
CANADA / JUDGMENT

Giesbrecht v. Giesbrecht

2018 BCSC 2552

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 2552 Giesbrecht v. Giesbrecht

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Giesbrecht v. Giesbrecht,

2018 BCSC 2552

Date: 20181108

Docket: E14893

Registry: Chilliwack

Between:

Albert Frank Giesbrecht

Claimant

And

Gail Anne Giesbrecht also known as Gail Anne Scarrow

Respondent

Before: The Honourable Madam Justice Matthews

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

D. Klassen

Counsel for the Respondent:

R. Krentz

Place and Date of Trial/Hearing:

Chilliwack, B.C.

November 6-8, 2018

Place and Date of Judgment:

Chilliwack, B.C.

November 8, 2018

- [1] I delivered these reasons for judgment orally on November 8, 2018 at the conclusion of trial. At that time, counsel brought to my attention a \$750 fee that was to be split and which affected the arithmetic. On November 15, 2018, I issued a memorandum correcting the arithmetic pertaining to spousal support. I have edited the transcript of the oral reasons I delivered including the corrected arithmetic for both these matters. The editing does not otherwise change the substance of the reasons I delivered on November 8, 2018.

Introduction

- [2] Albert Giesbrecht and Gail Giesbrecht were married in 1969. They worked hard and they raised two daughters. They suffered some hard times financially. For her entire adult life, Ms. Giesbrecht has been coping with severe emotional issues due to childhood trauma. Unfortunately, their marriage did not withstand all of the pressures upon it. Although they continued to live together until just a few months before trial, they signed the separation agreement providing for the division of Mr. Giesbrecht's pension with a date of separation indicated of December 2016. There was evidence that the marriage had changed fundamentally many years prior to December 2016. The actual date of separation is material in some ways to the matters before me.
- [3] In 2011, the Giesbrechts bought a condominium in Abbotsford which is a family asset. Mr. Giesbrecht seeks equal division of the equity in the condominium and argues that in the circumstances it must be sold. Ms. Giesbrecht seeks reapportionment of the condominium entirely in her favour in exchange for allowing Mr. Giesbrecht to keep the savings he has accumulated since separation.

The Issues

- [4] The main issue that brings the parties to court is the property division with regard to their Abbotsford condominium. There are some other assets in issue, namely, their respective bank accounts and vehicles. Ms. Giesbrecht also claims spousal support. She claims unequal division of the Abbotsford condominium. For this claim, she relies on s. 95(3) of the Family Law Act, S.B.C. 2011, c. 25 which provides for the court to take into account whether the objectives of spousal support have been achieved in considering whether to order unequal

division of family assets. It is necessary to determine the date of separation in order to value the assets for the purposes of apportionment.

[5] Given the interplay of the issues, I will address them in the following order:

- a) date of separation;
- b) property division assuming equal apportionment;
- c) spousal support; and
- d) reapportionment pursuant to s. 95 of the Family Law Act.

Background Facts

- [6] Mr. Giesbrecht and Ms. Giesbrecht were married in Winnipeg. During their marriage they lived in Winnipeg, Edmonton, Langley, and Abbotsford. Their daughters were born while they were living in Edmonton in 1975 and 1978.
- [7] Prior to the birth of their daughters, Ms. Giesbrecht worked as a telephone operator for BC Tel, Manitoba Tel and Alberta Health Care. Mr. Giesbrecht and Ms. Giesbrecht agreed that when they started a family, she would be a stay-at-home mother at least while the children were young. In 1980, they moved with their girls to Langley. Mr. Giesbrecht began working with his father in construction and, in short order, established his own construction business. Ms. Giesbrecht described it as feast or famine. Unfortunately, there was not enough work and Mr. Giesbrecht declared bankruptcy in around 1998. He found a job with Coast Mountain Bus Company where he worked until he retired from that company in November 2016. Ms. Giesbrecht testified that the regular paycheque and benefits were a relief and an improvement on the financial stresses the family had experienced.
- [8] While the parties do not agree in all respects about whether their financial arrangements were fair, they do agree as to what they were.
- [9] The Giesbrechts purchased the Abbotsford condominium in 2011. Mr. Giesbrecht raised the down payment by withdrawing approximately \$25,000 from his RRSP and arranging a line of credit for the balance of the down payment. They secured a mortgage through Coast Capital Credit Union. At that time, Mr. Giesbrecht deposited his Coast Mountain paycheques into their joint account and the mortgage was automatically debited from that account as were the strata fees, property taxes, and utilities. In short, all of the expenses in relation to the condominium were paid out of Mr. Giesbrecht's Coast Mountain paycheque.
- [10] At this time and for many years previously, Ms. Giesbrecht had been in charge of the family finances. She testified they would sit down together and budget and then she would write cheques on their joint account for the various expenses that needed to be paid.

- [11] In around 2014, this changed. Mr. Giesbrecht testified that he realized they had accumulated \$30,000 in debt and he was worried that he would not be able to retire. He testified that he did not blame Ms. Giesbrecht. He just realized he needed to take action to spend less and pay off the debt. He stopped depositing his paycheque into the joint account. Instead, he kept it in his own account and arranged for all of the expenses to come out of that account. This was at the same time that Ms. Giesbrecht turned 65 and became eligible for CPP and OAS. Mr. Giesbrecht took the view that Ms. Giesbrecht could cover her own expenses out of her CPP and OAS. He paid the mortgage, house insurance, insurance on their vehicles, utilities and strata fees out of his paycheque and transferred a grocery budget amount to the joint account for Ms. Giesbrecht to buy groceries and household supplies each month.
- [12] Ms. Giesbrecht's monthly expenses included amounts for counselling for traumatic events that took place over a lengthy period in her childhood. Mr. Giesbrecht had paid those fees up to 2014, but when Ms. Giesbrecht started receiving the CPP and OAS, he stipulated that she should cover them. Ms. Giesbrecht did. Those expenses are now at an end as Ms. Giesbrecht testified that earlier this year she exhausted the benefit from counselling and ceased attending.
- [13] Over the three years that followed 2014, Mr. Giesbrecht paid down the \$30,000 debt such that when he retired from Coast Mountain at the end of November 2016, the only debt they had was the mortgage on the Abbotsford condominium.
- [14] Mr. Giesbrecht and Ms. Giesbrecht both testified that Mr. Giesbrecht worked a lot of overtime for Coast Mountain and, no doubt, their frugal family budgeting and the overtime pay permitted the retirement of this debt to the benefit of both of them.

Date of Separation

- [15] In July of 2018, the parties signed a separation agreement in which they agreed that the date of separation was December 13, 2016. This agreement was for the purpose of dividing Mr. Giesbrecht's Coast Mountain pension and the agreement stipulates that their agreement to that date of separation was for that purpose.
- [16] However, the date does not come out of nowhere. At the end of November 2016, Mr. Giesbrecht retired from Coast Mountain. He left Canada on December 13, 2016, to travel to the Philippines with a friend from his church. He bought a ticket with no fixed return date, but that required him to return by June 2017.
- [17] Both parties testified that by early 2007, they had stopped physical relations. They remained living together and eating together. There is some difference in the evidence between them as to whether they continued to socialize together.

[18] It is my conclusion that, although the relationship fundamentally changed in 2007, it was a marriage up until the time that Mr. Giesbrecht went to the Philippines without Ms. Giesbrecht. Ms. Giesbrecht testified that Mr. Giesbrecht told her before that time that he was going to move to the Philippines. Mr. Giesbrecht testified that he did not decide to move until after he returned from his December 2016, but he is now making arrangements to do so.

[19] On all of the evidence, I conclude that the date of separation was December 13, 2016.

Property Division Assuming Equal Apportionment

[20] Part 5 of the Family Law Act addresses property division. The goal of the property division provisions is to simplify division of family property, make it more predictable, and make it more certain than it was under the former legislation: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 36.

[21] For the purposes of this proceeding, the relevant provisions of the Family Law Act are ss. 81, 84, 86, 87, and 95:

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, 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.

84(1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
 - (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.

(2) Without limiting subsection (1), family property includes the following:

- (a) a share or an interest in a corporation;
- (b) an interest in a partnership, an association, an organization, a business or a venture;
- (c) property owing to a spouse
- (i) as a refund, including an income tax refund, or
- (ii) in return for the provision of a good or service;
- (d) money of a spouse in an account with a financial institution;
- (e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;
- (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
- (g) the amount by which the value of excluded property has increased since the later of the date
- (i) the relationship between the spouses began, or
- (ii) the excluded property was acquired.

(2.1) For the purposes of subsection (2) (g), any increase in value of a beneficial interest in property held in a discretionary trust does not include the value of any property received from the trust.

- (3) Despite subsection (1) of this section and subject to section 85 (1) (e), family property includes that part of trust property contributed by a spouse to a trust in which
 - (a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,
 - (b) the spouse has a power to transfer to himself or herself that part of the trust property, or
 - (c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

86 Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

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

- (a) the value of family property must be based on its fair market value, and

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

95(1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (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.

- [22] In accordance with ss. 81 and 84 of the Family Law Act, all property which meets the definition of "family property" and all debt which meets the definition of "family debt" as of the date of separation are divided equally unless the court orders unequal division under s. 95 due to a finding that equal division would be significantly unfair. Section 95(2) sets out a number of factors that guide the analysis. In addition, s. 95(3) allows the court to consider the extent to which the financial means and earning capacity of the spouse who would be in receipt of spousal support 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 in s. 161 of the Family Law Act have not been met.
- [23] The proper approach is for the court to notionally divide the property and debt equally and then determine whether such an equal division would be significantly unfair within the meaning of s. 95, see *Remmem v. Remmem*, 2014 BCSC 1552 at paras. 30 and 43.

The Abbotsford Condominium and Associated Debt

- [24] In 2011, the parties purchased the condominium in Abbotsford in which they lived together until August 2018, apart from the time that Mr. Giesbrecht spent in the Philippines in late 2016 and early 2017. There is no doubt and no disagreement that it is a family asset. The parties agreed to a joint appraisal. The appraised value is \$260,000.
- [25] There is a mortgage registered against the property. As of the date of trial, the outstanding balance was not available, but a good estimate is \$105,000.
- [26] There is no doubt and no disagreement that the mortgage is a family debt. There was a levy made on each unit of the building for a new roof. The Giesbrechts' share was \$3,600. Mr. Giesbrecht paid it from his line of credit. There is no doubt that this amount is a family debt.
- [27] Dividing this asset and its associated debts equally results in each having a share of \$75,700 based on equal division of the condominium's value of \$130,000, less one-half the mortgage of \$52,500, less one-half of the strata levy of \$1,800. If the Abbotsford condominium must be sold, the real estate commission and associated taxes would be split equally and reduce that number for each.

The 2013 Acura

- [28] In 2015, the Giesbrechts bought a 2013 Acura for Ms. Giesbrecht's use. It is registered in her name. It was financed out of refinancing the mortgage on the Abbotsford condominium. I have addressed the mortgage as a family debt above. Based on Internet research, Mr. Giesbrecht estimates the value to be around \$20,000 and Ms. Giesbrecht estimates at \$15,500. I value it at \$17,500.
- [29] On equal division, each party's interest is \$8,750.

The 2003 Acura

- [30] The parties own a 2003 Acura which Ms. Giesbrecht used to drive and Mr. Giesbrecht has been driving since they bought the 2013 Acura. Their estimates of its value range from \$2,000 to \$3,000. Mr. Giesbrecht plans to sell it as part of his plan to move to the Philippines. I value it at \$2,500. On equal division, each party's interest is \$1,250.

Mr. Giesbrecht's Bank Accounts

- [31] There is not a lot of good information to determine the value of Mr. Giesbrecht's bank accounts at separation, but using the best evidence before me, he had about \$4,800 on deposit in December 2016. At the time of trial, that amount had grown to about \$25,000, including his Vancity shares. Mr. Giesbrecht argues that the growth, about \$20,000, is an excluded asset. This is countered by the argument that during separation and prior to trial he had not been paying spousal support, but he was continuing to financially support Ms. Giesbrecht in the same way he had for many years prior to separation. One way of looking at this money is that it is a family asset because he was able to accumulate it out of funds that he would have been using to pay spousal support had they not continued on in their previous manner. Another way of looking at it is that it is not a family asset, but I should order spousal support retroactively. I will come to that.
- [32] At any rate, an equal division of these assets apart from spousal support considerations are \$2,400 or \$12,500 depending on whether the post-separation savings are an excluded asset or not. Given my conclusion on retroactive spousal support, I conclude the post-separation savings are an excluded asset and the parties are entitled to \$2,400 each of Mr. Giesbrecht's bank accounts.

Ms. Giesbrecht's Bank Account

- [33] The evidence about this is not clear, but Ms. Giesbrecht rarely had money on hand. She held a term deposit of about \$575 that she and Mr. Giesbrecht had put aside to buy a new washer and dryer and she held some Vancity shares. The total is \$825. Equal division of these funds is \$412.50.

Spousal Support

- [34] The Family Law Act sets out circumstances in which spousal support shall be paid and for the determination and duration of spousal support in ss. 160, 161 and 162:

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].

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.

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.

[35] Compensatory support relates primarily to the first two objectives of spousal support referred to in s. 161, namely, to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship and to apportion between the spouses any financial consequences arising from the care of their child beyond the duty to provide support for the child. Non-compensatory support primarily relates to the third and fourth objectives in s. 161, namely, to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses and, as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[36] The leading case, *Chutter v. Chutter*, 2008 BCCA 507, describes non-compensatory spousal support in the following terms at para. 54:

Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state. Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[Citation omitted]

- [37] In ordering an award of non-compensatory spousal support, the court aims to narrow the gap between the needs and means of former spouses. In longer marriages, the courts have measured need against the marital standard of living by looking at the difference between the spouses' post-separation standards of living. A lump sum award can allow the parties to make a clean break: *V.B. v. M.B.*, 2017 BCSC 1761 at paras. 240-246, citing *Lee v. Lee*, 2014 BCCA 383 at para. 65.
- [38] A complicating factor in this case is that the date of separation is the date Mr. Giesbrecht retired from his full-time work as a bus driver with Coast Mountain Bus Company, a position he had held for 20 years. He was 70 years old. There is no suggestion that the retirement was to avoid paying spousal support. In fact, he returned to work the following year with Abbotsford Transit and worked for that company on a casual basis for about another year. He had a heart attack in February of 2018 and went back to work for a short period of time, but eventually retired fully in August 2018. He plans to move to the Philippines, as I have described.
- [39] When the parties separated in December 2016, they were both living in the Abbotsford condominium. Mr. Giesbrecht went on an extended holiday to the Philippines for three to four months. He returned and lived in the condominium until August 2018 when he moved out.
- [40] Between 2016 and August 2018, Mr. Giesbrecht and Ms. Giesbrecht continued the same financial arrangements they had prior to their separation. Mr. Giesbrecht paid the mortgage, the property taxes, the strata fees, the utilities, car insurance, and \$550 per month for food and other household needs for both himself and Ms. Giesbrecht.
- [41] During this time, Mr. Giesbrecht's income was his Coast Mountain Bus Company pension, his CPP pension, his OAS pension, and his earnings from Abbotsford Transit. His earnings from Abbotsford Transit were about \$39,000 in 2017. His 2018 earnings are not known, but if prorated from 2017 were about \$26,000.
- [42] The question becomes whether Mr. Giesbrecht should have been paying spousal support at that time and, if so, in what amount and what credit should be made for the amount he did pay. Ms. Giesbrecht claims retroactive spousal support.
- [43] Before turning to whether a retroactive claim would be successful, I conclude that had Ms. Giesbrecht made a claim for spousal support at that time, it would have been successful. Her income was her CPP and OAS and she would have qualified for compensatory and non-compensatory spousal support.

Retroactive Spousal Support

- [44] In *D.B.S. v. S.R.G.*, 2006 SCC 37, the court set factors to be considered in determining whether to make an award of retroactive child support. In *Kerr v. Baranow*, 2011 SCC 10, the Supreme Court of Canada said the same factors apply to a claim for retroactive spousal support. The factors are:
- a) whether the recipient has a reasonable excuse for not seeking support earlier;
 - b) the conduct of the payor;
 - c) the circumstances of the recipient; and
 - d) whether a retroactive award will occasion hardship on the payor.
- [45] None of these factors is decisive. A court must take a holistic view of the case, *D.B.S.* at para. 99. The court must balance certainty, predictability, and flexibility.
- [46] In *D.B.S.*, at paras. 61-84, the court considered three situations that could give rise to an application for a retroactive award. The first is where the payor is making support payments pursuant to a court order but there is a change in circumstances that prompts an application to revise support including retroactively. The second is where there is an agreement between the parties as to support and the recipient applies to the court to revise it. The third is where there has been no order for support.
- [47] The payor's interest in certainty, militating against a retroactive award, is highest in the first circumstance, lower in the second circumstance (because an agreement that has not been endorsed by a court order cannot give rise to the same expectation that the payor parent is fulfilling his or her obligations), and lowest in the third circumstance. In the third circumstance the payor not making payments is taken to know of his or her obligations and so the interest in certainty is not as compelling: *D.B.S.* at para. 80.
- [48] This case has features of both the second and third scenarios. There was no agreement for spousal support per se, but the parties did follow their pre-separation financial pattern.
- [49] Considering the factors, I find that Ms. Giesbrecht's delay was not great. Although she agreed to a December 2016 date of separation and did not claim spousal support until January 2018, the agreement referencing the date of separation was not made until July 2018 and Mr. Giesbrecht was still living in their family home. Mr. Giesbrecht filed his claim for divorce in November 2017 and she filed her counterclaim for spousal support in January 2018. The date of separation was a date the parties agreed to in order to divide the pension and not a real landmark that should have necessarily prompted Ms. Giesbrecht to make a claim for spousal support right away.
- [50] Mr. Giesbrecht was continuing to provide support as he had for many years. His conduct is neutral and not the type of conduct that attracts the rebuke of the court for failing to meet his obligations.

- [51] In terms of hardship, the evidence is that Mr. Giesbrecht saved considerable money during that time. Based on the calculations provided by the parties and accepting mid-range spousal support as appropriate, spousal support would have been about \$2,300 per month in 2017 and about \$1,900 per month in 2018 up until the end of August. Mr. Giesbrecht is entitled to a credit of about \$800 per month representing what he was paying less what he was consuming or what he was paying.
- [52] In my view, Ms. Giesbrecht has established an entitlement to retroactive spousal support to the end of August 2018. After that time, Mr. Giesbrecht was retired and Ms. Giesbrecht started receiving one-half of his Coast Mountain Bus Company pension. The total retroactive spousal support is \$26,800. Mr. Giesbrecht saved about \$20,000 during this timeframe.
- [53] Consistent with this finding, I conclude that the \$20,000 Mr. Giesbrecht saved post-separation is an excluded asset.

Prospective Spousal Support

- [54] As of August 2018, Mr. Giesbrecht was fully retired. His income is his CPP, his OAS, and his Coast Mountain pension. He and Ms. Giesbrecht have agreed to split his pension equally at source and they have done so. They have agreed to split their CPP and that process is in progress. Although this is asset division, the income that would have been available to pay spousal support has been divided equally.
- [55] Ms. Giesbrecht argues that she would be entitled to prospective spousal support despite the equal division of the income because of her disadvantaged circumstances and because Mr. Giesbrecht has much fewer expenses prospectively. This argument relates mostly to the s. 95(3) division issues of whether the objectives of spousal support have been met, but I will address it at this stage in determining whether a prospective spousal support order would be made.
- [56] The evidence is that Mr. Giesbrecht intends to move to the Philippines where his living expenses will be very modest. His monthly rent would be about \$150 and his utilities about \$130 per month. He will not need a car. By contrast, the mortgage on the Abbotsford condo, the strata fees, utilities, and the property insurance are over \$1,000 per month. Ms. Giesbrecht will need to continue to insure, fuel, and maintain her vehicle at about \$200 per month.
- [57] Mr. Giesbrecht argues that the objectives of spousal support require me to look at the relative positions of the parties and strive for equality and to ameliorate differences or hardship. I agree. The relative equality is the means available to each of them, but not how they choose to deploy those means. Mr. Giesbrecht has chosen a radically different lifestyle which reduces his needs dramatically. Ms. Giesbrecht does not want to reduce her needs. She argues that Mr. Giesbrecht's choices are not available to her because she has no connections anywhere else.

[58] While it is appropriate to look at the nature of expenses as part of needs, the objectives of spousal support do not call for the court to look to how a person plans to live off the means. For example, if a party has a health condition that requires a certain level of expense that another party does not have, that should be taken into consideration and, generally speaking, the party with the health expense will have greater need. In this case, the nature of their needs is the same: food, shelter, and clothing. While I do not think it is reasonable to say to Ms. Giesbrecht that she should move to the Philippines, I also do not think it is reasonable to say to Mr. Giesbrecht that, because he has made the choice to reduce his living expenses, Ms. Giesbrecht's needs are greater. Both parties must find a way to make the changes and sacrifices necessary to live within their means. I would not order prospective spousal support.

Consideration of Unequal Division under Section 95 of the Family Law Act

[59] Section 95 reads as follows:

95(1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (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.
- [60] The test for significant unfairness under s. 95 is whether equal division would be objectively unjust, unreasonable, or unfair in some important or substantial sense: Jaszczewska at para. 42; Parton v. Parton, 2018 BCCA 273 at para. 36.
- [61] Section 95(3) makes reference to the objectives of spousal support under s. 161 of the Family Law Act. I have set out and discussed those objectives above.
- [62] In McGrail v. McGrail, 2016 BCSC 104, Mr. Justice Verhoeven determined that equal division would be significantly unfair because the marital breakdown occurred when Mr. McGrail's earnings were allowing, him for the first time, to achieve the potential of his career and to allow the parties to be able to provide adequately for their retirement. He held that given that Ms. McGrail had taken the burden of childcare and had directly and indirectly contributed to Mr. McGrail's career potential, she was unfairly deprived of the upside that was to come by an equal division. Mr. McGrail was unable to pay spousal support in the future due to his age and his health. Verhoeven J. apportioned the family home entirely to Ms. McGrail. In doing so, he noted that Mr. McGrail and his new spouse sought to conceal significant assets from Ms. McGrail.
- [63] That case bears some resemblance to this case in that the pensions were split equally and there will be no spousal support in this case because Mr. Giesbrecht has retired and his only income is his pension, which has been split. However, that is where the similarity stops.
- [64] In this case, Ms. Giesbrecht shared equally in the totality of the ups and downs of Mr. Giesbrecht's career and earnings potential. Unlike in McGrail, Mr. Giesbrecht's highest earning potential was when he became a bus driver and he did that up until age 70. Ms. Giesbrecht testified that he worked overtime any time he could. After he retired from that, he took a holiday and then went back to work for another bus company as a casual employee.
- [65] During Mr. Giesbrecht's extended holiday in the Philippines, he met a family of five. The oldest son, aged 23, was looking after his four siblings. The children's mother was working as a foreign domestic worker in Saudi Arabia. Mr. Giesbrecht pays the rent for the house in which the family lives. He was sending money to help out with food. Apparently, the mother has now returned to the Philippines. Mr. Giesbrecht has a romantic relationship with her.

He plans to move to the Philippines permanently and he plans that they will live together if "it works out". I do not consider this to be at all like the situation in the McGrail case where Verhoeven J. found that Mr. McGrail and his new spouse were hiding money from Ms. McGrail.

- [66] Whether Mr. Giesbrecht's support of this family was a financially wise thing to do or not, it was not unfair to Ms. Giesbrecht, but rather in keeping with family values. Ms. Giesbrecht makes significant charitable donations both monetarily and in kind. She makes a monthly donation to her church and she volunteers a few days a week for local organizations that do much needed good work. When Ms. Giesbrecht declined the suggestion from Mr. Giesbrecht that she return to work in 1998 when he declared bankruptcy and gave up his business as a construction worker to drive a bus, one of the reasons she gave for not returning to paid work was her charity work which she did not want to cease. It is my view that she values charity and expects the family to make sacrifices as a result of it. In any event, the money Mr. Giesbrecht sent to the family in the Philippines was sent out of his 2017 and 2018 earnings. I have decided retroactive spousal support is payable for that time which neutralizes this issue.
- [67] There is no getting around the fact that the Giesbrechts' modest assets and modest income cannot support two people living apart in the same manner as two people living together. Strictly speaking, since the pensions are assets, not income, they have no income. As I have mentioned, they have split that pension and will be splitting the CPP in due course. It is not realistic that either of them can return to work at this stage in their lives. Had the marriage stayed together, they would live off their combined modest assets and combined pensions, but the marriage did not survive, and so the combination of those pensions and assets is no longer possible.
- [68] Equality is at the heart of the spousal support scheme. In McGrail, the court determined that Mr. McGrail had several excluded assets which he would use to support himself and, accordingly, there was a substantive difference between the spouses. That is not the case here. In my view, the parties have equal needs and equal means given the equal divisions of the pensions.
- [69] I cannot conclude that Ms. Giesbrecht has established significant unfairness based on the evidence that Mr. Giesbrecht's monthly expenses in the Philippines will be lower. The same reasoning I applied with regard to prospective spousal support applies to the s. 95(3) analysis. The objectives of spousal support are met in this case by the award of retroactive spousal support and the equal division of the pension.
- [70] Unfortunately, it is not realistic that either of these spouses can maintain the same lifestyle separately as they did together. Reapportionment in favour of Ms. Giesbrecht would mean that Mr. Giesbrecht would be deprived of half of the value of the only significant family asset other than Mr. Giesbrecht's pension. It would be manifestly unfair to Mr. Giesbrecht. I decline to reapportion it or any of the other assets.

[71] I turn to the order I should make about the assets. Ms. Giesbrecht very much wants to stay in the Abbotsford condominium. She does not know whether she can afford to do so. Mr. Giesbrecht wants to leave the country and sell his car. Ms. Giesbrecht is prepared to have her car sold, too, in order to lower the cash payment necessary for her to buy Mr. Giesbrecht's equity in the condominium. Accordingly, I conclude as follows:

- a) Mr. Giesbrecht shall retain full ownership of the 2003 Acura creating a credit to Ms. Giesbrecht of \$1,250 to be applied against Mr. Giesbrecht's equity in the Abbotsford condominium;
- b) Ms. Giesbrecht shall forthwith transfer ownership of her 2013 Acura to Mr. Giesbrecht for a credit to her of \$8,750 to be applied against Mr. Giesbrecht's equity in the Abbotsford condominium;
- c) Ms. Giesbrecht is entitled to a payment of \$26,800 in retroactive spousal support to be applied against Mr. Giesbrecht's equity in the Abbotsford condominium;
- d) Mr. Giesbrecht is entitled to 50% of Ms. Giesbrecht's bank account in the amount of \$412.50 which must be added to his equity interest in the condominium before the credits I have mentioned are applied;
- e) Ms. Giesbrecht is entitled to 50% of Mr. Giesbrecht's bank account at the date of separation which is \$2,400 to be applied against Mr. Giesbrecht's equity in the Abbotsford condominium;
- f) Mr. Giesbrecht's equity in the Abbotsford condominium net of the strata levy and the mortgage is \$75,700. I add back the \$3,600 levy because Mr. Giesbrecht is responsible to pay off his line of credit;
- g) Ms. Giesbrecht is entitled to a credit of \$375 for Mr. Giesbrecht's share of the \$750 fee to divide the pension; and
- h) when the levy is added back and the credits described above are taken off, the amount Ms. Giesbrecht must pay to Mr. Giesbrecht to buy him out of the Abbotsford condominium is \$41,652.50.

[72] I order as follows:

- a) Ms. Giesbrecht forthwith transfer the 2013 Acura to Mr. Giesbrecht.
- b) Mr. Giesbrecht retains the entire \$3,600 debt for the Abbotsford condominium strata levy.
- c) Mr. Giesbrecht retains the 2003 Acura.

- d) Ms. Giesbrecht must produce documentation by January 15, 2019, demonstrating that she has secured financing sufficient to cover the mortgage on the Abbotsford condominium and a payment to Mr. Giesbrecht in the amount of \$41,652.50. If she is able to do so, then the parties shall agree on the date at which the payment shall be made and Mr. Giesbrecht shall be removed from title and the mortgage discharged. If the parties cannot agree on a date, it must be no later than February 15, 2019.
- e) If Ms. Giesbrecht is not able to secure financing, the property shall be listed for sale on January 16, 2019. The parties shall have joint conduct of sale. On sale, the parties shall divide the proceeds less the real estate commission, any fees, and \$105,000 for the current value of the mortgage. The remainder shall be divided equally. Mr. Giesbrecht's share shall be increased by \$412.50 for his share in Ms. Giesbrecht's bank account and \$1,800 for Ms. Giesbrecht's share of the strata levy debt and then reduced by the other amounts I have listed for spousal support, his bank account, and Ms. Giesbrecht's share in the vehicles.

[73] [Discussion between the Court and counsel].

Divorce

[74] Subject to the filing of a certificate of pleadings, I declare the parties divorced from each other to take effect 31 days after today's date.

Costs

[75] With regard to costs, my order is the parties shall bear their own costs unless there is any matters about which I am unaware that may affect costs, in which case, the parties may make written submissions. Those submissions should be directed to me through the registry within 30 days of today's date.

[76] [Discussion between the Court and counsel].

[77] Counsel, thank you for your helpful submissions and your cooperation through the trial. Mr. Giesbrecht and Ms. Giesbrecht, I wish both of you the best of luck in the days to come.

"Matthews J."

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