

CANADA / JUDGMENT

Hammond v. Holtz

2024 BCSC 447

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Supreme Court of British Columbia

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2024 BCSC 447 Hammond v. Holtz

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hammond v. Holtz,

2024 BCSC 447

Date: 20240318

Docket: E00976

Registry: Abbotsford

Between:

Braden Edward Hammond

Claimant

And:

Kristina Eva Louise Holtz

Respondent

Before: The Honourable Justice K. Loo

Reasons for Judgment

Counsel for the Claimant:

L.S. Vidovich

Appearing on her own behalf:

K. Holtz

Place and Dates of Trial:

Abbotsford, B.C.

January 15-19, 22-23, 2024

Place and Date of Judgment:

Abbotsford, B.C.

March 18, 2024

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- [1] This is a family law proceeding in which the primary issue is the division of property. The respondent, Kristina Holtz, also advances a tort claim for assault and battery, and seeks orders in relation to spousal support and child support.
- [2] The claimant, Braden Hammond, is a glassblower and, more recently, has worked as a fitness instructor. Ms. Holtz works as a records clerk for the City of Burnaby. At the time of the trial, the parties were both in their early forties.

Factual Background

- [3] The parties met when Mr. Hammond moved to British Columbia from Canmore, Alberta, in early 2004. At the time, Ms. Holtz was living in a shared house with roommates, while Mr. Hammond rented one of the rooms in the house.
- [4] The parties began dating in approximately February 2004.
- [5] After about four months, they both moved from the shared house - Ms. Holtz moved into a basement suite and Mr. Hammond into a separate apartment. In late 2004, after her basement suite was broken into, Ms. Holtz moved in briefly with Mr. Hammond and then moved into an apartment on Halifax Street in Burnaby (the "Halifax Property") in November 2004, which she had purchased.
- [6] In December 2005, Mr. Hammond moved into the Halifax Property. There was a conflict in the evidence as to why he did so. Mr. Hammond testified that they intended to move in together as a couple. Ms. Holtz testified that she was trying to help him save money for his glassblowing business. In any event, it is clear that they were cohabitating as a couple from this date forward.
- [7] On or about December 2, 2005, the parties signed a written agreement entitled the "Cohabitation Agreement" (the "Cohabitation Agreement").
- [8] On October 21, 2011, their first child, Parker, was born.

- [9] In May 2012, the parties purchased, and moved into, an apartment on Norfolk Street in Burnaby (the "Norfolk Property"). Both of their names were registered on title and on the mortgage.
- [10] On May 6, 2014, their second child, Asher, was born.
- [11] In May 2016, the parties purchased, and moved into, a house on 123 Avenue in Maple Ridge (the "Maple Ridge Property"). Both of their names were registered on title and on the mortgage.
- [12] On October 9, 2016, their third child, Leora, was born.
- [13] In February 2017, the parties opened a joint bank account for the first time.
- [14] Ms. Holtz contends that the parties' spousal relationship ended in July 2020.
- [15] In January 2021, Ms. Holtz obtained a protection order and Mr. Hammond was compelled to leave the Maple Ridge Property. Mr. Hammond contends that their spousal relationship ended at this time.

Witnesses and Credibility

- [16] Ms. Holtz called six witnesses, including herself. In my view, she gave her evidence in an objective and straightforward way.
- [17] With a few exceptions, which will be described in the course of these reasons, the evidence of most of the other witnesses called by Ms. Holtz was not particularly helpful. These witnesses were called mostly to corroborate Ms. Holtz's testimony that Mr. Hammond did not participate in household duties and that there were arguments in which Mr. Hammond, in particular, would shout aggressively. It was clear from the testimony of all of these witnesses that they viewed their task as being supportive of Ms. Holtz in her disputes with Mr. Hammond. While this in itself does not make their evidence valueless, it does mean that I should approach their evidence with caution.
- [18] Mr. Hammond's evidence was more problematic than that of Ms. Holtz. He answered "I do not recall" to many questions to which the answers probably would have been unfavourable to him. He repeatedly failed to answer questions directly. The Court was required to intervene at one point during his cross-examination when he repeatedly answered "no comment" to questions that he did not want to answer.
- [19] As a result of the foregoing, where the evidence of the parties differs or conflicts, I have preferred Ms. Holtz's evidence, all other things being equal. That said, I will endeavour to make factual findings in this case without relying solely on the credibility of any of the witnesses. In this regard, Justice O'Halloran held as follows in *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.):

In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions.

Issues

[20] The following issues are to be determined:

- a) How are the assets to be divided, particularly in light of the Cohabitation Agreement?
- b) Is spousal support payable by Mr. Hammond to Ms. Holtz and, if so, how much?
- c) Has Ms. Holtz made out any tort claims against Mr. Hammond and, if so, what damages are to be awarded?
- d) What orders ought to be made for lump sum child support and lump sum s. 7 expenses, both in respect of arrears and future obligations?

Division of Property

[21] In order to divide the family property in this case, the following sub-issues will be considered: (a) the enforceability and impact of the Cohabitation Agreement; and (b) whether unequal division would be significantly unfair.

Enforceability of the Cohabitation Agreement

[22] The Cohabitation Agreement is dated December 2, 2005 - the same month that the parties started cohabiting. It is signed by both parties but not witnessed. Paragraph 3 of the Cohabitation Agreement states:

[3] Unless a particular piece of property is explicitly documented as being owned by both parties, the following types of property will not be deemed as shared property:

- [a] Any property owned by a party at the date or after the date of execution of this Agreement;
- [b] Any income or proceeds or increase in value derived from property owned by a party before or after the execution of this Agreement;
- [c] Any property acquired by either party with income received during their cohabitation from property owned by a party before or after the date of execution of this Agreement;
- [d] Any earnings, salary, or wage acquired before or after the execution of this Agreement; and
- [e] Any savings acquired before or after the execution of this Agreement.

[23] Section 93 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] provides the basis upon which a witnessed agreement respecting property and debt division may be set aside. Section 93(6) provides that the Court may also apply this provision to unwitnessed written agreements if it is satisfied it would be appropriate to do so in all of the circumstances.

[24] An agreement may be set aside under the FLA on two grounds:

- a) there is some defect in the process of making the agreement as described in s. 93(3) - that one or more of the following circumstances existed when the parties entered into the agreement:
 - i. a spouse failed to disclose significant property or debts, or other information relevant to the negotiation of the agreement;
 - ii. a spouse took improper advantage of the other spouse's vulnerability, including the other spouse's ignorance, need or distress;
 - iii. a spouse did not understand the nature or consequences of the agreement; and
 - iv. other circumstances that would, under the common law, cause all or part of a contract to be voidable; or
- b) there is significant unfairness in the agreement, having regard to the factors set out in s. 93(5):
 - i. the length of time that has passed since the agreement was made;
 - ii. the intention of the spouses, in making the agreement, to achieve certainty; and
 - iii. the degree to which the spouses relied on the terms of the agreement.

[25] The evidence regarding the making of the Cohabitation Agreement was not particularly clear. Although Mr. Hammond testified that he did not recall signing the agreement, he did not deny doing so.

[26] On the evidence before the Court, I am unable to find that there was a defect in the process of making the Cohabitation Agreement under s. 93(3).

[27] First, it has not been established that a spouse failed to disclose significant property or debts. Although Mr. Hammond asserted broadly that he did not receive disclosure specific to the making of this agreement, the Cohabitation Agreement states that the "parties have disclosed to the satisfaction of each of them all assets and liabilities that each may have".

[28] The parties did not have many assets at the beginning of their relationship. The Cohabitation Agreement provides that the Halifax Property shall remain in the name and ownership of Ms. Holtz. It lists other specific assets, such as a television; a bed; an IBM computer; a stereo system; a painting; a 1993 Honda; Ms. Holtz's photography equipment; and Mr. Hammond's glassblowing equipment as remaining in the name and ownership of either one of the parties.

[29] There is no evidence that either spouse failed to disclose any specific asset or liability.

[30] Second, there is no evidence that either spouse was particularly vulnerable, or in need or distress.

- [31] Third, although Mr. Hammond asserts that he did not understand what the Cohabitation Agreement would mean for his future, the agreement is clear on its face. Mr. Hammond appears to be literate and reasonably educated. I am unable to find that he did not understand the nature or consequences of the Cohabitation Agreement when he signed it.
- [32] On the other hand, I do have concerns that strictly enforcing the Cohabitation Agreement in accordance with all of its terms would be significantly unfair within the meaning of s. 93(5), particularly in light of the length of time that has passed since the agreement was made and the degree to which the parties relied on the terms of the agreement during the course of their relationship.
- [33] In my view, the appropriate course in this case is not to exercise this Court's discretion under s. 93(6) to apply s. 93 to the unwitnessed Cohabitation Agreement, but rather to leave the agreement as a factor to be considered pursuant to s. 95(2)(b) when determining whether it would be significantly unfair to divide family property or debt equally. I will now turn to that issue.

Would an Equal Division of Family Property be Significantly Unfair?

- [34] The statutory provisions central to the division of family property are ss. 81 and 95 of the FLA:

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.

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.
- [35] Ms. Holtz submits that an equal division of the family property would be significantly unfair having regard to her unequal share of household and parenting responsibilities throughout the parties' relationship. She also relies on the Cohabitation Agreement as a factor to be considered under s. 95(2)(b).

The Significance of Unequal Contribution

Legal Principles

- [36] Broadly speaking, it is not this Court's task to determine whether there is significant unfairness within the meaning of s. 95 by meticulously tallying up the respective contributions of the parties. Respective contributions are not a factor set out in s. 95(2). Further, s. 81(a) expressly states that "spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution" (emphasis added).

[37] Nonetheless, courts have recognized that in some circumstances, unequal contributions can lead to a finding that an equal division of family property would be significantly unfair. For example, in *Chang v. Chang*, 2020 BCSC 1783, the Court divided the family property unequally on the basis of unequal contributions.

[38] In *Chang*, the Court described the applicable test at para. 108:

To clear the high hurdle of significant unfairness, Ms. Chang must show "marked, prolonged, and intentional or unexplained disparities in contribution to family burdens": *Singh* at para. 133, citing *Khan v. Gilbert*, 2019 BCCA 80 at para. 32. Reapportionment requires "something objectively unjust, unreasonable, or unfair in some important or substantial sense": *Singh* at para. 134.

[39] Regarding the meaning of "significant unfairness" under s. 95, I have also considered the decisions in *Singh v. Singh*, 2020 BCCA 21; *Jaszczewska v. Kostanski*, 2016 BCCA 286; and *V.J.F. v. S.K.W.*, 2016 BCCA 186.

[40] The Court in *Chang* made the following findings:

[110] In the present case, I find there is evidence of significant disparities in contribution to family burdens, such as childrearing and household duties, which are intentional and unexplained. Again, Mr. Chang agreed that Ms. Chang was responsible for the majority of those duties during their relationship.

[111] While Mr. Chang attempted to explain his lesser contribution in these areas by pointing to the long hours he worked at Greyhound, there was no explanation for the many years during the relationship when he was unemployed or working part time.

[112] In finding that there are significant disparities in contribution to family burdens, I have taken into account that Mr. Chang did make some contributions to childrearing, elder care and maintenance of family property, some of which I described earlier in these reasons.

[113] I also considered that Mr. Chang did some work on the Family Home, such as enlarging closets, adding a fireplace mantle, updating light switches and carrying out various other tasks. However, I agree with Ms. Chang that Mr. Chang's work on the Family Home was often of poor quality and sometimes it was downright detrimental.

[114] For example, Mr. Chang undertook a renovation of the downstairs bathroom. He demolished the shower stall but never replaced it. Mr. Chang's bathroom renovation effectively reduced the total working showers from two to one. In addition, his work on the back deck and stairs did little, if anything, to improve their safety or usability.

[115] There is also evidence of significant disparities in the parties' financial contributions, which are intentional and unexplained. As pointed out earlier in these reasons, Mr. Chang acknowledged that Ms. Chang contributed far more towards family property and family expenses than he did.

Evidence and Factual Findings

- [41] Much of the trial was taken up by evidence regarding the parties' respective contributions to the household, both financially and otherwise.
- [42] Ms. Holtz testified that she did all of the housework, including cooking and laundry, and took care of the children. She mowed the lawn and did most of the gardening. Mr. Hammond did the watering. Witnesses called by Ms. Holtz corroborated her evidence in this regard, testifying that Ms. Holtz did almost all of the parenting and the housework, and that Mr. Hammond did very little.
- [43] Ms. Holtz testified that Mr. Hammond was very uninvolved with the children and primarily focused on his glassblowing business. She said that their relationship was a "90:10 split and not 50:50".
- [44] Ms. Holtz testified that the split was similarly unequal financially. She testified that she paid for all of the household expenses during the first four years of their relationship.
- [45] She provided a spreadsheet to the Court which shows that since 2016, she has contributed approximately \$195,000 towards the properties jointly owned by the parties - not including funds derived from the sale of the Halifax Property, which, as discussed below, I find were excluded property. By contrast, Mr. Hammond's contributions towards the properties during that same period totalled approximately \$46,000.
- [46] Ms. Holtz testified that the burden of responsibility for the household and its finances weighed on her throughout the relationship, but that the financial inequities were most pronounced in the years before 2016 when they moved into the Maple Ridge Property.
- [47] Ms. Holtz testified that she and Mr. Hammond orally agreed that they would share expenses once they moved into the Maple Ridge Property. However, Mr. Hammond did not live up to his end of that agreement. As a result of Mr. Hammond's reluctance in this regard, Ms. Holtz opened a joint account in February 2017. For the most part, it appears that both parties contributed to that account between February 2017 and late 2020 but, even then, Ms. Holtz testified that she remained solely responsible for the mortgage payments.
- [48] By contrast, Mr. Hammond testified that he and Ms. Holtz both contributed to their life together.
- [49] He testified that he paid the expenses for the vehicles which he used at the beginning of their relationship and which they both used from time to time later. He contributed cash from trade shows and markets which was used for groceries and other household expenses. He contributed \$10,000 towards the purchase of the Norfolk Property and either \$18,000 or \$24,000 (the evidence is conflicting) to the purchase of the Maple Ridge Property. He spent \$15,000 to build a glassblowing studio attached to the Maple Ridge Property. He testified that when the vinyl on the deck of the Maple Ridge Property needed replacing, the parties each paid half of the \$5,000 cost. After the joint account was set up, he contributed to it.

- [50] Mr. Hammond also gave evidence that he took the children to martial arts lessons and soccer, and took care of them on occasion - although when the children were old enough for daycare, they went to daycare, and Ms. Holtz's parents also took care of the children and cooked dinner from time to time. He testified that he did some cooking.
- [51] Mr. Hammond testified that part of his role was to fix items around the house. However, Ms. Holtz testified that he did not do so capably, and that his efforts simply caused more tension between them. She also testified that her father often helped them with maintaining the family home.
- [52] A recurring issue between the parties was the tension between Mr. Hammond's wish to practice glassblowing and the need for him to earn a more substantial income so that he could assist in supporting the family. With assistance from Ms. Holtz, he had some success at glassblowing in the sense that he established a business and participated in markets, such as Circle Craft and the Portobello Market in Vancouver, and others across the country, and he did make some money from the craft. However, he was not able to generate a substantial net income from his glassblowing business over time.
- [53] According to his income tax returns, his total income was less than \$15,000 per year for every year from 2006 to 2021, with one exception. In 2019, his income was \$23,457 due to taxable COVID-19 related benefits that he received that year. However, for the majority of years, it was less than \$10,000.
- [54] Ms. Holtz also testified about other job opportunities that Mr. Hammond had available to him, but that he did not take. For example, Mr. Hammond had opportunities to be trained as an ambulance driver or firefighter. She testified that she had to be careful when she was speaking with him about the possibility of getting a part-time job, because these discussions usually created tension between them and resulted in him saying that she did not believe in his glassblowing career. She specifically recounted two instances in which friends suggested jobs that Mr. Hammond could apply for; in both instances, he became angry when Ms. Holtz agreed with the friends' suggestions.
- [55] To summarize, it cannot be said that Mr. Hammond made no contribution to the household, financially or otherwise. That said, considering all of the evidence, I have no difficulty in finding that Ms. Holtz performed most of the household duties and contributed the most financially to the relationship. In my view, Ms. Holtz has proven that there were "marked, prolonged, and intentional or unexplained disparities in contribution to family burdens" in this case: Chang at para. 108, citing Singh at para. 133. I find that the disparity is similar to, although slightly less, than that described in Chang.

The Significance of the Cohabitation Agreement

- [56] As stated above, it is my view that it is appropriate to consider whether the Cohabitation Agreement supports an unequal division of family property under s. 95(2). In determining this question, I will examine the terms of the agreement. I will also consider the factors set out in s. 93(5) in assessing whether the Cohabitation Agreement is significantly unfair.
- [57] In this case, approximately 14 years passed between the making of the Cohabitation Agreement and the parties' separation. In dealing with items such as Ms. Holtz's bed and television, it is apparent that the Cohabitation Agreement was made at a very preliminary stage of the parties' relationship. There is no indication that the parties contemplated at the time that they would live together as spouses for 14 years and have three children together.
- [58] Further, there was no evidence that the Cohabitation Agreement was discussed or relied upon during the course of the relationship. Indeed, there was evidence that Ms. Holtz acted inconsistently with its terms. For example, although the agreement provides that "any earnings, salary or wage" of either party shall not be shared property, one of the witnesses called by Ms. Holtz, Michelle Ribout, gave evidence about a dispute between the parties regarding cash earned from a market at which Mr. Hammond was selling his glassblowing products. Ms. Ribout testified that when she first met Mr. Hammond, he was shouting at Ms. Holtz in the parking lot. He wanted to use the money that he earned at the market to go out with his friends, but Ms. Holtz said that the money was for both of them. Ms. Holtz's position in this dispute was inconsistent with the Cohabitation Agreement's provision that any earnings of either party would not constitute shared property.
- [59] Moreover, in assessing the impact of the Cohabitation Agreement on the division of property, it is important to examine its terms. As stated above, paragraph 3 of the agreement states that "unless a particular piece of property is explicitly documented as being owned by both parties, the following types of property will not be deemed as shared property" (emphasis added). Similarly, paragraph 2 states that if the parties separate, "all property will be treated as separate property owned solely by one party unless there is proof of shared legal ownership".
- [60] Although the parties disagree as to why this was done, both parties were registered on title to the Norfolk Property and the Maple Ridge Property. Therefore, those properties were "explicitly documented as being owned by both parties" and there is "proof of shared legal ownership". Even accepting that the Cohabitation Agreement is enforceable in accordance with its terms, those terms expressly exclude the Norfolk Property and the Maple Ridge Property from its scope.

- [61] For all of these reasons, it is my view that the Cohabitation Agreement is of some significance - in that it does provide some evidence of the parties' intentions regarding specific assets such as the Halifax Property, for example - but it does not carry significant weight in the overall assessment of whether an unequal division of assets would be significantly unfair.

Property Division

- [62] In determining whether to divide the family property unequally, this Court must first "notionally divide the family property, taking into account the exclusions, in accordance with the provisions of the FLA": *Remmem v. Remmem*, 2014 BCSC 1552 at para. 47.

The Maple Ridge Property

- [63] The primary asset at issue is the Maple Ridge Property. The Maple Ridge Property is valued at \$970,000 by an appraisal made in December 2023. There is approximately \$300,000 owed on the mortgage, leaving approximately \$670,000 in equity.
- [64] Ms. Holtz's evidence is that she made the first, and largest, contribution to the parties' housing by using \$111,000 which she received from the sale of the Halifax Property towards the purchase of the Norfolk Property. In turn, she used the net proceeds of the Norfolk Property towards the purchase of the Maple Ridge Property.
- [65] In my view, the \$111,000 Ms. Holtz derived from the sale of the Halifax Property is excluded property under the FLA. Ms. Holtz purchased that property approximately one year before the parties began cohabiting. Further, in the Cohabitation Agreement, the parties expressly agreed that the Halifax Property would remain in the name and ownership of Ms. Holtz.
- [66] The result of the foregoing is that the value of the Maple Ridge Property to be divided is approximately \$560,000. Notionally, an equal division would entitle each party to \$280,000.
- [67] Based on my assessment of the parties' unequal contributions above, and comparing the facts of this case to the circumstances in *Chang* wherein the Court divided the family home 75/25 in favour of Ms. Chang (at para. 122), it is my view that an appropriate division that would not be significantly unfair to Ms. Holtz would be 65/35 in favour of Ms. Holtz. This means that of the \$560,000 in equity in the Maple Ridge Property, Ms. Holtz is entitled to \$364,000 and Mr. Hammond is entitled to \$196,000.

Other Family Property

- [68] Other property that potentially remains to be divided between the parties includes the family vehicle, the parties' pensions and the Insurance Corporation of British Columbia ("ICBC") settlements received by each of them arising out of a motor vehicle accident in 2017.

Vehicle

[69] At the time of separation, the parties owned a Kia Sedona. Although evidence regarding the vehicle was unclear, it was established that there is a significant sum still owing on the vehicle and that its market value is in the same range as the debt outstanding. In my view, the vehicle has little to no net value and does not need to be taken into account in the division of property.

Pensions

[70] The evidence is that both Ms. Holtz and Mr. Hammond have pension entitlements, although hers are significantly greater than his. In my view, it would be significantly unfair to require Ms. Holtz to divide her pension benefits with Mr. Hammond.

[71] The evidence demonstrates that Mr. Hammond made the conscious decision to prioritize his glassblowing career over other job opportunities throughout their relationship. While he was entitled to do that, and to believe in his own career prospects as a glassblower, it would be significantly unfair for him to be entitled to a share of Ms. Holtz's retirement benefits, given that he was somewhat intentionally underemployed and not contributing to a pension of his own. With respect to this issue, the Cohabitation Agreement is also of some significance, given that the parties agreed that their individual savings would remain theirs upon separation.

ICBC Settlement Payments

[72] As indicated above, the ICBC settlement payments arose as a result of a 2017 motor vehicle accident the parties were involved in. After the parties' separation, Mr. Hammond received a settlement in the amount of \$101,714.29 and Ms. Holtz received a settlement in the amount of \$29,967.34.

[73] With respect to settlements from a personal injury claim, s. 85 of the FLA provides, in part:

85 (1) The following is excluded from family property:

- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;

[74] In this case, both parties speculated, but were not able to advance evidence of any substance, as to whether either of the ICBC settlements included sums for past or future wage loss. As neither party was able to establish that the exception in s. 85(1)(c)(ii) applies, I find that the ICBC settlements were excluded property and shall not be taken into account in the division of property.

Income from the Workshop at the Maple Ridge Property

- [75] Finally, there is an issue regarding the glassblowing shop built adjacent to the Maple Ridge Property. It appears that following separation, Ms. Holtz permitted a friend or acquaintance to use the shop and accepted \$200 per month for such use. As Mr. Hammond remains an owner of the Maple Ridge Property, he is entitled to a share of any income that is generated from it. There was no evidence as to how long this arrangement regarding the use of the shop was carried on for.
- [76] I conclude that although the amounts are minor, it would be significantly unfair for Mr. Hammond not to share in these amounts. The parties' allocation of assets shall be adjusted by means of a payment from Ms. Holtz to Mr. Hammond in the amount of \$1,500 (\$200 per month x 30% x 25 months).

Spousal Support

- [77] Ms. Holtz concedes that if spousal support is determined by applying the Spousal Support Advisory Guidelines to the parties' reported incomes, the quantum of spousal support would be zero. Nonetheless, she seeks lump sum spousal support that she submits ought to be paid out of Mr. Hammond's share of the family property.
- [78] Section 161 of the FLA provides:
- 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.
- [79] Ms. Holtz also submits that this Court ought to consider the extent to which her financial means and earning capacity have been affected by her responsibilities and the parties' relationship pursuant to s. 95(3).
- [80] However, Ms. Holtz's evidence on this issue amounted to vague allegations that the parties' relationship precluded her from pursuing career advancement. There was no specific evidence proffered as to what other career opportunities she had, or would have succeeded in obtaining but for her responsibilities and the parties' relationship.

[81] In my view, as the evidence is insufficient to establish that Ms. Holtz's financial means and earning capacity were affected by her responsibilities and the parties' relationship, there is no claim for spousal support in this matter.

Tort Claims

[82] Within this family claim, Ms. Holtz advances tort claims. She seeks damages for "family violence", tracking the language in s. 1 of the FLA wherein "family violence" is defined as:

- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
 - (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
 - (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,
 - (iii) stalking or following of the family member, and
 - (iv) intentional damage to property, and
- (e) in the case of a child, direct or indirect exposure to family violence;

[83] Alternatively, she seeks damages for the "tortious acts of assault and battery".

Legal Principles

[84] In the recent decision of the Ontario Court of Appeal in *Ahluwalia v. Ahluwalia*, 2023 ONCA 476, the Court declined to recognize a new tort of family violence. Although this Court is not bound by the decision in *Ahluwalia*, I find it persuasive. Accordingly, I will address Ms. Holtz's allegations by applying only the established law regarding the torts of assault and battery.

[85] In *Ahluwalia*, the Court of Appeal cited its recent decision in *Barker v. Barker*, 2022 ONCA 567, leave to appeal to SCC ref'd, 40381 (30 March 2023), wherein it provided a summary of the torts of assault and battery. It held that although the terms are often used interchangeably, there is a distinction. At para. 138 of *Barker*, the Court held:

battery and assault are distinct concepts in tort law, both being examples of trespass to the person ... a battery involves actual physical contact by the tortfeasor or bringing about harmful or offensive contact with another person, whereas a tortious assault involves intentionally causing another to fear imminent contact of a harmful or offensive nature.

[86] In Ahluwalia at para. 66, the Court emphasized the importance of the "imminence" requirement for assault, instead of relying on a fear of future harm. It held that a fear of future harm is not an apprehension of imminent harm: Barker at para. 182.

Allegations

[87] Ms. Holtz's allegations are of two types. First, she alleges that Mr. Hammond has engaged in a pattern of verbal and emotional abuse throughout their relationship. Second, she alleges that an incident of sexual battery occurred in 2019.

Verbal and Emotional Abuse

[88] Turning first to the allegations of a non-sexual nature, there was much evidence given by Ms. Holtz, and through other witnesses, that Mr. Hammond was loud and aggressive towards her. He was prone to jealousy and quick to anger. He often shouted at Ms. Holtz and called her demeaning names in response to minor irritations.

[89] However, there are no claims of physical violence. Further, Ms. Holtz's evidence was that Mr. Hammond's behaviour in this regard was not at a consistent level throughout the relationship. Rather, it intensified in 2020 as the relationship deteriorated and ultimately broke down.

[90] Towards the end of their relationship, Ms. Holtz called the police twice as a result of Mr. Hammond's conduct.

[91] In October 2020, Ms. Holtz reported that Mr. Hammond had "hugged her and would not let her go". Despite reporting this incident to the police, Ms. Holtz did not wish to attend the police detachment or to have the police attend at their residence to discuss the matter further. Ms. Holtz reported that there had been no violence or threats, and that she had no safety concerns for herself or her children, and that she only wanted the incident to be documented.

[92] In November 2020, there was a heated argument after Ms. Holtz came home late and would not explain to Mr. Hammond where she had been. He took her purse and would not give it back. The police report stated that the argument "was not physical in nature".

- [93] Ms. Holtz testified that Mr. Hammond's conduct has caused her to suffer from anxiety and depression. Her testimony that she is suffering from anxiety and depression was corroborated by her counsellor who testified at trial; however, it is not clear on the evidence whether Ms. Holtz's mental health concerns arise from Mr. Hammond's conduct, from the stress of the relationship's breakdown and this litigation, or both.
- [94] In light of the evidence, it is clear that Mr. Hammond engaged in verbally abusive behaviour during the course of the parties' relationship. I do not wish to minimize his conduct: there is no doubt that verbal abuse can be harmful in the same way that physical abuse is. However, in my view, based on the law as described in Ahluwalia, Mr. Hammond's behaviour did not rise to the level of being tortious.
- [95] Except for the unwanted "hug" that led to the second police report, Mr. Hammond's conduct did not constitute battery as it did not involve physical contact. I am therefore unable to find that any damages should flow from that unwanted "hug".
- [96] Further, in my view, there is insufficient evidence for me to conclude that Mr. Hammond intentionally caused Ms. Holtz to fear imminent contact of a harmful or offensive nature: Ahluwalia at paras. 61, 64, citing Barker at paras. 138, 170. I note that most or all of the cases Ahluwalia cited wherein this threshold was met are cases in which physical violence had occurred in the past, thereby reinforcing the spouse's fears that harm was imminent.

Sexual Battery

- [97] I turn next to the allegation of sexual battery, which concerns an incident during a family trip to the Harrison Hot Springs in November 2019.
- [98] As stated in Barker (cited above), battery is an example of a trespass to a person. It involves "actual physical contact by the tortfeasor which is harmful or offensive": para. 138.
- [99] The parties both testified that they each went to the hot tub while the other stayed in the hotel room with the children. Ms. Holtz went first, then Mr. Hammond. Ms. Holtz testified that by the time Mr. Hammond came back to the room, she was asleep. She woke up to find that he had penetrated her vagina with his penis. At the time, she did not push him away or tell him that she did not consent to having sexual intercourse with him to avoid any conflict, particularly because the children were in the room.
- [100] Ms. Holtz testified that it was only after she and Mr. Hammond separated in 2020 that she was advised by others that she had been sexually assaulted. She then sought to amend her counterclaim in this proceeding to include this incident and reported it to the police.

[101] Mr. Hammond's evidence regarding this incident was vague. He stated that when he came back to the room, the parties had consensual sexual intercourse. He denied, in general terms, that he had ever had intercourse with Ms. Holtz without her consent, but he did not offer any details about whether Ms. Holtz was asleep or awake when he returned to the room.

[102] I am satisfied, on a balance of probabilities, that the incident occurred as described by Ms. Holtz. I have reached this conclusion because of Ms. Holtz's reasonable and detailed account; Mr. Hammond's vague, non-specific testimony in response; and because of my views regarding the parties' credibility generally, as described above. In particular, I find that Ms. Holtz was asleep when the penetration occurred.

[103] The defence of consent is not available to Mr. Hammond in these circumstances since, as a matter of law, an unconscious person cannot consent to sexual intercourse.

[104] I therefore find that Mr. Hammond's conduct constituted the tort of battery.

Damages

[105] Ms. Holtz has not sought any specific amount in damages and advised the Court that she seeks whatever award is just. Although she asserted that this event has had "long lasting significant effects" on her life, Ms. Holtz did not advance any specific evidence regarding the damages she suffered. Rather, she conceded that this incident was in fact "less impactful" than others because Mr. Hammond did not demean or shout at her on this occasion. She does not seek damages for past or future wage loss, or special damages.

[106] In *Nova Scotia (Attorney General) v. B.M.G.*, 2007 NSCA 120 [B.M.G.], the Court set out a non-exhaustive list of factors a court should consider in assessing non-pecuniary damages in civil sexual battery cases, including (at para. 134):

- a) the circumstances of the victim at the time of the events, including factors such as age and vulnerability;
- b) the circumstances of the assaults including their number, frequency and how violent, invasive and degrading they were;
- c) the circumstances of the defendant, including age and whether he or she was in a position of trust; and
- d) the consequences for the victim of the wrongful behaviour including ongoing psychological injuries.

[107] These factors militate towards a lower damages award in this case.

- [108] Further, although battery is actionable without of damage, and liability is not confined to foreseeable consequences, a plaintiff is not entitled to more than nominal damages unless they prove that the battery caused them loss: *C.D. v Mostowy*, 2021 BCSC 1920, citing *Norberg v. Wynrib*, [1992] 2 S.C.R. 226 at para. 54 and Elizabeth K.P. Grace & Susan M. Vella, *Civil Liability for Sexual Abuse and Violence in Canada* (Toronto: Butterworths, 2000).
- [109] On the other hand, in *B.M.G.*, the Court held:
- [128] There is no doubt that sexual battery constitutes a deep affront to the victim's dignity. In *Norberg v. Wynrib*, 1992 CanLII 65 (SCC), [1992] 2 S.C.R. 226 at 265, LaForest, J. echoed the words of Cory, J. in *R. v. McCraw*, 1991 CanLII 29 (SCC), [1991] 3 S.C.R. 72 that it is hard to imagine a greater affront to human dignity than non-consensual sexual intercourse. To the same effect, Cory, J. said in *R. v. Osolin*, 1993 CanLII 54 (SCC), [1993] 4 S.C.R. 595 at 669, that it cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence It is an assault upon human dignity.
- [110] In my view, Ms. Holtz is entitled to general damages for the affront to her dignity, as well as for the violation of her personal and physical autonomy.
- [111] Most of the case law regarding civil damages for sexual battery involves cases of prolonged and repeated abuse, often of a minor by an adult in a position of trust or authority and which caused or contributed to serious, ongoing negative effects on the victim. In those cases, courts have regularly awarded damages exceeding \$125,000. However, neither counsel nor Ms. Holtz has been able to identify any cases analogous to this one - in which a single incident of sexual battery has occurred between spouses, without proof of specific damages.
- [112] I have considered the range of damages awarded in non-sexual battery cases.
- [113] In *R.Y.W. v. D.W.W.*, 2013 BCSC 472, this Court awarded \$2,000 in damages (including aggravated damages) for an assault and battery of a non-sexual nature. In that case, the husband committed a battery of the wife by striking her twice on the head. He also held her by the head or the ear near the street and restrained her as she tried to get away from him.
- [114] In *Valenti v. Valenti*, [1996] O.J. No. 522, 1996 CanLII 8082 (Ont. C.J.), the husband punched his wife in the face and head area, forcing her head into the walls of the hallway. She was kicked and forced to sit on the couch with instructions not to move. The husband then forced his wife into the vehicle and as they drove, he struck his wife in the face and hit her with the car phone. She became terrified and attempted to leave the vehicle. At that point, the husband assumed control of the truck and returned to the residence after driving around for a short period of time. In that case, the Court awarded \$15,000 in damages (\$10,000 for general damages; \$2,500 for aggravated damages; and \$2,500 for punitive damages).

[115] As stated in B.M.G., sexual battery constitutes a deep affront to a victim's dignity. On the other hand, this was a single incident, there was no exploitation of a position of trust, and there is no proof of specific damages.

[116] In all of the circumstances, I have concluded that \$10,000 in general damages is appropriate to compensate Ms. Holtz for pain, suffering and loss of enjoyment of life, and to vindicate her dignity and personal autonomy: B.M.G. at para. 132.

Lump Sum Child Support and Section 7 Expenses

Arrears

[117] By an order filed on April 17, 2023, Provincial Court Judge Bond made several orders regarding child support payable by Mr. Hammond to Ms. Holtz (the "PC Order"). The PC Order provided, among other things, that beginning January 1, 2023, Mr. Hammond will pay Ms. Holtz \$1,183 in monthly child support. It also provided that the parties will share equally in certain s. 7 expenses for the children, and it quantified the arrears outstanding at that time. The parties did not challenge the PC Order in these proceedings.

[118] Since the PC Order was made, Mr. Hammond has paid approximately \$9,700 in child support and nothing in s. 7 expenses. The parties agree that the present arrears total \$40,428.94, which include child support up to and including January 2024, as well as s. 7 expenses up to and including November 2023.

[119] Ms. Holtz has asked this Court to set off these arrears against any amount to which Mr. Hammond is entitled as a result of the division of property. Mr. Hammond did not oppose such an order and, in my view, it is appropriate.

Prospective Obligations

[120] An award in respect of prospective child support and s. 7 expenses raises different issues. Ms. Holtz seeks lump sum child support in the amount of \$142,000 and lump sum s. 7 expenses in the amount of \$57,000. It is unclear on the evidence precisely how she calculated these amounts.

[121] Ms. Holtz submits that given Mr. Hammond's past employment history, and his history of not paying child support, it is unlikely that he will pay any prospective child support. She submits that because he is largely self-employed, the Family Maintenance Enforcement Program will have difficulty collecting arrears. In this regard, she cites decisions such as P.W. v. G.Z., 2022 BCSC 1323, wherein this Court held:

[75] Section 170 of the FLA provides the court with the discretion to make a lump sum child support order. In Zhang v. Sun, 2016 BCSC 1418 at paras. 279-284 Fleming J. summarized the principles relevant to determining whether a lump sum child support payment should be made, including:

1. The same considerations that apply to orders for lump sum spousal maintenance apply to consideration of a lump sum child maintenance order;
2. Lump sum maintenance awards are exceptional, and should be made only when there is some special need or specific circumstances render it appropriate;
3. The existence of animosity between the parties may favour a lump sum maintenance order to reduce future sources of conflict;
4. Whether the parent disobeyed a previous maintenance order and had not demonstrated prudent financial management;
5. The payor's past avoidance of support payments.

[76] The risk of a lump sum order is that the payor's ability to pay may change, leading to a need for variation. Given my comments regarding the futility of a review, G.Z.'s failure to provide adequate financial disclosure, G.Z.'s pattern of failing to pay creditors, and the likely difficulty P.W. will have collecting support, I find that a lump sum child support order is the appropriate award, despite the risk that future variation could be required.

[122] Mr. Hammond testified that he has done his best to pay child support, but he is precluded from paying more due to a lack of funds or steady employment.

[123] Ms. Holtz argues that this testimony is belied by his actual conduct - having used his ICBC settlement to only a small degree to pay his child support obligations - but, in turn, he asserts that the settlement funds were used for rent and legal expenses. There is no evidence that he spent the settlement funds frivolously.

[124] In *N.W. v. Y.W.*, 2023 BCSC 1843, this Court held as follows regarding an application for lump sum prospective child support:

[70] In the present case, while Mr. W. failed to pay child support, I accept that it was because he could not do so on top of the mortgage and expenses on the family home, as well as other family expenses. It was not because he did not see child support as his parental obligation. Once the parties have separated and the house is sold, Mr. W.'s financial situation should be improved. I am concerned that a lump sum award may impact Mr. W.'s future self-sufficiency. Therefore, I decline to order lump sum child support as sought by Ms. W.

[125] Similarly, in *Devathanan v. Devathanan*, 2019 BCSC 661 at para. 339, aff'd 2020 BCCA 209, this Court quoted with approval the decision of the Ontario Court of Appeal in *Davis v. Crawford*, 2011 ONCA 294 at para. 63, for the proposition that:

it is well accepted that an important consideration in determining whether to make a lump sum spousal support award is whether the payor has the ability to make a lump sum payment without undermining the payor's future self-sufficiency.

- [126] In this case, as in many others, there are insufficient assets to allow both the children to have full security for prospective support payments while still giving the payor a reasonable opportunity to become self-sufficient. In my view, the appropriate course here is to order lump sum child support for part of the remaining term. Such an order was made in Devathasan.
- [127] The purpose of such an order is to balance, insofar as it is possible, the various considerations described in the case law set out above. I am hopeful that a lump sum order will assist Ms. Holtz in securing the home for herself and her children; on the other hand, I am hopeful that the limited nature of the order will still allow Mr. Hammond to become self-sufficient. Further, the time-limited nature of the order will allow the Court and the parties to revisit matters if the situation changes materially in three years.
- [128] I have concluded that lump sum payments shall be made and deducted against Mr. Hammond's share of the equity in the family home for child support and s. 7 expenses in amounts equating to three years of payments - from February 2024 to January 2027 inclusive.
- [129] At a discount rate of 2% per annum (consistent with s. 56 of the Law and Equity Act, R.S.B.C. 1996, c. 253 and s. 1(b) of the Law and Equity Regulation, B.C. Reg. 352/81), 36 monthly payments of \$1,183 have a present value of \$41,302. This is the lump sum payment for prospective child support up to and including January 2027.
- [130] Ms. Holtz also seeks a lump sum payment for prospective s. 7 expenses. It is impossible to predict with any certainty what those expenses will be, and it seems likely that they will rise given the ages of the children, but Ms. Holtz advised the Court that she understands the risk that a lump sum payment may end up being less than what she and the children are entitled to. She advised the Court that she is willing to accept that risk as she believes that the certainty of payment is more important than the quantum.
- [131] As stated, she has sought a lump sum s. 7 payment in the amount of \$57,000, which she submits would be appropriate for all of the remaining time that the children will remain children of the marriage. This is approximately 40% of the lump sum prospective child support that she seeks. The s. 7 arrears calculated by Provincial Court Judge Bond for 2022 amount to approximately \$373 per month, which is approximately 31% of the monthly child support amount.
- [132] In my view, it is appropriate to award lump sum s. 7 expenses in an amount equal to the present value of 36 monthly payments of \$373 at a discount rate of 2% per annum, or \$13,023.
- [133] The lump sum payments in respect of child support and s. 7 expenses described above will satisfy Mr. Hammond's obligations under the PC Order for three years, ending on January 31, 2027. After that date, the PC Order will continue unless it is varied.

Conclusion

[134] If Ms. Holtz wishes to, and is financially able to, assume full ownership of the family home, she shall pay Mr. Hammond the following amounts: \$196,000 for his share of the Maple Ridge Property, less \$40,428.94 for arrears in respect of both child support and s. 7 expenses, less \$41,302 for lump sum prospective child support, less \$13,023 for lump sum prospective s. 7 expenses, less \$10,000 for damages for battery, plus \$1,500 for income derived from the workshop adjacent to the Maple Ridge Property. By my calculation, these amounts total \$92,746.06.

[135] If the Maple Ridge Property is sold, Ms. Holtz shall be entitled to 65% of the net proceeds and Mr. Hammond shall be entitled to 35% of the net proceeds. From his share of those proceeds, Mr. Hammond shall pay Ms. Holtz \$40,428.94 for arrears in respect of both child support and s. 7 expenses, \$41,302 for lump sum prospective child support, \$13,023 for lump sum prospective s. 7 expenses, and \$10,000 for damages for battery, less \$1,500 for income derived from the workshop adjacent to the Maple Ridge Property.

Costs

[136] If there are matters such as settlement offers that would impact this Court's decision on costs, the parties shall arrange to make submissions through the registry. Otherwise, I have concluded that no costs shall be payable by either party, despite the fact that Ms. Holtz has been substantially successful in this trial. I have reached this conclusion because of the importance of not upsetting the balance achieved by this Court's award on the substantive issues addressed in these reasons: see *M.N. v. C.G.F.*, 2020 BCSC 2071 at para. 7, citing *Gold v. Gold*, [1993] B.C.J. No. 1792 at para. 20, 1993 CanLII 1248 (C.A.).

"The Honourable Justice Loo"

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