
CANADA / JUDGMENT

Harper v. Harper

2021 BCSC 758

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 758 Harper v. Harper

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Harper v. Harper,

2021 BCSC 758

Date: 20210423

Docket: E152793

Registry: Victoria

Between:

Tracey Jean Harper

Claimant

And

Craig Alexander Harper

Respondent

Before: The Honourable Madam Justice W.A. Baker

Reasons for Judgment

In Chambers

Counsel for the Claimant:

R. Faber

Counsel for Respondent:

B. E. Bate

Place and Date of Hearing:

Victoria, B.C.

March 11, 2021

Place and Date of Judgment:

Victoria, B.C.

April 23, 2021

I. Introduction

- [1] In this application, the respondent, Mr. Harper, seeks a full review of spousal support, an adjustment to child support, and a determination of Federal Child Support Guidelines, SOR/97-175 [Guidelines] incomes for him and the claimant. The claimant, Ms. Farrington (named Ms. Harper at the time of the commencement of this action), opposes the relief sought or, in the alternative, seeks an increase in spousal support if an order decreasing child support is made.
- [2] The parties are now in their fifties. They were married in 1994, separated in November 2014, and divorced in February 2018. There are two children in the family, K.H., a daughter born in 2001, and S.H., a son born in 2003.
- [3] In the fall of 2017 this family matter proceeded to trial. It did not complete in the scheduled time. In February 2018 the parties returned to court, and on February 22, 2018 a consent order was made that resolved all matters, and included a term providing for a full review of spousal support in or about September 2019, and an adjustment of child support annually. It also provided that both spousal support and child support would be reviewed if the children's residence changed. At the time of the consent order, S.H. resided solely with Ms. Farrington and K.H. resided with each parent 50% of the time.

II. Issues

- [4] The issues on this application are:
- What are the guideline incomes of the parties?
 - Should any adjustments be made to child support?
 - Should any adjustments be made to spousal support?

A. What is the guideline income of the parties?

- [5] A parent's income for the purposes of child support obligations must be calculated pursuant to s. 16 of the Guidelines. The Guidelines also provide the starting point for determination of income for spousal support purposes under the Spousal Support Advisory Guidelines.

- [6] The starting point in the determination of guideline income is the source of income set out under the heading "Total Income" or line 150 on the parent's tax return. This may be adjusted in accordance with the considerations set out in Schedule III of the Guidelines. In addition, where the most current tax return information is not a reasonable gauge of a party's current income, the most accurate current information should be used: *M.H.G. v. D.J.G.*, 2006 BCSC 214 at para. 19.
- [7] Under s. 21 of the Guidelines, a spouse's income from sources including disability benefits, workers compensation benefits, and pension income must all be included in the assessment of income.
1. Income of Mr. Harper
- [8] Mr. Harper retired from the Victoria Police Department in March 2021 after 26 years of service. When he retired he held the rank of staff sergeant. At the time of his retirement he had achieved his full years of service, with an unreduced pension.
- [9] Mr. Harper does not want to continue working past age 55. He is entitled to collect his unreduced pension now, and has made the decision to do so. He attests to the ages of people at the rank of staff sergeant or above within his department. Of the seven people in positions ranked senior to staff sergeant, only one person is older than Mr. Harper. That one person is one year older than Mr. Harper but has two years less service than him. Of the other nine staff sergeants, all are younger than him. Mr. Harper argues that it is not reasonable for him to keep working any longer given that most police officers are retired by his age, and he is now entitled to his full pension.
- [10] Before his retirement, Mr. Harper had an annual income of \$142,000. Now that he is retired, Mr. Harper will receive a monthly pension income of \$4,563 from his municipal pension, and \$928 from his portion of Ms. Farrington's municipal pension. His total annual income will be \$65,892.
- a) Assessment of earning potential
- [11] Ms. Farrington argues that Mr. Harper is not entitled to retire at age 55, as he has done. Ms. Farrington argues that Mr. Harper is required to continue working to pay spousal and child support. She suggests that it is open to him to work at a number of different jobs, such as security guard or private investigator. She argues that a total income of \$142,000 ought to be imputed to him to reflect his earning capacity. However, no evidence was led as to the earning potential at the jobs she suggests Mr. Harper is qualified for.
- [12] Mr. Harper states that he and Ms. Farrington had spoken many times about both of their plans to retire when they had put in enough time to receive their full pension. These discussions are denied by Ms. Farrington. I accept the evidence of Mr. Harper in this respect. However, that is not the end of the question. The question is whether it is reasonable for Mr. Harper to stop working at any job at the age of 55 given that he is no longer married to Ms. Farrington, the plans that they made together are no longer in effect,

and he is now a payor of support.

- [13] Mr. Harper relies on *Powell v. Levesque*, 2014 BCCA 33 at para. 31-33 where the court of appeal held that a person could not be compelled to remain at her job after becoming eligible for full retirement, even though she was only 44 years old. The payor in *Powell* had suffered a number of significant injuries which resulted in physical limitations, and worked at a Tim Hortons after retirement. The court concluded that, given her health problems, her pension and her income from Tim Hortons were the appropriate basis upon which to determine her earning capacity.
- [14] Ms. Farrington relies on *Szczerbaniwicz v. Szczerbaniwicz*, 2010 BCSC 421, where the court concluded that a payor could not seek a reduction of a final support order on the basis of his reduced income due to his voluntary retirement. The court held that the payor's decision to take early retirement did not relieve him of his obligation to pay spousal support.
- [15] In the case before me, Mr. Harper has retired as permitted under his employment, and will receive his full unreduced pension. Consistent with the law as set out in *Powell*, I am satisfied that Mr. Harper has not taken early retirement and his decision to retire was reasonable. However, unlike the payor in *Powell*, Mr. Harper is in good health and has not indicated that he intends to continue working in some other capacity. As found by the court in *McPherson v. McPherson*, 2019 BCSC 933, "[e]ntitlement to a full pension is but one factor to consider in evaluating the overall reasonableness of an individual's decision to retire from the workforce. It is not determinative on its own."
- [16] The court may impute income to a party if that party is not earning to capacity, bearing in mind factors such as age, health, education, skill and work history. In *Harris v. Visser*, 2019 BCSC 2438 at para. 40, the court adopted the following summary of principles:
1. parents who are healthy and can work have a duty to seek employment;
 2. reasonable income-earning capacity will be based on consideration of a parent's age, education, experience, skills, health, and on-the-job opportunities that are reasonably available;
 3. limited experience and skills do not justify a failure to pursue employment;
 4. persistence in un-remunerative employment or unrealistic career aspirations will not be an excuse; and
 5. self-induced reduction in income will not justify the avoidance of child support obligations
- (*Fong v. Fong*, 2011 BCSC 42)
- [17] In *Szczerbaniwicz* the court considered whether, having taken early retirement, additional income should be imputed to the payor in accordance with his earning capacity. The court found that the payor earned, at the peak of his career and at the time he took early retirement, \$118,000. The payor provided no evidence as to what employment opportunities

were available to him. The court concluded that, taking into account the payor's education, experience and skill set, an annual income of \$90,000 should be imputed to him, as a reasonable estimate of what he could earn.

[18] In the case before me, Mr. Harper has provided no evidence of any employment opportunities available to him. Ms. Farrington suggests that he could work as a security guard or private investigator, and that income should be imputed to him on that basis to his pre-retirement income level of \$142,000.

[19] I am not satisfied that the evidence establishes that Mr. Harper is realistically capable of earning an additional \$76,000 over his pension income, to achieve \$142,000 in annual income. However, I agree that some additional income ought to be imputed to Mr. Harper over and above his pension income. Ms. Farrington earns \$26/hour working part time. I find that this is a reasonable proxy for the kind of income Mr. Harper could obtain now. If he worked full time, he would earn approximately \$40,000/year. However, I do not think it is realistic to expect Mr. Harper to immediately find a full time job following his retirement from the police force.

[20] For the purposes of determining support, I impute an additional approximate amount of \$30,000 to his pension income, for a guideline income of \$96,000/year.

2. What is the guideline income of Ms. Farrington?

[21] During the marriage, Ms. Farrington was a full time police officer with the Saanich Police Department from 1994 until 2001. In 2002, after her first maternity leave, Ms. Farrington began working part time with Saanich Police. She left Saanich in 2009 and moved to the BC Legislature as a part time special constable. In the fall of 2017 Ms. Farrington was injured on the job, and was off work for approximately two years. In October 2019 she returned to work at the Legislature as a part time mailroom assistant.

[22] In her financial statement sworn February 21, 2021, Ms. Farrington claims her current annual employment income is \$24,165, plus worker's compensation benefits of \$12,660, for a total annual income of \$36,825. Her current hourly wage is \$26.15. The tax returns attached to her financial statements disclose the following historical income information:

Taxation Year

Earnings

Worker's compensation benefits

2019

\$6,177

\$27,918

2018

\$4,440

\$55,543

2017

\$37,674

\$28,422

2016

\$42,037

N/A

2015

\$45,465

N/A

a) Photography business

[23] During the marriage Ms. Farrington was interested in photography. This became an increasingly important part of her life. She describes herself as a professional photographer. Based on the affidavit material presented, Ms. Farrington is clearly an exceptional photographer. Her work is widely published and shown. She has been nominated for and won national and provincial awards for photography over the years. She has presented at workshops and conferences. Her website describes her as follows:

From North America to Africa from being recognized by her peers as being one of the best photographers in Canada, Tracey (TJ) Farrington's career has spanned the globe. The multiple award-winning photographer has been in business since 2000, and joined the professional photographers in 2004. In 2008 she was awarded "Photographic Artist of the Year" by the Professional Photographers of Canada (PPOC) and been a Finalist in 2012 & 2019.

Tracey is recognized as an International Judge and has earned her Masters of Photographic Arts, MPA, four times over, as well as her Fellowship for British (F/PPOC-BC), Canada (F/CAPA) and England (F/SWPP). She earned her Service in Photographic Arts (SPA), has been named the BC Photographer of the Year twice, National Portrait Artists of the Year, and has won the Kodak Gallery Award, Nikon Excellent Award and numerous Judge's Choice awards.

[24] Since the parties separated in 2014, Ms. Farrington continued her education in photography, and had photographs in juried exhibitions, solo exhibitions and group exhibitions. She received six significant awards for her work, participated in at least seven speaking and teaching engagements, and been a judge in seventeen competitions. She has travelled extensively for her photography.

[25] Mr. Harper argues that the time Ms. Farrington spends on photography is significant and represents time she could be working at a remunerative job. He also points to the travel and volunteer work Ms. Farrington engages in. Mr. Harper provided a schedule in an affidavit he swore in 2017 which lists 34 trips Ms. Farrington took in the three years since separation. In his recent affidavit sworn in support of this application, he points to further trips, such as six short trips in 2018 ranging from a few days to a week, and several trips in 2019.

[26] In her financial statements in this litigation, the attached tax returns disclose the following with respect to Ms. Farrington's photography business:

Year

Earnings

Expenses

Losses

2019

\$1,043

\$5,018

\$3,975

2018

\$744

\$4,701

\$3,957

2017

(\$759)

\$2,770

\$3,529

2016

\$3,413

\$8,292

\$4,879

2015

\$5,124

\$11,846

\$6,722

2014

\$3,379

\$10,171

\$6,792

2013

\$11,986

\$13,219

\$1,233

[27] Ms. Farrington indicates in her affidavit that she is now a retired professional photographer. She suggests it is simply a hobby for her, and never took on the importance in her life as described by Mr. Harper. However, on balance, I find that Ms. Farrington has consistently downplayed her involvement in photography in this litigation. Her website, which was attached to an affidavit of Mr. Harper, demonstrates she has had a much more active involvement in the business of photography than her affidavit in 2021 suggests, including activities right up through 2018 and 2019. Further, in her affidavit sworn in 2017, she states she is unable to continue pursuing photography, yet her website suggests otherwise, as do her tax returns up to and including 2019.

[28] While her tax returns show a loss from her business each year, what her tax returns and answers on discovery also disclose is the fact that Ms. Farrington continued to make a significant investment in her business, including costs of travel and materials, which she was then able to write off against her income. Her tax returns and her website allow me to conclude that Ms. Farrington has directed significant energies towards a photographic business, which she enjoys and excels at, and which produces little remuneration for her.

[29] In addition to her photography, Ms. Farrington is involved in the community. She has worked with the Cycling Without Age Society, has hosted a radio show, and has been a volunteer at many photography related organizations and events.

b) 2017 workplace accident

- [30] At the time the consent order was entered in 2018, Ms. Farrington was on leave from her work due to her work place injury. The fact of her injury was known to the parties at trial, although any resulting long term disability was unknown at that date. One day after the consent order was entered, Ms. Farrington received a report from WorkSafe BC determining that she was 6.45% disabled. She was awarded \$23,572.43 in a lump sum permanent partial disability payment.
- [31] In January 2020 Ms. Farrington received a further assessment from Worksafe BC in which she was awarded a further lump sum of \$27,148 and a monthly disability payment of \$1,055. Prior to this award, Worksafe BC had paid \$26,771 with respect to vocational rehabilitation for Ms. Farrington, and this amount was deducted from her 2020 lump sum award. Ms. Farrington will receive the monthly disability payment until age 65. At age 65 she will also receive a lump sum retirement benefit, based on 5% of her monthly benefit payment. Each month \$52.75 is set aside in her retirement fund to be invested pending her retirement. Ms. Farrington is entitled to make additional contributions to her retirement fund.
- [32] Ms. Farrington states in her affidavit that she continues to suffer from low back pain, which limits her ability to sit for extended periods of time. She continues to attend physiotherapy and massage therapy. Ms. Farrington argues that she has restrictions on her ability to work due to both the 2017 accident and a prior motor vehicle accident that happened more than 20 years ago.
- [33] I am not satisfied that Ms. Farrington's ability to work was impacted by an injury prior to the date of separation. I note that that in 2009, when Ms. Farrington was assessed for her job at the Legislature, that medical fitness assessment described her as fit with no restrictions, and that Ms. Farrington confirmed on discovery that she was medically fit for that position.
- [34] In September 2017, Ms. Farrington received a graduated return to work plan which stated that she was safe to attempt all tasks, but may experience decreased tolerance for certain tasks. The plan recommended that Ms. Farrington be accommodated by pacing and extra breaks.
- [35] The 2018 WorkSafe BC report stated that "there is no evidence of any pre-existing disability in the area of the injury which may have enhanced the current permanent disability under this claim."
- [36] I am satisfied that any continuing pain Ms. Farrington experiences is primarily a result of the 2017 workplace accident, and not any injury she suffered during the marriage. Further, I find that her disability is relatively minor and can be accommodated in the work place. Ms. Farrington has not established that she is disabled from working to a greater degree than she is presently.

c) Pensions

- [37] Pursuant to the 2018 consent order, the following pensions were divided equally between the parties, with the portion subject to division being from June 1, 1994 to March 15, 2014:
- a) Ms. Farrington's Municipal Pension Plan,
 - b) Ms. Farrington's Public Service Pension Plan, and
 - c) Mr. Harper's Municipal Pension Plan.
- [38] Ms. Farrington contributes to the Public Service Pension Plan in her current job, and she is not entitled to benefits from it until she retires. This pension is properly excluded from the issues on this application, and will not be considered in my analysis.
- [39] The municipal pensions allow for pension benefits to be collected once people reach 50 years old. If people wait until they are 55 years old, they will be entitled to collect their whole unreduced pension income. The evidence of Mr. Harper was that both he and Ms. Farrington were entitled to receive the unreduced municipal pensions now.
- [40] Ms. Farrington argues that she is entitled to allow her pensions to grow until she reaches age 60. She argues that she will receive a substantial increase in her monthly pension payment amount if she waits until she is 60.
- [41] Mr. Harper says that while Ms. Farrington may chose to continue to allow her pension to grow, she is entitled to receive it as income now. In *Boston v. Boston*, 2001 SCC 43, the court adopted the rationale that where a spouse receives assets in lieu of a share of the pension, the spouse has the obligation to use those assets in an income producing way. At para. 54 the court states, "[the payee spouse] need not dedicate the equalization assets to investment immediately on receiving them; however, she must use them to generate income when the pension-holding spouse retires." At para. 56 the court explains the rationale as follows, "The payee spouse cannot save the assets that she receives upon equalization and choose instead to live on the liquidation of the payor spouse's pension when he retires."
- [42] In the case before me, the facts are more stark than in *Boston*. Both parties have in their own names the identical pensions that each of them contributed to during the marriage. I am satisfied that the income available to Ms. Farrington from the two municipal pensions must be taken into account in determining Ms. Farrington's guideline income. She is not required to take the income from those pensions now, if she prefers to allow them to build until she reaches age 60. However, the income she is entitled to receive now will be imputed as income for the purposes of determining her guideline income.
- [43] Ms. Farrington did not obtain a statement from the municipal pension administrator as to the monthly payments she is presently entitled to receive. I accept the evidence of Mr. Harper that only Ms. Farrington is able to access this information because she is the sole beneficiary of her share of the municipal pensions. The application before me was filed in November 2020, and Ms. Farrington made no attempt to determine what amounts she could expect to receive under her pensions, other than a conversation with a pension specialist in

February 2021. She has a positive obligation to bring the best evidence forward on this application. Because she has not done so, I must assess the values of the pensions available to both parties as best I can with the information available to me.

- [44] Mr. Harper continued to contribute to his municipal pension for seven years after separation. As he worked for 26 years, I assess that 73% of his pension was contributed to before the date of separation. I determine that Ms. Farrington is presently able to obtain from Mr. Harper's pension an amount equal to 73% of his monthly amount, or \$3,330. While this assessment may not be exact, I am satisfied that it is reasonable on the information available to me on this application. Ms. Farrington left the Saanich Police Department during the marriage. As such, the monthly pension amounts available to each partner under Ms. Farrington's municipal pension should be the same, or \$928/month.
- [45] In the result, I find that Ms. Farrington has available to her a monthly income of \$4,258 from the two municipal pensions, or an annual income of \$51,096.
- d) Assessment of earning potential
- [46] Mr. Harper argues that income should be imputed to Ms. Farrington to account for either unreported income she receives from photography, or the time she could be working to earn money. He says her Guideline income should reflect her actual earning capacity, and not the 50% capacity she chooses to work.
- [47] I have some concerns with the credibility and reliability of the statements made by Ms. Farrington in her affidavits, in particular regarding her ability to work and the activities she undertook during the marriage. For example, I find she has underplayed the role of photography in her life with the intention of minimizing the time and energy she spends in pursuit of this activity. I am also concerned that she was not forthcoming with information about her disability. Ms. Farrington was required pursuant to the consent order to regularly disclose to Mr. Harper details of reports from Worksafe BC. As these documents relate to her income, pursuant to para. 34 of the consent order she was under a positive and ongoing obligation to disclose this information immediately. However, she failed to provide Mr. Harper with the 2018 Worksafe Report for almost 16 months after she received it, and did not provide him with the January 2020 Report until February 2021, more than a year after she received it. These reports are material and disclose important information in relation to the support issues outstanding between the parties. These examples illustrate why, where there are differences in the evidence proffered by the parties, I generally prefer the evidence of Mr. Harper, whose evidence I found to be reliable and consistent with the documentary evidence before me.
- [48] Ms. Farrington's energies directed to her photography and volunteer activities, including after her injury in 2017, allow me to conclude that Ms. Farrington does have an ability to direct her energies towards additional remunerative work. She has chosen to work part time in the mail room at the Legislature, and asks the court to conclude that this is the maximum amount that she can work. However, there is no medical evidence before the court which

would allow me to conclude that she is incapable of additional work, and no evidence of any efforts by Ms. Farrington, since the parties' separation, to obtain additional remunerative work. While Ms. Farrington may suffer from lower back pain, I am not satisfied that her level of pain is such that she is incapable of work. Many jobs can and do accommodate people with lower back pain.

- [49] In *Jendruck v. Jendruck*, 2014 BCCA 320 at para. 16, the court of appeal held that, "where the effort to contribute to one's own support is deemed insufficient in all the circumstances, the court will place the consequences of the inadequate effort on the person whose choice it is, and may do so by the vehicle of imputing income for under-employment."
- [50] On the evidence before me, I conclude that Ms. Farrington has a capacity to earn more than she does presently. I find that it is reasonable to impute employment income equal to 75% of full time income from her present job, or \$33,000 annually. Ms. Farrington's income also includes her annual workers compensation benefits of \$12,660, and the \$51,096 she is entitled to receive from the municipal pensions. I find that the Guideline income of Ms. Farrington is \$96,000.

B. Should any adjustments be made to the child support order made in 2018?

- [51] At the time of the 2018 consent order, K.H. spent 50% of her time with each parent, and S.H. lived solely with Ms. Farrington. Between May 29, 2018 and November 13, 2018 the children lived with each parent 50% of the time.
- [52] Since November 13, 2018 K.H. has lived solely with Ms. Farrington. K.H. is estranged from Mr. Harper. The reason for this estrangement was not clear from the evidence. I was provided affidavit evidence of the extensive efforts made by Mr. Harper to resume and maintain his relationship with K.H., which evidence I accept. Unfortunately, Mr. Harper's efforts have been unsuccessful and they remain estranged.
- [53] S.H. generally has shared his time equally between his parents, although he tends to spend a month or more with a parent before moving to the other. From June 2018 to the end of 2019 S.H. shared his time equally between his parents. From January 2020 to mid-March 2020 S.H. lived with Ms. Farrington, from mid-March to the end of 2020 he lived with Mr. Harper, from sometime in December 2020 to February 28, 2021 he lived with Ms. Farrington, and in March 2021 he returned to Mr. Harper. As such, since March 2020 S.H. has been with Mr. Harper for 11 months and Ms. Farrington for 6 months. The parties are content for S.H. to determine the time he spends with each of them.
- [54] Pursuant to the 2018 consent order, Mr. Harper pays Ms. Farrington \$1,332 per month in child support. Ms. Farrington pays Mr. Harper \$366 per month in child support. The child support payments have not been adjusted since 2018.

- [55] K.H. reached 19 years of age and tried to begin programs at Camosun College in 2019 and 2020, but these efforts were unsuccessful. K.H. works part time at a café in Victoria. Ms. Farrington provided an affidavit from a psychologist who conducted a psycho-educational report addressing KH's learning disabilities. Ms. Farrington argues that K.H. remains a child of the marriage and Mr. Harper should continue providing support.
- [56] Pursuant to the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) K.H. is no longer a child of the marriage unless it has been proven that by reason of illness, disability or other cause, she is unable to withdraw from the care of her parents or obtain the necessities of life. There is no application before me to establish that K.H. remains a child of the marriage. As such, I find there is no basis upon which I could make the order sought by Ms. Farrington. Further, if that application was properly before me, on the slim evidence on this application I would not find that K.H. has met the test to be determined a child of the marriage. She is currently working and is not in school. There is insufficient evidence that would support the order sought by Ms. Farrington. I make no orders for child support with respect to K.H.
- [57] The parties propose that child support in relation to S.H. should be paid by whichever parent S.H. is not living with. The parties are content to allow S.H. to determine where he wants to live, and acknowledge that the schedule chosen by S.H. tends to have him living with a parent for many months at a time. As such, rather than establishing a monthly set off payment, the parties agree that the parent who has S.H. living with them for less than 50% of the month will pay child support to the other parent.
- [58] Based on the Guideline incomes I have determined, in relation to S.H., Mr. Harper will pay child support to Ms. Farrington in the monthly amount of \$912 in those months where S.H. is with Ms. Farrington more than 50% of the time. Ms. Farrington will pay child support to Mr. Harper in the monthly amount of \$912 in those months where S.H. is with Mr. Harper more than 50% of the time.

C. Should any adjustments be made to the spousal support order made in 2018?

- [59] Pursuant to the 2018 consent order and section 15.2 of the Divorce Act, Mr. Harper pays Ms. Farrington \$2,037 each month in spousal support.
1. What is the scope of review on this application?
- [60] Mr. Harper submits that entitlement, quantum and duration are all open for review on this application, pursuant to the consent order. He argues that he does not have to prove a material change in circumstances, given that a review was consented to as a term of the order. Ms. Farrington argues that entitlement cannot be revisited, because it was agreed to by consent. She argues that the issue on this application must be determined somewhere between a material change in circumstances and going right back to the beginning.
- [61] The specific language of the order is:

30. By Consent, the claimant is entitled to spousal support on both compensatory and needs-based grounds.
35. By Consent, there shall be a full review of spousal support in or about September 2019 which will include a review of quantum, duration, and entitlement. Following this review further reviews, if any, shall be at the court's discretion.
- [62] I was provided with the transcript of the proceeding before the judge when the terms of the consent order were spoken to. It is clear that a number of issues remained in dispute and were put off to be dealt with on the review agreed to by the parties. These issues included whether Mr. Harper's decision to retire was reasonable, whether Ms. Farrington has a duty to become self sufficient and earn to her capacity. Counsel for Mr. Harper stated, at the time the consent order was spoken to, "that's why the entitlement issue is contemplated."
- [63] Because the order for support went by consent, there are no findings by a court on any of the relevant factors which determine entitlement, quantum and duration. I find that the intention of the parties was to, essentially, postpone a determination on the issues of entitlement, quantum and duration to a time no earlier than September 2019. Entitlement was consented to in 2018, but that agreement on entitlement does not extend any further than the date of this application. The consent order in the case at bar is analogous to the agreement on support with a right of review in *McEachern v. McEachern*, 2006 BCCA 508 at paras. 26-32, where the court determined that a full analysis under s. 15.2 of the Divorce Act was required. Similarly, in *Stringer v. Stringer*, 2017 BCSC 1470, at para. 70, and *Domitri v. Domitri*, 2010 BCCA 472 at paras. 32-36, our courts have confirmed that a review application contemplated in a previous order is to be treated the same as an initial application for support, without a requirement to show a material change in circumstances.
- [64] As such, I find that all issues are to be determined in the first instance as of the date of this application. I find that s. 17(4) of the Divorce Act is not applicable on this application.
2. Income for the purposes of spousal support
- [65] While pensions are properly considered in the parties' income for the purposes of child support Guideline income, there is a question as to whether it is appropriate in the context of spousal support where pensions have been split.
- [66] Mr. Harper argues that, given the pensions contributed to in the marriage were split equally, Ms. Farrington should not be able to access his pension income as a source of spousal support. He argues that to require him to pay spousal support from his pension income, when that same pension income is available to Ms. Farrington, would result in a double dipping. As stated by the SCC in *Boston* at para. 34:

upon marriage dissolution the payee spouse (here the wife) receives assets and an equalization payment that take into account the capital value of the husband's future pension income. If she later shares in the pension income as spousal support when the pension is in pay after the husband has retired, the wife can be said to be recovering twice from the pension: first at the time of the equalization of assets and again as support from the pension income.

[67] In *Szczerbaniwicz*, the court found that considering the payor's pension income would be double dipping, and imputed employment income to the payor. Similarly, I also find it is reasonable to exclude Mr. Harper's income from the shared pension in my assessment of income for spousal support. I have determined that the annual value of the portion of Mr. Harper's pension contributed to in the marriage is approximately \$51,000. Mr. Harper receives an additional approximate amount of \$15,000, which I determine is the annual value relating to the years after the pension was split. The pension value accrued since the pension was split is available as a source of spousal support. In addition, I have imputed employment income to Mr. Harper in the amount of \$30,000. Therefore, I find that for the purposes of spousal support, Mr. Harper's annual income is \$45,000.

[68] Ms. Farrington argues, relying on *Szczerbaniwicz* at paras. 55, that Mr. Harper should not be allowed to avoid his support obligation and force her to take her pension entitlement early simply because Mr. Harper chose take his pension entitlement early. She argues that no pension income available to her at present should be considered in the assessment of her income for the purposes of spousal support. I agree, and I exclude the present annual value of Ms. Farrington's municipal pension income from her income for the purposes of spousal support. For spousal support purposes, I find Ms. Farrington's annual income to be \$46,000 (her imputed earnings of \$33,000 plus her workers compensation benefits of approximately \$13,000).

3. Entitlement

[69] Entitlement to spousal support is determined through considerations of the factors and objectives set out in s. 15.2(1) of the Divorce Act. Pursuant to subsection (4), the court must consider:

the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[70] Pursuant to subsection (6), in making a support order the court must:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[71] No single objective set out in s. 15.2(6) is paramount, and all must be considered by the court: *Moge v. Moge*, [1992] S.C.R. 813 at 850-853. The first two objectives relate to compensatory support, and the last two objectives relate to non-compensatory support. A court is not required to decide one basis of support to the exclusion of the others, and the doctrine of equitable sharing is the overarching principle to be focussed on by the court: *Chutter v. Chutter*, 2008 BCCA 507 at para. 49.

[72] Dealing first with compensatory support, where a recipient spouse made efforts which conferred economic benefits or advantages on the payor spouse during the marriage, this may be recognized with an order for compensatory support. Compensatory support principles recognize compensation for losses caused by the marriage or its breakup, and recognize that a recipient spouse made sacrifices in assuming primary childcare and household responsibilities during the marriage resulting in a lower earning potential. The doctrine of equitable sharing recognizes both the disadvantages suffered by one and the advantages enjoyed by the other: *Chutter* at paras. 50-51. Compensatory support also addresses economic advantages and disadvantages on marriage breakdown.

[73] Non-compensatory support focusses on the needs and means of each spouse, the length and nature of the marriage, and "the idea that spouses, by virtue of marriage, have some ongoing responsibility to care for one another": *Zacharias v. Zacharias*, 2015 BCCA 376 at para. 27, *Chutter* at para. 54. Further, the needs of the parties go beyond subsistence needs. The court must consider any disparity between the incomes of the parties after separation, and the standard of living during the marriage: *Chutter* at para. 55-59.

a) Compensatory factors

[74] This was a long marriage. During the marriage, Ms. Farrington worked part time and spent a considerable amount of time pursuing photography. Mr. Harper worked full time as a police officer. In his 2017 affidavit, Mr. Harper describes how the parties shared household and parenting responsibilities. He describes how they each had long shifts - 10-12 hours, and how they coordinated their shifts with their household responsibilities. Mr. Harper states that he and Ms. Farrington worked as a team, and he took on many household chores, including laundry, cooking, and childcare, on the days he was not working.

- [75] Mr. Harper confirms that Ms. Farrington was often responsible for taking the children to various appointments, and says this was done because she worked part time shifts with the police department, and her remaining time spent on photography was flexible and allowed her to schedule visits more easily than his schedule would allow. Mr. Harper also described how Ms. Farrington's photography activities took her away for long periods of time, up to one month, and during those times he was the sole parent responsible for the home and family.
- [76] Ms. Farrington disputes Mr. Harper's characterization of their roles in the marriage, and says she was the primary parent looking after the children. She says that her role in the marriage was to support Mr. Harper and the children, and that Mr. Harper's career dominated the family. She says that a family decision was made that the children would not be raised in daycare, and that her working part time allowed for the children to be raised at home. Ms. Farrington also says that she injured her back in an accident more than 20 years ago, and her back pain did not allow her to work full time.
- [77] Having reviewed the affidavit material of both parties, which I have briefly summarized above, I am satisfied that both parties shared parenting and work responsibilities, and this was not a "traditional" marriage where one party was disadvantaged by removing themselves from the work force. I accept that when the children were young, Ms. Farrington did work part time to keep the children out of daycare. However, once the children started school, I am satisfied that Ms. Farrington, supported by Mr. Harper, chose to work part time with the police and part time with her photography business.
- [78] Beyond the early years, I do not accept that Ms. Farrington's decision to work part time was a sacrifice made in the interests of the family. Rather, it was a decision supported by Mr. Harper which allowed Ms. Farrington to pursue her creative interests in photography. She was able to pursue both careers, and was not disadvantaged by the roles she assumed within the marriage. Further, I do not accept that Ms. Farrington was disabled to the point that she could not work full time during the marriage. Other than her bald assertions to this effect, there is no corroborating evidence which would support such a conclusion. Further, there is evidence of her travels, photography, and her physical assessment at the time she took the job at the Legislature, which all support a conclusion that she was not disabled.
- [79] Her decision to transfer from the Saanich Police Force to the Legislature was motivated by her own desire for the job change, and not a financial or other requirement of the marriage. Her change of job at the Legislature was related to an accident which happened after the separation. On the evidence before me, I can find no basis to conclude that factors related to the marriage prevented her from working full time during the marriage. Further, at the time of separation, the children were no longer small children and there is no suggestion that Ms. Farrington's childcare responsibilities were such that she could not transition to full time employment, if she so chose.

- [80] While Ms. Farrington could have worked in a remunerative position full time in the marriage, I accept that the family decision for Ms. Farrington to work in remunerative employment only part time did leave her in a slight disadvantage as she had to transition from part time to full time work. However, Ms. Farrington was a fully trained police officer during the marriage, and transitioned to a special constable during the marriage. This is not a case where one partner left the workforce entirely and had to restart a career from scratch. As such, spousal support to bridge the transition of Ms. Farrington to a full time position was reasonable at the time of separation. Mr. Harper provided Ms. Farrington with spousal support for seven years after separation. In my view, that was adequate time to allow Ms. Farrington to transition to full time employment, and to alleviate any disadvantage she experienced on the break down of the marriage. While Ms. Farrington has not attempted to return to full time work, this is not as a result of any disadvantage continuing from the marriage.
- [81] In determining whether compensatory support is appropriate, the courts often consider the standards of living of both parties post separation. In *Pendleton v. Pendleton*, 2010 BCSC 1167, the court stated:
- [41] Compensatory support is intended to address both economic disadvantages suffered by the recipient and economic advantages enjoyed by the payor (see *Chutter* at para. 51). In part because it is difficult to associate decisions taken during the marriage to particular advantages or disadvantages, and in part because it may be a useful indicator of those advantages and disadvantages, courts have looked to post-separation standards of living and compared it to pre-separation standards of living, with a view to determining whether there has been significant economic advantage or disadvantage as a result of the breakdown of the marriage (see generally *W. v. W.*, 2005 BCSC 1010 at para.12). In doing so, it is necessary to bear in mind that the standard of living of both households will likely suffer as a result of the separation because of the increased cost of maintaining two households on the same or nearly the same income.
- [82] On separation, Mr. Harper moved out of the family home and took rental accommodation nearby. Mr. Harper's rental cost was \$1,900/month. The mortgage on the family home was \$845/month. Mr. Harper shared in the costs of the home, such as taxes. In the 2018 consent order, the parties divided all assets equally and house was sold. These assets included the matrimonial home, the RRSPs, a LIRA, and shares.
- [83] Ms. Farrington purchased a new home for \$599,000. There is a \$350,000 mortgage on her home. Of the mortgage funds, \$50,000 were not used towards the purchase price but rather were placed in an investment account. At the time of this application, the mortgage balance was \$338,000, and her monthly payments were \$1,536.

- [84] In 2020 Mr. Harper moved in with his current partner and purchased half of her home at a cost of \$367,000. He paid \$167,000 from the sale of the family home and the remaining \$200,000 is mortgaged. The home is assessed at \$764,000, and is held jointly between Mr. Harper and his new partner.
- [85] Both Mr. Harper and Ms. Farrington state in their affidavits that their homes are not new, and are in need of repairs.
- [86] In 2020 Ms. Farrington took out a student loan in the amount of \$24,000 to pay for courses at Vancouver Island School of Art, where she would like to train to become an art therapist.
- [87] Ms. Farrington argues that her current financial commitments on her home, and her loan repayment obligations, place her in need of support. She says that without spousal support she would not have qualified for her mortgage, and worries that when it comes up for renewal she will not requalify without spousal support.
- [88] In *Stringer v. Stringer*, 2017 BCSC 1470, the court held:
- [73] While a support recipient may have need, it is not always the responsibility of the other spouse to meet that need indefinitely, particularly in circumstances where the payor has retired and the recipient has not managed her resources well. For example, in *Cramer v. Cramer*, 2000 BCCA 272, the Court upheld the termination of spousal support in the following circumstances: (a) the parties had had a 30-year traditional marriage; (b) the husband had paid support for six years; (c) the wife had not pursued retraining or remunerative employment; and (d) the wife was found to not have been prudent in her personal spending, running up a debt of \$160,000 against a house worth \$300,000. The husband had retired, sold his business, and had remarried. The wife was aware at all times that the husband would eventually be retiring. While it was acknowledged the wife had need, that need was "largely attributable to the fact that she has not managed her money well, has lived beyond her means and has not recognized the stark fact that the day of Mr. Cramer's retirement was approaching": para. 12.
- [89] I find that Stringer has application in the case before me. If Ms. Farrington has over extended herself, or has made unwise decisions regarding loans, that is not as a result of a disadvantage arising from the marriage or its breakdown.
- [90] I do not find that there is a disparity the parties' standards of living which would suggest that Mr. Harper is advantaged over Ms. Farrington. They have both invested in real property. While Mr. Harper lives in a detached home and Ms. Farrington lives in a duplex, Mr. Harper only owns 50% of his home. His share of his home is worth less than the duplex owned by Ms. Farrington.

- [91] I am satisfied that, upon separation, the parties had an equivalent asset base upon which to begin their post-marriage lives. Since separation Mr. Harper paid Ms. Farrington annual spousal and child support. Since 2018 in the approximate net amount paid by Mr. Harper to Ms. Farrington was \$36,000/year.
- [92] Finally, I have determined that the current guideline income of each party is essentially identical. Based on the incomes I have determined for the purposes of spousal support assessment, I do not find a disparity in income between the parties.
- b) Non-compensatory factors
- [93] Seven years is sufficient time for a spouse in the position of Ms. Farrington to obtain full time employment. However, Ms. Farrington did not take steps to transition to full time employment after separation. Then, three years after separation, she was injured and taken out of the work force for two years. Ms. Farrington is now 54 years old and suffers from low back pain as a result of her work place injury. I must consider whether the 2017 injury has given rise to a non- compensatory basis for support.
- [94] Ms. Farrington returned to work in 2019, on a part time basis. I accept that her injury has impacted her timeline for increasing her hours of work. Nevertheless, I am satisfied that she is capable of working more than she is currently. As discussed earlier in these reasons, I find that she is now capable of working at least 75% of full time hours.
- [95] While there may be a presumption of mutual support in a long marriage, the court must also look to whether financial support has been provided by a source other than the spouse. Ms. Farrington does not require support from Mr. Harper to address her losses flowing from her disability. That loss has been fully compensated by worker's compensation, through which she receives a benefit of \$1,055 each month. As such, Ms. Farrington has not established a clear need for support arising out of her disability: *Fyfe v. Jouppien*, 2011 ONSC 5462.
4. Conclusion on spousal support
- [96] I find that on this review Ms. Farrington has not established a compensatory or a non-compensatory basis for entitlement to spousal support from Mr. Harper.

III. Disposition

- [97] The consent order entered on February 22, 2018 is varied as follows:
- a) The 2021 Guideline Income of the Claimant is \$96,000, and the 2021 Guideline Income of the Respondent is \$96,000.
- b) K.H., born July 19, 2001, is no longer a child of the marriage, as defined in the Divorce Act.
- c) Paragraph 6 is amended as follows:

Commencing April 1, 2021, the respondent shall pay child support to the claimant in the monthly amount of \$912 in those months where S.H. is with the claimant more than 50% of the time.

d) Paragraph 7 is amended as follows:

Commencing April 1, 2021, the claimant shall pay child support to respondent in the monthly amount of \$912 in those months where S.H. is with the respondent more than 50% of the time.

e) Paragraph 9 is no longer of any force or effect.

f) Paragraphs 30-35 are no longer of any force or effect.

[98] I make no orders for retroactive adjustments to child support or spousal support, other than as necessary to address child support obligations commencing April 1, 2021.

[99] The parties have liberty to speak to costs. If the parties wish to speak to costs, they must make arrangements with the registry within 45 days of these Reasons.

"Baker J."

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