demonstrating, on a balance of probabilities and a sufficient evidentiary basis, that income should be imputed: *D.M.B. v. D.W.A.L.*, 2018 BCSC 1254 at para. 140; *Marquez* at para. 36.

Are LOAs included in income?

- [54] Under the Guidelines, the court has broad discretion to calculate a payor's income for child support purposes, while ensuring the children benefit from both parties' post-separation. Section 6(6) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp) excludes LOA payments from a person's taxable income. This, however, does not bind the court. The court routinely encounters payments that are not considered taxable income by the CRA but nevertheless may be treated as income for the purpose of support payments. As mentioned above, s. 19(1) of the Guidelines allows the court to impute the income of a spouse as it considers appropriate. It is therefore open to the court to include benefits received by the payor, including an LOA.
- [55] The following cases are instructive. In *Webster v. Webster*, 2014 BCSC 730, at para. 37, Justice Pearlman summarized the law on the treatment of LOAs:
- (a) generally, a living-out allowance paid for the recovery of work-related travel and living expenses will not be treated as income under the Guidelines;
 - (b) living-out allowances are intended to compensate the recipient spouse for the extra costs associated with working away from home;
 - (c) in all the cases where courts have excluded living-out allowances from the recipient spouse's Guideline income, there has been some evidence that the recipient actually incurred extra costs associated with working away from home, although the recipient was not required to account for the whole amount of the allowance; and
 - (d) under s. 19(1) of the Guidelines, the court has a broad discretion to impute such amount of income to a spouse as it considers appropriate in the circumstances.

- [38] The circumstances in which the court may impute income to a spouse specifically enumerated in s. 19 of the Guidelines are non-exhaustive: *Nielsen v. Nielsen*, 2007 BCCA 604. A court may, in an appropriate case, determine whether a living allowance, or some part of it, should be added back to a spouse's income.
- [56] In *Stromquist v. Stromquist*, 2020 BCSC 1556 at paras. 84 to 96, Justice Wilson addressed LOAs. Justice Wilson found that the LOA recipient spouse had no significant costs associated with working at the remote location because he was writing off those expenses against his income for tax purposes. Consequently, the LOA was added back to his income and grossed up.
- [57] In *D.A.C. v. D.J.C.*, 2015 BCSC 372 rev'd on other grounds 2016 BCCA 130 at para. 13, Justice Baird declined to add back an expense allowance for work out of the country because the amount was "trifling" and because "there is clear authority that such an allowance is not to be included as income in circumstances where it is expended for its intended purpose": Webster at para. 40.
- [58] Lastly, in *K.M. v. S.W.*, 2014 BCSC 2240, Justice Savage, as he then was, provided this analysis when he refused to add a vehicle allowance into the payor's income:
- [36] Mr. W. projects his 2015 income to be that based on his base rate of pay in his employment contract or \$48,000. He does not include his vehicle allowance of \$12,000. I agree that this vehicle allowance should not be included in Mr. W's 2015 income. In Webster, Pearlman J. relied on the Alberta Court of Appeal decision in *Calver v. Calver*, 2014 ABCA 63. I also find this case instructive.
- [37] In *Calver*, the appellant argued that the trial judge should not have imputed income to him for a living allowance he received from his employer. The Alberta Court of Appeal agreed and allowed the appeal. At para. 16 the Court explained:

Several cases have declined to impute income based on job-related payments for travel and living expenses, see e.g., *McCaffrey*; *Jordan v Jordan*, 2005 SKQB 129; *Dartige v Dartige*, 1997 CanLII 1100 (Sask QB); *O'Brien v O'Brien*, 1999 CanLII 6800 (NWT SC). Various rationales exist: it would be unjust to attribute income that is meant to reimburse a party for costs incurred in the course of employment; the Income Tax Act, RSC 1985, c 1 (5th Supp) excludes from income certain benefits relating to special work sites or remote work locations; living allowances are not income under the Federal Child Support Guidelines, SOR/97-175; it would be inconsistent with the Guidelines to add a travel allowance to income when the Guidelines specifically authorize the deduction from income of travel expenses paid directly by an employee (Schedule 3, section 16(1)); and these amounts can be speculative since they may depend on the number of days away from home. The fact that an employee need not account for such an allowance has been considered irrelevant to the allowance's treatment: *O'Brien* at para 6.

Analysis

Is M.A. a "child of the marriage"?

- [59] The parties do not agree on whether M.A. continues to be a child of the marriage. Ms. A concedes that Q.A. is no longer a child of the marriage.
- [60] Ms. A does not face an onerous burden to establish that M.A. remains a child of the marriage while he attends university: see Nitchie. She testified that she spends a lot of money on his food, she pays his cell phone bill, when his truck broke she paid for the repairs, she also paid for his tires and so forth. Although he contributes to his expenses, he continues to rely on financial assistance while he attends school. In this regard his situation more closely resembles that of a minor child living at home than an independent adult. I also find that M.A. has reasonable career plans following his graduation.
- [61] In these circumstances, I have no hesitation finding that M.A. remains a child of the marriage and continues to be a child of the marriage as of the date of trial. Ms. A is therefore entitled to child support for M.A. post-separation until he finishes his university degree, provided he completes his degree in a reasonable amount of time and continues to live with her.
- [62] The parties agree that no s. 7 expenses are to be considered since M.A.'s tuition will be covered under the parties' RESP.

Should the LOA be included in Mr. A's income?

- [63] Ms. A testified that she was upset that Mr. A no longer lives in Kelowna, close to the boys, and is no longer collecting the LOA. She claims this is intentional and an attempt by Mr. A to reduce support payments.
- [64] I do not accept that Mr. A was attempting to evade support payments by persuading his employer to terminate his LOA. Immediately after the parties first separated in April of 2023, Mr. A returned to Kelowna from Deep River, Ontario and he continued to "reside" in the family home. At this point, he was working in Ontario and receiving the LOA while he continued to assume primary responsibility for many of the household expenses.
- [65] Mr. A was still receiving the LOA between April and December of 2023 because he claimed Kelowna as his primary residence, although he was rarely there. Mr. A was unable to return to the family home in the summer of 2023 due to forest fires. When he tried to return on October 18, 2023, M.A. informed Mr. A that he could no longer stay at the family home as his mother forbid it. While this is entirely understandable given the martial situation, Mr. A no longer had a home in Kelowna. As a result, in January 2024, Mr. A informed his employer that his primary residence was in Deep River. His LOA was terminated.

- [66] Mr. A subsequently had an opportunity to work on a project in Ottawa, and he again received LOA Payments. However, Mr. A did not continue to work in Ottawa, and his LOA was terminated when he returned to work in Deep River.
- [67] Ms. A contends that Mr. A continues to receive LOA Payments. In her written submissions, Ms. A says: "If the Court is going to accept Mr. A is no longer receiving LOA, that does not negate the child and spousal support payments due for 2023 and 2024 based on the previous years' income."
- [68] I find that as of February 1, 2025, Mr. A no longer received LOA Payments. I accept that Mr. A does not foresee any future LOA Payments and if he does receive any further, this can be easily determined by an exchange of tax returns in 2026 and future years.
- [69] I dismiss Ms. A's argument that Mr. A was trying to minimize his income so that he could pay her less support. This argument is not persuasive and is contrary to the evidence before me.
- [70] Ms. A further says the onus is on Mr. A to demonstrate that the LOA is not for his personal benefit. This is incorrect. The presumption under s. 19 of the Guidelines is that LOAs are not to be included as income. The onus is on the party attempting to impute such income: D.M.B. at para. 140.
- [71] As stated above, the case law generally considers such allowances as non-income under the Guidelines. LOAs may be imputed under s. 19(1) of the Guidelines if the value of the LOA far exceeds the actual, legitimate, expenses incurred by the recipient. If so, the portion that was not used for actual expenses should be added back as income and grossed up for tax purposes.
- [72] Although she cites some relevant law in her submissions, Ms. A then takes the position that "the LOA should be treated like a business expense/deduction." She cites various cases where "business expenses" that had been accepted as deductions for tax purposes were then added back by the court to the payor's income for child support purposes. This is a different type of expense, and it is not applicable to this case.

What is Mr. A's income for child support purposes?

- [73] To properly consider the issue of child support payments, I must calculate Mr. A's income from 2023 to the present day. Mr. A has been employed on a full-time basis since the parties separated in 2023, except for a stress leave from late 2024 into early 2025.
- [74] Based on the legal principles regarding LOAs, I must look carefully at Mr. A's LOA against his actual out of town expenses. Mr. A provided the court with a comprehensive summary of his LOA Expenses. I agree with Ms. A that a few of the expenses he has claimed are not properly living out expenses. These include hair cuts, clothing and other items he would have spent whether living in Kelowna or Deep River. However, the majority of his expenses were legitimate living out expenses that he incurred in Ontario.

- [75] Mr. A testified he made this budget before he knew Ms. A intended to retain counsel, despite allegations by Ms. A that the summary was self-serving. Based on his overall credibility, I have no reason to believe the summary is inaccurate.
- [76] Ms. A argued that I must add the employer RRSP contributions to Mr. A's annual income. I have done so.
- [77] In 2022, when the parties were still in a relationship, Mr. A had a base income of \$168,391. He also received a LOA as well as other benefits.
- [78] There are three periods of time in which Mr. A has received LOA Payments and has incurred LOA Expenses:
- 1) From October 1, 2023, to December 31, 2023, Mr. A received an LOA Payment of \$30,408 and incurred LOA Expenses of \$21,689.35.
 - 2) From April 30, 2024, to October 31, 2024, Mr. A received an LOA Payment of \$9,306.25 and incurred LOA Expenses of \$34,922.91.
 - 3) From January 1, 2025, to January 31, 2025, Mr. A received an LOA Payment of \$4,713.33 and incurred LOA Expenses of \$1,275.93.[1]
- [79] During the first two periods, Mr. A was paying for living expenses in Deep River, Ontario. In the third period he was paying for living expenses in Ottawa.
- [80] In 2023, Mr. A had a base income of \$149,267, a bonus of approximately \$8,360, an employer RRSP contribution of \$8,956, and a project allowance of \$14,927. This resulted in a 2023 income of \$181,510. Between January and September he had a LOA of \$48,911. Mr. A continued to pay rent for the family home in Kelowna and various other household expenses. This largely continued until October 1, 2023 when he began paying child and spousal support pursuant to a consent order. Due to his contribution to the Kelowna expenses, I will not include his LOA of \$48,911 in his income up to October 1, 2023.
- [81] From October 1, 2023, to December 31, 2023, Mr. A received \$30,408.00 in LOA Payments and he spent \$21,689 in LOA Expenses. His calculations demonstrate that the LOA was greater than his expenses. As a result, I add \$8,000 back to his 2023 income, grossed up.
- [82] I find Mr. A's income for child support purposes in accordance with the Guidelines was \$197,510 (\$181,510 plus \$16,000 for the grossed up excess LOA Payments) in 2023. This income is to be applied to his child and spousal support payments from October 1 to December 31, 2023.
- [83] Mr. A's base salary in 2024 was \$124,218; his LOA in 2024 was \$41,456. I find his living out expenditures exceeded the amount of the LOA. Consequently, I do not include the LOA in his 2024 income. In 2024 Mr. A withdrew from his employer RRSP in 2024 to help with his expenses. Ms. A argues that I should include this in his income.

[84] The Guidelines provide various mechanisms through which the court can determine a spouse's available income. Justice Harris, in *J.M.D. v. R.M.J.D.*, 2011 BCSC 1295 at para. 24 addressed non-recurring income, in that case a capital gain. He stated that, "the ultimate question is whether a non-recurring capital gain should fairly be treated in substance as enhancing the income or financial means of a parent." The "task of the court is to determine what money is fairly available to support the children of the marriage": *Younger v. Younger*, 2017 BCSC 363 at para. 25.

[85] Section 17 of the Guidelines provides the court with the discretion to address non-recurring income or losses where the court believes the determination of a spouse's income under s. 16 is not appropriate: *Vincent v. Vincent*, 2012 BCCA 186. As stated in the Federal Child Support Guidelines: Step-by-Step, at page 60, non-recurring may include RRSP income:

[I]f you withdraw money once or rarely from a plan, including an RRSP, you or a court may decide that it is a non-recurring amount that should not count as income to determine child support.

The Department of Justice: Government of Canada http://www.justice.gc.ca/eng/rp-pr/fl-lf/child-enfant/guide/step-by-step_e.pdf.

[86] A RRSP withdrawal must be taken into account when dividing the RRSP if the withdrawal was from pre-separation contributions. Here Mr. A accounted for this withdrawal and demonstrated that it came from his post-separation contributions. Consequently Mr. A need not reimburse Ms. A for the withdrawal.

[87] Section 17 of the Guidelines provides the court with the discretion to include non-recurring income if doing so would be fair and reasonable: *Felts v. Silvestre*, 2021 BCSC 523 at para. 49. I have exercised my discretion and not included this one-time RRSP withdrawal from his 2024 income because it was to assist with his expenses and to pay down the parties' line of credit, rather than simply adding to his yearly wealth.

[88] Mr. A's 2024 income, including his short-term disability, his project allowance, his vacation pay, his profit-sharing pay, and the employer RRSP contribution of \$9,253 was therefore \$178,292.

[89] In 2025, Mr. A was on leave from work for a short period of time. His statements of earnings show his gross semi-monthly base salary was \$6,670.64 and his project allowance was \$667.06, for a total of \$7,337.70 every two weeks. When multiplied by 24, his annual gross income including the bonus will be \$176,105.

[90] In 2025, Mr. A only received \$4,713 from his LOA. This is a trivial amount and I decline to add it back to his income for this year. However, I again add the employer RRSP contribution of approximately \$10,000 to his annual income. This results in his 2025 income being \$186,105.

[91] The above three amounts are to be used for Mr. A's retroactive child support payments for 2023 to 2025.

Retroactive Child Support

[92] Ms. A takes the position that Mr. A has engaged in blameworthy conduct and she argues that Mr. A's conduct must be critically examined when addressing retroactive child support. She pointed out that a number of cases since D.B.S. have provided more insight into the types of behaviour that may constitute blameworthy conduct, including:

- a) a payor hiding increases in income or job changes from the recipient, and failing to provide financial disclosure: *Collins v. Colling*, 2017 ONSC 2232; *Dickson v. Dickson*, 2007 NBQB 221;
- b) a payor trying to dissuade the recipient from bringing an application for support using pressure tactics or threats: *Collins*; and
- c) a payor misleading the recipient into believing they are meeting their support obligation when they are not, including by misrepresenting their income: *Ferguson v. Thorne*, 2007 NBBR 66; *Schick v. Schick*, 2008 ABCA 196.

[93] None of the above definitions of misconduct apply in this case. As a result, I do not factor this into the retroactive child support adjustments.

[94] In 2023 Mr. A paid \$3,000 in child support. I assume his child support obligation was more than that but if it was not, that amount is not to be disturbed.

[95] Mr. A owes retroactive child support for M.A. from January 1 to December 31, 2024, and January 1 to December 31, 2025, based on Mr. A's income as found in this Judgment. The \$1,000 per month in ongoing child support that Mr. A paid in child support in 2024 and 2025 is to be offset against the amount of retroactive child support that Mr. A owes to Ms. A.

Prospective Child Support

[96] Ms. A argues that going forward, the child support for M.A. should be at least \$2,350 per month which would include \$1,000 a month for his room in Ms. A's house. I am not sure how she came to this calculation (apart from the \$1,000), but it is excessive in the circumstances. The parties have a RESP worth slightly over \$16,000. Mr. A submits that M.A. can use the \$16,000 in the RESP account. He notes that after a deduction for tuition and books, there will be a significant amount remaining and in addition to M.A.'s earnings and some of this money can be used for his other expenses. Mr. Armstrong proposes that in addition to this RESP money, he will provide \$500 per month in child support payments for M.A., ending on April 30, 2026.

[97] Given that M.A. works part-time during school and full-time during the summer, and has access to the RESP funds, I find this to be a reasonable solution, consistent with J.C.W. and Neufeld. The \$500 per month is on the low side and I order that \$800 per month be the child support for M.A. going forward. This support is to continue until M.A. finishes university.

Family Property

[98] Upon separation on April 22, 2023, the parties had the following property:

- a) The net proceeds of sale from the Deep River Property of \$62,581;
- b) RRSPs;
- c) RESP;
- d) CPPs;
- e) Non registered account #5243: \$1,432.21;
- f) I-Trade Account #1151: \$1,559.95;
- g) Mr. A's Scotia Personal Bank Account #8089: \$34.79;
- h) Ms. A's Scotia Personal Account #2695: \$8,143.37; and
- i) Jeep Wrangler Vehicle: approximate value of \$8,000.

[99] Upon separation, the parties had the following debts:

- a) Line of Credit (the "LOC"), \$58,919;
- b) Mazda Vehicle shortfall remaining after loan payout, \$6,307; and
- c) Keystone RV Vehicle Loan Payment: \$32,180, approximate value \$20,000.

Division of Property

Parties' Positions

[100] Ms. A seeks to divide the remaining net assets 70% to her and 30% to Mr. A. Further, Ms. A alleges that the amount of money Mr. A's counsel holds in trust for the Mazda is due to her.

[101] The parties entered into a consent order on October 18, 2023, restraining the disposition of family assets. Ms. A alleges that Mr. A breached this order by disposing of family assets including the sale of the Dodge Vehicle, a \$51.21 withdrawal from the Wise Account, and the RRSP withdrawal in 2024. Mr. A disputes these allegations.

[102] Mr. A disagrees that any family property should be apportioned 70% to Ms. A and 30% to him. Based on the authorities, he argues that all family property and family debt should be divided equally.

Legal Principles

- [103] The starting point under s. 81 of the FLA is that each spouse is entitled to a presumptive one-half undivided interest in each family property as a tenant-in-common upon separation. Under s. 81(a) of the FLA, a spouse is not required to use or contribute to family property to be presumptively entitled to an equal division. The parties' relative contributions to family assets and debts during the marriage are largely irrelevant to the division of family property: *Venables v. Venables*, 2019 BCCA 281 at paras. 85-100.
- [104] Section 95 of the FLA limits the circumstances when a court may depart from an equal division of family property. The law that preceded the FLA, the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], permitted an unequal division of family property if an equal division would result in "unfairness". The FLA raises that bar; this Court is only to reapportion family property if an equal division would be "significantly unfair" meaning "unjust, unreasonable, or unfair in an important or substantial sense": *Singh v. Singh*, 2020 BCCA 21 at para. 134. Failing that, the general rule of equal division of family property prevails: *Singh* at para. 134. As explained by the Court of Appeal in *V.J.F. v. S.K.W.*, 2016 BCCA 186:
- [10] The consequence of the categorization of property as either family property or excluded property is that on separation, each spouse is generally entitled under s. 81 to an undivided half interest in family property as a tenant in common. The court may divide it unequally only if equal division would be "significantly unfair" having regard to all the factors listed in ss. 95(2) and (3). Obviously, the phrase "significantly unfair" is intended to set a higher bar for the exercise of judicial discretion than the 'unfairness' test in the FRA
- [105] The burden is on the party seeking unequal apportionment, and the threshold they must meet is a high one. An unequal division of family under s. 95 requires a finding of significant unfairness that is compelling or meaningful having regard to the factors set out in s. 95(2): *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 35; *Kumagai v. Campbell Estate*, 2018 BCCA 24. The court will not engage in a forensic accounting of expenditures during the relationship: *Glassen v. Glassen*, 2025 BCSC 640, at para. 200, citing the Court of Appeal in *Banh v. Chrysler*, 2022 BCCA 74.

Analysis

- [106] Ms. A's counsel took the position that because Mr. A did not file a counterclaim, her request for an unequal division of property in her favour should prevail. This is incorrect. Mr. A said he did not file a counterclaim as he was not asking for anything from Ms. A. He did file a response to the notice of family claim and in that response he states: "There is no evidentiary basis to support an order for unequal division of family property in favour of the claimant based on unfairness pursuant to section 95 of the FLA. ". In addition, and importantly, an equal division of family property is the presumption under the FLA, so the burden is on Ms. A to persuade me that an unequal division is justified: *Rudyak*; *Kumagai*.

- [107] Ms. A relies on one authority, *Jafari v. Moradi*, 2016 BCSC 1331 at paras. 92-106 to justify "a division of assets 70/30 in her favour". The proceedings in *Jafari* were commenced prior to the FLA coming into force and, accordingly, the property division provisions of the FRA continued to apply: FLA, s. 252. Under the FRA the party had only to establish "unfairness". The FLA, which applies, provides that this Court is only to apportion family property unequally if the party seeking it establishes that an equal division would be "significantly unfair".
- [108] Ms. A provided me with no compelling reason to divide property unequally and did not persuade me that an equal division of property would be significantly unfair to her. The one authority to which she referred does not assist her as it does not apply to the current legislative framework. The test today is much more stringent. Applying the correct legal test, I find that all family property is to be equally divided between the parties. All family debt is also to be divided equally.
- [109] Under s. 87(b)(ii) of the FLA, family property is valued at the date of trial absent compelling evidence to depart from that date: *Rudyak* at para. 35. The value of the family property is generally the fair market value, subject to agreement or as otherwise ordered: FLA, s. 87; *D.Z. v. M.Z.*, 2022 BCSC 706 at para. 152.
- [110] As I have found no significant unfairness and there is no agreement between the parties, the value of the family property is to be determined as of the date of this Judgment. This includes the proceeds of sale of real property as well as any of the personal property such as bank accounts, RRSPs, lines of credit, etc. Any contributions to such property post-separation are excluded, provided that the contribution did not come from a joint account of the parties.

Canada Pension Plans

- [111] Under s. 84(2)(e) of the FLA, family property includes a spouse's entitlement under a pension plan. Both parties have made payments to the Canada Pension Plan (the "CPP") during their relationship. It is standard for parties' pensionable earnings under the CPP to be equalized pursuant to the Canada Pension Plan, R.S.C. 1985, c. C-8, and divided at source under Part 6 of the FLA.
- [112] I order that the parties' unadjusted pensionable earnings under the CPP be divided and equalized in accordance with Part 5 and 6 of the FLA for the period of the relationship, from October 1, 1995, to April 22, 2023. The parties' unadjusted pensionable earnings earned during that period will be divided under the Canada Pension Plan Act upon either party applying. Either party may apply for such division and the other party must cooperate and take all steps which are required to effect the division of the parties' CPP credits.

RRSPs

- [113] Ms. A has a RRSP worth \$13,751.00. Mr. A has a non-RRSP which was valued at \$5,321 in 2020. They are both family property and should be divided equally as of the date of separation.
- [114] Mr. A has an Employer RRSP (Manulife #3551) which was worth \$ 58,388 on the statement closest to the date of separation (\$55,655 at the date of trial). At one point post-separation the RRSP was worth considerably more than \$55,655. Mr. A acknowledges that he withdrew \$57,465 in 2024 and Ms. A concedes that \$1,440 was for her benefit.
- [115] Ms. A suggested that Mr. A disposed of the RRSP after the date of the s. 91 FLA consent order (temporary order respecting the protection of family property). Mr. A denies this. The evidence demonstrates that Mr. A requested Manulife to withdraw all of the money he contributed to the RRSP after the date of separation. Manulife did the calculation and came to \$57,465. Mr. A withdrew this amount, but 30% of the withdrawal went to taxes, resulting in Mr. A receiving the amount of \$40,183. He deposited this amount into his personal account and subsequently transferred it to the parties' LOC. Mr. A used the remaining money to cover his support payments and other post-separation expenses. He testified that the injection of money helped to reduce the LOC interest charges and that he was not asking Ms. A to share those interest charges.
- [116] An RRSP withdrawal must be taken into account when dividing the RRSP if the withdrawal was from pre-separation contributions. However, Mr. A accounted for the withdrawal in 2024 by demonstrating that it came from his post-separation contributions. As a result, Ms. A is not entitled to a repayment.
- [117] The remaining amount after the withdrawal was \$55,654. Ms. A is therefore owed \$27,827 from this RRSP. Mr. A is entitled to 50% of Ms. A's spousal RRSP. The RRSPs are to be equalized by way of a spousal rollover unless otherwise agreed.

RESP

- [118] The parties' RESP shall be used by M.A. to finish his schooling. Should any money remain after he has graduated, it should be split equally between the parties.

Mazda Vehicle

- [119] Ms. A alleges she incurred post-separation loans for the payout of the Mazda vehicle. To facilitate the sale of the Mazda vehicle, the parties agreed to each deposit \$5,000 into their lawyers' trust accounts so that the loan could be paid. At that time, the Ms. A expressly stated she had no interest in retaining the vehicle. It was assumed the vehicle would be sold to a third party. The testimony established that unbeknownst to Mr. A, Ms. A's father paid out the Mazda loan so that Ms. A could purchase the vehicle. On February 26, 2024, Ms. A filled out her own bill of sale and signed it as both seller and purchaser for the sum of

\$26,500.00, leaving a shortfall of \$6,307. Ms. A purchased the Mazda, but it was worth less than the outstanding loan. After she purchased the vehicle, a debt of \$6,307 on the loan remained. Mr. A is responsible for half of that debt.

[120] Mr. A concedes he is responsible for one half the shortfall. I therefore order that Mr. A pay \$3,153.50 to Ms. A, for this shortfall and the parties will need to adjust what is in the trust account accordingly.

Jeep Wrangler

[121] The Jeep Wrangler is worth approximately \$8,000. The vehicle can be given to M.A. (independent of child support) or Mr. A will sell it and split the proceeds with Ms. A. In the latter case, the Jeep Wrangler should be removed from the premises of the family home forthwith.

Keystone RV Vehicle

[122] When Mr. A was first working in Ontario, he purchased the Keystone RV vehicle to live in while working away from home. Mr. A lived in the RV, on a friend's property, for approximately two years until October 2023. There is a debt against this vehicle of \$32,807 but the current value of the RV is only \$26,500.00 based on similar listings. Mr. A expressed a preference for the RV to be professionally evaluated but that should have been done prior to trial. Mr. A will retain the vehicle by paying Ms. A \$13,250 for one-half of its value and Ms. A will pay Mr. A \$16,404 reflecting her half of the family debt of \$32,807. The net effect will be that Mr. A will retain the vehicle with the associated debt, and Ms. A will pay him the net amount of \$3,154.

Dodge Vehicle

[123] In August 2023, Mr. A sold the Dodge vehicle for \$3,000. Ms. A is entitled to 50% in the amount of \$1,500.

Deep River Property

[124] Mr. A bought the Deep River property in Ontario during the relationship. This is family property that was subsequently sold for \$77,445.27. Mr. A claims a deduction for improvements to the house to prepare it for sale of \$14,864.56. He testified that was for work that was recommended by the real estate agent. The equity left in the house proceeds is thus \$62,581.

[125] I accept that Mr. A put \$14,865 into the Deep River property prior to its sale. However, Mr. A collected \$6,000 in rent from his friend Jason during the time he was living in this house. Ms. A is entitled to half of the rent. Ms. A is thus entitled to half the equity in the house, \$31,291, plus half the rent, \$3,000, totalling \$34,291, from the Deep River property.

Line of Credit

- [126] Ms. A says that Mr. A paid off a number of his credit cards in the six months prior to their separation from their LOC. She says some of that credit card debt was used for his expenses in Ontario. Ms. A argues that Mr. A is responsible for the LOC debt of \$15,100 that was incurred by him. I have dismissed this argument as Ms. A did not meet her burden of proof that this money was not used for a family purpose.
- [127] Ms. A argued there was a credit card (#2013/9030) that Mr. A did not disclose, despite the two disclosure applications she brought. According to her counsel, neither judge ordered disclosure but said it should be raised with the trial judge. There was no such application before me.
- [128] At separation, the LOC was \$58,919. Post-separation, Mr. A used the LOC for personal expenditures totalling \$30,692 and calculates his share of the interest on these expenditures to be \$3,422 for a combined total of \$34,114. The balance at that point was approximately \$93,033 due to his \$30,692 use of the LOC and the accrued interest. Between April 2023 and May 27, 2025, Mr. A paid \$18,043 to reduce the LOC balance, half of which is the responsibility of Ms. A (totalling \$9,022). Mr. A subtracted the \$34,114 (the \$30,692 plus \$3,422 in interest) from the balance of the LOC as of May 7, 2025, leaving a family debt balance of \$40,177 (each owing \$20,089). Ms. A, is, therefore, responsible for \$29,111 (\$20,089 plus \$9,022).
- [129] Ms. A is responsible for \$29,111 which should be subtracted from any amounts that Mr. A is to pay her under this Judgment.

Wise Account

- [130] Mr. A withdrew \$51.21 from this account in June 2023. This account currently has a minimal value of either \$68.68 or \$88 USD. which Ms. A may keep as her own given Mr. A's earlier withdrawal.

Miscellaneous Accounts

- [131] There were also the following accounts, with the approximate values as of the date of separation:
- a) Non registered account #5243: \$1,432.21;
 - b) I-Trade Account #1151: \$1,559.95;
 - c) Mr. A's Scotia Personal Bank Account #8089: \$34.79; and
 - d) Ms. A's Scotia Personal Account #2695: \$8,143.37.

[132] I am unable to sort out the exact amounts of these accounts and the parties' submissions did not assist me. However, the same principle applies: the family accounts are to be equalized as of the date of trial, excluding any post-separation contributions and adjusting for any post-separation withdrawals.

Spousal Support

Parties' Positions

[133] The parties agree that Ms. A is entitled to spousal support from Mr. A. The outstanding issue is quantum.

[134] Ms. A contends she is entitled to increased spousal support due to the psychological harm she suffered as a result of Mr. A's conduct. She argues this harm arose from his affair during the marriage and his lack of financial support post-separation.

[135] Mr. A takes the position that in addition to Ms. A's gross annual salary of \$41,760.00, Ms. A collects a total of \$15,600.00 annually from Q.A. for rental of the basement suite (i.e., \$1,000 in rent every month and an annual payment of \$3,600 for the tax on the rental income). Mr. A concludes that Ms. A's annual gross salary, including the rental income, is \$57,360.00.

[136] Mr. A requests the Court consider ordering a review of spousal support no sooner than June of 2034. He argues that indefinite spousal support is not permanent and should be periodically reviewed: Spousal Support Advisory Guidelines [SSAG]; *Rai v. Athwal*, 2024 BCSC 1261 at para. 238.

Legal Principles

[137] Entitlement is a threshold issue when determining spousal support. There are three separate bases for entitlement: compensatory, contractual, and needs-based: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, 1999 CanLII 715 at para. 15.

[138] Compensatory spousal support addresses the contributions of a spouse to the marriage and their losses upon its breakdown. It is based on the principle that spouses must share the economic consequences of a marital breakdown. An order for compensatory spousal support is appropriate to compensate the spouse for the value they brought to the relationship, as well as the economic loss they suffered as a result of the relationship: *Bracklow* at para. 18.

[139] Non-compensatory support is based on the economic disadvantages generated by the dissolution of the marriage, not contributions made during the marriage: *Bracklow* at para. 41. Need alone may be sufficient to establish entitlement to spousal support: *Bracklow* at para. 43; *Chutter v. Chutter*, 2008 BCCA 507 at para. 54, leave to appeal to SCC ref'd, [2009] S.C.C.A. No. 41. The degree to which non-compensatory principles apply will depend on a close examination of the means and needs of the parties: *Bracklow* at para. 53.

- [140] The primary consideration when determining spousal support is one of reasonableness, taking into account the party's capacity to earn income given their age, education, health, work history, work availability, and retraining prospects. As stated in *Hsieh v. Lui*, 2017 BCCA 51:
- [48] When a judge decides whether to impute income, the spouse's capacity to earn income given his or her age, education, health, work history, work availability and retraining prospects should be considered. The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to these factors: *Marquez* at para. 37. The judge undertook the necessary exercise, and fully reviewed Ms. Lui's background and circumstances. She decided not to impute income to Ms. Lui largely because she had been out of the workforce for 17 years and primarily responsible for child care since Olivia's birth (para. 142). Her primary caregiving responsibilities are ongoing. In these circumstances, I see no basis upon which the judge's discretionary decision not to impute income to Ms. Lui should be disturbed.
- [49] However, in my view the judge did err in awarding retroactive spousal support based on Mr. Hsieh's current annual income. Insofar as possible, retroactive support is to be determined based on actual income earned in each year for which it is due: *Tedham v. Tedham*, 2003 BCCA 600 (B.C. C.A.) at paras. 58, 71; *Cornelissen v. Cornelissen*, 2003 BCCA 666 (B.C. C.A.) at paras. 35-42. Although I do not accept that the judge erred in awarding spousal support for the pre-trial period, given that entitlement was compensatory and the parties' post-separation incomes differed significantly, I agree that she calculated the retroactive portion of the spousal support award on an erroneous basis.
- [141] A court must also consider the payee's needs, the standard of living during the marriage, the parties' post-separation standard of living, the disparity of the parties' incomes and earning capacity, the division of assets, and the parties' current expenses: *T.N. v. J.C.N.*, 2015 BCSC 439 at para. 178. Economic self-sufficiency is also an important consideration following the breakdown of a relationship. It is, as far as is practicable, to be promoted post-separation: *Divorce Act*, s. 15.2(6)(d).
- [142] The authors of the SSAG have confirmed that the methodology for determining income for child support under the Guidelines should be used for spousal support: SSAG, c. 6.1; *Megson v. Megson*, 2014 BCSC 2467 at para. 165.
- [143] Section 15.2(5) of the *Divorce Act* and s. 166 of the *FLA* direct that the court not consider the misconduct of a spouse in relation to the marriage, except for conduct that arbitrarily or unreasonably causes, prolongs, or aggravates the need for spousal support, or affects the ability of the recipient to become financially self-sufficient. There is good reason for this caution: investigations into spousal misconduct would greatly lengthen trials and hinder resolution. It could make trials into a public airing of inflammatory marital grievances (even more so than they currently do). Further, simply the threat to air spousal misconduct could be used as litigation blackmail. All these outcomes are to be strenuously avoided: *T.C.*

v. L.A., 2020 BCSC 1315 at para. 29.

- [144] Although spousal misconduct is generally irrelevant to support issues, its consequences may be considered in determining spousal support. As articulated in *Leskun v. Leskun*, 2006 SCC 25:
- [19] In forceful submissions, counsel for the appellant says that the court should not encourage unemployment self-induced by a spouse's "scorched earth" policy and warns that if the court is to permit "a claim that a spous[e]'s adulterous conduct has left the non-offending spouse so bitter and emotionally traumatized as to be unable to return to work", the court will not only be "opening the floodgates" but create a "legal tsunami" of review or variation applications which would not only "be the return to fault in the Divorce Act " but lead to a "weakening, I guess, of the Canadian economy".
- [20] I believe that stripped of the rhetoric, the appellant has a valid point of statutory interpretation. Prior to the 1985 Act, s. 11 of the Divorce Act, S.C. 1967-68, c. 24, directed the court to have "regard to the conduct of the parties and the condition, means and other circumstances of each of them" in exercising its discretion in making an award of spousal support. The 1985 Act sought to eliminate misconduct, as such, as a relevant consideration. Section 15.2(5) of the Divorce Act now provides that in making an interim or final order for spousal support, "the court shall not take into consideration any misconduct of a spouse in relation to the marriage". In addition, s. 17(6) instructs the court not to consider any conduct in a variation application that could not be considered in the making of the initial order. These provisions make it clear that misconduct should not creep back into the court's deliberation as a relevant "condition" or "other circumstance" which the court is to consider in making or varying a spousal support order (s. 15.2(4)). Misconduct, as such, is off the table as a relevant consideration.
- [145] The Court qualified the above statements by recognizing that there is "a distinction between the emotional consequences of misconduct and the misconduct itself" (*Leskun* at para. 21, emphasis in original). Only the former is a relevant consideration. As Binnie J., speaking for the Court, explained:
- [24] If the misconduct point were to be viewed in isolation, the appellant is correct, but the point cannot be viewed in isolation. The fact is that both the chambers judge and Newbury J.A., who differed from her colleagues on the relevance of the misconduct, cited numerous other factors (also referenced by the majority judgment) to reject the appellant's attempt to extricate himself from any further financial responsibility for his former wife. Newbury J.A. observed that:

Mrs. Leskun is now 57 years of age and her affidavit evidence points to various family difficulties and to her medical problems and those of her family. A court cannot ignore these difficulties, which have been exacerbated by the breakdown of the Leskuns' marriage. For this reason, and not because of any self-imposed disability, I would reluctantly uphold the order of the Court below and dismiss the appeal. [para. 63]

I agree. I would add the point made by the chambers judge about the narrowness of the respondent's work experience, and underline the difficulty of someone now approaching 60 years of age to re-enter the labour force after a lengthy absence and with few marketable skills outside the limits of her former job at the bank, now eliminated.

[146] Put simply, the attribution of fault or misconduct to the other party has been deemed by Parliament to be irrelevant to the issue of spousal support by virtue of s. 15.2(5) of the Divorce Act. This is based on the premise that the current family law regime is designed to address the consequences of a marital breakdown on a "no-fault" basis.

[147] Lastly, rental income, with expenses deducted, is normally imputed to a party's income: J.L.B. v. M.D.O., 2012 BCSC 1107 at paras. 36, 60; Hughes v. Erickson, 2014 BCSC 1952 at paras. 30-31; Glack v. Baxter, 2021 BCSC 1557 at para. 18. Rental income should be imputed regardless of whether the recipient party reported it on their tax return: J.L.B. at paras. 36, 60.

Analysis

Misconduct

[148] There is no dispute that Mr. A should pay spousal support.

[149] Ms. A takes the position that Mr. A engaged in misconduct both during the marriage, an affair, and after their separation, given his lack of financial support post-separation. Ms. A argues that Mr. A's misconduct resulted in such harm that at times she was unable to work. Ms. A contends she is entitled to increased spousal support. I do not agree.

[150] Allegations of a spouse's misconduct, alone, cannot be used as a reason for the other spouse's inability to become and remain reasonably self-sufficient. Unless it fits within the limited circumstances outlined in Leskun, misconduct is not to be considered when calculating support.

[151] I have some concerns with Ms. A's testimony. First, she testified that she was devastated when she learned, in May 2023, that the respondent had cheated on her. The evidence before me indicated that both parties engaged in pre-separation behaviour that would be hurtful to the other party. Moreover, an affair is not sufficient to overcome the legislative no-fault regime. Mr. A also points out that Ms. A learned about the affair in May 2023 but was able to work until September 2023, and during this period she applied for and obtained a full-time job in August of 2023 at Dyck's pharmacy.

- [152] Second, Ms. A's evidence was inconsistent. During her examination for discovery, she testified that she was unable to work because she learned Mr. A had been cheating on her. When she was asked if there was any other reason, she simply replied "isn't that enough?".
- [153] Despite this testimony, in her second affidavit, Ms. A stated the predominant reason she was unable to work was that the respondent had cut her off financially while she was in Las Vegas in July of 2023. Mr. A agreed he did not put his paycheque into the joint account but emphasized that she had access to monies in the joint account and use of her credit card. Both had balances available, prior to and upon her return. Mr. A also gave Ms. A \$5,000 upon her return.
- [154] Ms. A also alleged that Mr. A cut her off from financial support in September 2023. However, at trial Mr. A established that he was paying her an average of \$6,000 per month towards her living expenses during this time. The allegation that Mr. A withdrew financial support is also at odds with the August 30, 2023 email exchange where the parties discussed the transfer of the expense accounts, including the car, and where Mr. A agreed to pay the accounts on behalf of Ms. A until December 31, 2023.
- [155] Another significant controversy at trial was the 2023 consent order. At their first judicial case conference on October 19, 2023, the parties agreed to a support order where Mr. A would pay Ms. A \$5,000 per month (\$1,000 for child support and \$4,000 for spousal support). Unfortunately, Mr. A reduced this payment by what he believed he had already contributed (e.g., for the internet, the Mazda loan payments, and the car insurance). In cross-examination, Ms. A agreed that he was making such payments until the end of October 2023. This issue was resolved on December 3, 2023, when Mr. A paid the deducted money back to Ms. A.
- [156] The allegation that Mr. A simply withdrew support was significantly overstated. To the extent there was financial misconduct by Mr. A, it was short-lived and minimal. Ms. A's allegations do not hold up under scrutiny.
- [157] While I accept that the marital breakup was emotionally difficult for Ms. A, this did not give Ms. A license to refrain from working to achieve self-sufficiency post-separation. Except in the limited circumstances articulated in *Leskun*, s. 15.2(5) of the Divorce Act governs. As Justice Loo stated in *D.M.D. v. R.L.D.*, 2015 BCSC 2332 at para. 112: "The issue comes down to whether [Ms. A] is able to rely on the emotional consequences of [her spouse's] conduct as the cause of her inability to take any steps towards economic self-sufficiency. I think not."
- [158] Similar to *D.M.D.*, there are a myriad of reasons why Ms. A was not working between September 2023 and April 2024. However, there was nothing in the evidence before me to support a finding that Mr. A's conduct was anywhere near the level that would cause Ms. A such harm that she could not work during this time.
- [159] I dismiss this argument.

Ms. A's income

- [160] In this case, the calculation of income for the purpose of ongoing spousal support is straightforward as both parties were employed at the time of the trial and neither party has any intention to change their current employment situation in the foreseeable future. I use the same calculations to impute income to Mr. A as I did for the purposes of child support.
- [161] In contrast to the relative stability of Mr. A's employment over the last few years, Ms. A did not work throughout most of the relationship. This was a joint decision and one that was beneficial to the family unit as she was focussed on the children.
- [162] The evidence before me is that Ms. A has had addiction and mental health challenges since the parties were married. She has been sober since 2020, but she continues to have some difficulties with her mental health post-separation. She testified that she quit her job in August 2023 because her anxiety and depression had resurfaced and that she was suicidal. She submits that her doctor provided her with two choices: be admitted into the hospital or withdraw from the workforce. She says she took a leave from work between August 2023 and April 2024 due to her mental health issues.
- [163] If Ms. A was legitimately unable to work for medical reasons, this would be factored into the calculation for spousal support under a needs-based analysis. It recognizes the economic hardship and loss of the marital standard of living that arises due to the economic interdependency during the relationship: D.M.D.
- [164] Unfortunately, no expert medical evidence was proffered to support Ms. A's withdrawal from work. In September of 2023, right after she stopped working, her family doctor noted that she was anxious and depressed but in November 2023 noted this was related to her divorce proceedings. While she mentioned thoughts of self-harm she had not actually done anything. There was no note of her being suicidal.
- [165] Despite her mental health problems over the years, I was not provided with sufficient or proper medical evidence to justify Ms. A's withdrawal from the workforce for such an extended period of time. I dismiss these arguments of Ms. A. Ms. A testified that she has now 'turned her life around'.
- [166] Ms. A receives a straight T4 income slip from her employer. Ms. A's annual gross salary is reflected in her Line 15000 income as reported on her annual income tax return. In 2023, she made \$24,758; and in 2024, she made \$27,087.
- [167] Ms. A's most recent statement of earnings was for the period ending on June 6, 2025. Her semi-monthly gross earnings are \$1,740. When multiplied by 24, her gross annual salary is \$41,760.

- [168] Mr. A requests that I impute income to Ms. A. This Court has a broad discretion to impute income for the purposes of determining spousal support: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 34. Although not legally binding, I will first consider the definition of income under the Guidelines: *Megson* at para. 165. This Court must also consider the SSAG in determining quantum: *Yemchuk v. Yemchuk*, 2005 BCCA 406; *Redpath vs. Redpath*, 2006 BCCA 338.
- [169] Ms. A has gone back to work post-separation but has had a number of challenges in her employment in recent years. These challenges do not in my view amount to intentional under-employment as defined in s. 19 of the Guidelines.
- [170] Mr. A argues Q.A. and his girlfriend live in the basement suite of Ms. A's house and pay her \$1,000 per month which should be included in her income. Ms. A disagrees. She testified that she provides Q.A. with her time and resources. For example, she needs to remind him to take his medications, as he has some mental health challenges, and to shower and eat. He does not drive so she often needs to take him places. She took time off work when Q.A. sustained a significant injury in a leaf blower accident. Q.A.'s accident resulted in Q.A. reducing his rental payment by \$500. Additionally, Ms. A covers some of Q.A.'s expenses, drives him to medical appointments, and occasionally prepares food for him and his girlfriend.
- [171] In these circumstances, I accept that having Q.A. and his girlfriend living in Ms. A's basement suite results in additional expenses to her overall household budget. While these may be considered gratuitous payments to a non-child, given his mental health issues, and based on the analysis in *Nielsen v. Nielsen*, 2007 BCCA 604, I am not prepared to increase Ms. A's income to include the \$1,000 per month in rent, and the minimal property tax contribution, she receives from Q.A. This rent helps to offset Ms. A's expenses and she is in a difficult financial position.

Duration of spousal support

- [172] Ms. A is currently employed on a full-time basis as a medical office assistant. She has worked the longest in this position and is earning the most amount of money she has earned since being married. Subject to raises from time to time to account for inflation, etc., I find it is unlikely there will be significant changes in her Guidelines income in the future.
- [173] In terms of duration, Ms. A meets the "Rule of 65" set out in s. 7.5.3 of SSAG. This is because the length of the marriage, together with Ms. A's age at separation, exceeds 65. Therefore, Ms. A is presumptively entitled to indefinite support: SSAG, s. 7.5.3. While the SSAG are advisory only, this presumption reflects the reality that a parent who has been out of the work force for a lengthy period of time will take longer to become self-supporting after a marital breakdown. Here, Ms. A was out of the workforce, off and on, until recently. Ms. A works in an entry-level position and has no formal education. That said, her employment is

full-time and it provides the most income that she has earned since the parties began their relationship.

[174] Based on Ms. A's delayed entry into the full-time labour force, her limited education, the length of their marriage, the parties' ages, and their expected work life, Ms. A is entitled to indefinite spousal support, subject to an agreement otherwise or further court order.

[175] I find that Ms. A is entitled to spousal support based on her Guidelines income of \$41,760.00 and Mr. A's Guidelines income of \$186,105, with children, at the mid-range. Once M.A. is no longer a child of the marriage, Ms. A is entitled to mid-range spousal support without children.

[176] There may be a review of this order, which can be initiated by either party, on January 1, 2035 or anytime thereafter.

Retroactive Spousal Support

[177] The parties agree that retroactive support should be calculated between October 1, 2023, and June 23, 2025 (the date of trial).

[178] Ms. A receives a straight T4 income from her employer. Ms. A's annual gross salary is reflected in her Line 15000 income as reported on her annual income tax return. In 2023 she made \$24,758, in 2024 she made \$27,087, and in 2025 she made \$41,760. Mr. A's income in 2023 was \$197,510, in 2024 it was \$178,292, and in 2025 it was \$186,105. These are the amounts to be used in those respective years to calculate retroactive spousal support, applying the mid-range of the formula. However, Mr. A is to be credited for the spousal support payments he made in that period.

Costs

[179] If there are matters relevant to costs that either of the parties wish to bring to my attention, they are at liberty to submit written submissions, not to exceed ten pages, within 45 days of the date of these Reasons. The other party may file response submissions, to be submitted within 15 days of the receipt of the original submissions. Any reply submissions may be submitted within ten days of the receipt of the response submissions. The parties may arrange to do so with Supreme Court Scheduling. I will schedule a hearing if I deem an oral hearing necessary after receiving the written submissions.

"D. MacDonald J."

[1]The relevant dates on which Mr. A collect the LOA was between October 1, 2023 and February 15, 2024, and April 30, 2024 to October 31, 2024. It was suspended during Mr. A's stress leave from October 31, 2024 to January 6, 2025. It was reinstated January 6 and terminated on January 31, 2025 when the Ottawa project ended for Mr. A.

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