
CANADA / JUDGMENT

Dhaliwal v. Dhaliwal

2017 BCSC 2083

COURT

Supreme Court of British Columbia

DECIDED

16 November 2017

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2017 BCSC 2083 Dhaliwal v. Dhaliwal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Dhaliwal v. Dhaliwal

2017 BCSC 2083

Date: 20171116

Docket: E4107

Registry: Chilliwack

Between:

Sinder Kaur Dhaliwal

Claimant

And

Paramjit Singh Dhaliwal

Respondent

Before: The Honourable Mr. Justice Branch

Written Reasons for Judgment

Counsel for the Claimant:

P. Virk

Counsel for the Respondent:

M. Hargrave

Place and Dates of Trial:

Chilliwack, B.C.

September 11-15, 2017

October 20, 2017

Place and Date of Judgment:

Chilliwack, B.C.

November 16, 2017

I. INTRODUCTION

- [1] This is a family law matter where the parties separated more than 15 years ago. At long last, they are seeking a final determination of their respective rights and obligations. This passage of time has both clarified and complicated matters. Their children have reached the age of majority, attended post-secondary institutions and, in the case of their two daughters, married. The value of the family home has increased substantially over the long course of the separation. The parties themselves have moved past middle age, and both suggest that they are now unable to work.
- [2] These life events occurring since separation drive the core issues that must be addressed in this judgment.

II. BACKGROUND

- [3] Sinder Kaur Dhaliwal, the claimant wife, was born in India on December 4, 1962, and is currently 54 years old. The claimant's education is limited, having reached only a grade 10 level in India. Paramjit Singh Dhaliwal, the respondent husband, was born on August 27, 1961 and is 56 years old. The respondent also received very limited education, reaching a grade 4 level. Both speak limited English.
- [4] The respondent immigrated to Canada in or around February 1980. The parties were married on January 27, 1984 in India. The claimant immigrated to Canada in 1985, having been sponsored by the respondent.
- [5] The parties purchased their first home on Dehavilland Street in Abbotsford jointly with the respondent's brother, Sarbjit Singh Dhaliwal, who is married to the claimant's sister, Gurdip.
- [6] In or around 1994, the parties purchased the matrimonial home located on McCurdy Place in Abbotsford (the "Home"). The Home was purchased for approximately \$213,000, using \$95,000 received from the disposition of the parties' share in the Dehavilland Street property, and financing was obtained for the balance. The mortgage was apparently paid off by the time the parties separated in November 2002.

[7] The parties had two daughters and one son during their marriage, namely:

Prabhjot Kaur Dhaliwal, born July 18, 1986 ("Prabhjot")

Navneet Kaur Dhaliwal, born September 19, 1987 ("Navneet")

Arvin Singh Dhaliwal, born September 17, 1991 ("Arvin").

[8] The marriage was a very unhappy one, with the claimant and each of the children giving evidence of substantial and disturbing physical and mental abuse inflicted by the respondent on both the claimant and the children. The respondent drank heavily, and there were various criminal proceedings taken against him as a result of this abuse. I found the claimant and her children's testimony to be credible on this issue. The respondent's evidence, on the other hand, was evasive, aggressive, and vague. He was shown to have given several inconsistent answers at trial, as compared to his earlier responses on discovery. He made it clear that he would not respect a spousal support order if the court were to make one. Where the evidence differed between the respondent, and the claimant and the children, I accept the evidence of the claimant and her children: *Sohi v. Sohi*, 2015 BCSC 1043, at paras. 95-99.

[9] The respondent started working for Waldun Forest Products ("Waldun") as a shake packer in or about 1990. He had previously worked in a cannery and as a farm labourer. The respondent was a poor worker, with multiple citations being noted in his work file. However, his employment did continue until August 2012, at which point there was a fire at the work site. Waldun called him back to work once they were back up and running, but the respondent did not respond to their entreaties to return to work. By the time he decided in the spring of 2013 that he should go back to Waldun, the position was gone. He has earned very little since then. He had been receiving a rate at Waldun that would reach full time earnings of about \$62,000 per year, although he was averaging closer to \$52,000 given injuries and temporary layoffs. The respondent has a pension, earned through his work at Waldun, valued at approximately \$61,000, as well as certain Canada Pension Plan ("CPP") credits.

[10] The claimant worked seasonally as a farm worker and as a berry picker during parts of the marriage, but her ability to work was restricted by child care responsibilities. She was not working regularly at the time of separation. She has accumulated some CPP credits.

[11] The claimant was primarily responsible for the care of the children. The respondent was actually a negative element in this respect, disrupting the children's homework, berating them, and otherwise abusing them.

[12] The parties separated in or around November 2002 when the respondent left the Home. The respondent disconnected the utilities after he left, and removed a large number of family items. He did not tell his family where he had gone. They only learned of his whereabouts a month or so later. The claimant made early efforts at reconciliation, but the respondent refused those overtures. Flowing from this evidence, I find that there is no possibility of

reconciliation, the parties have been living separate and apart for many years, and there has been no collusion.

- [13] The claimant's health started to deteriorate after the separation, and she has not worked outside the home since then. She has had surgery on her leg and has surgery pending for her hand. She was approved for CPP disability benefits effective January 2009. The respondent did not contest that the claimant is disabled from working.
- [14] The children continued to live at the Home with their mother through high school and, in the case of the daughters, up until their marriages. Arvin continues to live at the Home.
- [15] The children have had limited contact with the respondent since the separation, beyond occasions when he physically blocked the family car in the street, and yelled verbal threats at them. He had only moved a few blocks away, which was disturbing for the children and the claimant. There was no effort on the respondent's part to engage with them in a constructive or meaningful way.
- [16] All three children pursued post-secondary education. Navneet commenced studies at the University of the Fraser Valley, but was unable to continue due to problems with depression and anxiety, which she attributes in part to the abuse and stress caused by the respondent's abuse, and the continuing problems created after the separation. She eventually returned to study at Kwantlen University College, but at this point was married. Arvin had to take time out of his police officer training for health problems, but was able to return to complete that training.
- [17] The claimant proposes the following dates for when each child ceased to be a child of the marriage:

Child

Date

Age

Basis for Date

Prabhjot

June 1, 2008

21 years, 10 months

Completed post-secondary education.

Navneet

June 15, 2012

24 years, 8 months

Married and left the Home.

Attended post-secondary education before and after marriage, with a gap created by a medical condition.

Arvin

April 30, 2016

24 years, 7 months

Completed post-secondary education.

[18] Despite their difficult upbringing, each of the children turned out to be well-spoken and thoughtful young adults. Even after all of the alleged abuse, they would still value reconciliation with the respondent but, as noted, he has shown no interest. Indeed, when the opportunity was presented to participate in family events through the marriage of his two daughters, he expressed no interest, and refused to provide any financial support. The claimant borrowed money from relatives and friends to pay for these weddings. There was evidence that the agreements were that these amounts would be repaid once the issues surrounding the Home were resolved through this litigation.

[19] The two major family assets remaining at trial were the Home and the respondent's pension. There was evidence that the pension is valued at about \$61,000. There have been several appraisals of the Home over the years, yielding the following estimates:

July 31, 2017

\$700,000

November 28, 2009

\$360,000

November 4, 2005

\$325,000

May 19, 1997

\$380,000

[20] A basement suite in the Home was rented by the claimant at various times after the separation for \$450 per month. However, the suite has not been rented since approximately 2009 due to the need for extensive repairs, which the claimant could not afford to make.

[21] In terms of material court interventions in this matter prior to trial:

- a) On October 20, 2003, interim child support was awarded in the amount of \$953 per month. On December 9, 2003 interim spousal support was awarded in the amount of \$650 per month commencing October 1, 2003.

- b) On December 15, 2003, due to the fact that the respondent was not meeting his obligations, the claimant applied for and received a garnishing order.
 - c) On June 11, 2004, an order was made requiring that an RRSP held by the respondent be cashed and the proceeds distributed equally to the parties.
 - d) On December 11, 2009, an order was made declaring that the respondent's income was \$63,345, and accordingly awarded child support for the two remaining children living at Home at \$952 per month. There was also a short retroactive reduction in the support payable as a result of a workplace injury.
- [22] As a result of the various garnishing and disposition orders, the claimant has been able to extract a total of \$150,637.23 owing against the various support orders.

III. ISSUES

- [23] The parties require direction on a number of issues, specifically:
- a) What is the proper treatment of any arrears and educational expenses?
 - b) Should an award be made for ongoing spousal support?
 - c) What is the appropriate treatment of certain Home expenses incurred by the claimant?
 - d) What is the proper treatment of the daughters' wedding expenses?
 - e) How should the pensions be managed?
 - f) How should certain other family expenses and assets be addressed?

IV. DISCUSSION AND ANALYSIS

- [24] I will address each of the key issues separately, and then provide the required final directions and orders.
- a) What is the proper treatment of any arrears and educational expenses?
- [25] There was little dispute between the parties on the straight calculation of child support payable under the various court orders, factoring in the dates when the claimant accepts the children were no longer children of the marriage. The plaintiff calculated the amount payable at \$130,079.50. The respondents' figure was actually higher, but did not appear to adjust for changes in the children's status. I am prepared to use the claimant's figure.
- [26] The parties agreed that the historical interim spousal support awarded up to trial totals \$109,200.
- [27] On top of these two amounts, the claimant seeks an order for retroactive special or extraordinary expenses of \$31,734.27. This amount is calculated by tallying the total educational expenses incurred by the three children prior to the dates set out above, reducing that figure by the value of an RESP purchased during the course of the marriage, and then applying to the respondent an 86.5% ratio of income to the remaining educational

expenses. The respondent did not take particular issue with this method of calculation. I find that it is a reasonable approach, and accept the amount claimed as retroactive special expenses under s. 7(1)(e) of the Federal Child Support Guidelines, SOR/1997-105 for the reasons set out below.

- [28] As a necessary part of this determination, I accept the cut-off dates the claimant proposes for the "children of the marriage" determination, pursuant to the factors set out in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 at 64-65 (B.C.S.C.). The claimant has met her burden of establishing that this status continued after the age of majority. It is clear that the parties contemplated that their children would attend post-secondary education, in that they had contributed to an RESP, and the claimant has provided a credit for this amount. However, insufficient funds were reserved in this vehicle, making an additional award appropriate. While the children did receive some compensation for part-time work, these amounts were marginal, and were used for family expenses rather than for tuition.
- [29] After the children reached the age of majority, they continued to reside at the Home while they pursued their studies: *L.M.W. v. R.L.W.*, 2016 BCSC 758 at para. 32. Although two of the children had gaps in the progress of their education, these were due primarily to health difficulties which in turn required that they remain in the Home: *Nordeen v. Nordeen*, 2013 BCCA 178 at para. 23. The circumstances of the children were such that they remained dependent during the period of both their post-secondary educational pursuits, and their efforts to address their health problems.
- [30] I note that any breakdown in the relationship with the respondent was not due to termination by the children, but was rather the result of the respondent's own conduct: *Berrie v. Honey*, 2015 BCSC 568 at paras. 15, 36-38.
- [31] Given the clear intention for the children to obtain a post-secondary education, a retroactive award to cover the educational expenses incurred during this period is appropriate. I am prepared to approach the child support arrears, and the claim for retroactive special expenses for educational expenses incurred beyond the age of majority, as appropriately coming within the scope of s. 3(2)(a) of the Child Support Guidelines. Both the arrears claimed pursuant to the court orders, and the retroactive award of \$31,734.27, are reasonable.
- [32] Deducting the \$150,637.23 already received by the claimant from the total amount of \$271,013.77 I have determined to be payable leaves \$120,376.54 owing.
- [33] However, the respondent asks that the arrears be cancelled. I find that he has not met the heavy onus required for such an order: *K.P.B. v. A.S.R.*, 2016 BCCA 382 at paras. 20-21, 26-29; *Earle v. Earle*, 1999 CanLII 6914 at para. 27 (B.C.S.C.). The earlier interim orders are presumed to be correct, and are not to be departed from lightly: *Hausmann v. Klukas*, 2016 BCSC 853 at para. 45.

- [34] Although it was initially suggested that the material changes were based on the respondent now suffering from a medical condition, the respondent's counsel did not advance this position in his final argument. This was a reasonable concession, as there was no objective medical evidence supporting such a position. The only evidence provided that could have supported such a conclusion was the respondent's own self-serving suggestion that he could not work because there was "something wrong with his brain". This type of evidence is generally insufficient to support a retroactive adjustment: *Childs v. Childs*, 2017 BCSC 916 at paras. 46-49.
- [35] In his closing, the respondent did suggest that any arrears should nonetheless be cancelled because otherwise the respondent would be excessively penalized for making one admittedly disastrous decision, that being his decision not to return to work when called back by Waldun after the fire. I find that this is an insufficient basis on which to cancel arrears. Improvident choices should not relieve a party from his or her legal obligations: *Earle*, para. 27. The respondent's equitable position is also undermined by a lack of evidence of reasonable efforts to find other comparable employment since abandoning Waldun in 2012.
- [36] Concerns about hardship that might accrue to the respondent if these arrears are confirmed are mitigated as a result of the fact that the amount necessary to cover the arrears is available through the equity in the Home.
- [37] An additional factor weighing against the cancellation of arrears is the long delay in seeking a remedy. The respondent abandoned his position at Waldun in August 2012. He failed to take steps to adjust the accruing arrears in the five years before trial. In *D.B.S. v. S.R.G.*, 2006 SCC 37, paras. 101-104, the court held that when considering a request for a retroactive order, it is appropriate to consider the circumstances surrounding the delay in bringing the application. The court held that it will usually be inappropriate to make a fresh support award retroactive to a date more than three years before formal notice was given (at para. 123).
- [38] The court in *D.B.S.* accepted that the payor's conduct can be relevant: paras. 105-109. As to the respondent's conduct here, it is also relevant to note that the vast majority of support paid was not paid voluntarily, but rather had to flow from garnishment and disposition orders: *Sijrecic v. Kazic*, 2016 BCSC 186, paras. 51, 67-70; *D.L.D. v. R.A.G.*, 2010 BCSC 1080 at paras. 36, 54- 56.
- [39] As such, I find that there is no gross unfairness requiring a cancellation of the arrears, and that the child and spousal support amounts owing to the claimant up to the date of trial are \$120,376.54.
- b) Should an award be made for ongoing spousal support?

[40] The claimant seeks an award for spousal support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) and the Family Law Act, S.B.C. 2011, c. 25 ("FLA"). Sections 15.2(4) and (6) of the Divorce Act identify the relevant factors and objectives:

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
 - (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[41] Under the FLA, the relevant provisions are as follows:

Duty to provide support for entitled spouse

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;

- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

Orders respecting spousal support

165 (1) On application, the court may order a spouse to pay to a designated person the amount the court considers appropriate as spousal support after taking into consideration section 160 [duty to provide support for entitled spouse].

- (2) An application under subsection (1) may be made
 - (a) by either spouse or both,
 - (b) on behalf of a spouse, by a designated agency under the Adult Guardianship Act after an investigation conducted under Part 3 of that Act, or
 - (c) if the right to apply for an order under this section is assigned to a minister under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act, by the minister to whom the right is assigned in the name of the government or the name of the person who made the assignment.
- (3) The court may not make an order respecting spousal support if the spouses have an agreement described in section 164 (1) [setting aside agreements respecting spousal support], unless all or part of the agreement is set aside under that section.

Matters that may be provided for in support orders

170 In an order respecting child support or spousal support, the court may provide for one or more of the following:

- (a) that payments be made periodically, annually or otherwise, for an indefinite or limited period or until a specified event occurs;
- (b) that child support or spousal support be paid respecting any period of time before the date the application for the order is made;

- (c) that payment of a lump sum be made, directly or in trust;
 - (d) that a charge be registered against specific property to secure payment;
 - (e) that a person who has a contract of life insurance within the meaning of Part 3 of the Insurance Act
 - (i) designate his or her spouse or child as a beneficiary, irrevocably or for the period designated by the court, and
 - (ii) either pay all premiums on the policy, or authorize his or her spouse to pay all premiums on the policy and to compensate the spouse for doing so;
 - (f) that expenses arising from and incidental to prenatal care of a mother or child, or the birth of a child, be paid, except in relation to the prenatal care of a surrogate within the meaning of section 29 (1) [parentage if surrogacy arrangement];
 - (g) subject to section 171 (1) [support obligations after death], that a duty to pay child support or spousal support continues after the death of the person having the duty, and is a debt of his or her estate for the period fixed by the court.
- [42] In *Quaife v. Quaife*, 2014 BCSC 1418, Mr. Justice G.P. Weatherill held that the Court should first consider the s. 161 objectives of spousal support, then consider the conditions, means, needs and other circumstances of the spouses under s. 162. The analysis is a "balancing act":
- [50] According to the Divorce Act (ss. 15.2(4)(6)) and the Family Law Act (ss. 161 and 162), the starting point in determining spousal support as applied to this case's facts is: (1) recognizing the economic advantage or disadvantage arising from the marriage and its breakdown; (2) relieving the economic hardship arising from the marriage breakdown; and (3) promoting the claimant's economic self-sufficiency. In passing, I note that all four children are adults and independent, so the Divorce Act, s. 15.2(6)(b) and the Family Law Act, s. 161(b) do not apply.
- [51] With these objectives in mind, I am required by the Divorce Act, s. 15.2(4) and the Family Law Act, s. 162 to look at the "condition, means, needs and other circumstances of each spouse".
- [52] This analysis is a balancing act that includes considering how long the parties lived together; the functions each party performed in the marriage; and any order, agreement or arrangement relating to supporting, express or implied, each spouse's needs and standard of living.
- [53] I must consider these factors and any other relevant factors in light of the spousal support objectives and determine what the fair and appropriate amount of spousal support should be: *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. No hard and fast rule applies to every case. The determination is always fact specific.

[43] In *L.A.I. v. K.B.Z.*, 2014 BCSC 652, Mr. Justice Schultes commented on ss. 160-162 of the FLA and the appropriate use of the Spousal Support Advisory Guidelines ("SSAG") in calculating spousal support. He states:

[130] These factors are even more closely aligned with spousal support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) than the provisions of the Family Relations Act were. As was the case under that preceding legislation, the principles articulated in cases interpreting the Divorce Act spousal support provisions are applicable, and the Spousal Support Advisory Guidelines [SSAG] are an appropriate resource to consider when arriving at the amount of an award.

[44] Looking first at the appropriateness of compensatory support, Mr. Justice Voith described the intent of spousal support under the Divorce Act in *H.C.F. v. D.T.F.*, 2017 BCSC 1226 at para. 205:

[Sections 15.2(4) and (6) of the Divorce Act] are intended to promote the sharing of the economic consequences of a marriage breakdown. The Divorce Act does so, in part, by both recognizing and accounting for the economic disadvantages that are incurred by a spouse who makes sacrifices by staying at home to care for the parties' home and children, and who thereby confers economic advantages on the other spouse; see *Moge v. Moge*, [1992] 3 S.C.R. 813 at para. 73. The nature of the losses that can be suffered by a spouse who is absent from the workforce, in order to assume a homemaking role, was further developed in *Moge* where L'Heureux-Dubé J. said:

81 The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

[45] Here the claimant was generally responsible to care for the children. The respondent provided very little support in this regard, and indeed was a negative influence. The claimant did seek to provide some income for the household by picking fruit and working at a cannery. However, she only ever earned in the range of \$9,000 per year for this work. There was no evidence that the respondent ever expected the claimant to do more work while he worked full time.

[46] The parties clearly came to an understanding that the claimant should primarily stay at home, and that this would advance their interests as a family unit: *H.C.F.* at para. 209. As such, I find that there is a compensatory basis for the spousal support claim.

[47] Needs-based support is grounded in s. 15.2(6)(c) and (d) of the Divorce Act. Need is defined by both the marital standard of living and the other spouse's post-separation standard of living: *H.C.F.* at para. 212.

- [48] The issue of need is paramount here, as the respondent accepts that the claimant is disabled. She has qualified for, and is in receipt of a stream of CPP disability payments totaling only about \$9,000 per year, which is comparable to the amount she was able to find time to earn before the marriage breakdown. At trial, the claimant was clearly struggling both emotionally, physically, and financially. There was no suggestion from the respondent that the claimant should be imputed more than the amount she is receiving in disability benefits.
- [49] In this case the parties' standard of living during the period they lived together was modest. However, the separation did worsen the claimant's economic position. She struggled to pay the expenses of the Home and had to borrow from friends and family to keep the family afloat.
- [50] The respondent's standard of living since separation has actually been worse than the claimant's. He is presently living in a combination of a rented room in his relatives' home, and in a rough cabin when the "man of the house" is out of town, in light of cultural sensitivities. However, it is difficult to place too much weight on this factor, given my conclusion that the respondent needs to be attributed income at a level that could reasonably be expected to put him in more comfortable surroundings.
- [51] As such, I find that a basis for entitlement to spousal support is made out, on both compensatory and needs based grounds. The next question is the appropriate amount and duration.
- [52] To this end, we look first to the SSAG. The SSAG, unlike the Federal Child Support Guidelines, are not legislated. They are informal guidelines that are designed to assist the court in ensuring that like cases are treated alike while providing a space for the normal process of legal development. In *Yemchuck v. Yemchuck*, 2005 BCCA 406 at para. 64, the court approved the SSAG "as a useful tool to assist judges in assessing the quantum and duration of spousal support". The court described the SSAG not as law or expert evidence, but as a synthesis or compilation of the authorities that are a product of *Moge v. Moge*, [1992] 3 S.C.R. 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. In *Redpath v. Redpath*, 2006 BCCA 338, the court suggested that an award that falls substantially outside the SSAG range should be explained:
- [42] Now that [the SSAG] are available to provide what is effectively a "range" within which the awards in most cases of this kind should fall, it may be that if a particular award is substantially lower or higher than the range and there are no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention.
- [53] The parties agreed that a lump sum spousal support award would be appropriate here. This was largely driven by three factors:

- a) the respondent made it clear that he had no intention of paying going forward periodic spousal support voluntarily;
- b) the respondent's decision to stop working makes it difficult for him to pay, or for the claimant to garnish, any ongoing income; and
- c) any lump sum amount payable should be readily available through the equity in the Home.

[54] This agreement to allow a lump sum award is consistent with the factors affecting such an award in the case law: *Robinson v. Robinson*, 2011 BCSC 1489 at paras. 96-106; *Kanizaj v. Krcmar*, 2016 BCSC 375 at paras. 166-170.

[55] The respondent suggested that a lump sum of \$50,000 would be reasonable, and provided a DivorceMate software lump sum calculation based on (1) an imputed income of \$30,000 to the respondent, (2) income of \$9,000 for the claimant, and (3) a period of 10 years. The low range was \$47,688 and the high range was \$62,550.

[56] The claimant suggested that the appropriate lump sum would be \$100,000, which was roughly based on DivorceMate calculations using an imputed income to the respondent of \$52,200 (the approximate average of the respondent's historical earnings at Waldun).

[57] In terms of determining an appropriate forward-looking lump sum for spousal support and, in particular, the appropriate income level to use, the respondent does not bear the same onus that he did in attempting to establish a basis to set aside arrears that had accrued pursuant to prior court orders. The claimant acknowledged that the spousal support amounts that were the basis of the arrears analysis conducted above were interim rather than final orders. As such, the court has greater scope at this stage of the analysis to consider the actual facts on the ground as of today, as opposed to generally being bound to the income the respondent was assessed when the prior interim orders were made.

[58] I note as well that any concern about ensuring adequate provision for the children is no longer a factor in terms of imputing an appropriate income level. There is no longer any child support payable given the age of the children.

[59] I do accept that the respondent is presently underemployed as compared to his actual capacity. However, his capacity is limited. He is illiterate. He was extremely fortunate to have obtained his prior relatively high wage position with Waldun given his limited education and experience. But he has not held that position for five years now. While I am entitled to impute an income level to the respondent when determining appropriate spousal support (see *MacEachern v. MacEachern*, 2006 BCCA 508 at paras. 41, 59, 63), this imputed amount should be reasonable in all the circumstances. In these circumstances, for the purposes of any forward-looking SSAG illustrative calculation, \$30,000 per year as proposed by the respondent is a more reasonable amount, particularly given the negative contingencies that may arise as he ages. This is (1) higher than a minimum wage position, (2) not as high as he was earning at Waldun, but (3) is substantially above the paltry amounts he has actually been earning.

[60] As such, given:

- a) that the claimant was required to sublimate any material income earning prospects in order to care for the parties' three children;
- b) the claimant's financial need;
- c) the claimant's acknowledged disability;
- d) that a reasonable income to impute to the respondent in terms of his present realistic earning capacity is \$30,000; and
- e) that the 10 year assumption used in the DivorceMate SSAG lump sum calculations takes the respondent to age 65, a reasonable retirement date;

I have determined that \$62,550 is the appropriate going forward lump sum spousal support award. This is within, but at the high end of, the applicable range suggested by the SSAG.

- c) What is the appropriate treatment of certain Home expenses incurred by the claimant?

[61] The claimant initially suggested that the Home should be valued as of the date of separation, with all increase in value accruing to her benefit. However, once the case reached final argument, that position had modified to a request for an unequal division of the Home to account for certain expenses the claimant had incurred.

[62] This shift in position was reasonable, given that the case law indicates that, in most cases, any inequity should be assessed under the discretion granted for that purpose in s. 95 of the FLA, rather than by modifying the default trial date for valuation of family assets under s. 87.

[63] In *Remmem v. Remmem*, 2014 BCSC 1552, Mr. Justice Butler stated:

[22] Part 5 of the FLA establishes the new regime for division of property and debt between separating spouses. Pursuant to s. 81(b), the starting point is that each spouse "has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt." Subject to s. 85 which deals with excluded property, family property includes all real and personal property owned by at least one spouse on the date of separation.

[24] Pursuant to s. 87, the value of family property must be determined as of the date of the hearing (unless parties have entered into an agreement) and must be based on fair market value. Section 95 provides the court with a discretion to order an unequal division of family property or debt if it would be "significantly unfair" to divide it equally.

- [64] This approach is also supported by the recent decision in *E.H.H. v. C.L.M.*, 2017 BCSC 1299, where Madam Justice Young held that there should be compelling evidence to depart from the standard valuation date as the date of trial, which departure would have the effect of disentitling one property owner the benefit of the increase in value of property which is brought about by market forces and not as a result of direct effort of the other party:
- [89] Section 87 of the FLA provides that, unless there is an agreement or court order to the contrary, the presumptive date for valuation of family property and debt should be the date of trial. A change in valuation date should certainly be the exception. It is possible to rebut the presumption but my view is that this should only be done if the facts support a finding of significant unfairness. Each case will depend on its own unique facts.
- [94] In *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 39, the British Columbia Court of Appeal said that the general rule is that parties should share in post-separation increase in value of property independent of the parties' respective contributions to post separation increase in value, noting:
- [39] Also, because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property. Once again, because of s. 81, this entitlement exists independent of the parties' respective contribution to the post-separation increase in value.
- [Emphasis added.]
- [95] I adopted the same approach in *K.A.L. v. K.J.L.*, 2017 BCSC 651.
- [96] It remains my view that there should be compelling evidence to depart from the standard valuation date as the date of trial thereby disentitling one property owner the benefit of the increase in value of property which is brought about by market forces and not as a result of direct effort of the other party. The fact that one party stayed in a home and paid the mortgage is not sufficiently compelling evidence to depart from the standard valuation date. In fact, it is fairly commonplace. If every time it occurs the court values the property at the date of separation, then s. 87 of the FLA would become meaningless. Adjustments can be made for the payment of mortgage and the benefit of occupational rent. There has to be something more to compel a departure from the date of trial valuation as there was in *Slavenova and Davie*.
- [65] As such, I have treated this issue as more appropriately addressed as a claim for unequal division of assets under s. 95 of the FLA.
- [66] The recent decision in *Nanara v. Nanara*, 2017 BCSC 1447 provides a useful summary of the law in relation to reapportionment. The court held as follows:
- [63] Certain of the key principles which may apply to this proceeding include:

- (a) the FLA espouses a presumption of equal division of family property, the entitlement to which exists independent of contributions or use. However, unequal contribution after separation can be a relevant consideration in reapportionment: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 44;
 - (b) the court must first "go through the notional exercise" of equal division, then consider if equal division would be significantly unfair. "Significantly unfair" means "compelling or meaningful having regard to the factors set out in s. 95(2)". There must be "very persuasive reasons" from departing from equal division: *Parton v. Parton*, 2016 BCSC 1528 at para. 71 [Parton]; *Dheenshaw v. Gill*, 2017 BCSC 319 at paras. 44-45; *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44;
 - (c) lack of financial disclosure is a factor which may be taken into account in considering whether an unequal distribution is appropriate: *Bamford v. Mulyati*, 2017 BCSC 945 at para. 43; *Ahmadi-Abbasabadi v. Ahmadian*, 2017 BCSC 648 at para. 171;
 - (d) reapportionment is meant to remedy substantial unfairness but does not require both parties to be in absolute equality. *Parton* at para. 108.
- [67] Here, the claimant makes a claim for unequal division based on certain expenses incurred in relation to the Home after separation. She claims an adjustment sufficient to cover half of the following expenses:

Property taxes & Utilities

\$63,953.17

House insurance

\$11,567.00

Repairs/maintenance

\$42,754.00

(collectively, the "Home Expenses")

Total Expenses

\$118,274.17

Half of Total Expenses

\$59,137.09

- [68] I note that these Home Expenses cover a period of 15 years since separation, so average to about \$8,000 per year.

- [69] In *Namdarpour v. Vahman*, 2017 BCSC 1189 at paras. 56-58, Mr. Justice Myers found that where a party has demonstrated that an asset has increased in value after separation and before trial because of that party's efforts, the Court may make an adjustment to ensure that equal division is not significantly unfair. Hence the first issue to consider is whether the Home Expenses actually increased the value of the Home in such a way that it would be substantially unfair for the respondent to gain any benefit from any associated appreciation. I do not find any evidence that the increase in value is as a result of these routine expenses paid by the claimant. These were all standard expenses that any homeowner can be expected to pay. Indeed, the claimant testified that she did not perform any major capital upgrades to the Home due to a lack of funds.
- [70] It is also appropriate to consider the respective living situations of the parties in considering whether the claimant has made out the existence of a "significant unfairness" resulting from the default property division.
- [71] In *K.A.L. v. K.J.L.*, 2017 BCSC 651, the claimant asserted that the respondent had not contributed to the maintenance of the house post-separation, and therefore should not be entitled to any increase in value the house has experienced since separation. However, the court noted that the claimant had been occupying the respondent's half of the family property without paying him any rent. Additionally, the claimant had rented out a suite and several rooms in the home and had used this money to pay the property's mortgage. Based on these facts, the court found that there was no basis to make an adjustment (at paras. 275-290).
- [72] In *Stasiewski v. Stasiewski*, 2007 BCCA 205 the Court of Appeal held as follows:
- [27] The wife contends that the trial judge erred in ordering an equal division of the matrimonial home "and then ordering a reapportionment by way of occupational rent". In her submission, the husband's claim for occupation rent was a factor to be considered by the trial judge in exercising his discretion under s. 65 of the Act as to whether there should be a reapportionment, and that the effect of the approach adopted by the trial judge was to reapportion the family home in favour of the husband.
- [28] The wife relies on *Donovan v. Donovan* (1986), 7 B.C.L.R. (2d) 221, 5 R.F.L. 1 (S.C.) [*Donovan* cited to B.C.L.R.), where Paris J. concluded that the object of an award of occupation rent is to do equity between the parties. In *Donovan*, the husband remained in the matrimonial home with the children after the parties separated. He continued to make mortgage payments and other payments in respect of the home and sought credit for those payments on the division of family assets. The wife claimed occupation rent and the husband argued that she was not entitled to an award because she left the home voluntarily. After referring to some case law, Paris J. said, at 225,

I summarize the principles which emerge from the two foregoing cases as follows. (1) In the first instance a co-tenant out of possession could not claim occupational rent because he normally had the right to go back into possession. (2) However, such a claim would be considered by the

court if he had been required to vacate or was ousted from the property. (3) Furthermore, if the occupying tenant put forward a claim for expenditures made to the benefit of the property, (as in the case at bar) he was required as a condition of that equitable relief to submit to a claim for occupational rent -- and this, apparently, regardless of whether or not the non-resident tenant had vacated the property voluntarily.

[29] Continuing, he observed that "ouster" would be irrelevant in the case before him, since the husband made a claim for expenditures to the benefit of the property, and that, in any event, the wife's claim for occupation rent was not made as a cause of action under ordinary property law, but rather as a factor to be considered in the division of family assets. He concluded that the claims for expenses and for occupation rent should be considered relevant to the division of family assets.

[30] More recently, in *Dacyshyn v. Semeniuk*, [2007] B.C.J. No. 79 (QL), a case in which occupation rent was claimed as a cause of action in itself, Humphries J. canvassed the case law on the subject, including *Donovan*. She dismissed the action as unsupported on the evidence but, in her useful review of the law, she came to the same conclusion as had Paris J., that occupation rent is awarded when it is just and equitable to do so.

[31] Here, the wife continued to make the payments on the line of credit after the husband was evicted from the family home. As well, she maintained the home and paid the property taxes. It is apparent from the passage of the trial judge's reasons quoted at paragraph 25 above that he took those items into account when he fixed the allowance for occupation rent. Thus, according to the authorities to which I have referred, the wife would ordinarily be required to submit to an award of occupation rent.

[32] Moreover, the trial judge made it clear when the topic was raised during opening submissions that he considered the claim for occupation rent as a factor to be weighed in the division of family assets, rather than as the subject of a free-standing award [see 1 Tr. pp. 49-51]. Since he said he did not want to delay judgment in order to prepare written reasons because of the concern of the parties about the "precarious" state of the real estate market, the mere juxtaposition of the topics of equal division of the matrimonial home and occupation rent in his oral reasons for judgment does not persuade me that he departed from that approach.

[33] Accordingly, I would not accede to the wife's submission that the trial judge erred in principle in awarding occupation rent. His decision to credit the husband with occupation rent was an exercise of his discretion to do equity between the parties in the circumstances, and no basis has been shown upon which we could properly interfere.

[Emphasis added.]

[73] In *Holland v. Holland*, 2017 BCCA 75 at para. 24, the court recently confirmed that the concept of "occupational rent" can properly be considered as part of a reapportionment analysis, rather than as a stand-alone order. As such, there is no issue arising from the fact

that the respondent did not make a formal claim for "occupation rent" in his pleading. He is entitled to raise the issue of the parties' respective living arrangements as part of his opposition to any claim for unequal division made by the claimant, particularly in light of the various factors set out in s. 95(2) of the FLA, notably (d), (f) and (i). The proper use of the concept of occupational rent is as a discretionary tool to achieve fairness: *McFarlen v. McFarlen*, 2017 BCSC 1737 at paras. 16- 20.

- [74] In terms of achieving fairness, the claimant is the party that has advanced a claim for unequal division. However, the claimant has had the use of the Home with her children since 2002 without having to pay any rent. I also note that the claimant was able to receive a small amount of rental income, which she does not propose to divide equally with the respondent. It is necessary in these circumstances to view the situation from the perspective of the respondent as well. The respondent has been incurring rental expenses notwithstanding that he also owns a share of the Home. There was some evidence that he rented basement suites for 10 years at about \$650 per month. The respondent suggests that these facts should also be taken into account in considering whether the claimant has established "substantial unfairness" requiring an unequal division. I agree.
- [75] The fact that the respondent left the Home voluntarily is also a factor in this analysis, although not a substantial one: *Shen v. Ton*, 2013 BCCA 519 at para. 94, *McFarlen* at paras. 14-15. The fact that the respondent did not keep up with his support payments also weighs against him in the analysis. However, given that:
- a) the Home Expenses incurred were routine, rather than being incurred to increase the capital value of the home;
 - b) the increase in the value of the Home was more likely driven by market forces rather than the Home Expenses;
 - c) the claimant did enjoy exclusive use of the Home during this period, while the respondent was paying for alternative accommodation;
 - d) the amount the respondent was required to pay for alternative accommodation was roughly equivalent to the share of Home Expenses the claimant is now claiming from the respondent; and
 - e) the respondent is not seeking to advance a positive claim for occupational rent, but is simply invoking the reality of their respective living arrangements to respond to a claim for unequal division;

I find that the claimant has not met the burden required under s. 95 of the FLA to justify an unequal division arising from the payment of the Home Expenses.

- d) What is the proper treatment of the daughters' wedding expenses?

- [76] The claimant suggests that there should be an unequal division of property in order to account for the \$86,665.13 in wedding expenses she incurred for her two daughters' nuptials. Due to a lack of resources, she was forced to take out loans to cover these expenses. There was evidence from the lenders of agreements to repay these loans once ownership of the Home was finally determined in this proceeding.
- [77] The recent decision in Nanara provides assistance in relation to this issue. In Nanara, the wife relied on her having paid for the eldest child's wedding as one basis for reapportionment. The court held as follows:
- [76] I also find that the respondent did agree to pay for half of Daljeet's reasonable wedding expenses but then, as he testified on examination for discovery, "changed his mind". His conduct in attending the temple with his daughter, her future in-laws, and the claimant after the couple's engagement is corroborative of his acknowledging financial responsibility in that regard. In addition, the cultural basis for his obligation to pay his share of the wedding expenses was not significantly challenged by the respondent during the cross-examination of either the claimant or Daljeet. Mr. Nanara confirmed his cultural obligation to pay for his daughter's wedding in his testimony. There is also the fact that Mr. Nanara had paid for half of his eldest daughter's wedding expenses which is consistent with his cultural obligations as a father.
- [78] There is then the issue as to whether the \$87,000 for the wedding can be considered reasonable.
- [79] In that regard, the comments I have made earlier regarding Mr. Nanara and Maninderjeet's sense of entitlement regarding the claimant's income earning potential and sense of obligation to take care of her family members essentially without question, also applies to Daljeet and the wedding.
- [80] During their evidence, both the claimant and Daljeet went out of their way, in my view, to emphasize how reasonable the wedding expenses were. I was quite skeptical of portions of this evidence given that, as was consistent with other portions of her evidence, Ms. Nanara appeared incapable of resisting any request from her children for money, a character trait they were quite willing to take full advantage of.
- [81] Portions of the amount claimed for the wedding related to building a new deck and other renovations for the Vancouver property. Even if these amounts were not reasonable wedding expenses, they would still be a proper expense for preserving and maintaining the Vancouver property after separation.
- [82] When I consider all the evidence relating to the wedding expenses, I conclude that a reasonable amount for the wedding, for which Mr. Nanara is 50% responsible, is \$65,000. That is, Mr. Nanara is responsible for \$32,500 of the wedding expenses.

[83] When I apply the legal framework to which I have referred to the facts of this case as I have found them, I also conclude that there should be a reapportionment in the claimant's favour. I find the existence of several s. 95(2) factors including:

- (a) the claimant has paid approximately \$114,000 since separation towards the Richmond property, including the reduction of the mortgage principal;
- (b) she has also paid approximately \$36,000 towards maintaining the Vancouver property since separation; and
- (c) there was a significantly unequal contribution by the parties during the marriage, both financial and otherwise. This is not a case where one party has earned more than the other over the years but still contributed relatively equally to the relationship by other means, such as household and parental responsibilities. In this case, the claimant has, throughout the marriage, contributed both financially and non-financially in a far greater proportion than the respondent.

[87] In my view, the following factors, many of which I have previously referred to, support a 60/40 apportionment of assets in favour of the claimant:

- since the separation the claimant has spent approximately \$150,000 of her own funds to maintain the Vancouver and Richmond properties. The expenses the claimant has paid towards the Richmond property include additional mortgage payments for the sole purpose of reducing the principal, which, if the assets are divided as proposed by the claimant, would be for the sole benefit of the respondent;
- while I have previously determined the amounts the respondent should contribute towards, respectively, Maninderjeet's education expenses (\$20,000) and Daljeet's wedding expenses (\$32,500), the fact that the claimant has, to date, been solely responsible for such family expenses is an indicator of the extremely inequitable division of family expenses;
- the respondent has not provided any evidence to explain why he has been continually underemployed, working only casual or part time hours, for the duration of the relationship while, during the course of the relationship, the respondent has upgraded her education and worked multiple full time jobs at a time; and
- the respondent has not been forthcoming regarding the value of his financial assets, namely pensions he holds from GF Strong and IWU.

[88] I agree with the claimant that the assets should be apportioned 60/40 in her favour in accordance with the Schedule. I have also taken into account that Mr. Nanara is not responsible for any of Ms. Nanara's "over indulgence" towards Maninderjeet and Daljeet in reducing the amounts claimed by Ms. Nanara as described above.

[Emphasis added.]

- [78] Here there is no evidence of a formal agreement to pay for the wedding expenses. However, there was evidence provided by a number of the witnesses as to the cultural norm in the Punjabi community that the bride's father pays for the wedding of his daughter. Such evidence of cultural norms was also relied upon by Mr. Justice Abrioux in *Nanara*. The respondent agreed that his parents paid for his siblings' weddings. Although the respondent himself disclaimed a responsibility to pay for his daughters' weddings, and denied having been invited to either wedding, I have already remarked on his credibility above. I find that he was invited to the two weddings. I also note that the respondent's brother decided that he should loan the claimant the money required for Prabhjot's wedding. I conclude that if these marriages had arisen during the course of the parties' marriage, the respondent would certainly have paid for these expenses out of the family's assets.
- [79] I note as well that the claimant is not asking that the respondent be solely responsible for the cost of the weddings, but only for an unequal division that reflects half of the wedding costs effectively incurred by the claimant.
- [80] Any reapportionment to accommodate this issue must be based on a reasonable expense level. In *Nanara*, the court directed a reduced \$65,000 cost for a single wedding, admittedly in the context of a family that had far greater resources. Here the costs were approximately \$40,000 per wedding. In reviewing the receipts, I do not see any extravagances reflected therein, and the respondent was unable to point to any. These may have been large weddings in terms of attendance, but not in terms of there being any obvious or unnecessary luxuries. I note that the respondent's own relatives participated in at least one of the weddings. As such, particularly given the evidence of cultural norms, I find that it would be significantly unfair for the claimant to bear the cost of the weddings on her own, and I am prepared to accommodate a reapportionment of the assets necessary to acknowledge the respondent's responsibility for one-half of the wedding costs.
- e) How should the pensions be managed?
- [81] The parties agreed that the respondent's pension from Waldun should be divided. Given the long-standing tension in this family, the benefit of a "clean break", and the fact that the value of the Home creates an asset sufficient to allow for immediate readjustment, I order that the agreed value of the pension of \$61,541.16 be divided equally now, using the equity of the Home to facilitate the required adjustment.
- [82] The parties agreed that the CPP pensions should be divided equally under the Canada Pension Plan, R.S.C. 1985, c. C-8.
- f) How should certain other family expenses and assets be addressed?
- [83] The respondent agreed that the Home should be divided in such a way as to accommodate the fact that the claimant was compelled to bear their burden of the following expenses properly attributable to the respondent:

- a) \$9,356.96 in expenses incurred by the claimant to pay the respondent's former counsel;
- b) \$5,005 incurred in relation to a line of credit taken out by the respondent.

[84] The claimant also asked for a credit related to a line of credit at the Bank of Nova Scotia for \$18,312.17. However, I find that this line of credit was largely offset through the claimant's disposition of a family asset, being a vehicle the respondent had left behind at the Home, and hence there is no need for further accounting.

[85] The parties were content that ownership of any household assets remain with the party in possession.

V. CONCLUSION

[86] In sum, I conclude that:

- a) the parties will be granted a divorce, pursuant to s. 8 of the Divorce Act, taking effect 31 days from the date of this judgment;
- b) the CPP pensions shall be divided equally under the Canada Pension Plan;
- c) the value of the Home shall be divided equally at first instance, subject to the respondent's residual share being reduced by the following amounts:
 - (1) past child and spousal support owing in the amount of \$120,376.54;
 - (2) future lump sum spousal support in the amount of \$62,550;
 - (3) one-half of the wedding expenses, or \$43,332.50;
 - (4) one-half of the value of the Waldun pension, or \$30,770.58;
 - (5) the expenses paid by the claimant to the respondent's prior counsel of \$9,356.96;
 - (6) the line of credit expense of \$5,005; and
 - (7) the costs of this proceeding as directed below.

[87] Given that the claimant has been substantially successful in this matter in terms of collecting on past arrears, obtaining a going-forward lump sum spousal support award, and obtaining an unequal division of property, she shall have her costs in accordance with the Supreme Court Family Rules, Appendix B. I do not find that there is a basis upon which to award special costs. These costs, as agreed or assessed, shall be deducted from the respondent's residual share of the Home as set out above. I make this order on the manner of addressing costs given the failure of the defendant to comply with prior court orders, and his stated intention not to necessarily follow future court orders.

[88] If the parties require further direction on the disposition of the Home, they may re-attend before the court.

"Branch J."

The Honourable Mr. Justice Branch

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