

CANADA / JUDGMENT

DeWolfe v. Flanagan

2022 BCSC 1155

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Supreme Court of British Columbia

DECIDED

11 July 2022

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2022 BCSC 1155 DeWolfe v. Flanagan

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

DeWolfe v. Flanagan,

2022 BCSC 1155

Date: 20220711

Docket: E150198

Registry: Vancouver

Between:

Nicole Charlene DeWolfe

Claimant

And

Martin Herbert Flanagan

Respondent

Before: The Honourable Justice MacNaughton

Reasons for Judgment

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Place and Date of Trial:

Vancouver, B.C.

February 22-25 and 28, 2022

March 1, 2022

Place and Date of Judgment:

Vancouver, B.C.

July 11, 2022

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Introduction

- [1] The parties began living together on October 1, 2008, and separated on December 23, 2014. They are the parents of twin boys, AF and LF, born in June 2010.
- [2] Ms. DeWolfe, who is 44 years old, is also the mother of JSD, a son from a prior relationship. JSD was born in November 2003 and is currently attending university.
- [3] Ms. DeWolfe currently works from home, part time, providing bookkeeping services for her boyfriend's plumbing company.
- [4] Mr. Flanagan is 43 years old. By training, he is a commercial pipe fitter, but he currently works as a superintendent with Brymark Installation Group Inc. ("Brymark").

- [5] The parties have been litigating their family dispute since shortly after they separated. They palpably distrust each other. Both blame the other for the fact that this matter did not resolve before trial.

The Issues

- [6] The most significant financial issue between the parties is whether the value of the family home is \$855,000, the value set in April 2016, or the fair market value at trial which, based on the most recent appraisal, is \$1,850,000.
- [7] The other issues I must decide are:
- a) What other adjustments should be made in calculating the equalization payment in this case? Including:
 - i. What is the value of the family boat, which Mr. Flanagan sold despite a court order specifically preventing him from doing so?
 - ii. Is Mr. Flanagan entitled to share in a retroactive lump sum child support payment made by JSD's father pursuant to a settlement with Ms. DeWolfe?
 - iii. Is Mr. Flanagan entitled to a return of child support paid for JSD since separation?
 - iv. Is Mr. Flanagan entitled to a return of his share of the contributions made to a Regulated Education Savings Plan ("RESP") for JSD?
 - b) Do the parties have excluded property claims with respect to their contributions to purchase the former family home and, if so, what is the value of their claims?
 - c) Has Mr. Flanagan proven his excluded property claim as it relates to his RRSP?
 - d) Is Ms. DeWolfe entitled to ongoing spousal support and, if not, when should spousal support be terminated?
 - e) Should income be imputed to Ms. DeWolfe and, if so, in what amount and commencing when?
 - f) Should there be a retroactive adjustment to the interim spousal support Mr. Flanagan is paying?
 - g) What special expenses should Mr. Flanagan contribute to and in what proportion?

Resolved Property and Debt Matters

- [8] Just prior to the commencement of trial, and to a lesser extent during it, the parties were able to resolve a number of property and debt issues. They agreed as follows:
- a) At separation, the parties owed \$11,227 on their joint Bank of Nova Scotia ("Scotia") line of credit. They are jointly responsible for that debt.

- b) Post-separation, Ms. DeWolfe spent \$7,994 on the parties' joint Scotia line of credit. She is wholly responsible for that debt.
- c) Mr. Flanagan received a \$15,000 employment bonus from Brymark for 2014. Net of tax, the bonus was \$10,050, and Ms. DeWolfe is entitled to share in that amount equally.
- d) At separation, the parties had \$4,013 in a joint Scotia master account. It is to be shared equally.
- e) At separation, Mr. Flanagan had \$9,201 in a TFSA. It is to be shared equally.
- f) At separation, Ms. DeWolfe had \$6,629 in a TFSA. It is to be shared equally.
- g) At separation, Ms. DeWolfe had a total of \$4,517 in five different bank accounts in her name. It is to be shared equally.
- h) At separation, Mr. Flanagan had \$3,493 in a savings account. It is to be shared equally.
- i) At separation, Ms. DeWolfe had \$36,595 in RRSPs. Mr. Flanagan is entitled to \$13,723 of that amount;
- j) At separation, Mr. Flanagan had \$77,663 in RRSPs. Ms. DeWolfe is entitled to \$24,248 of that amount.
- k) At separation, Ms. DeWolfe owned a 2009 Chevrolet Suburban. The parties agreed that it was worth \$8,000 and that Ms. DeWolfe has an excluded property claim for \$4,000. The parties are to share equally in the remaining \$4,000.
- [9] There was one issue that may have been resolved between the parties, but, during the trial, Mr. Flanagan's position on the issue was unclear.
- [10] On February 14, 2018, the parties jointly obtained an actuarial report (the "Report") on the capitalized value of Mr. Flanagan's Plumbing and Pipefitting Workers Local 170 pension plan accrued during his relationship with Ms. DeWolfe. The purpose of the Report was to determine an appropriate compensation payment in accordance with Part 6 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. It appears the valuation was done in advance of settlement discussions regarding the parties' family home. The order with respect to the family home will be discussed later in these reasons.
- [11] The Report was based on Ms. DeWolfe receiving a compensation payment for the present value of the pension benefits Mr. Flanagan earned during the length of the parties' relationship, based on Mr. Flanagan retiring on two different possible dates.
- [12] It appears that the compensation payment was never agreed to or paid. In his closing submissions, Ms. DeWolfe's counsel suggested an adjustment to the compensation payment set out in the Report of 2.9 percent a year for four years. Mr. Flanagan did not respond to the suggestion.

- [13] If the parties wish to deal with Ms. DeWolfe's interest in Mr. Flanagan's pension plan by way of a compensation payment they must either agree on a number or obtain an updated capitalized value report.
- [14] If the parties wish to divide the pension at the source under Part 6 the FLA, then they must complete the forms required by the pension plan.

Background

Ms. DeWolfe

- [15] Ms. DeWolfe graduated from high school in 1996, and moved to Vancouver from her parents' home in Port Coquitlam.
- [16] For about four years, she worked in the hospitality industry, primarily at night, at the BaBalou Lounge ("BaBalou"), the Roxy Cabaret (the "Roxy"), and Rodney's Oyster House ("Rodney's"). At various times, she was a server, coat checker, cigar seller, and a bartender. She worked four or five nights a week from about 7 p.m. to 2:30 a.m. at BaBalou and the Roxy. At Rodney's, she worked one day shift and three night shifts a week. She picked up other shifts when she could.
- [17] Starting in about 1998, Ms. DeWolfe also took post-secondary courses during the day. For two semesters she attended the BC Institute of Technology certificate program in financial planning, but, after three months working part time in an entry-level job at Canaccord Capital Corp., she decided she did not want to work in finance.
- [18] Starting in about 1999, Ms. DeWolfe attended Langara College ("Langara") and studied towards a science degree. When she was working at Rodney's, she reduced her course load as she was not earning enough to pay tuition. She did not complete the program. She stopped attending Langara when she was pregnant with JSD, who was born in November 2003. She never lived with JSD's father, and the relationship ended before JSD was born. She returned to live with her parents in May or June 2003.
- [19] Ms. DeWolfe worked as much as she could when JSD was young, cleaning houses, house sitting, and dog walking.
- [20] Ms. DeWolfe received child support from JSD's father from February 2005 until the spring of 2012.
- [21] In about 2005, Ms. DeWolfe returned to work at Rodney's three nights a week, while still living with her parents. She continued to do odd jobs. She also sold her car and lived off of the proceeds.
- [22] In late 2005, Ms. DeWolfe moved into a boyfriend's home in Yaletown. When her boyfriend became ill, she left Rodney's to help out in his business. Their relationship ended in late 2007, and she moved back to her parents' home.

- [23] Sometime in 2007, Ms. DeWolfe took a job as a receptionist for Ajilon, a permanent or temporary staffing agency, at the intersection of Hastings Street and Burrard Street. She moved into an apartment in Westwood Plateau, close to her parents' home and to JSD's daycare.
- [24] In the summer of 2008, the parties started dating. They went to elementary and high school together and became reacquainted through mutual friends. JSD started kindergarten in Westwood Plateau. Ms. DeWolfe dropped him off at preschool at about 7 a.m., and picked him up at the end of the day from after-school care.
- [25] In October 2008, Ms. DeWolfe gave up her apartment and moved into Mr. Flanagan's home at 20677 W. River Road, Maple Ridge, BC ("River Road"). Mr. Flanagan bought River Road in 2007.
- [26] Ms. DeWolfe testified about the stress of dropping JSD off at daycare in Westwood Plateau, getting to the station to take the train downtown, returning by train, driving to pick JSD up at daycare, and driving to River Road. She did that for a few months. However, in November 2008, as a result of a health scare, and changes at Ajilon, she and Mr. Flanagan decided that she would find a job closer to home and work enough hours to qualify for maternity leave. They wanted to have children together.
- [27] Ms. DeWolfe did not work for about a year and then took a job at Starbucks working for just over minimum wage. After about six months, and before the end of 2009, she found out she was pregnant with twins. Ms. DeWolfe's pregnancy was high risk, and she was put on medical leave. She did not return to Starbucks after the twins were born.
- [28] In June 2010, during the birth of the twins, Ms. DeWolfe experienced medical complications that lengthened her recovery.
- [29] Both parties agreed that Mr. Flanagan worked hard to support the family while Ms. DeWolfe was the primary caregiver for the twins and JSD. Ms. DeWolfe estimated that in 2011, Mr. Flanagan earned between \$220,000 and \$225,000. He did not dispute that evidence.
- [30] In the spring of 2012, after learning about the birth of the twins, JSD's father stopped paying the court-ordered child support.
- [31] In 2012, the parties needed and could afford more space. They decided to sell River Road, and in the late spring of 2012, bought a home located at 10644 - 244th St. in Maple Ridge, BC (the "Family Home").
- [32] Before paying fees and taxes, the parties cleared about \$39,000 on the sale of River Road, which was rolled into the Family Home.

- [33] Ms. DeWolfe testified that her parents gave her \$40,000 towards the purchase of the Family Home. She said that her parents saw that the family had outgrown River Road, they knew she was not working, and wanted her to have something of her own to put towards the purchase. She deposited a cheque from her mother into her account, transferred it into a joint account, and then transferred it to a lawyer on the closing date. Mr. Flanagan testified that Ms. DeWolfe's parents gifted the money to both of them.
- [34] As will be discussed below, Ms. DeWolfe makes an excluded property claim with respect to the \$40,000, and Mr. Flanagan does the same with respect to the \$39,000.
- [35] Ms. DeWolfe continued to be primarily responsible for the care of all three children. She drove JSD to and from school and to his early morning and evening hockey games and other activities. The twins were in preschool two days a week from 8:30-11:30 a.m. and they continued in the same preschool until they started kindergarten in September 2015, after the parties separated.
- [36] In July 2018, Ms. DeWolfe started working part time for Inlet Mechanical Services ("Inlet"), a company owned by her current boyfriend, Edward Halstrom, and a partner. She works from home, 24 hours a week, doing accounting work and other basic clerical work at a rate of \$20 an hour. Her hours are flexible, which frees her up to attend to the twins' needs.
- [37] Since 2018, Mr. Halstrom has lived with Ms. DeWolfe. He has a separate room in the basement of the Family Home. There was a dispute at trial about whether he paid rent to Ms. DeWolfe and, if so, how much. She produced cancelled cheques for rent of \$500 a month dating back to October 1, 2016. She denies that she is in a marriage-like relationship with Mr. Halstrom.

The Twins

- [38] Beginning in March 2020, Ms. DeWolfe homeschooled the twins who had developed severe COVID-19 anxiety and refused to leave the house.
- [39] The twins were also homeschooled for the September 2020-June 2021 school year.
- [40] LF has been assessed with learning disabilities and has been diagnosed with Central Auditory Processing Disorder. He needs specialized tutoring. Although AF does not have a diagnosed learning disability, he too has required some specialized tutoring.
- [41] Mr. Flanagan has had limited in-person parenting with the twins since March 2020. On March 21, 2021, a consent order was filed in Provincial Court in which the parties agreed to engage a psychologist for the purposes of reunification counselling.

Mr. Flanagan

- [42] Mr. Flanagan attended BCIT over a period of four years of combined schooling and apprenticeship. He was trained as a steamfitter and started working in the field in 1997 or 1998. He has worked for Brymark for over 20 years. Brymark is a union-affiliated contractor, and Mr. Flanagan was a member of the union until the end of 2019.
- [43] In 2006 or 2007, he was promoted to a position as a general foreman. He then became a superintendent and, for the last five years, has worked for Brymark as a project superintendent. He is responsible for scheduling, costing, and budgeting Brymark's heavy industrial construction jobs throughout the province.
- [44] In late 2019 or early 2020, Brymark's General Manager asked Mr. Flanagan to move out of the field and into the office. He was reluctant to do so as it would have meant becoming a salaried employee and would have resulted in a pay cut that he could not afford. He agreed to do so when the General Manager told him that he would be paid as an hourly employee at the same hourly rate as he was paid under the union contract, increasing by a dollar an hour each year.
- [45] Mr. Flanagan had been earning the highest available rate under the union contract since 2007 or 2008.
- [46] For 15 years, Mr. Flanagan worked at the Chevron refinery in Burnaby. However, he was moved from that site after the parties separated. Since then, he has been moved around British Columbia. He tries to stay local as much as he can.
- [47] Since the parties' separation, Mr. Flanagan has re-partnered and has purchased a home with his new partner and her parents.

The Litigation History

- [48] The parties have been litigating their family dispute in this Court and in Port Coquitlam Provincial Court since shortly after their separation. I will not review the litigation history in detail. Suffice it to say that there have been numerous applications in both courts.
- [49] On January 6, 2015, the Provincial Court granted a without notice protection order, and, thereafter, a series of further protection orders were issued on different terms. Parenting issues have been dealt with in Provincial Court.
- [50] This notice of family claim was filed on January 22, 2015. There have been a number of court orders since the claim was filed. I will refer only to the orders that are relevant to child and spousal support and the division of property and debt, the issues that were litigated in this trial.

The Applications in This Proceeding

Ms. DeWolfe's Interim Support Application

- [51] On May 4, 2015, Ms. DeWolfe applied for interim child support for the twins and JSD, and interim spousal support. After several adjournments, the parties appeared before Master Muir on June 8, 2015. Master Muir made several interim, without prejudice orders (the "Muir Order"). In particular, she:
- a) imputed an annual income of \$185,000 to Mr. Flanagan and, based on that income, ordered him to pay Ms. DeWolfe \$3,281 per month in child support for three children; and
 - b) ordered Mr. Flanagan to pay \$3,356 per month in spousal support. Although the Muir Order was silent as to Ms. DeWolfe's income, she was not working at the time and, for the purposes of spousal support, it appears that her income was assessed at zero.
- [52] Both child and spousal support commenced on June 8, 2015, and continued on the eighth day of each month thereafter, until further order of the court or agreement of the parties. Mr. Flanagan has paid child and spousal support throughout.
- [53] From her support, Ms. DeWolfe was ordered to pay the first \$1,300 of the monthly mortgage on the Family Home; the parties equally divided the balance of the mortgage and the monthly home insurance payments.
- [54] Either party could apply to vary the Muir Order on a material change of circumstances.

The Property Agreement and Order

- [55] On September 2, 2015, among other relief, Mr. Flanagan applied to sell the Family Home, with the net sale proceeds to be held in trust. Alternatively, he sought an order that Ms. DeWolfe advise him of her intention to purchase his one-half interest in the Family Home at fair market value and, thereafter, have 30 days to complete the purchase.
- [56] Ms. DeWolfe opposed the relief sought but, in her response, said that she wished to buy Mr. Flanagan's interest in the Family Home. She had been approved for a mortgage. Mr. Flanagan's application was adjourned a number of times.
- [57] The parties appeared before Master Keighley on March 16, 2016. Ms. DeWolfe was represented by her current counsel; Mr. Flanagan was then represented by Glenn Laughlin.
- [58] At the appearance, counsel advised Master Keighley that they were seeking an adjournment to March 30, 2016, because they had agreed to the terms of a consent order which involved Ms. DeWolfe offering to buy the Family Home from Mr. Flanagan and there were steps that had to be taken in that regard. Nevertheless, they entered into certain consent orders. The terms of Master Keighley's March 16 order provided that:
1. The Claimant is to make available for pick up by the Respondent the family boat and trailer and all accessories.

2. The Respondent is not to take the children on the boat without further court order or agreement between the parties; or to sell the boat without further court order or agreement between the parties.

3. The balance of the relief claimed in the Respondent's Notice of Application filed September 2, 2015 is adjourned to March 30, 2016 or such other date as counsel may agree upon.

[59] The parties next appeared before Master Keighley on March 30, 2016, and spoke to two separate consent orders. The first, which I will refer to as the RRSP Order, provided:

1. Without prejudice, the Claimant shall transfer the total amount of her Registered Retirement Savings Plans at Scotiabank, (with an approximate value of \$40,000) to a Registered Retirement Savings Plan in the Respondent's name by a spousal rollover under s. 146(16)(b) of the Income Tax Act (Canada) by May 15, 2016.

[60] The second, which I will refer to as the Family Home Order, provided:

1. The parties shall jointly retain an expert property appraiser to provide a current valuation with respect to the property located at 10664 - 244th Street, Maple Ridge, B.C. (the "Property") within 10 days of the date of this Order.

2. The Respondent shall transfer his interest in the Property to the Claimant by April 30, 2016 on the condition that the Claimant shall do whatever is necessary to have the Respondent released from all financial obligations under the current mortgage against the Property by April 30, 2016.

3. The updated appraisal figure shall be used for the purpose of calculating the credit due to the Respondent as against future division of the remaining assets and support obligations.

4. If the transfer of the Respondent's interest in the Property to the Claimant does not occur by April 30, 2016, the application of the Respondent for sale of the property shall be reset to the first week of May 2016.

[61] With respect to the Family Home Order, Mr. Flanagan's counsel told Master Keighley, "[s]o, effectively, we're getting the house out of the picture and we'll sort it out down the road".

[62] With respect to the RRSP Order, Ms. DeWolfe's counsel explained to Master Keighley that they were "hiving off" the RRSPs because she had the RRSPs when she applied for the mortgage she was obtaining to buy out Mr. Flanagan's interest, but it was "none of the bank's business what happen[ed] to those RRSPs afterwards, and that's why we're kind of keeping that outside the picture, just in case".

[63] Pursuant to the Family Home Order, Ms. DeWolfe arranged for her own mortgage and paid out the existing joint mortgage in the amount of \$541,156.26. She thereby released Mr. Flanagan from any liability under the mortgage, and he was no longer required to make a monthly contribution to it.

[64] Title to the Family Home was transferred into Ms. DeWolfe's name, and, thereafter, she paid all of the mortgage payments and all other costs related to the Family Home. What remained was the calculation of the credit due to Mr. Flanagan as against the future division of the remaining assets and support obligations.

Mr. Flanagan's Application to Vary the Muir Order

[65] On November 22, 2019, Mr. Flanagan sought to reduce the income which had been imputed to him by Master Muir. He also sought an order setting his child support obligation for JSD at zero. For the purposes of spousal support, he sought to impute income to Ms. DeWolfe. He also sought to terminate his spousal support obligation as of December 8, 2019.

[66] Finally, he sought orders:

- a) for disclosure of information regarding child support and spousal support received by Ms. DeWolfe from JSD's father from March 23, 2015, to that date;
- b) copies of court orders and agreements for JSD's child support and s. 7 expenses;
- c) repayment of child support made by him for the support of JSD from March 2015 to that date;
- d) that Ms. DeWolfe provide a current Form 8 financial statement; and
- e) that the parties attend a mediation

(the "November Application").

[67] The parties appeared before Justice Harvey on December 6, 2019. Since Ms. DeWolfe had not filed a Form 8, the November Application was adjourned. She was ordered to provide her Form 8 within 14 days.

[68] Ms. DeWolfe filed a cross-application on February 19, 2020, in which she sought orders that:

- a) on being provided with an original receipt, Mr. Flanagan pay her, on an interim, without prejudice basis, 72 percent of certain s. 7 special expenses and 100 percent of others; and
- b) that Mr. Flanagan disclose certain bank, financial, RRSP, and pension contribution records

(the "February Application").

[69] The November and February Applications were scheduled to be heard on March 3, 2020, but they were bumped. Due to the COVID-19 pandemic, the parties were not able to schedule a full-day hearing until April 2021 when they appeared before Justice Forth (the "Forth Order").

- [70] In her reasons indexed as 2021 BCSC 872, Justice Forth concluded that there had been a material change in circumstances since the Muir Order but was satisfied that Mr. Flanagan's imputed income continued to be appropriate. She imputed an income of \$25,000 to Ms. DeWolfe because she was homeschooling the twins.
- [71] Ms. DeWolfe agreed that Mr. Flanagan should not have been paying child support for JSD. Justice Forth terminated Mr. Flanagan's ongoing obligation to do so and adjusted the child support order to \$2,572 for the twins, commencing June 8, 2021. She left the calculation of the retroactive adjustment of the child support to be decided at trial.
- [72] Justice Forth also adjusted spousal support, based on the imputed incomes she set for both parties, and ordered Mr. Flanagan to pay Ms. DeWolfe \$2,327 per month, the low end of the range, commencing June 8, 2021.
- [73] Justice Forth ordered Mr. Flanagan to provide certain financial records to Ms. DeWolfe.
- [74] Finally, Justice Forth ordered the parties to attend a mediation. Although mediation dates were scheduled, the parties never did so.

Legislative Framework for the Division of Family Property and Debt

- [75] The regime established under Part 5 of the FLA for the division of family property and debt was intended to increase certainty and reduce litigation in cases involving property division: *Venables v. Venables*, 2019 BCCA 281 at paras. 84-90. In the circumstances of this case, the basic principles are:
1. All real and personal property that is owned by at least one spouse at the time of separation is family property unless it is excluded property: ss. 84 and 85;
 2. Family property includes any increase in the value of excluded property since the later of the date the relationship between the parties began or the acquisition of the excluded property: s. 84(2)(g);
 3. Excluded property includes property acquired by a spouse before the relationship began, inheritances to a spouse, gifts to a spouse from a third party, and any property derived from such property: s. 85(1);
 4. Family debt includes all financial obligations incurred by a spouse from the beginning of the relationship to the date of separation and after separation if incurred to maintain family property: s. 86;
 5. Unless an agreement or order provides otherwise, the value of family property must be based on its fair market value, and the value of family property and family debt must be determined as of the date an agreement dividing family property was made or the date of the hearing before the court respecting the division of family property and family debt: s. 87;

6. Family property and family debt are to be divided equally unless it would be "significantly unfair" to do so: ss. 81 and 95; and
7. Excluded property is not subject to division unless it would be "significantly unfair" not to divide it: s. 96.

[76] Subsections 95(2) and (3) of the FLA list a number of factors the court may consider in determining whether it would be significantly unfair to equally divide family property, family debt or both. These subsections provide:

95 (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93(1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

- [77] The property division regime in the FLA creates a presumption that family property, including the growth in value of excluded property, will be divided equally at the date of trial. That presumption may be displaced by the parties' agreement or a court order. It may also be displaced if an equal division would be "significantly unfair": see discussion in Venables at paras. 85-90.
- [78] If an equal division would be significantly unfair, the legislation provides two remedies. The court may vary the date for division of family property under s. 87 or order an unequal division of family property under s. 95: *Blair v. Johnson*, 2015 BCSC 761 at para. 69; *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 53. A departure from the presumptive date for valuing family property "is effectively a reapportionment or an unequal division of family property": *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 59.
- [79] The term "significantly unfair" creates a "high threshold": *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 81. In *Singh v. Singh*, 2020 BCCA 21, Justice Garson provided the following helpful summary of various descriptions of the term "significantly unfair":
- [134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.
- [80] When it comes to the court exercising its discretion to depart from valuing family property at the date of trial, the court has held that it "should only be done where there is compelling evidence" to justify doing so: *Rudyak v. Bekturova*, 2018 BCCA 414 at para. 35.

Is the value of the Family Home to be set as of April 2016 or at the date of trial?

- [81] In this case, Ms. DeWolfe submits that the parties agreed, and then entered into a court order incorporating their agreement, to value the Family Home in the spring of 2016 based on an updated appraisal that was to be obtained within ten days of the Family Home Order. That appraisal was obtained on April 7, 2016, and established a value of \$855,000.
- [82] Mr. Flanagan submits that the "updated appraisal" wording in the Family Home Order should not be interpreted to mean the April 7, 2016 appraisal. He submits that it was an "open term" and that the updated value would change over time, as further appraisals were done. He says that the 2022 valuation of \$1.85 million is an "updated appraisal" for the purposes of valuing the Family Home, which should be valued at the trial.
- [83] Mr. Flanagan also submits that when he agreed to the Family Home Order, he understood that he would be paid his interest right away. There was a trial date that was approaching that would establish his entitlement if the parties were unable to agree to it. He submits that

Ms. DeWolfe acted in bad faith. He blames Ms. DeWolfe alone for the fact that the parties are only now calculating the credit that is due to him with respect to the division of the remaining assets and support obligations. He says that she cancelled a number of mediations that could have resolved matters. In the result, he says that using the 2016 valuation of the Family Home would be significantly unfair to him.

- [84] Mr. Flanagan further submits that he received no consideration for the transfer of title to the Family Home to Ms. DeWolfe and that his understanding, at the time of the Family Home Order, was that the parties would negotiate and agree on consideration. That never occurred because, as soon as title to the Family Home was transferred to Ms. DeWolfe, she stopped negotiating.
- [85] I find that the Family Home Order was not ambiguous. It only contemplated one updated appraisal, the one on April 7, 2016. That updated appraisal was to be used to establish the value of the Family Home for all purposes and, in particular, to calculate Mr. Flanagan's interest in the property, subject only to adjustments for other property claims and with respect to child and spousal support adjustments.
- [86] In this case, the parties agreed to and incorporated into a court order, a valuation date for the Family Home that was different than the valuation date at trial. This is significant as, pursuant to s. 87 of the FLA, the value of family property is typically determined at the date of trial or the date of a separation agreement between the parties. The interpretation urged on me by Mr. Flanagan is not supported by the wording in the court order or the submissions of Mr. Flanagan's counsel made in support of the Family Home Order.
- [87] The Family Home was, "taken out of the picture", and the other issues were left to be resolved "down the road". Mr. Flanagan was not proceeding on an understanding that he would receive his interest right away.
- [88] Mr. Flanagan received consideration for the transfer of title to the Family Home to Ms. DeWolfe. From the date of the transfer, he was relieved of his obligation to pay mortgage payments, property taxes, insurance, and the cost of other upkeep of the Family Home. As a result, he was free to obtain a mortgage and purchase a property with his current spouse.
- [89] He also received the without prejudice transfer of Ms. DeWolfe's RRSPs in the approximate amount of \$36,000.
- [90] The parties' children also benefited from being able to stay in the Family Home without disruption.
- [91] If Mr. Flanagan had obtained an order for sale of the Family Home, the proceeds of the sale would have been held in trust pending agreement of the parties or a consent order. Without access to the funds, it is not clear what accommodation arrangements could have been made by Ms. DeWolfe for herself, the twins, and JSD. The agreement and Family Home Order gave both parties certainty as to her and the twins' living situation.

- [92] Ms. DeWolfe took on all of the risk with respect to the mortgage and expenses on the Family Home.
- [93] Mr. Flanagan, through his counsel, could have incorporated a date for the calculation of the equalization payment into the terms of the Family Home Order; he did not do so. Rather, it was left to be calculated "down the road" at an unspecified date.
- [94] Both parties were to blame for matters not resolving as quickly as they could or should have. For a period of time, Mr. Flanagan was subject to the terms of a protection order granted by the Provincial Court, which prevented direct and indirect contact between the parties. There were outstanding disclosure issues. Both parties sought certain documents from the other. Further, through no fault of his own, Mr. Flanagan changed his counsel a number of times, which delayed matters. Then, COVID-19 affected the scheduling of applications in this file and the scheduling of the trial. In this case, homeschooling the twins, and dealing with their anxiety, was demanding of Ms. DeWolfe's time and emotional resources.
- [95] Ms. DeWolfe has benefitted from the increase in the value of the Family Home, but there is no basis, on the facts of this case, for setting aside the agreement the parties reached in March 2016 to deal with the Family Home separately, or the terms that they incorporated into the Family Home Order.
- [96] Enforcing the Family Home Order creates no significant unfairness in this case.

Other Property Issues

What is the value of the boat?

- [97] The parties purchased a 2007 Bluewater Shadow, a fresh water ski boat, in 2009. The receipt for the purchase was filed as an exhibit, and it showed a purchase price of \$19,160 for the boat and its trailer.
- [98] The parties disagree on the value of the boat. Ms. DeWolfe says it was worth \$32,500, and Mr. Flanagan says it was worth the \$13,000 he sold it for in September 2018 to a friend. The sale was in breach of Master Keighley's order.
- [99] Ms. DeWolfe testified that in addition to the purchase price of the boat, they spent about \$5,000 on custom covers and \$2,000 to \$3,000 on speakers and a stereo. She described it as well-maintained.
- [100] Mr. Flanagan said that the boat was not in as good a shape as it was when the parties bought it. It needed detailing and to be polished or waxed. He testified that they spent roughly \$1,400 on covers and about \$2,000 on speakers.
- [101] Mr. Flanagan put in evidence a listing from a California boat dealer for a Bluewater Shadow at a price of US\$10,500. The listed boat is one year older than the one the parties owned. The listing did not say whether the boat had a stereo or covers.

[102] Doing the best I can with the evidence I have, I conclude that the boat was sold for less than it was worth. Based on current conversion rates, US\$1.00 is worth about \$1.28. Therefore, US\$10,500, the listing price for the Californian 2006 Bluewater Shadow, converts to \$13,482. Considering that: the Californian listing does not appear to include custom covers or a \$2,000 stereo system; the Californian boat is one year older than the parties' boat; and that Mr. Flanagan sold the boat almost four years ago when it was eleven years old, I conclude that a fair value for the boat is \$20,000. The parties are to share that value equally.

Is Mr. Flanagan entitled to share in the child support settlement?

[103] On February 8, 2005, Judge Alexander of the Provincial Court ordered JSD's biological father to pay \$2,000 a month in child support.

[104] When the parties began living together, Ms. DeWolfe was receiving child support from JSD's biological father. In 2012, after he learned of the birth of the twins, JSD's biological father stopped paying support, and the parties became solely responsible for supporting JSD.

[105] After the parties separated, Ms. DeWolfe settled her claim for arrears of child support from JSD's father, together with any retroactive claims she had for support and claims for extraordinary expenses. The all-inclusive settlement amount was \$50,000. The relevant part of Judge G. N. Smith's July 26, 2016 order confirming the settlement, provided as follows:

[Father] shall pay Nicole Charlene DeWolfe \$50,000 by September 30, 2016 which is in full and final satisfaction of all child support arrears accumulated pursuant to the Order of the Honourable Judge Alexander pronounced herein on February 8, 2005 (Judge Alexander's Order) and in full and final satisfaction of any retroactive claims for support inclusive of a claim to extraordinary expenses (the Arrears).

[106] Upon payment of the arrears as defined in the order, Ms. DeWolfe was required to withdraw her enforcement claims with the Family Maintenance Enforcement Program.

[107] Mr. Flanagan seeks to share in the settled arrears of child support, prorated for the time he supported JSD, without contribution from JSD's father. He submits that \$30,000 of the settlement amount was for the period of time he and Ms. DeWolfe were supporting JSD without contribution from JSD's biological father.

[108] The parties were unable to find any authority that directly addressed this issue.

[109] For the following reasons, I am satisfied that the lump-sum child support arrears, negotiated by Ms. DeWolfe, should be shared, in part, with Mr. Flanagan.

[110] Child support is the right of the child; it is not the right of the parent with custody: *Earle v. Earle*, 1999 BCSC 283 at para. 17. The purpose of child support is not to transfer wealth from one ex-spouse to the other. Its purpose is to ensure that children of the marriage are adequately supported in each household: *D.W.G. v. E.W.G.*, 2006 BCSC 1682 at para. 29.

- [111] The practical reality of child support is that it is paid by one parent to the other in order to compensate the recipient parent for the cost of the basic necessities of life for a child in their care. It extends to the cost of feeding, clothing, and sheltering the child. JSD's father was obliged to contribute to those costs while JSD was being cared for by Ms. DeWolfe and Mr. Flanagan; commencing in 2012, he did not, and they bore those costs.
- [112] If child support for JSD had been paid ongoingly in accordance with Judge Alexander's order, it would have been available to Ms. DeWolfe and Mr. Flanagan's household to contribute to JSD's costs. The fact that it has now been paid retroactively in a lump-sum, after Ms. DeWolfe and Mr. Flanagan separated, should not change the analysis. It was money that would have gone into their household. Therefore, it is only fair that Mr. Flanagan share in part of the retroactive child support settlement.
- [113] Calculating the portion of the settlement amount that is referable to the period of time for which the parties supported JSD is almost impossible on the record before me. Mr. Flanagan proposes that he be entitled to share in \$30,000 of the arrears on a pro rata basis. However, a pro rata calculation fails to consider that some portion of the \$50,000 is related to retroactive support for the almost two-year period between JSD's birth and the pronouncement of Judge Alexander's order in which Ms. DeWolfe did not receive child support. Further, it fails to consider that some portion of the \$50,000 is related to s. 7 expenses incurred before the parties lived together and after their separation.
- [114] Doing the best I can with the evidence I have, and in an admittedly rough and ready approach, I conclude that \$20,000 of the arrears settled by Ms. DeWolfe are a family asset and should be shared equally.

Is Mr. Flanagan entitled to a repayment of the child support he paid for JSD pursuant to the Muir Order?

- [115] As set out above, pursuant to the Muir Order, Mr. Flanagan was required to pay child support of \$3,281 for three children commencing on June 8, 2015. Mr. Flanagan paid that support until June 8, 2021, when Justice Forth terminated his obligation to pay child support for JSD and ordered him to pay \$2,572 for the twins.
- [116] Justice Forth also concluded that an adjustment had to be made for the child support that Mr. Flanagan paid for JSD. However, Justice Forth did not undertake that exercise during the hearing.
- [117] I agree that an adjustment has to be made for the child support that Mr. Flanagan has paid for JSD.

[118] In the six years during which Mr. Flanagan paid child support, the table amounts changed. On the evidentiary record before me, I am unable to precisely calculate the total of Mr. Flanagan's overpayment. On a simple math equation, assuming that the table amounts remained the same for six years, Mr. Flanagan overpaid child support by \$709 a month for 72 months for a total of \$51,048.

[119] If the parties are unable to agree on the adjustment for Mr. Flanagan's overpayment, which I urge them to do, I refer this matter to the Registrar for the purpose of finalizing the amount of the overpayment.

Is Mr. Flanagan entitled to a return of his share of the contributions to JSD's RESP?

[120] While the parties were living together, they contributed to an RESP for JSD. The initial deposit came from JSD's father's child support. The government of Canada matched, to a limit, their contributions. Mr. Flanagan testified about two different amounts he was contributing for each child. The contributions were either \$25 or \$50 for about two years. There is no clear evidence before me about the amount or timing of the contributions.

[121] The parties were unable to find any cases under the FLA where this issue was considered.

[122] The contributions were made when Mr. Flanagan had a parental relationship with JSD.

[123] Further, the contributions were made from joint family funds. To the extent that they were made when the parties were receiving child support from JSD's father, some notional and incalculable portion of the contributions came from that child support. The parties also benefited from matching government contributions into the RESP. Any precise mathematical calculation of Mr. Flanagan's contributions, as a part of the total available, is nearly impossible.

[124] Ms. DeWolfe has exhausted JSD's RESP fund for his post-secondary education.

[125] In *Vetrici v. Vetrici*, 2015 BCCA 146 at para. 36, the court determined that an RESP is the property of the subscriber (parent) until the subscriber directs payment to the beneficiary. Since the RESP has been exhausted, it may not be Ms. DeWolfe's or Mr. Flanagan's property.

[126] However, Ms. DeWolfe conceded that she was prepared to credit Mr. Flanagan with an equalization payment for half of \$6,635, the actual contributions made by the parties during the relationship. In light of that concession, Mr. Flanagan is entitled to an equalization payment of \$3,317.

The Excluded Property Claims

Has Ms. DeWolfe proven her excluded property claim for \$40,000 as it relates to the Family Home?

[127] The parties disagree about whether the gift from Ms. DeWolfe's parents was, as Ms. DeWolfe testified, a gift to her alone, or, as Mr. Flanagan testified, a gift to both of them.

- [128] The burden of proving an excluded property claim is on the person advancing it. In this case, that means that Ms. DeWolfe must prove, on a balance of probabilities, that her parents intended the payment of \$40,000 by cheque to her, to be a gift to her alone.
- [129] Mr. Flanagan testified that the \$40,000 was intended as a gift to both parties. His evidence was not put to Ms. DeWolfe in cross-examination.
- [130] A gift from one spouse's parents, used by the parties to buy a family home or pay down a mortgage, may not give rise to an exclusion claim if the gift was intended to benefit both spouses. The intention of the donor when making the gift is what is relevant: *Cabezas v. Maxim*, 2014 BCSC 767, aff'd 2016 BCCA 82 at paras. 22, 29, 36.
- [131] In this case, there was no evidence of the donor's intent. The fact that the cheque was written to Ms. DeWolfe alone can be explained by the fact that, at the time, the parties did not share a bank account.
- [132] Ms. DeWolfe did not produce a written gift letter or any contemporaneous written communication from which I could find evidence of her parents' intent, and she did not call either of her parents to testify. In the circumstances, I conclude that Ms. DeWolfe has not proven her exclusion claim to the required standard of proof.
- Has Mr. Flanagan proven his excluded property claim of \$39,000 as it relates to the Family Home?
- [133] Mr. Flanagan submits that he is entitled to an exclusion in the amount of the net proceeds of sale from River Road, a property purchased and owned by him prior to the parties' relationship. He has the burden of proving the exclusion.
- [134] Mr. Flanagan purchased River Road in July 2007 for a purchase price of \$397,000 with a \$10,000 deposit. Because he was unable to meet the minimum down payment requirement, he was in a low equity mortgage situation and was required to pay an additional \$14,689 to the Canadian Mortgage and Housing Commission. At the date of closing, the total mortgage amount was \$411,689, amortized over 40 years, for a five-year term, at an interest rate of 5.2 percent.
- [135] As a result, when Mr. Flanagan bought River Road, it was mortgaged for more than he paid for it and presumably more than it was worth. Very little of the mortgage would have been paid down in the 16 months during which he owned River Road and before Ms. DeWolfe moved in. I find it probable that on the date Ms. DeWolfe moved in, River Road was still worth less than the mortgage. It is also possible that the value of River Road may have decreased due to the 2008 recession.
- [136] Any increase in the value between the date Ms. DeWolfe moved in and the sale of River Road in 2012 is family property and would be shared equally.
- [137] I conclude that Mr. Flanagan has not proven his excluded property claim.

Has Mr. Flanagan proven his excluded property claim of \$24,132 as it relates to his RRSP?

- [138] Mr. Flanagan claims entitlement to an exclusion of \$24,132, the amount he had in RRSPs when the parties commenced cohabiting.
- [139] Mr. Flanagan agreed that in about July 2007, he borrowed \$10,000 at an interest rate of 8.5 percent, for the purposes of contributing to an RRSP with Primerica. In cross-examination, he agreed that the loan was paid off during the parties' relationship. It is not clear on the evidence how much of the debt Mr. Flanagan retired before the parties began cohabiting.
- [140] The Primerica documents Mr. Flanagan produced with respect to his RRSP showed that it was worth \$25,985.08 as of June 30, 2008, but had dropped to a closing market value of \$22,280.20 by December 31. As the parties began cohabiting at the beginning of October 2008, the value of the RRSP was presumably somewhere between those values.
- [141] The documents and the evidence do not make it possible to precisely calculate the value of Mr. Flanagan's excluded property claim with respect to the Primerica RRSP. Doing the best I can with the available evidence, Mr. Flanagan is entitled to an excluded property claim of \$14,000. I arrive at that number by using a value of \$24,000 for the RRSP and deducting the \$10,000 debt as, in light of the high interest rate, I think it unlikely that much of the principal would have been paid down between the date of the loan and the date the parties began to cohabit.

Spousal Support

- [142] Ms. DeWolfe claims spousal support on a compensatory basis. Based on her evidence, uncontradicted for the most part by Mr. Flanagan, she stopped working at Ajilon due to a health scare and changes in Ajilon's Canadian operations. The parties agreed that they wanted to start a family and that she would find work closer to home, thereby reducing the stress of commuting.
- [143] Ms. DeWolfe did not work for about a year but then accepted a job at Starbucks, earning slightly more than minimum wage, so that she would qualify for maternity benefits from the Federal Government. Before the end of 2009, she learned that she was pregnant with twins. The pregnancy was considered high-risk, and she was put on medical leave before the twins were born on June 11, 2010. She did not return to Starbucks afterwards.
- [144] The parties agree that Mr. Flanagan would be the primary income source for the family and Ms. DeWolfe would care for the three children. Mr. Flanagan was earning a significant income, exceeding \$200,000.
- [145] By the spring of 2012, the parties were financially able to buy the Family Home without Ms. DeWolfe earning an income.

- [146] Starting in 2014 and until 2015, Ms. DeWolfe trained as a yoga instructor. The cost of the course was \$2,000, some portion of which was paid prior to the parties' separation. Although I did not hear much evidence about the parties' plans with respect to the yoga training, presumably Ms. DeWolfe intended to work in that capacity at some point. She never did.
- [147] The parties separated when the twins were four years old and JSD was 11 years old. The twins were in preschool two or three days a week from 8:30-11:30 a.m., and JSD was in school full time. Ms. DeWolfe was not employed at the time and had not been employed for about six years.
- [148] LF was experiencing some learning difficulty in preschool and attended learn- to-read tutoring. Concerns about his learning difficulty became more pronounced in kindergarten. Commencing in Grade 1, LF was put on a waitlist for a psychological educational assessment ("Assessment"). Because there was a concern that there was a visual component to his learning delays, his vision was tested and he got glasses.
- [149] By Grade 2, LF was falling behind the rest of the class. He was not recognizing letters in the alphabet and was behind in reading. A school psychologist recommended that Ms. DeWolfe enrol him in Orton-Gillingham tutoring and provided her with a contact name. He has been attending two or three times a week since the spring of 2018.
- [150] At the same time, there was a concern that LF had auditory processing issues, and his hearing was tested. After a referral from the family doctor, in October 2018, LF underwent an audiological assessment. He was identified as having a Central Auditory Processing Disorder. The report indicated memory and developmental issues. If he is in a noisy classroom, the background noise interferes with his uptake of information. He also has concentration and memory issues.
- [151] Because LF had not yet had a publicly-funded Assessment, he had not been designated for additional classroom supports. Ms. DeWolfe arranged for the Assessment to be completed privately. He was tested at the end of 2018, and the report was prepared on January 2, 2019. The Assessment concurred that LF had an auditory processing disorder. He was diagnosed with specific learning disorders in reading, written expression, and math, which qualified him for designation as a student with a learning disability. The report recommended that LF have an Individual Education Plan to deal with his learning disabilities.
- [152] LF and AF suffered higher than usual anxiety about COVID-19, and they continue to be homeschooled. Ms. DeWolfe estimated that she spends six to seven hours a day on schooling, including the tutoring that both of the twins receive.
- [153] The twins have not seen their father for more than two years. Pursuant to a Provincial Court order, there is a plan for them to participate in a family reunification program.

[154] Ms. DeWolfe began working part time in about the middle of July 2018. She works for Inlet doing accounting and clerical work from home. Inlet is owned by Mr. Halstrom and his partner. Ms. DeWolfe testified that the work provided her with flexibility in hours, and that it permits her to manage LF's tutoring schedule and support both boys in their schooling. She earns \$20 an hour and works about 20 to 24 hours a week.

Income Information

[155] Based on the parties' income tax returns, the parties earned the following line 150 or 15000 totals in the following years:

Year

Mr. Flanagan's Income

Ms. DeWolfe's Income Excluding Spousal Support

2015

\$198,135

0

2016

\$181,050

0 Ms. DeWolfe received \$1,500 in room rental from Mr. Halstrom.

2017

\$161,429

\$1,759.29 from taxable dividends, interest and investment income, and taxable capital gains. Ms. DeWolfe also received \$6,000 in room rental from Mr. Halstrom.

2018

\$168,296

\$11,737.35 from employment income, taxable dividends, interest and investment income and taxable capital gains. Ms. DeWolfe also received \$6,000 in room rental from Mr. Halstrom.

2019

\$163,996

\$26,298.88 from employment income, taxable dividends, interest and investment income and taxable capital gains. Ms. DeWolfe also received \$6,000 in room rental from Mr. Halstrom.

2020

\$195,638

\$29,015.03 from employment income, taxable dividends, interest and investment income, taxable capital gains, and CERB benefits. Ms. DeWolfe also received \$6,000 in room rental from Mr. Halstrom.

2021

\$195,638

\$28,621- this figure was taken from Ms. DeWolfe's submissions. No 2021 Income Tax Return was available.

[156] At trial, Mr. Flanagan's income for 2021 was not available, so, for the purposes of spousal support, I have used his 2020 income.

[157] According to the Forth Order, Ms. DeWolfe was imputed an income of \$25,000 commencing June 8, 2021, and Mr. Flanagan was ordered to pay spousal support of \$2,327 per month, the low end of the range.

[158] As I understand Mr. Flanagan's submission, he is not disputing that Ms. DeWolfe is entitled to spousal support, but he says that it should terminate in December 2019, five years after separation. He argues that based on the assets set out in Ms. DeWolfe's financial statement, I should conclude that Mr. Halstrom is in a spousal relationship with Ms. DeWolfe and contributing more than the \$500 a month in rent to her household. He also argues that after separation, Ms. DeWolfe did not take any steps to become self-sufficient.

[159] Ms. DeWolfe submits that based on the Spousal Support Advisory Guidelines ("SSAG"), she should be entitled to spousal support until the end of 2022, seven years after separation, slightly less than the average duration for support with respect to a relationship of 6.25 years based on the with child support formula.

[160] For the reasons that follow, I have concluded that spousal support in this case should terminate as of the end of 2021. It should be paid at the mid-range amount pursuant to the SSAG based on the with child support formula with two children. There is no evidentiary basis in this case to depart from mid-range spousal support.

[161] Spousal support is to be calculated based on Mr. Flanagan's and Ms. DeWolfe's actual incomes for 2015 through to the end of 2021. This is not a case where income should be imputed to Ms. DeWolfe.

[162] First, I accept that Ms. DeWolfe has a strong compensatory claim based on her years away from the workforce and her role as the primary care parent for three children, allowing Mr. Flanagan to work, including overtime hours, to support the family.

- [163] Second, after separation, as the primary care parent of three children, two of whom were not in full-time school, I am not persuaded by Mr. Flanagan's argument that Ms. DeWolfe was in a position to pursue employment as a yoga instructor, or in any other capacity until 2018, when she started working part time for Inlet. Her combined childcare costs for three children may well have exceeded her income.
- [164] Third, prior to the parties' relationship, Ms. DeWolfe's only significant work experience was in the hospitality industry, working nights and evenings. She did that work when she was young and had no family responsibilities. She had not worked in hospitality for about six years prior to her separation and could not do so after separation because of her responsibility for the children and the fact that childcare was unlikely to be available. While she had trained as a yoga instructor, she had never actually worked as an instructor, and she had limited ability to work in the evenings or on weekends. I accept her evidence that she suffered an injury to her rotator cuff in a motor vehicle accident, which has affected her ability to teach yoga. She would have had limited opportunities to retrain to become self-sufficient in her circumstances.
- [165] Fourth, the end of the parties' relationship was difficult, involving allegations of violence, resulting in the Provincial Court issuing protection orders against Mr. Flanagan. Ms. DeWolfe and the children received counselling, and I accept that the twins struggled post-separation.
- [166] Fifth, Ms. DeWolfe has assumed all of the responsibility for managing LF's learning disability including advocating for him, pursuing appropriate testing, liaising with the School District and medical practitioners, and arranging for and taking LF to Orton Gillingham tutoring. She also arranged for tutoring for AF who, while he has not been diagnosed with a learning disability, required extra assistance. Mr. Flanagan suggested that the tutoring could have been arranged after school and on weekends but, having established a relationship with an effective tutor early on in LF's school life, I accept that Ms. DeWolfe acted reasonably in continuing with the same tutor.
- [167] Sixth, during COVID-19, and the school shutdowns, Ms. DeWolfe was available to home school the twins who were experiencing extreme COVID-19 anxiety, as acknowledged by Mr. Flanagan.
- [168] Seventh, while I accept that Ms. DeWolfe's financial statement suggests that there is more income coming into her household than what she earns and the rent she receives from Mr. Halstrom, because her claim is compensatory as opposed to need-based, Mr. Halstrom's contribution to Ms. DeWolfe's household is less relevant to spousal support.
- [169] Eighth, Ms. DeWolfe is earning \$20 an hour working part time for Inlet. Had she returned to work in hospitality, she likely would have earned less than that and incurred childcare costs that would have been s. 7 expenses.

[170] Finally, I have terminated spousal support at the end of 2021 because, by that date, in my view, Ms. DeWolfe was capable of working more hours for Inlet and would have been earning more than she earned working for Ajilon or in the hospitality industry. Any economic disadvantage she suffered as a result of being the primary care parent for the parties' children would have been appropriately compensated. School attendance had returned to normal for most children starting in September 2021 and with the counselling the twins were receiving, even a gradual return to school should have resulted in them being in full-time attendance by December of that year.

Calculation of Spousal Support Arrears

[171] With respect to the calculation of spousal support arrears, Ms. DeWolfe conceded that Mr. Flanagan is entitled to a credit of \$18,276 as against his child and spousal support obligation for household expenses paid by him between January 2015 and May 2015.

[172] A recalculation of spousal support paid between the effective date of the Muir Order and the Forth Order will be required to consider:

- a) the increase in spousal support payable based on two rather than three children of the marriage;
- b) the recalculation based on the parties' actual incomes between 2015 and 2021;
- c) a readjustment from the low end to the middle of the range suggested by the SSAG between July 8, 2021 to December 8, 2021; and
- d) a credit for spousal support paid after the end of 2021, the date on which I have concluded that it should terminate, to date.

[173] The parties presented different SSAG calculations and did not agree on the information that was to be included in the calculations. Further, the SSAG calculations presented were not prepared based on the order I have made.

[174] If, on receipt of these reasons, the parties are unable to agree on the recalculation required, they will appear before the Registrar of the Court to finalize any readjustment required.

What Special Expenses Should Mr. Flanagan Contribute to and in What Proportion?

[175] Ms. DeWolfe claims s. 7 expenses totalling \$71,442 since separation as follows:

\$7,940 - for the period from January 2015 to May 31, 2017;

\$7,052 - for the period from June 1, 2017 to September 28, 2018;

\$18,716 - for the period from October 2018 to December 2019;

\$24,001 - for the period from January 2020 to December 2021; and

\$13,733 - for the last receipts of 2021.

- [176] Mr. Flanagan does not dispute many of the s. 7 expenses. He also does not dispute that: tutoring expenses; medical and dental expenses, including glasses, and counselling; and extra-curricular activities, including hockey and baseball are appropriate s. 7 expenses.
- [177] Rather, Mr. Flanagan is concerned that Ms. DeWolfe enrolled the twins in activities without consulting him and which he cannot afford. He also submits that Ms. DeWolfe's failure to deliver original receipts to him, and to deliver receipts in a timely way, meant that he was unable to obtain full or partial reimbursement from Brymark's extended medical and dental plans, which cover the twins.
- [178] Based on the parties' incomes, Ms. DeWolfe submits that, on average, between 2015 and 2021, the parties' respective shares of s. 7 expenses are 73.2 percent for Mr. Flanagan and 26.8 percent for Ms. DeWolfe. I did not hear submissions from Mr. Flanagan disputing those percentages, and I set their respective shares at 73 percent and 27 percent for all years.
- [179] From the expenses claimed by Ms. DeWolfe, I would deduct the following expenses as not qualifying as s. 7 expenses and not being otherwise agreed to by the parties:

January 2015 to May 31, 2017

- [180] All costs for Timberline Ranch: As Ms. DeWolfe was not working, the twins did not need to participate in day camps over the school winter and spring breaks or in the summer. These activities are not s. 7 expenses and were not agreed to in advance.

June 1, 2017, to September 28, 2018

- [181] The cost of the Elite Dreams Football Camp, the Timberline Ranch, and RPM: The twins did not need to attend summer camp at RPM, and the other activities are not s. 7 expenses, and were not agreed to in advance.

October 2018 to December 2019

- [182] At the hearing, Ms. DeWolfe withdrew her claims for hot lunches, and the amounts paid to Maple Ridge Parks Recreation and Culture for "Learn to Paddle" and "Pottery". These activities are not s. 7 expenses and were not agreed to in advance.
- [183] On the evidence, I accept that Ms. DeWolfe was not providing receipts to Mr. Flanagan in a timely way and that, as a result, he was unable to receive reimbursement for some of the expenses that would, otherwise, have been covered by his extended health benefits. It is, however, impossible to determine which invoices this would have applied to and when Mr. Flanagan's coverage, which is limited with respect to certain expenses, would have been exceeded. I was not provided with details of the extent of the coverage and what limits apply. For example, there appear to be limits on his coverage for orthodontic, chiropractic, counselling, vision care, and tutoring expenses.

[184] The parties' inability to meaningfully communicate with each other due to the protection orders and their distrust of each other after Mr. Flanagan terminated JSD's and Ms. DeWolfe's benefits without notice to her, as well as his preventing her ability to have dental receipts submitted directly by the dentists' office meant that, to a certain extent, he contributed to the difficulty in receiving insurance reimbursement.

[185] In all the circumstances, I think it is fair to address this by reducing by 5 percent the remaining balance of all of the remaining s. 7 expenses incurred by Ms. DeWolfe.

Conclusion on Permitted S. 7 Expenses

[186] Deducting the s. 7 expenses, I have disallowed and reduced the total remaining amount by 5 percent, Mr. Flanagan is to pay to Ms. DeWolfe 73 percent of the following adjusted special expenses:

- a) \$6,787 for January 2015 to May 31, 2017;
- b) \$5,689.77 for June 1, 2017 to September 28, 2018;
- c) \$17,278.98 for October 2018 to December 2019;
- d) \$22,801 for January 2020 to December 2021; and
- e) \$13,046 for the last receipts of 2021.

[187] The total of these s. 7 expenses is \$65,603, and Mr. Flanagan's 73 percent share is \$47,890.

Orders

[188] In addition to the property division orders that are consented to as set out in para. 8 of these reasons, I make the following orders:

Child Support and S. 7 Expenses

- a) Based on an annual guideline income of \$195,638, Mr. Flanagan will pay to Ms. DeWolfe for the support of the twins \$2,698 per month commencing January 1, 2022, and continuing on the first day of each month thereafter, for as long as the twins are entitled to receive support pursuant to the FLA ("Child Support").
- b) Commencing January 1, 2022, Mr. Flanagan will pay to Ms. DeWolfe 73 percent of the following s. 7 expenses of the twins:
 - i. medical and dental expenses, including but not limited to eye glasses, orthodontic expenses, and counselling;
 - ii. tutoring expenses;
 - iii. hockey, baseball and swimming expenses; and

- iv. such further and other expenses as agreed to by the parties.
- c) The Child Support and proportional share of s. 7 expenses will be reviewed on June 1, 2023, and on June 1 of each year thereafter. The first variation will be retroactive to January 1, 2022, and, for each subsequent year, to January 1 of that year.
- d) The parties will exchange the documents required by the Federal Child Support Guidelines by May 1 of each year for as long as the twins are entitled to receive support pursuant to the FLA.
- e) Ms. DeWolfe will continue to hold the two Scotiabank RESP accounts in trust for the twins. Any sums remaining after the twins reach the age of 25 will be divided equally between the twins.
- f) Mr. Flanagan will pay Ms. DeWolfe \$47,890 for his 73 percent proportionate share of s. 7 expenses incurred between 2015 and the end of 2021.
- g) If the parties are unable to agree on the adjustment for Mr. Flanagan's overpayment of child support, they will appear before the Registrar of the Court to finally determine the adjustment.

Spousal Support

- h) If the parties are unable to agree on the adjustment, if any, in the amount of Mr. Flanagan's spousal support payable to Ms. DeWolfe, they will appear before the Registrar of the Court to finally determine the adjustment.

Property Division

- i) Ms. DeWolfe will pay Mr. Flanagan \$81,705 within ten days of this order for his share of the appraised value of the Family Home pursuant to the Family Home Order.
- j) Mr. Flanagan will forthwith transfer his interest in the Suburban vehicle to Ms. DeWolfe.
- k) Mr. Flanagan will pay Ms. DeWolfe \$10,000 for her interest in the boat.
- l) Ms. DeWolfe will pay Mr. Flanagan \$10,000 for his share of the child support settlement she received from JSD's father.
- m) Ms. DeWolfe will pay Mr. Flanagan \$3,317 for half of the contributions the parties made to JSD's RESP.
- n) Mr. Flanagan is entitled to an excluded property claim with respect to his RRSP in the amount of \$14,000.
- o) Each party will otherwise keep the assets held in their own names and possession for their own use absolutely.
- p) Each party will be solely responsible for the debts held in their own names.

q) The balance of relief sought in the notice of family claim and counterclaim is dismissed.

[189] Remaining to be determined is the issue of the equalization of Mr. Flanagan's union pension plan. If this issue is resolved, it should be included in the final order.

Costs

[190] In their pleadings, each party sought costs of the trial. If, after reading these reasons, the parties are unable to agree on a costs order, or wish to make submissions on whether any settlement offers should have been accepted, they may seek to appear before me for a case management hearing to discuss the process for submissions on costs.

"MacNaughton J."

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Prepared on 25 October 2026 · Esheria