

CANADA / JUDGMENT

Hill v. Kelly

2023 BCSC 630

COURT

Supreme Court of British Columbia

DECIDED

20 April 2023

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2023 BCSC 630 Hill v. Kelly

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hill v. Kelly,

2023 BCSC 630

Date: 20230420

Docket: E15714

Registry: Chilliwack

Between:

Kelley Lynn Hill

Claimant

And

Daniel James Kelly,

DK Keldan Distribution Ltd.,

Euphoria Paradise, and

Paws on a Mission

Respondents

Corrected Judgment: The text of the judgment was corrected at para. 141
on April 28, 2023.

Before: The Honourable Justice Walkem

Reasons for Judgment

Counsel for the Claimant:

A. Berrie

The Respondent appearing on his own

behalf, and as agent for DK Keldan

Distribution Ltd., Euphoria Paradise and

Paws on a Mission:

D.J. Kelly

Place and Dates of Trial/Hearing:

Chilliwack, B.C.

January 10-13, 2023

January 16-18, 2023

Place and Date of Judgment:

Chilliwack, B.C.

April 20, 2023

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- [1] This case arose as a result of the breakdown of the marriage between Ms. Kelley Hill ("Ms. Hill"), the claimant, and Mr. Daniel Kelly ("Mr. Kelly"), the respondent.
- [2] At trial, Mr. Kelly represented himself and the companies named as respondents including DK Keldan Distribution Ltd., doing business as Euphoria Paradise and Paws on a Mission. The named companies are no longer operating. Ms. Hill was represented by counsel.
- [3] The claimant's pleadings listed "XPOWER" as a family business and named that company as a respondent. Testimony of both parties was that XPOWER was a pet grooming product that the respondent sold, not a business he owned. Accordingly, all claims against XPOWER are dismissed.

PROCEDURAL HISTORY

- [4] An ex parte order of October 22, 2018, made pursuant to s. 91 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] restrained the respondent from disposing of any assets personally or from the businesses (the "October Order").
- [5] On November 8, 2018, the October Order was vacated by consent and replaced with mutual orders that:
 - each party could use personal accounts for ordinary living expenses;
 - Euphoria Paradise could use its accounts in the course of ordinary business;
 - the respondent would provide copies of business bank statements on a monthly basis; and,
 - the 2008 Bayliner boat and 2014 Cunningham trailer be sold, with proceeds to be divided equally between the parties.

- [6] The October Order also addressed some of the respondent's personal items. The claimant was to photograph the respondent's tools in the garage, and arrangements were to be made for a third party to pick up those items. The respondent was to provide a list of items received.

BACKGROUND

- [7] The parties began to live together in May 2006, married on September 10, 2011, and separated on June 14, 2018. The relationship was approximately 12 years long, and evidence at trial suggested it was contentious for much of that time.
- [8] The claimant's testimony was that the respondent was violent and abusive toward her during the marriage. On several instances, police were involved. At one point, the claimant alleges the respondent sexually assaulted her at knifepoint. The respondent was arrested, though charges were not pursued, and the claimant was uncooperative with the investigation.
- [9] The claimant changed the password on the respondent's computer multiple times when she believed he was communicating with other women. The respondent admits to being unfaithful, but denies he was violent towards the claimant.
- [10] The claimant says the respondent's drinking was an issue during their marriage, something the respondent denied.
- [11] From before the parties met, and continuing through their relationship to the time of trial, the claimant has been on long-term disability ("LTD") and unable to work. She collects \$18,643 annually from her disability coverage. She testified that her disability is a permanent condition.
- [12] The respondent was employed in various capacities over the course of the relationship, including at different building supply stores. The parties decided to pursue entrepreneurial business opportunities. Initially, the respondent ran a lumber truck. The parties then opened and operated Paws on a Mission, a dogfood delivery business. The respondent also sold and serviced XPOWER machines, a brand of dryer used in the dog grooming business.
- [13] In 2015, the lumber truck was sold, and the proceeds were used to finance DK Keldan Distribution Ltd., which ultimately did business as Euphoria Paradise, a pet and human wellness store that sold essential oils and dog food among other items. Generally, the businesses operated through Euphoria Paradise. Euphoria Paradise opened in September 2015. The respondent largely operated and ran the store. The claimant helped, as she was able, particularly with her knowledge of essential oils.
- [14] Euphoria Paradise, and some clients of the store, purchased essential oils through the claimant's account with Young Living Canada ("YLC"), an essential oils manufacturer and distributor. When purchases of essential oils from YLC exceeded a certain amount in any given month, the claimant received a cash bonus for these sales.

- [15] After the respondent was involved in a physical altercation with a neighbouring business owner over parking, Euphoria Paradise changed locations in early 2018. After the move, the business suffered a setback. Clients had trouble finding the new location and parking was limited. The respondent closed the business and liquidated the store in the fall of 2019.
- [16] After the separation, the respondent was diagnosed with cancer and underwent treatment. He experiences other health difficulties. Since the closure of Euphoria Paradise, the respondent has been employed as a SkipTheDishes delivery driver, relied on CERB payments during the COVID pandemic, and is presently employed with a distributor for industrial products where he earns approximately \$47,688 annually. He says his plan is to retire within the next few years, when he turns 65, if not sooner.

DEBT CONSOLIDATION

- [17] The financial situation between the parties is unique because, just prior to separation, they refinanced their home and paid off the personal and business debts that they had accrued together. This included credit card debt, several lines of credit, and an outstanding loan of approximately \$4,436 on the respondent's F150 truck. Debt was consolidated in May 2018, and the parties separated in June 2018.
- [18] Following debt consolidation, the parties' combined debt was reflected in the mortgage on the former family home. When the family home was sold, the mortgage was discharged. Effectively, both parties paid off the personal and joint debts that had accumulated during their marriage at that time.
- [19] Evidence of debt, added in the few weeks (less than a month) between debt consolidation and separation, was inconclusive.

EVIDENCE

- [20] The original notice of family claim was filed in October 2018 and set down for trial in February 2021. It was then adjourned several times. At the opening of this trial, all parties acknowledged the less than complete evidentiary record and stated that they wanted to proceed.
- [21] The financial evidence was spotty at best, and non-existent at worst, for some issues. Financial records were incomplete for Euphoria Paradise, post-separation. In addition, there were indications multiple versions of tax returns for the same year may have been filed by Mr. Kelly, and it was not clear if I had the final versions before me. Disclosure was incomplete from both parties, particularly from the respondent.

- [22] Ms. York, the accountant of DK Keldan in 2017-2018 and a personal friend of the claimant, was called as a responsive witness by the claimant. Ms. York testified remotely and had to leave for a medical appointment in the middle of her testimony. She could not return during the time scheduled for trial, and both parties agreed to continue without her completing her testimony.
- [23] I have elected to disregard the testimony of Ms. York, as the respondent was not given a full opportunity to cross-examine her.
- [24] The parties indicated that they each have limited financial resources and expressed a desire to have the matter decided on the record available.
- [25] I have considered the following cases where courts have grappled with incomplete evidence and the principle of finality in family law matters:
- a) Boylan v. Boylan, 2021 BCSC 1726, where Justice A. Ross noted that:
- [5] Despite the evidentiary problems, the parties agreed to proceed to trial and seek the court's ruling on the issues raised. In these reasons, I have attempted to make the best decisions possible based on the available evidence. Given my findings on credibility and other issues, the division of assets is more of an accounting exercise than a legal one.
- b) Justice Veenstra in M.W. v. N.L.M.W., 2021 BCSC 1273 noting a deficiency in evaluating the companies in a family law case said:
- [343] [T]here is a need for finality in family litigation that requires the court to move ahead, if it can, notwithstanding deficiencies in the evidence: Bodine-Shah v. Shah, 2014 BCCA 191 at paras. 55-59. This overarching objective may, in a case like this, overtake achieving perfect justice.
- c) The Court of Appeal's decision in Bodine-Shah v. Shah, 2014 BCCA 191, at paras. 56-57, where the Court of Appeal emphasized the principle of finality and noted each party's obligation to "marshal the evidence required to establish their claims at trial."
- [26] Having heard from the parties, it was clear that more time would not necessarily produce the missing information.
- [27] I have contemplated where a decision is possible based on the evidence before me. Where there is sufficient, if not perfect, evidence to do so, I make the findings necessary to resolve the issues between the parties. To leave the issues unresolved, given the limited assets between the parties, would not do justice. Such a result would leave assets tied up with little chance of the parties achieving finality.
- [28] On some issues, I find there was insufficient evidence for me to decide. Therefore, the following claims are dismissed:

- the respondent's claim for a portion of assets, including cameras and photographic equipment, of Sweet Willow Photography;
- the claimant's request that the respondent reimburse her for a penalty she owed insurer Canada Life, resulting from undeclared bonus money she received from YLC;
- the respondent's claim for reimbursement for XPOWER motors or parts; and
- the claimant's claim that the respondent continue to pay for a life insurance policy, and name her as a beneficiary of that policy.

[29] Additionally, the respondent's claim for the Bayliner boat and trailer were dealt with by a prior order of this Court in November 2018, and so are not addressed here.

[30] The claims either party makes for investments they say the other holds are addressed below.

ISSUES

[31] Issues addressed here are:

1. division of proceeds from the sale of the former family home;
2. division of the family businesses' assets and debts (including whether a Share Purchase Agreement entered between the parties at separation is valid, responsibility for the debts of the company, and whether any amount is owed to any party resulting from the operation and liquidation of the business assets);
3. vehicles;
4. personal property;
5. pension division;
6. division of investments of either party;
7. timeshare in Mexico; and
8. spousal support.

LEGAL PRINCIPLES

Family Law Act

[32] Section 84(2) of the FLA defines "family property" to include real property, business interests, investments, money, pensions, and increases in value of any excluded property during the course of a relationship. Parties are entitled to an equal division of family property and family debt upon separation pursuant to s. 81. A court is only to reapportion family property to provide for an unequal division if an equal division would be "significantly unfair". Justice N. Brown touched on this difference in *L.G. v. R.G.*, 2013 BCSC 983 stating:

- [71] In my view, the term 'significantly unfair' in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness'. Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.
- [33] When determining the value of the assets and debts, s. 87 of the FLA states the trial date or date of the agreement is the valuation date, unless otherwise ordered or agreed to. Setting the valuation date at another date requires the application of s. 95(1) of the FLA and a finding of significant unfairness (*Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76; *Eisele v. Eisele*, 2015 BCSC 2297; *Blair v. Johnson*, 2015 BCSC 761).
- [34] In determining whether equal division would be significantly unfair, s. 95(2) provides that the court may consider 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.
- [35] The main assets and debts at issue between the parties are the division of the family business, Euphoria Paradise, and disposition of the proceeds from the sale of the family home. Disposition of each asset is intertwined.

- [36] The claimant seeks to enforce a Share Purchase Agreement (the "SPA") for her shares of Euphoria Paradise which were to be paid from proceeds of the sale of the family home.
- [37] The respondent seeks to have the claimant pay a portion of business debts accrued post-separation from her share of the proceeds from the sale of the family home.

Former Family Home

- [38] The parties bought a house located at 34935 Brient Drive, in Mission, B.C., in May 2016. Each party contributed to the downpayment, though they disagree on the amounts either contributed. At one point, the claimant came off title, but this was only because a former bankruptcy would not allow for refinancing with her name on title. I find the parties intended, and treated, the former family home as a shared family asset.
- [39] The former family home sold in December 2019. The claimant received \$10,000 from the sale proceeds, and the remainder of proceeds from the sale were put into a trust account. At the time of trial, \$113,239.73 from the proceeds of that sale remained in trust.
- [40] The respondent paid the mortgage, as well as gas and hydro (approximately \$800 in utilities), to the end of September 2018. In October 2018, the respondent requested to skip three mortgage payments and then never resumed payments. The respondent continued to pay home insurance until the property sold. The claimant did not make any mortgage payments. She did pay the utilities from October 2018 until the property sold. Ultimately, the home went into foreclosure because neither party paid the mortgage.

Position of the Parties

- [41] The respondent argues that the claimant insisted on a higher list price and refused to show the house, so she could live there longer. The claimant denies this.
- [42] The claimant says the home suffered damage from a windstorm in 2018, and then from a flood in 2019. Repairs were delayed because the parties could not agree to share payment of the insurance deductibles. The claimant argues the disrepair of the house delayed the sale. The claimant points out that viewings did occur, and the home finally sold after she negotiated with a contractor to do the repairs, with the insurance deductibles (\$500 for each claim x 2 = \$1,000) being paid later, upon sale of the home.
- [43] Ultimately, both parties signed the listing agreement indicating they agreed to the initial listing price, as well as subsequent price reductions.

- [44] The respondent argues he should get an equivalent credit to the \$10,000 that the claimant received upon sale of the home. No evidence was provided of any agreement regarding the \$10,000 received by the claimant. The claimant says \$3,500 was used to pay for a new septic field, though final receipts were not provided, and \$1,000 was paid in deductibles to the contractor who repaired the storm damage. She kept the remainder to help her move and resettle.
- [45] The respondent agrees the pump in the septic field was changed, but argues this should cost a maximum of \$500.
- [46] The respondent also argues that the claimant should pay 13 months' occupational rent (18 months x \$2,600 = \$46,800 - 50%) of \$23,400.

Findings

- [47] Subject to adjustments made in the remainder of this decision, the parties are entitled to equally share the proceeds of the former family home. There is currently \$113,239.73 remaining in trust from the sale of the family home. Each party is entitled to one-half (currently, \$56,619.87) of that amount, subject to the other allocations set out in this decision.
- [48] The respondent is entitled to the amount of \$5,500 which I find equal to the amount the claimant received as an initial lump sum payment from the home sale. I find, on a balance of probabilities, the remaining \$4,500 was used by the claimant for repairs necessary to prepare and maintain the home for sale, including paying for insurance deductibles to have repairs from storm and wind damage repaired.
- [49] The law around occupational rent was summarized by Justice Jenkins in *McFarlen v. McFarlen*, 2017 BCSC 1737 at paras. 12-22. Ordering occupational rent is a discretionary remedy intended to achieve fairness. The remedy is exceptional and should be used cautiously.
- [50] The relevant factors to be considered in a claim for occupational rent were summarized by Justice Fleming in *McManus v. McManus*, 2019 BCSC 123 at para. 76:
- Aside from ouster, the circumstances under which the non-occupying spouse left the home, and if and when the non-occupying spouse moved for a sale of the home;
 - Whether children are residing with the occupying spouse;
 - Whether the occupying spouse has made a claim for contribution from the non-occupying spouse for the expenses related to the premises;
 - Whether support has been paid;
 - Whether the occupying spouse increased or decreased the value of the property;

- The duration of the occupancy; and
- Other competing claims in the litigation that may offset an award of occupation rent.

- [51] The respondent indicated he moved out of the family home and into the store following the breakdown of the marriage. He continued to live there until he found housing elsewhere. The respondent then rented an apartment where he paid rent and utilities, and purchased new household goods and furniture, while the claimant continued to live in the family home until it sold. He also continued to pay house insurance on the former family home until it sold.
- [52] The evidence was that repairs were necessary to the former matrimonial home for much of the time that the claimant lived there, and this impacted its sale. The claimant paid utilities and arranged for repairs. It is not clear what the fair rental market value of the home was until those repairs were made. The home had suffered wind and flood damage. From October 2018 onwards, neither of the parties paid the mortgage.
- [53] I do not find that an order for occupational rent is required in order to achieve fairness. Under these circumstances, I decline to order occupational rent.
- [54] The claimant lived in the family home until the property sold in December 2019. During that time, mortgage arrears continued to accumulate as neither party paid the mortgage. The arrears were finally paid when the home was sold and deducted from the amount that either party was entitled to receive. In this sense, each party did ultimately pay for one-half of the mortgage during the time that the claimant lived there. While I do not award occupational rent, I do find this a factor for consideration in determining past spousal support due.

Family Business

- [55] At separation, the respondent presented the claimant with a Share Purchase Agreement for DK Keldan Distribution Ltd. doing business as Euphoria Paradise (the "SPA"). The SPA was drafted by the respondent from a template he got off the internet. Neither party had a lawyer. The parties signed the SPA on June 14, 2018. The SPA was generally understood between the parties to mean the claimant transferred her entire share of the family business to the respondent for a purchase price of \$59,000, payable from the respondent's share of the proceeds from the sale of the family home.
- [56] The claimant's initial claim was for one-half of the family business, including the inventory of the store, the profits it made before it was liquidated and a share of the amounts received upon liquidation of the inventory. At trial, the claimant indicated she was no longer seeking division of the family business and instead argued the SPA should be enforced.

- [57] The respondent argues that the claimant did not act like the SPA was valid as she repeatedly entered the store, took product and approached customers. The claimant argues the SPA is binding; and, as the respondent drafted it and relied on it when Euphoria Paradise was still operational, he should not be able to state after the fact that it is not valid.
- [58] After the SPA was signed, the respondent operated the business on his own. The respondent had the sole benefit of proceeds from the operation of the business. The accounts and all business operations were under the control of the respondent. Profits generated by Euphoria Paradise were kept by the respondent.
- [59] On multiple occasions, the claimant situated herself outside of Euphoria Paradise, and discussed the situation surrounding the separation and ownership of the store with customers. The respondent claimed this disrupted business.
- [60] The respondent said there were multiple instances when the claimant came into the store and took product, including jewelry, essential oils and dog food, or accessed the computers and changed banking and account passwords. The respondent incurred costs to reset passwords and gain access to accounts. On at least one occasion, the police were called and directed the claimant to return items she had taken, which she did.
- [61] The claimant admitted she entered the store on several occasions when the respondent's brother and girlfriend were working and that she took dog food for the parties' dogs, but minimized or denied taking other product.
- [62] The respondent introduced video stills showing the claimant entering the store on November 11, 2018, for a period of two-and-a-half hours, shortly after midnight. The claimant is seen exiting the store several times with different bags, which appear to be full.
- [63] The claimant admitted she took the books and records from the business to copy one night, but said she returned them the following night. The respondent disputes that the files were returned and says the claimant taking the files caused him to be unable to file taxes for the business in 2019.
- [64] The respondent estimated that the claimant took \$4,000 worth of product from the store based, in part, on his calculations of where she appeared to stop in the video stills; and, on another occasion, based on what his girlfriend, who was working in the store, said she thought the claimant took.
- [65] I cannot accept the respondent's evidence (which, in essence, is speculation) about amounts of product the claimant took from the store, or about actual amounts he paid to rectify the situation through computer technicians or lawyers. Further, the legal fees the respondent seeks reimbursement for were intermingled with those incurred in this family law matter.

- [66] There are taxes owed to Revenue Canada as a result of the operation of the business post-separation. The precise nature of this debt was one of the areas where evidence was insufficient. The respondent argued that some of the amounts owing reflect penalties due because the claimant took the financial files from the business. What actions the respondent took to file taxes based on the electronic records he had available, despite that the claimant took the financial records, was not clear.
- [67] Significant debts were accrued by the respondent post-separation, which he claimed were related to the operation of Euphoria Paradise. Some credit card statements (but not all) were produced, and even fewer invoices relating to those credit charges were produced. The credit card statements show purchases for restaurants, alcohol, lottery tickets and travel, among other things. It was clear that not all of the charges were properly characterized as "business expenses". Legal fees were paid on the credit card which the respondent said related both to the separation and to issues related to the claimant changing account passwords, and also because the business was named as a respondent in the notice of family claim.
- [68] Business debts that the respondent claims should be paid by the claimant are \$47,516.96 which reflects 50% of bills produced by the respondent, including company and the respondent's personal credit cards.
- [69] The respondent seeks payment of all corporate debts from the proceeds of the sale of the former family home. In the alternative, the respondent argues the SPA was for only 50% of the shares the claimant owned in DK Keldan, and that the claimant retained 25% of the shares and should therefore be responsible for a proportional (25%) share of the debts. It appears to have been an error that the SPA document prepared by the respondent himself listed only one-half, and not all, of the claimant's shares in DK Keldan.

Findings

- [70] Section 92 of the FLA provides that spouses may make agreements with respect to division of family property:

92 Despite any provision of this Part but subject to section 93 [setting aside agreements respecting property division], spouses may make agreements respecting the division of property and debt, including agreements to do one or more of the following:

- (a) divide family property or family debt, or both, and do so equally or unequally;
- (b) include as family property or family debt items of property or debt that would not otherwise be included;
- (c) exclude as family property or family debt items of property or debt that would otherwise be included;

- (d) value family property or family debt differently than it would be valued under section 87 [valuing family property and family debt].
- [71] I first turn to the question of whether the SPA is binding.
- [72] Agreements or contracts between spouses must meet the basic requirements of contract formation, including offer and acceptance of clear terms, consideration or an exchange of something of value between the parties and an intention to create legally binding relations: *Bartch v. Bartch*, 2019 BCSC 1643. This has been described by this Court as "a manifest meeting of the minds" and an outward representation by the parties "that indicates both an intention to be bound and reasonably certain mutually agreed terms", *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 322. See also *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53.
- [73] Justice Milman helpfully summarized the law where former spouses can be considered to have entered a binding agreement on marriage breakdown in *Wilson v. Bokenfohr*, 2020 BCSC 1902 at paras. 28-29. I have reviewed, and adopt, those considerations here.
- [74] Where it can be determined that the disputant parties reached an agreement, the courts will generally enforce those agreements.
- [75] The respondent acted as though an agreement had been reached: He changed the locks on the store; showed the SPA to police to indicate that the claimant did not have an interest in the store or business; and sent emails asking her to stay away from the store, indicating that she did not own any part of the store.
- [76] While the claimant suggested she did not originally want to sign the SPA, it was also she who sought to enforce it at trial.
- [77] When read in its plain language, and considering the objective facts known to the parties at the time, there was a common intention to create a legally binding agreement. At the time the contract was formed, the parties were separated without any intent to reconcile. The respondent continued to fully manage all aspects of the business to the exclusion of the claimant. The parties had agreed to list the family home for sale, and there was an explicit term within the SPA that the claimant would be paid for her shares upon the sale of the home. There were no legal proceedings filed or underway regarding property division.
- [78] The claimant did not have a say in the operation of Euphoria Paradise, nor did she derive any financial benefit from it from June 15, 2018 onward, until the store closed in September 2019. The respondent got all benefit from the operation of Euphoria Paradise, and exercised all operational control.
- [79] I find that the intention of the parties was that the SPA was intended to sever the claimant's ownership and control of DK Keldan doing business as Euphoria Paradise. I find, on a balance of probabilities, the SPA is legally binding and that Euphoria Paradise should be treated as excluded property for the respondent.

- [80] I find that \$59,000 represents a valuation that both parties agreed to of the claimant's share of the business, and existing inventory, at the time of separation. In a sense, it is the only valuation available given the poor condition of the financial records introduced.
- [81] The respondent had sole control over the operation of Euphoria Paradise after the SPA was signed, to the exclusion of the claimant. He kept all the profits, generated all the debts, and ultimately made the decision to close the business and liquidate assets.
- [82] The parties consolidated their personal and business debts less than a month before the parties separated. Through that consolidation, the claimant paid her share of personal and business debt arising during the marriage.
- [83] I find it would be significantly unfair to hold the claimant liable for any business debts or taxes the respondent incurred post-separation. I find that the respondent should be solely responsible for all business debts he incurred after the parties entered the SPA. This applies to debts the respondent accrued on business credit cards and accounts, as well as his personal credit cards which he said were business debt accrued post-separation.
- [84] However, I do find, on a balance of probabilities, that the claimant repeatedly entered Euphoria Paradise after the SPA was signed and engaged in behaviours (approached customers, changed passwords) disruptive to business.
- [85] Further, I find on a balance of probabilities, that the claimant took product and financial records from Euphoria Paradise and that this caused loss to the respondent. The respondent incurred costs, including for computer technical support and legal fees to access accounts, as a result. Amounts are difficult to assess, as the evidence adduced by both parties was incomplete and contradictory.
- [86] The respondent should receive \$5,000 to compensate him for product and business records the claimant took from the store, and a portion of the costs he incurred as a result. The total amount the respondent owes to the claimant as a result of the SPA is $\$59,000 - \$5,000 = \$54,000$.

Debts

- [87] Each party is responsible for all debts in their own name, not addressed here.

Vehicles

- [88] Each party claimed that they should keep their own vehicle but be credited with 50% of the value of the other's vehicle. The respondent owned a truck when the parties got together. Throughout the course of the marriage, he made payments on the truck and used his existing vehicle for a trade-in to purchase a new truck.

- [89] The claimant says her Mazda 3 vehicle was transferred to Euphoria Paradise ownership for accounting purposes. It was later transferred back to her. Given incomplete information on the current value and payment history of the vehicles, each party is to keep the vehicle they each have in their possession. The respondent will keep the F150 truck and the claimant, the Mazda 3.
- [90] The claimant is entitled to a credit back for one-half of the family funds used to pay off the truck loan at the time of refinancing, in the amount of \$2,218. I order this be credited to the claimant from the respondent's remaining interest in the proceeds from the sale of the family home.

Respondent's personal property

- [91] The respondent argued that the claimant should reimburse him \$35,000 for his personal property. His claims were for both personal property which belonged to him alone (such as fishing rods, clothing, records and items belonging to his mother he received after her death) and also for property which the parties acquired together but which the claimant kept (such as furniture or housewares). There was insufficient evidence of the actual value of the respondent's personal items, or what items he actually received from the home to support a valuation of \$35,000.
- [92] I do not accept that a rough estimate of value of goods he received subtracted from the "home contents" insurance value is a workable or reasonable calculation. I am, however, satisfied on evidence before me that the respondent did lose personal property which was either disposed of by the claimant, or for which the claimant refused to allow him to access.
- [93] The respondent is entitled to a credit of \$5,000 for personal property. This is to be credited to him from the claimant's interest in the proceeds from the sale of the family home.

Investments and Pensions

- [94] All Canada Pension and employment pension benefits accrued by either party during the course of their relationship are to be divided equally.
- [95] Actual amounts of investments either party held were unclear.
- [96] Each of the parties made an argument that they were entitled to a portion of the investments that the other party had at separation. The claimant says the respondent had approximately \$11,000-12,000 in investments. The respondent says that the claimant had approximately \$9,000. The claimant admits she had a TFSA of approximately \$3,340.43 but denies the other investments.
- [97] There was a lack of evidence about the investments each said the other had.

- [198] The amount of the claimant's TFSA should be divided equally between the parties, with the respondent being credited for \$1,670.21. This should be credited to the respondent from the claimant's interest in the proceeds from the sale of the family home.
- [199] As I have indicated, evidence adduced at trial and in argument was limited and often scattered, including regarding additional investments each claimed the other had. I cannot properly value them at this time. I therefore make no finding on the division of any other investments that either party has.

Mexico Timeshare

- [100] In 2011, the couple bought a timeshare in Mexico. They can book stays for several weeks of each year. The timeshare requires a yearly payment of \$349 USD. In 2036, the timeshare will mature as an annuity of \$21,000.
- [101] The respondent has paid the fees since separation. The respondent has vacationed there with his girlfriend and family. The claimant would either like him to purchase her interest, or to have use of the timeshare.
- [102] The timeshare should be divided equally. Each party is entitled to use of one-half of the available time. The respondent shall sign whatever papers are necessary, if any, to ensure the claimant's equal use and access to the booking process. Each party shall pay for one-half of the fees for each year.

Spousal Support

- [103] The claimant seeks compensatory and needs-based spousal support under both the FLA and the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA].
- [104] The provisions relating to spousal support are found in ss. 160-165 of the FLA. The objectives of spousal support are set out in s. 161, and include to "recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship"; to "relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses"; and "as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time."
- [105] Orders for spousal support under the DA, are made pursuant to s. 15.2. This section also sets out the objectives for spousal support under the DA and the factors to be considered.

Compensatory Spousal Support

- [106] Compensatory spousal support is discussed in numerous authorities including *Moge v. Moge*, [1992] 3 S.C.R. 813 [*Moge*], and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.

[107] In *Chutter v. Chutter*, 2008 BCCA 507 [Chutter], Justice Rowles described the purpose and rationale underlying the compensatory grounds for spousal support:

[50] The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success .

[Citations omitted.]

[108] In *Moge*, the Supreme Court of Canada directed that:

[84] [G]reat disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution .

[Citations omitted.]

[109] A compensatory award should continue until compensation is achieved even if the spouse has achieved self-sufficiency (*Chutter* at para. 79; *Tedham v. Tedham*, 2005 BCCA 502 at para. 60; *Morigeau v. Moorey*, 2015 BCCA 160 at para. 37).

[110] I do not find that the claimant has made out a claim for compensatory support. She was on long-term disability when the parties met and remained so during the course of their marriage. She does not appear to have given up opportunities or suffered further economic disadvantage as a result of the relationship.

[111] *Joffres v. Joffres*, 2014 BCSC 1778 [Joffres] summarized the law for when to award non-compensatory support:

[137] [T]he non-compensatory approach is based on her need, which in law is tied loosely to the marital standard of living and the loss of access to the former spouse's income: *Bracklow* at paras. 23 - 25. The amount of support to which a spouse is entitled does not always equal the amount of need: *Bracklow* at para. 54. Need is a relative concept, related to the marital standard of living: *Riad v. Riad*, 2002 ABCA 254 at para. 33. The term "reasonable need" is used to convey a standard of living that reflects the marital standard, but also recognizes the inevitable lowering of standards for both spouses after separation.

[112] *Joffres* also discussed how the court should approach assessing quantum for spousal support, including the objective of "self-sufficiency" outlined in s. 161(d) in the FLA, going onto to state:

[164] "Self-sufficiency" itself is a relative notion. To be self-sufficient after a long marriage, the recipient's earnings must bear some relationship to the marital standard of living and to that enjoyed by the payor spouse .

[Citations omitted.]

[113] Non-compensatory support is "grounded in the 'social obligation model' of marriage, in which marriage is seen as an interdependent union." Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, not the state (Chutter at para. 54).

[114] In *K.R. v. J.R.*, 2022 BCSC 1856 Justice Schultes clarified:

[353] It is important to note however, that a mere disparity in the spouse's incomes is not sufficient to create entitlement: *Lee v. Lee*, 2014 BCCA 383, at para.60. Instead "there must at least be some evidence of how the applicant's lifestyle has been diminished and, even then, other factors may have to be considered": *Madruga v. Madruga*, 2015 BCSC 1605.

[115] The claimant argues for both retroactive and prospective spousal support, and seeks to have this by way of a combined lump sum payment:

- retroactive from July 2018 to December 31, 2018, and then prospective from his share of the family home;
- \$22,525 (retroactive spousal support) based on an entitlement of \$425 monthly; and,
- \$427/month for four years in prospective support (based on imputing the respondent's current income at \$47,000), which she argues is at the low end of the Guidelines spousal support range.

[116] In the alternative, the claimant argues that a lump sum payment would be appropriate for all past and prospective spousal support in the amount that is equivalent to the respondent's remaining share of the former family home.

[117] In keeping with the need to assess the division of assets/debts in total, I first set out what these amounts are thus far.

[118] Of the amount remaining from the sale of the former family home (\$113,239.73), I find that each party is entitled to a 50% share, or \$56,619.87. The respondent is entitled to an additional amount of \$5,500 to match the \$10,000 (of which I have found \$4,500 was used to pay for repairs) the claimant received on the sale of the former family home. Based on these figures the respondent has a \$62,119.87 interest in home proceeds.

[119] I have found that the SPA is an enforceable agreement and that the respondent owes the claimant \$59,000 minus \$5,000 (for costs he incurred and lost product) under that agreement. The amount the respondent owes the claimant under the SPA (\$59,000 - \$5,000) is \$54,000. Based on these calculations, the amount of the respondent's share of the proceeds from the sale of the home that is remaining is \$8,119.87.

[120] I have also found that the respondent is entitled to a 50% share of the claimant's TFSA, so his entitlement is \$9,727.08.

- [121] I have further found that the claimant is entitled to a credit back of \$2,218 of refinancing funds used to pay for the respondent's truck. The respondent is entitled to \$5,000 for personal property and his share of joint property.
- [122] When each of these divisions is considered, the total amount the respondent is entitled to keep from the proceeds of the family home is \$12,509.09.
- [123] The respondent argues he should not have to pay spousal support. He says that over the past several years, he made less money than the claimant in three years and relied on CERB payments during COVID-19. As well, he says his health prevented him from working fully at times.
- [124] The respondent argues he plans to retire in three years, and after that will rely on his Canada Pension. He says he is ill in health and argues he may be homeless when he retires, based on the modest income he will receive from CPP.
- [125] Neither of the parties is well off and each struggles in their own way. Given her health issues and long-standing disability, it is very unlikely that the claimant will ever be fully self-sufficient.
- [126] The respondent is 61 years old. He is currently employed, making approximately \$47,688 per year. His evidence was that his health is an issue for him. For some years post-separation, the respondent's income was lower than, or nearly equivalent to, the claimant's income. Now the respondent earns double of the claimant's monthly income. He will likely keep making this amount until he retires at age 65.
- [127] However, there was also evidence that while the claimant continued to live on her limited disability pension, the respondent vacationed with his girlfriend and family members in the time share the parties own in Mexico, and did other local travel with his girlfriend, including to Harrison Lake.
- [128] I find the respondent should pay the claimant needs-based spousal support, on the low end of the spectrum per the Spousal Support Advisory Guidelines [SSAG]. Given the relative situations of the parties, I find that this spousal support should last for 6 years, reflecting the 12-year duration of their relationship. Also, as I noted earlier, each of the parties continues to struggle in their own way. The claimant is on LTD, while the respondent experiences health issues and intends to retire within a few years when he attains the age of 65.

Retroactive Spousal Support

- [129] In terms of the request for retroactive support, the Supreme Court of Canada has said that awards for retroactive child support should follow a similar analysis to that of an award for retroactive child support: *Kerr v. Baranow*, 2011 SCC 10:

- [212] The comments of Bastarache J. at para. 113 of D.B.S. may be easily adapted to the situation of the spouse seeking support: "A [spouse] who underwent hardship in the past may be compensated for this unfortunate circumstance through a retroactive award. On the other hand, the argument for retroactive [spousal] support will be less convincing where the [spouse] already enjoyed all the advantages (s)he would have received [from that support]". As for hardship, there is the risk that a retroactive award will not be fashioned having regard to what the payor can currently afford and may disrupt the payor's ability to manage his or her finances. However, it is also critical to note that this Court in D.B.S. emphasized the need for flexibility and a holistic view of each matter on its own merits; the same flexibility is appropriate when dealing with "retroactive" spousal support.
- [130] In 2019, the claimant lived in the family home. Neither party paid the mortgage during that time, though the mortgage continued to accrue and was paid out of the profits received upon the sale. Here, for at least one year, the claimant was able to remain in the family home while it awaited sale, and to maintain a standard of living relatively equal to that she experienced during the marriage. The respondent's age, health and income must be taken into consideration, as must the claimant's current circumstances and fact that she lives on LTD. Claims for retroactive spousal support are typically considered from the point the payor spouse received notice of the claim.
- [131] In this case, the original application was filed in October 2018 and a reply filed in November 2018. For the purposes of the analysis, the date of any award for retroactive support should begin in November 2018-assuming this is when Mr. Kelly received notice (recognizing the original application and order was filed and sought ex parte).
- [132] From November 2018 until December 2019, the claimant lived in the family home and maintained a similar standard of living to that she experienced during the marriage, while the respondent temporarily lived at the business and then rented an apartment in addition to paying insurance on the family home. I find no support owing from for November or December 2018.
- [133] In 2019, the respondent made marginally less than the claimant. This was the year Euphoria Paradise closed. The financial records were not in good repair. I am not sure that the income of \$14,732 that the respondent says he made is accurate, but have no way of making this determination on the evidence before me. For 2019, the respondent does not owe any spousal support.
- [134] In 2020, the respondent's income was \$21,008, very close to the claimant's income. This was the year he relied primarily on CERB benefits. I find he owes no spousal support for that year.

- [135] For 2021 through to the date of trial, I accept the claimant's assertion that spousal support should be calculated based on an income imputed to the respondent of \$47,000 per the SSAG, which is within range, if not slightly lower than, his actual income. For 2021 and 2022, the total amount of spousal support owing, calculated on a monthly basis, would be \$427 per month (or approximately \$5,124 per annum).
- [136] For 2023, the claimant's receipt of payment for her shares in the business per the SPA must be considered for the purposes of calculating spousal support. She will receive the amount of the SPA payment, plus her LTD benefits. I find there is no spousal support owing for 2023.
- [137] Based on these findings, the total amount of retroactive spousal support owing to the time of trial is \$10,248. I order that this amount be paid from the respondent's share of the proceeds from the sale of the family home.

Prospective Support

- [138] From January 1, 2024, and payable on the first day of each month until June 1, 2025, or a further order of this Court, the respondent is to pay to the claimant spousal support based on an imputed income \$47,000 per the SSAG. Based on this imputed income, the total amount of spousal support owing, calculated on a monthly basis, is \$427.

Lump Sum Award

- [139] The claimant asks that all retroactive and prospective spousal support be paid in a lumpsum award given the hostility between the parties, the allegations of family violence, and the unlikelihood the respondent will abide by a court order for ongoing spousal support.
- [140] The Court of Appeal in *Parton v Parton*, 2018 BCCA 273 noted there are circumstances where a lump sum payment may be appropriate on consideration of the totality of the circumstances.
- [48] In *Robinson v. Robinson*, 2011 BCSC 1489, for example, after quoting extensively from *Davis [Davis v. Crawford, 2011 ONCA 294]*, Justice Watchuk awarded \$330,000 in lump sum spousal support. In explaining her reasoning, Justice Watchuk noted that a lump sum award is appropriate in circumstances where the payor spouse has insufficient income to pay spousal support on an ongoing basis, but has capital assets with which to make a lump sum payment. She also noted that lump sum spousal support may contribute to self-sufficiency and assist the recipient spouse to achieve an appropriate standard of living. This Court upheld her decision in reasons indexed as 2012 BCCA 497.

[141] On the evidence before me, the respondent does not have the ability to pay a lump sum award for both retroactive and prospective spousal support at this time. As such, I order that the respondent pay to the claimant \$10,248 in retroactive spousal support from his share of the proceeds from the sale of the home. Prospective monthly periodic spousal support is to be paid from the respondent to the claimant commencing on January 1, 2024, and lasting through June 1, 2025.

DIVORCE

[142] Both parties agree a divorce should be granted, and I grant the divorce.

[143] As success was divided, each party shall bear their own costs.

"A. Walkem J."

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