

CANADA / JUDGMENT

H.J. v. P.J.

2020 BCSC 378

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 378 H.J. v. P.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

H.J. v. P.J.,

2020 BCSC 378

Date: 20200313

Docket: E45666

Registry: New Westminster

Between:

H.J.

Claimant

And

P.J.

Respondent

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Claimant:

I.G. Gibson

The Respondent Appearing in Person:

P.J.

Place and Dates of Trial:

New Westminster, B.C.

January 6-10, 2020

January 13,14; 16-17, 2020

January 20-23, 2020

Place and Date of Judgment:

New Westminster, B.C.

March 13, 2020

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I. Introduction

- [1] In this matter, I delivered reasons for judgment orally on February 12, 2020, in relation to parenting issues involving the two teen-aged children of the parties. I reserved judgment on the financial matters, which are dealt with in these reasons for judgment. The earlier oral reasons have since been indexed as H.J. v. P.J., 2020 BCSC 179. To the extent relevant, the findings I previously made are incorporated into these reasons.
- [2] I made an order divorcing the parties at the conclusion of the trial. Nevertheless, for convenience, in these reasons for judgment I will refer to the parties as the wife (the claimant) or the husband (the respondent).

II. Background

- [3] The husband (P.J.) was born in England in 1973. He came to Canada as a young child in 1978, and grew up in Edmonton, Alberta. He graduated from high school in 1991. He obtained a diploma in business from Northern Alberta Institute of Technology. For a number of years he worked in the computer business. In July 2000 he moved from Alberta to British Columbia. His parents had already relocated here. He worked in computer sales with IBM from March 2001 until March 2002, when he was laid off. After the parties were married in August 2002, he resumed working for a computer company. In 2003, he transitioned to working as a licensed life insurance agent with World Financial Group ("WFG"). Later, he obtained an investment fund license to allow him to sell mutual funds, in addition to life insurance.
- [4] As an insurance and mutual fund sales person, he worked purely on commission. His father also worked for WFG, in similar roles, and continues to do so.
- [5] In 2011 the husband incorporated Indrosh Marketing Inc. ("Indrosh") and began working through that company. Indrosh has no assets. Indrosh paid some of its income to the husband personally, by way of dividends.
- [6] Following separation October 1, 2013, the husband continued to work as an insurance and mutual fund sales person. For some time he continued to pay household expenses, such as rent. By the time of the JCC on September 12, 2014, he was paying \$1,800 per month as combined child and spousal support, and also making loan payments on the family vehicle, a Dodge minivan, and paying the insurance on the van. At the JCC, he agreed to increase the support payments of \$2,000 per month, comprised of \$610 child support, and \$1,390 spousal support, both commencing October 1, 2014. The orders were made on a without prejudice basis.
- [7] The JCC order has never been varied; it remains in effect.

- [8] The husband testified that he suffered from grief, and stress and depression affecting his ability to work. He began seeing a therapist, Linda Saucy, in March 2015. He saw his family doctor, who prescribed antidepressant medication, which he took for a month, in March 2015.
- [9] He took a leave of absence from work in August 2015. He returned to work in September 2016. He did not attempt any other form of work during the year that he was not working.
- [10] When he stopped working in August 2015, he stopped paying child and spousal support. The only payments made since then have been some amounts garnisheed by the Family Maintenance Enforcement Program ("FMEP"), totalling \$8,043.58 for the years 2017-2019. At trial, he stated that he expects to begin a part salaried and part commissioned position of employment on February 1, 2020. He expects a 2020 income of approximately \$40,000. He stated that his father will pay him the income of \$20,000, to assist him in his father's business. He expects to earn the other \$20,000 as his own independent commission income. There is no letter of engagement.
- [11] According to the FMEP records, arrears of child and spousal support amount to \$105,584.72 as at January 11, 2020.
- [12] When the parties separated on October 1, 2013, the husband returned to live with his parents in their home in Surrey, on B. Place (the "B. Place Residence"). His parents sold that home in May 2014. The husband lived with a friend for some months. Since October 1, 2014 he has resided in a rented apartment in Surrey. His father has paid the rent on the apartment since 2015, when the husband stopped working. The rent is \$1560 per month.
- [13] The husband has largely supported himself over the past several years through loans and support from his parents.
- [14] The husband's earlier financial statements indicate that his father lent the husband \$140,000 for living expenses since September 2015, and \$98,000 for legal fees. His most recent financial statement (December 17, 2019) indicates that his father advanced a "debt consolidation loan" of \$57,365 on October 1, 2019, in addition. There are no loan records in evidence. In total, the husband owes his father \$317,176, according to his most recent financial statement.
- [15] The wife (H.J.) was born in England in 1975. She came to Canada in 1975 as an infant. The family resided in Kitimat, where her father worked in the aluminum smelter. After high school she took some university courses at UNBC in Prince George, but did not complete any program of post-secondary education. She married in the late 1990s. The marriage was not a success. She moved to the Lower Mainland in 2000 or 2001, and met the husband in late 2001. When the parties were engaged in 2002, she was working for the Toronto Dominion Bank. When she became pregnant with their first child, a son, I., she took a maternity leave from TD Bank, but did not return to work after the maternity leave. I. was born November 30, 2003. Their second child, a daughter, H., was born in 2005.

- [16] After they married, the parties resided with the husband's parents in a rented house in Richmond until November 2002. From 2002 to 2006 they lived in various rented basement suites in Surrey and Delta. In 2006 they moved back in with his parents in a rented home. In 2007 his parents purchased the B. Place Residence. The parties and their children resided elsewhere, in a basement suite, from April 2007 to September 2010. In September 2010 they moved into a suite in the B. Place Residence, to save money. They stayed there until October 1, 2012. The wife was unhappy living in his parent's residence. The parties moved to a rented townhome where they resided from October 1, 2012 to October 1, 2013, the date of separation. At that time, as noted, the husband left the residence and returned to live with his parents at the B. Place Residence. The wife and the two children remained in the townhome until November 1, 2014. Currently, the wife resides with the children in a rented two bedroom basement suite.
- [17] As I explained in the earlier judgment, the children have resided with the wife at all times since separation, and continue to do so. The husband has had no real parenting time since June 2014.
- [18] After the separation the wife returned to school. She achieved qualification as a special education assistant. She was hired by the Surrey School District June 20, 2015, to begin working on September 22, 2015. She earns employment income of \$29,770 per annum. She works a maximum of 30 hours per week, five days per week. Workdays are from 8:10 to 3:00 p.m. She hopes to upgrade her education and become a teacher.
- [19] She has struggled financially since the separation. She has filed a consumer proposal, twice. She continues to owe Canada student loan monies of \$8,428. She has borrowed from her parents approximately \$170,000 to assist with living and legal expenses.

III. Family Property and Debt

- [20] Part 5 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] deals with the division of family property and debt between separating spouses. Pursuant to s. 81(b) the starting point is that 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."
- [21] Subject to s. 85, which deals with excluded property, under s. 84(1), family property is all real property and personal property owned by at least one spouse on the date the spouses separate.
- [22] Family debt is defined in s. 86 as all the 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.

- [23] On the pleadings, both parties claim equal division of family property and debt. As noted previously, their pleadings agree that the date of separation was October 1, 2013, notwithstanding the attempted reconciliation (as the husband describes it) or the "cooling off period" as the wife describes it, during 2014. Because the parties have agreed on the date of separation in their pleadings, and in their submissions at trial, it is not necessary that I decide whether FLA s. 83(1) might apply, on the facts, for purposes of property division and support issues.
- [24] The wife's Amended Notice of Family Claim seeks an order for compensation in lieu of an interest in the B. Place Residence. At trial she testified that she believed the husband has purchased this property together with his father. The husband denies ever having had any ownership interest in the property, and there is no evidence that he did.
- [25] At trial, the wife abandoned claims to any family property. However, as the husband advances claims that the wife remains responsible for family debt, I must address both family property and family debt issues, as they are intertwined.
- [26] There is no reliable evidence of pre-marriage property or debt of either party. In cross-examination the wife acknowledged that when they met she had a student loan, but she could not recall the amount. There are no documents. In any event, the husband does not assert that the wife was solely responsible for pre-marriage debt upon separation. Neither party seeks any exclusion of property.
- [27] As of the date of separation, October 1, 2013, the husband had not filed tax returns since the 2007 tax year. He filed returns for 2008 to 2013 sometime in late 2014 or early 2015. At trial he explained that he was already two or three years behind in filing tax returns and paying taxes in 2005 or 2006. He had no good explanation for not filing returns or paying taxes. He explained that he got behind, that he had difficulty paying household expenses, and could have been in denial. He recognizes that his behaviour was irresponsible and he blames no one else.
- [28] I accept the evidence of the wife that she had no involvement in financial matters during the marriage, that the husband was completely responsible for them, and she had no specific knowledge of the state of the family finances, including tax liabilities. Nevertheless, the tax debt at separation is a family debt.
- [29] In 2009 a group of 20 or more WFG insurance agents decided to purchase office premises for their business use. They did so through a corporation, ADT Financial Inc. ("ADT").
- [30] ADT owns property at #101-7475 - 135th Street, Surrey. The husband testified that he owns 2,241 shares in the company. He does not know what percentage of the share total this represents. He asserts that the shares are worth \$77,350, which was the purchase price. He says a deposit for his share acquisition of \$21,875 was paid by his father, as a loan to him, that he still owes. There is no documentation of this loan. He states that the rest, \$55,475 was mortgaged or borrowed. There are no loan or mortgage documents in evidence in

relation to this.

[31] The husband contends that family property at separation consisted of:

- a) Shares, ADT \$77,350
- b) Vehicles (two) \$7,000

[32] The vehicles have no current value, and so can be ignored.

[33] The husband contends that the family debts at the date of separation were:

- a) Financial (credit cards, loans) \$46,956
- b) ADT deposit loan from father \$21,875
- c) ADT, shares loan \$55,475
- d) CRA (tax) debt, Indrosh Marketing \$17,665
- e) CRA (tax) debt, personal \$52,370

Total debt husband asserts: \$194,341

[34] The total of the CRA debts is \$70,035. CRA charged interest and penalties in addition to the taxes. The husband does not contend that the wife is responsible for sharing in the interest and penalties.

[35] At trial the husband withdrew a claim of debt of outstanding "office fees" to ADT of \$6,972.

[36] The husband contends that the wife should also be responsible for payment of one-half of the interest that has accrued on the financial obligations of the parties (the \$46,956) at separation. The total of the interest accumulated from October 1, 2013 to June 1, 2019 is \$23,945.32. The husband claims that the wife should pay \$11,972.66. I do not accept that she is responsible for any portion of this claim.

[37] Under s. 86(b), family debt includes financial obligations incurred by a spouse after the date of separation, if the obligation is incurred for the purpose of maintaining family property. This would be the husband's burden to establish, on the evidence. He has not done so. The interest was not incurred "to maintain family property." It was incurred to service debts, which, in my view, could have been retired. In any event, in the circumstances of the case overall, to saddle the wife with the interest would be significantly unfair.

[38] As I will explain, the husband's income ought to have been higher than his actual income, thus providing a means to pay the debts. He also has a close business and financial relationship with his father. His father obtained the benefit of the husband's clientele when the husband stopped working in 2015. His father has lent the husband considerable monies since separation. In my view on the evidence as a whole the husband had or ought to have had the resources with which to pay this debt but instead chose to allow the debt to remain in place, and therefore to allow the interest to accumulate. The wife had no control over this

debt and no financial means, due to her circumstances and, since September 2015, no financial support from the husband. As there is no claim on the pleadings for re-apportionment, s. 87 provides a means to address this: J.(K.M.) v. N.(J.H.D), 2014 BCSC 1895, at para. 154. Therefore the value of this debt is the value it had at separation.

- [39] The wife contends that she had a credit card debt of \$1,054. She has paid this amount and is entitled to a credit of one-half, or \$527.
- [40] On the figures presented by the parties, the family debts exceed the value of the family property. The wife would be responsible for payment of one-half of the net family debt, which on the figures presented, would seem to amount to \$57,968 (debt total of \$194,341 divided by 2 = \$97,170.50) minus (one half of asset in husband's name valued at \$77,350 = \$38,675) = \$58,495, less credit of one half of \$1,054 = \$527) = \$57,968.
- [41] Aspects of this evidence are less than satisfactory. There are no sources or independent records in the evidence about the ADT share purchase, loans, and values. It can be seen that the asserted ADT deposit and ADT shares loan amounts add to \$77,350, the same amount as the asserted value of the ADT shares. This suggests that nothing has ever been paid on these debts. The value of the shares appears arbitrary.
- [42] The wife has a half interest in the shares. I would infer that their value could bear a relationship to the value of the real estate or the business of ADT. There is no valuation evidence. Under s. 87, unless there is an agreement or order otherwise, the value of family property and debt is to be based upon fair market value, determined as of the date of the hearing, in the absence of an agreement dividing the property and debt.
- [43] At trial, the wife did not seriously challenge the husband's evidence as to the value of the ADT debts and the ADT shares. I infer that she simply does not have the resources to do so.
- [44] I have carefully considered whether I should defer making a decision about the property and debt issues, and call for further evidence, at a resumption of the trial. However, in my view in the circumstances of this case, that is not the appropriate course. The delay could be several months or more. These issues have been apparent on the face of the husband's several F8 financial statements for several years, and through several adjournments of the trial. The wife has been unrepresented at times in the past, but was capably represented at trial. I infer that counsel must have made decisions as to what could be contested at trial, and what could not, in the context of limited resources. I conclude that a further adjournment of the trial would not likely be fruitful and would not be in the best interests of either party, or their children.
- [45] Therefore, although the evidence is unsatisfactory, the trial is complete and I must do the best I can with the evidence as it is.
- [46] The ADT loans and shares perfectly cancel each other out. The debt to be shared consists of the financial obligations of the parties at separation, and the tax liability of the husband and his company at that time. Although the wife had no role in family finances and was not

aware of the tax problems and debt, I am satisfied that it is a family debt, as I said. There is no claim for reapportionment. The interest and penalties incurred on these debts will remain the husband's sole obligation. Accordingly, the wife's share of the family debt is \$57,968.

IV. Child Support and Spousal Support Issues

A. Background

- [47] As noted, when the parties separated the husband was working as a life insurance and mutual funds salesperson with WFG. The wife was not working. At the time, the children were 9 and 8 years of age.
- [48] The husband contends that he was completely unable to work from August 2015 to September 2016 due to severe depression, brought on by grief caused by lack of contact with his children. In addition, he contends that for this reason his ability to earn an income has been substantially reduced compared with his pre-separation earnings.
- [49] He seeks re-calculation of his past child support and spousal support obligations based upon his actual income during the years in question, and cancellation of arrears accumulated under the JCC order made in September 2014.
- [50] The husband contends that his income for spousal support and child support purposes, on a going forward basis, is \$40,000 per year. This aligns with this most recent Supreme Court Family Rules form F8 financial statement dated December 17, 2019, in which he stated that his income for child support and spousal support is zero, but that he expects to earn \$40,000 commencing February 1, 2020.
- [51] The husband seeks retroactive variation of spousal support and child support based upon his actual income since the JCC order of September 12, 2014. The husband made payments of \$2,000 per month in accordance with the order until August 2015. Following that, some amounts were paid by way of FMEP garnishment, only.
- [52] The claimant's position is that there should be no retroactive variation of the support amounts payable under the JCC order. She contends that income should be imputed to the husband for the time period from the JCC order to the present. As I understand her submission, the husband was capable of earning income commensurate with his pre-separation income at all times, but chose to earn less than he was capable of earning.

B. Income of the Parties for Child Support and Spousal Support Purposes

- [53] Income for child and spousal support awards is determined in accordance with ss. 15-19 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines]. The starting point for determining income for support is found in s. 16 of the Guidelines. It sets a spouse's annual income as determined by the sources of income set out in Line 150 income of the T1 Form, subject to ss. 17-20. Courts look to ss. 17-20 to determine if any exceptions set out in those

sections applies and what effect should be given them on the facts: *Brown v. Brown*, 2014 BCCA 152, at para.16.

[54] The following table sets out the employment income of the husband and the wife for the years 2011 through 2019, based upon their respective income tax documents, or in the case of 2019, their evidence at trial:

Year

Wife

Husband

2011

19,500

65,055

2012

0

71,863

2013

0

52,588

2014

0

79,180

2015

11,032

38,986

2016

28,932

7,954

2017

29,017

11,780

2018

29,770

17,234

2019

29,770

20,000

[55] I find that the foregoing amounts are the amounts actually earned, for child support and spousal support purposes.

[56] The source of the wife's 2011 earnings of \$19,500 is not in evidence. She testified that she did not work in her husband's business or in any other paid employment since the birth of her first child.

[57] For 2014, the husband submitted that the wife's income was \$6,334 in accordance with her notice of assessment for that year. The source of this income is not clear. It may at least in part reflect spousal support payments, which she received for the final three months of 2014. Spousal support is not included in calculating income: Guidelines, Schedule III, para. 3. I accept the wife's testimony that she did not begin to earn an income until September 2015, when she began working as an SEA with the school district. I conclude that her income for 2014 is zero.

[58] The husband's figure of \$20,000 for 2019 is based upon his asserted year to date payments from WFG of \$15,925. He submits that since this is partial, \$20,000 be taken as his 2019 income. There is no other evidence.

[59] The wife did not challenge the husband's claimed business expenses. The limited information available suggests that the expenses deducted are relatively large. For example, the husband claimed expenses of \$47,888 in 2013, against gross commission income of \$100,476. His expenses claimed for 2014 and 2015 are similarly large. Expenses claimed in 2015 are \$65,978, against commission revenue of \$104,964. However, there is insufficient evidence to conclude that some of the expenses are personal rather than business expenses. And since the expenses were not challenged, on the evidence, and in fairness, I am unable to conclude that some expenses should be added to corporate pre-tax income under s. 18(2) of the Guidelines, or are unreasonable expenses within the meaning of section 19(1)(g). I am only able to say that the figures for the husband's income may be favourable to him in the sense that they could understate his actual income for support purposes, but on the evidence, I accept the amounts shown, which are as asserted by the husband.

[60] The 2014 JCC order does not state what income amounts were used to calculate the child support and spousal support amounts ordered, of \$610 per month child support and \$1,390 spousal support.

- [61] As I did in *M.K.M. v. P.S.M.*, 2013 BCSC 579 [M.K.M.], I adopt my comments in *R.W.L. v. L.B.*, 2012 BCSC 457 regarding the principles applicable to imputation of income under s. 19 of the Guidelines:
- [26] Child support payments are based on both earnings and earning capacity. Payments are based on what the parent actually earns, and also on what the parent has the capacity to earn. A parent has a legal obligation to earn as much as he or she is reasonably capable of earning to meet the obligations to support the children: *G. (S.) v. W. (G.)*, 2006 BCSC 991, [2006] B.C.J. No. 1463, and *Earle v. Earle*, 1999 BCSC 283, [1999] B.C.J. No. 383.
- [27] This principle is reflected in s. 19(1)(a) of the Guidelines, which provides:
- 19.(1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [28] The principles applicable to the imputation of income were reviewed by the Court of Appeal in *Watts v. Willie*, 2004 BCCA 600, 247 D.L.R. (4th) 54, at para. 16:
- [16] In *Donovan v. Donovan* (2000), 190 D.L.R. (4th) 696, 2000 MBCA 80, Madam Justice Steel gave the judgment of the court and wrote at para. 21:

The following guidelines may be considered when determining whether to impute income. (See Dr. Julien D. Payne, *Imputing Income, "Determination of Income, Disclosure of Income,"* Child Support in Canada, Danrab Inc., August 3, 1999.)

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work. It is "no answer for a person liable to support a child to say he is unemployed and does not intend to seek work or that his potential to earn income is an irrelevant factor" (*Van Gool v. Van Gool* (1998), 166 D.L.R. (4th) 528 (B.C.C.A.)).
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

4. Persistence in unremunerative employment may entitle the court to impute income.
 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
- [41] In order to impute income under s. 19(1)(a) of the Guidelines, I must find that L.B. is intentionally underemployed or intentionally unemployed.
- [42] The payor parent will be held to be intentionally underemployed if that parent chooses to earn less than he or she is capable of earning, and will be held to be intentionally unemployed if he or she chooses not to work when capable of earning an income: *Hanson v. Hanson*, 1999 CanLII 6307, [1999] B.C.J. No. 2532 (S.C.), at para. 13, per Madam Justice Martinson.
- [43] There are two aspects of a parents' capacity to earn. The first is what the parent is capable of earning based on age, education, experience, skills and health. The second aspect is the job opportunities that are realistically available: *Hanson* at para. 20.
- [62] The husband contends that he has been completely or substantially incapable of remunerative employment for more than four years, from August 2015 to the present. Given the profoundly important obligation upon a parent to provide for support of the children, and also where applicable, the former spouse, compelling evidence would be required to establish this. In my view, the evidence falls far short.
- [63] I accept that the husband suffered from significant depression and other emotional and psychological effects caused by the loss of any meaningful relationship between himself and his children, and also his frustration with his circumstances. However, the evidence does not go as far as establishing that the husband was incapable of earning an income commensurate with his pre-separation earnings.
- [64] The husband's own testimony as to his grief, depression and frustration was credible. His evidence was supported by a lay witness, a close friend of his, Mr. Rapinder [Raj] Heran, with whom he has spent a great deal of time over the past few years.
- [65] The husband started seeing a counsellor, Ms. Linda Saucy, in March 2015, and saw her fairly regularly in 2015 and 2016. He has seen her on a few more occasions since the end of 2016. He has seen her on a total of 33 occasions. Ms. Saucy testified and gave factual evidence about the services she provided, and her observations.
- [66] Ms. Saucy referred the husband to a psychologist, Dr. Keith Krull, who saw the husband on three occasions in 2016, and provided a medical legal report, at the husband's request. The report is dated October 31, 2016. Dr. Krull testified at the trial.

- [67] Dr. Krull noted that the husband presented as significantly depressed and anxious, and that the major stressor was his inability to function well enough to work and to pay child support. His grief over not seeing his children was very strong, and his depression was primarily related to his loss of contact with his children. Dr. Krull noted that the ongoing loss was inhibiting his ability to work and earn an income. His grief was more than he could emotionally handle. Dr. Krull noted signs of serious depression. Dr. Krull noted that the respondent tended to feel victimized and helpless toward his ex-wife. He suggested that the husband would need considerably more treatment in order for him to become more functional both in his personal and professional life.
- [68] However, the husband did not seek or obtain much more in the way of treatment. He continued to see the counsellor on two occasions in late 2017 and a few more occasions in 2018. He saw his family doctor, but there is no evidence from the family doctor.
- [69] I place very limited weight on Dr. Krull's report, insofar as it relates to the actual issue that I am concerned with, that is, the husband's capacity for employment. The report itself is brief. It is based upon only three visits, all in 2016. It is based largely upon the husband's self-reports at the time, when the husband was seeking evidentiary support for his position that he was incapable of earning an income to pay support. The scope of the report is limited. As Dr. Krull noted, his clinical evaluation was limited, as he was asked only to assess his current functioning in relation to his ability to work and to earn an income, as of the date of the report. Dr. Krull did not feel that there was a need for extensive evaluation related to his background, personal history, and possible psychological diagnosis. There is no formal diagnosis, and a very limited prognosis.
- [70] Dr. Krull provided a brief "to whom it may concern" letter dated January 25, 2016, coinciding with the husband's first visit with Dr. Krull. In the letter Dr. Krull states that he recommends that the husband be off work for at least two months in order to recover. The letter was provided at the husband's request. I place no weight on the opinion in the letter, for substantially the same reasons given by Greyell J. in *Taylor v. Taylor*, 2010 BCSC 1539, at paras. 32 to 34.
- [71] At best, Dr. Krull's opinion and evidence supports only that the husband was struggling to function at times in 2016.
- [72] There is no medical opinion evidence at all, and certainly nothing to support the proposition that the husband has been completely or substantially incapable of working in any capacity for more than four years. The husband testified that he saw his family doctor, who prescribed antidepressant medication. He took the medication for about a month. The husband's F8 sworn November 2, 2015 states that he is being treated by his family doctor. As noted, there is no evidence from the family doctor. I consider it appropriate to draw an adverse inference from the absence of this evidence, or any medical evidence. I infer that the husband's family doctor would not have been able to support that the husband was substantially incapable of gainful employment from August 2015 to the present, as the

husband asserts.

[73] Dr. Elterman interviewed the husband and administered some psychological tests in April or May 2017 for the purposes of his s. 211 assessment.

[74] Dr. Elterman stated:

[P.J.] went through a period of depression as a result of feeling that he had lost the children and he was prescribed an antidepressant. He appears to have recovered from this and given the period of time that has now followed, he has likely settled into a low grade depression where not seeing the children has become the unhappy norm.

[75] While I appreciate that Dr. Elterman was not testing for clinical depression or directly assessing the husband's capacity for work, Dr. Elterman's test results and his report do not suggest that the husband was not capable of working.

[76] The husband is an intelligent, well-educated and articulate person. He is very personable. Dr. Elterman noted that he presented as an outgoing, socially poised individual. It is easy to see why he has been successful in his work in the past.

[77] The husband very capably represented himself at trial. He displayed excellent stamina, and a very good memory. He was well prepared, and well-organized. While as the trial judge I was grateful for this, my impression is that he has invested far too much time and energy into this litigation, when he ought to have been focused upon doing everything within his power to earn a reasonable income.

[78] Overall, my sense is that he has a broad range of marketable skills. He was 39 years of age when the parties separated in 2013. At 46 years of age, the husband remains relatively youthful. He does not assert any problems with his physical health.

[79] The husband acknowledges that he did not work at all for a full year from August 2015 until August 2016, and only worked part-time after that. He indicates that he will be resuming full time work only in February 2020. He never sought any form of employment other than as an insurance agent. He explained that after 15 years in the insurance field he was not suited to any other work.

[80] The husband states that the litigation has been a distraction and that the time necessary to prepare for hearings and trials has impacted his ability to earn income, particularly since he has had to represent himself much of the time. I accept that this is true, but I do not accept that it is a valid excuse for not applying himself fully to earning an income with which to pay support. These are common problems for spouses and parents involved in family litigation, and they are routinely overcome. I rejected a similar argument in M.K.M., at para. 243.

- [81] In *Hanson v. Hanson*, 1999 CanLII 6307, [1999] B.C.J. No. 2532 (S.C.), referred to above, the husband was on stress leave from his occupation as a firefighter. He contended that the stress leave was caused in part by the stress of the marriage breakdown and the resulting litigation. Martinson J. held that he remained capable of earning the income he had traditionally earned both as a firefighter and in his ancillary business.
- [82] It is clear that the husband has only been able to continue to support himself with the assistance of his father. Without that assistance, it seems to me that the husband would have been compelled to obtain gainful employment in order to support himself, at least.
- [83] I note that the husband substantially understated his income in his first F8, sworn December 22, 2014. He stated that his income was \$40,000, about one-half of his actual net income for that year of \$79,180. This suggests that he was not motivated to pay reasonable support, from the outset. The six F8 statements he swore subsequently all state that his income for support purposes is zero.
- [84] The circumstances cause me to be sceptical of the husband's claims of incapacity.
- [85] On all of the evidence, I do not accept that the husband was substantially incapacitated in relation to employment and capable of earning only the meagre amounts he earned in 2015 to the present.
- [86] In my view, it is appropriate to use the husband's average income over the three years of 2012 through 2014 as his imputed income for child support and spousal support purposes for the years 2015 to 2019. The average is \$67,879.
- [87] The wife's income remains modest. She has worked as a Special Education Assistant ("SEA") for the past 4.5 years, since September 2015. She was able to obtain the required training and re-enter the workforce quite quickly after the separation. As an SEA, she works a maximum of 30 hours per week, and only on days when school is in session. In my view, this is part-time work. She is attempting to upgrade her qualifications in order to become a teacher. The husband does not argue that the wife is underemployed. This could become an issue in the future, if the wife continues to work part-time, earning an income commensurate with part-time work.

C. Past Child and Spousal Support Issues

- [88] As noted, arrears of child and spousal support according to FMEP records amount to \$105,584.72 as at January 11, 2020. This amount is comprised of the following:
1. arrears from ongoing maintenance: \$97,956.42;
 2. interest on arrears: \$6,428.30;
 3. arrears subtotal: \$104,384.72; and
 4. Provincial Government summary default fees: \$1,200

Total \$105,584.72.

[89] On the schedule provided, there is no breakdown of the amount owing as between child support and spousal support. I can infer that the proportions are in line with the amounts set out in the JCC order of \$610 child support, and \$1,390 spousal support. The proportions are 30.5% child support, and 69.5% spousal support.

1. Legal Principles

[90] The JCC order was expressly interim and "without prejudice".

[91] The child support order for payment of \$610 per month references the FLA, therefore the FLA applies to the issues of retroactive variation and cancellation of support.

[92] The spousal support order for payment of \$1,390 per month does not reference the FLA or the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [DA], but the Notice of Family Claim, the only pleading that had then been filed, sought spousal support under the DA, only.

[93] The correct approach to deciding whether the order is made under the DA or the FLA is to examine the pleadings of the action, the language of the order itself, and the circumstances in which the order was granted: *Yu v. Jordan*, 2012 BCCA 367, at para. 53. Based on the pleadings, the DA is applicable to the spousal support issues arising from the JCC order. The Notice of Family Claim was amended later to include a claim for spousal support under the FLA, but this is not relevant to this determination.

[94] The relevant sections of the FLA are as follows:

Changing, suspending or terminating orders respecting child support

152 (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.

(2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:

- (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
- (b) evidence of a substantial nature that was not available during the previous hearing has become available;
- (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

Changing, suspending or terminating orders respecting spousal support

167 (1) On application, a court may change, suspend or terminate an order respecting spousal support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in the condition, means, needs or other circumstances of either spouse has occurred since the order respecting spousal support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by either spouse was discovered after the order was made.
- (3) Despite subsection (2), if an order requires payment of spousal support for a definite period or until a specified event occurs, the court, on an application made after the expiration of that period or occurrence of that event, may not make an order under subsection (1) for the purpose of resuming spousal support unless satisfied that
 - (a) the order is necessary to relieve economic hardship that
 - (i) arises from a change described in subsection (2) (a), and
 - (ii) is related to the relationship between the spouses, and
 - (b) the changed circumstances, had they existed at the time the order was made, would likely have resulted in a different order.

Reducing or cancelling arrears

174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

- (2) For the purposes of this section, the court may consider
 - (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

[95] In relation to cancelling arrears under the DA, in *MacCarthy v. MacCarthy*, 2015 BCCA 496, the Court of Appeal stated:

54 The factors to be considered in granting an order cancelling arrears are set out in *Burgie v. Argent*, 2013 BCCA 247, at paras. 15 and 23, namely, (a) whether there is a material change in circumstances, and (b) whether it would be "grossly unfair" not to cancel or reduce the arrears. In general, arrears will only be cancelled if the applicant shows he is unable to pay "now and in the future": *Semancik v. Saunders*, 2011 BCCA 264 at para. 25. The test for cancelling arrears of child support is more stringent than that for refusing to make a retroactive child support order. It is a "higher threshold".

[96] In addition, the Court quoted extensively from the well-known decision of *Martinson J.* in *Earle v. Earle*, 1999 CanLII 6914, [1999] B.C.J. No. 383 (S.C.).

[97] However, an interim, without prejudice order may be varied without a material change in circumstances: *D.P.G. v. V.M.G.*, 2015 BCSC 1038, at paras. 35-38; *Sandhu v. Bhullar*, 2016 BCSC 59, at para. 44.

[98] The JCC order was not based upon any factual findings by the court. I would interpret the meaning of "without prejudice" in the circumstances to mean that the amounts ordered to be paid would not be relevant to the subsequent determination by the court as to the amounts of support that ought to have been payable. However, the court order remained in effect and ought to have been adhered to.

[99] Section 17(1) of the DA governing variation of support orders applies to child support orders made under s. 15.1(1) of the DA, not interim orders made under s. 15.1(2): *Hama v. Werbes*, [1999] B.C.J. No. 2558, at para. 15.

[100] Insofar as possible, retroactive support is to be determined based on actual income earned in each year for which it is due: *Hsieh v. Lui*, 2017 BCCA 51, at para. 49; *Visser v. Visser*, 2019 BCSC 1856, at para. 247.

2. Analysis

[101] The husband claims that he overpaid child support and spousal support by a total of \$25,893.86 from the date of separation, October 1, 2013, to the end of 2019, effectively the commencement of the trial.

[102] This is calculated by reference to his incomes from year to year as asserted, and calculations of child support and spousal support payable at those incomes.

[103] He calculates that he paid family expenses or support payments of \$72,741.86 during the period in question, when his obligations under the Guidelines and for mid-range spousal support totaled \$46,848.

[104] However, there are several flaws in this claim.

- [105] The claim is based upon his assertions of his actual income, whereas, I have imputed different, larger incomes to him for the years 2015 to 2019.
- [106] A substantial part of the claim relates to the period after separation and before payments of support were payable under the JCC order commencing October 1, 2014. In effect the husband contends that all amounts paid prior to the order, for maintenance of the wife's household is equivalent to support, and if the amounts are higher than his asserted support obligations, he is entitled to a credit. I do not agree. This kind of analysis could be relevant in answer to a claim by the wife for retroactive support prior to JCC order, but the wife makes no such claim. There was no agreement or court order specifying the amount of support he was obliged to pay.
- [107] After separation, a period of time is typically required for financial adjustments and changes to be made. There is always a transition period, which may be quite long, depending on the circumstances. Here, when the parties separated the wife was not working and had no income. In the meantime, the bills needed to be paid. Quite properly, during this interim period the husband continued to provide support for his spouse and children in accordance with his existing legal and moral obligations. But there is no legal basis for later claiming a proportion of such payments back, except perhaps, if the payor establishes that such payments were truly excessive in the circumstances of the case, the excessive payments might be considered in relation to claims for unequal division of property or debt. However, in this case, the payments were not excessive, and in any event no claim for unequal division is made by either party.
- [108] Some of the claim is for other voluntary payments made following the JCC order, such as for motor vehicle loan payments and insurance. In my view there is no basis upon which these payments can or should be recoverable.
- [109] Therefore, in my view the husband's voluntary payments prior to the JCC order or after the order are not relevant to calculation of his past support obligations.
- [110] The following table sets out the relevant incomes of the parties and the corresponding support obligations of the husband:

Year

Wife's income

Husband's income

Child Support, monthly

Spousal Support (mid-range), monthly

Total monthly support

Total annual

Support actually paid

2014

0

79,180

1,197

1,400

2,597

7,791 (3 months)

6,000

2015

11,032

67,897

1,029

552

1,581

18,972

16,000

2016

28,932

67,897

1,029

0

1,029

12,348

0

2017

29,017

67,897

1,053

0

1,029

12,636

1,042.23

2018

29,770

67,897

1,053

0

1,029

12,636

5,472.99

2019

29,770

67,897

1,053

0

1,053

12,636

1,528.36

2020

29,770

70,000

1,086

0

1,086

Total, 2014 to 2019:

66,195

10,824

77,019

30,044

[111] These support calculations include consideration of the wife's payment of the s. 7 orthodontic expenses, discussed later in these reasons.

[112] Therefore, the husband's net past support obligation is calculated at \$46,975, (\$77,019 minus \$30,044) before consideration of s. 7 expenses.

3. Section 7 Expenses

[113] The mother has and continues to incur orthodontic expenses for the children. Payment is being made via monthly installments. The total amounts that have or will be paid when all installments are paid in August, 2020 is \$8,600. [I., \$4,050, and H., \$4,550] This is the patient's portion of the expenses, after insurance payments. Payments are spread over 24 months from 2018 to 2020. (The tax receipt records the mother produced do not cover the entire expense, but the ledger records are complete.)

[114] The orthodontic expense is a special expense pursuant to s. 7(1)(c) of the Guidelines and therefore is to be shared in accordance with the incomes of the parties pursuant to s. 7(3) of the Guidelines.

[115] Future special or extraordinary expenses will be shared in proportion to the Guidelines' income of the parties.

[116] Based upon the parties' incomes for 2018 to 2020, the husband's proportional share of orthodontic expense is 69.75%, or \$5,998.

[117] As a practical matter, it is best if the parties agree about incurring special or extraordinary expenses before they are incurred, where reimbursement is going to be sought. This would hopefully reduce disputes about whether the expense qualifies, and whether it will be shared.

[118] Therefore, there will be an additional order as follows:

Where circumstances allow, each party shall inform the other party of s. 7 special or extraordinary expenses that are proposed to be incurred, where the party incurring the expense expects to seek reimbursement for a share of the expense from the other party, and shall attempt to seek agreement to the expense being incurred. Claims for reimbursement will be accompanied by copies of receipts to the other party as soon as practicable, and in any event not more than 60 days after the expense is incurred.

4. Canada Child Tax Benefit (CCTB) Recovery Issue

- [119] On October 20, 2016 the wife received a lump sum payment of \$27,354.78 as child tax benefits. The payments were in respect of the years 2006 through 2013. The Canada Child Tax Benefit (CCTB) was not claimed in the past, during the years in question. The husband denies that the reason the CCTB was never applied for was that he did not file tax returns for the last several years of the marriage. I accept that this is indeed the reason. Had the tax returns been filed, then there would be no reason at all for the parties not to apply for these valuable benefits. The husband is a financial industry professional. Thus, the husband is at fault for the fact that the CCTB was not received for the benefit of the family and children when it should have been.
- [120] The benefits were not applied for or obtained until 2016. Of the \$27,354.78 received on October 20, 2016, \$26,755 related to the years 2006 through 2013. The husband claims this amount as equivalent to child support, as I understand his position.
- [121] The husband claims that further receipts shown in the wife's bank records are also CCTB lump sum payments attributable to the time period prior to separation. This is not supported by the evidence.
- [122] At best, the claim would be for one-half of the amount, or \$13,377, as the father's notional share of these funds. However, I do not agree that the payment should affect the husband's child support obligations. The CCTB payment ought to have been applied for and received at the relevant times. The husband is at fault for the fact that this did not occur. Presumably these payments are intended largely to benefit the children, directly or indirectly. The children lost the benefit of these funds when they were not received previously. The subsequent receipt ought to be seen as a make-up for the previous loss to the children, and not as a substitute for the father's later child support obligations.

D. Variation of JCC Order, and Cancellation of Arrears

- [123] The husband's past support obligations as recalculated total \$52,973 (\$46,975 plus \$5,998).
- [124] As noted, given the interim, without prejudice nature of the order, a finding of a material change in circumstances since the making of the order is not required. However, there clearly has been a material change in circumstances, in that the husband's spousal support obligations ceased when the wife became employed. As noted, spousal support comprised 69.5% of the amount payable under the order. It can be safely inferred that most of the arrears are for spousal support, which I have found not to be payable, in the main. It would be grossly unfair not to cancel arrears of spousal support which are not owing.
- [125] However it is not grossly unfair to cancel the amount I have found to be actually payable. This is largely for child support. I have found that the husband could have earned more than he did.
- [126] Therefore the principal amount of the arrears of support are determined to be \$52,973, as at December 31, 2019. The remainder is cancelled, subject to my comments below.

- [127] The interest on the cancelled portion of the arrears is reduced proportionately under FLA s. 174(4). The default fees are reduced proportionately under s. 14.4(6) (b) of the Family Maintenance Enforcement Act, R.S.B.C. 1996, c. 127 [FMEA].
- [128] There is no evidence before me as to whether the Director of Maintenance Enforcement has been given notice of the husband's applications to cancel arrears, as required by s. 7 of the FMEA. I am aware that the husband has been in communication with FMEP, as the Director has cancelled his driver's licence and required him to surrender his Canadian passport. It seems likely therefore that the Director was given notice by the husband of the forthcoming trial and his applications.
- [129] I direct that my orders reducing the arrears, interest and default fees are stayed until further order of the court. In order to make the further order, I will require confirmation that the Director was given notice of the husband's application, or confirmation that the Director takes no position.
- [130] The parties may of course choose to set off each other's obligations.

E. Future Child Support

- [131] The husband remains underemployed. There is no reason he cannot achieve the earning potential he demonstrated the ability to fulfill previously. In addition, at last, the litigation is substantially concluded. It has been a major preoccupation for him for the past several years, both from an emotional perspective and from the point of view of the amount of work that he has the work and distraction it has occasioned.
- [132] As noted, in the future the mother should also be able to increase her income from its present level. As noted, she is endeavoring to do so. The husband does not assert that the wife is underemployed. In any event I do not make that finding at this time.
- [133] The husband states that his income for support purposes is \$40,000 effective February 1, 2020. The income of \$67,879 that I have assessed as imputed income for the years 2014 to 2019 is based upon the husband's average earnings from 2012 to 2014, several years in the past.
- [134] In modest recognition of the effects of inflation on incomes, I impute income of \$70,000 per annum to the husband effective January 1, 2020.
- [135] Therefore, I order that the husband pay child support in the amount of \$1,086 per month commencing January 1, 2020, based upon his imputed income for 2020 of \$70,000.
- [136] I also order that the parties exchange income tax information for the preceding calendar year by no later than June 30 of each year, and that they review the amount of child support payable. In the event that they cannot agree on the amount to be paid, then they are at liberty to apply for variation of my order.

F. Future Spousal Support

- [137] I adopt my comments as to the legal principles applicable to spousal support as set out in my decision in *D.P.R. v. L.L.R.*, 2015 BCSC 2317, at paras. 116 to 18.
- [138] In this case, spousal support would be payable on compensatory principles, but based upon the incomes of the parties and the Spousal Support Advisory Guidelines [SSAG], no spousal support is currently payable. This is because of the priority of child support, under the DA s. 15.1(3), and FLA s. 173. Therefore, pursuant to DA s. 15.3(3), or FLA s. 173(3)(b), any subsequent reduction or termination of the child support constitutes a change of circumstances for the purposes of applying for a spousal support order, or a variation order in respect of the spousal support order, as the case may be.

V. Costs, and Dr. Elterman Fees

- [139] There will be no order as to costs, except in relation to the fees of Dr. Elterman.
- [140] Very broadly, success has been divided. I found that the wife was responsible for causing the children's alienation from the father, as the father contended. However, the husband did not succeed in obtaining the order for re-integrative therapy that he sought, largely because I thought it was too late, and such orders would not be effective.
- [141] Success was also divided on the financial issues. The husband's financial claims against the wife were only partly successful. She is ordered to pay a share of the family debt at separation. The husband obtained a substantial reduction in support arrears, but far less than what he sought. I rejected his primary argument that he was incapable of earning a living, and his claim for overpayment of support. I ruled in the wife's favour by imputing income to the husband, but not to the degree the wife sought in her pleadings, where she asserted that he earned more than \$150,000 per annum. She also asserted that he had ownership interests in the B. Place Residence, which I did not find.
- [142] Under s. 211(5) of the FLA, a court may allocate among the parties or require one party alone to pay the fees relating to an assessment under s. 211.
- [143] I have no difficulty concluding that "the fees relating to an assessment" may include the fees payable to the assessor for attending at the trial to give evidence.
- [144] I order that Dr. Elterman's fees (for his reports, and his attendance at trial) shall be shared equally. Dr. Elterman's report fees are \$15,120. I expect that there could be further fees for his attendance at trial. The husband paid Dr. Elterman's report fees. As both parties are to bear their own costs, the effect otherwise would be that the father alone would pay these fees. In view of my findings on the parenting issues, it is fair and reasonable that the parties share this expense equally. The mother was primarily responsible for causing the alienation of the children, but the father was not entirely blameless, and was not successful in obtaining the results that he sought at trial.

"Verhoeven J."

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