
CANADA / JUDGMENT

J.F.L.M. v. S.N.M.

2021 BCSC 596

COURT

Supreme Court of British Columbia

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2021 BCSC 596 J.F.L.M. v. S.N.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.F.L.M. v. S.N.M.,

2021 BCSC 596

Date: 20210331

Docket: E78135

Registry: Nanaimo

Between:

J.F.L.M.

Claimant

And

S.N.M.

Respondent

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

Counsel for the Claimant:

B.R. Vining

Counsel for the Respondent:

M.L. Warsh

Place and Date of Trial/Hearing:

Nanaimo, B.C.

November 18 and 19, 2020

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Nanaimo, B.C.

March 31, 2021

Table of Contents

INTRODUCTION. 3

ISSUES. 5

DIVORCE. 5

PARENTING.. 6

DIVISION OF FAMILY PROPERTY. 11

Statutory Framework. 12

Determination. 14

Credit Card Debt 14

The Family Home. 15

Other Assets. 17

SUPPORT ISSUES. 18

The Parties' Incomes. 18

JM.. 18

SM.. 19

Child Support 20

Retroactive Child Support 21

Spousal Support 24

SUMMARY OF ORDERS. 26

COSTS. 29

INTRODUCTION

- [1] In this summary trial, the claimant, JM, and the respondent, SM, seek a divorce and a final determination of division of property, division of family debt, and support. JM is a full-time support worker and SM is currently completing her PhD studies and working as a consultant on Aboriginal rights and title issues.
- [2] The parties provide different accounts of the beginning of their relationship, but I am satisfied that by the fall of 2003 they were in a marriage-like relationship. They had their child K in February 2005, and were married on September 1, 2006. They both pursued further education over the course of their relationship, with SM obtaining her MA in Indigenous Governance in 2008 and JM studying for and obtaining his Early Childhood Development diploma in 2007 and a certificate in drug and alcohol counselling.
- [3] Although the parties have suggested different end dates for the termination of their relationship, JM accepted the October 2013 date at this summary trial, and I make that determination. JM moved into the basement suite of their family home sometime in 2012, but the evidence establishes that they continued to attempt to reconcile and live as a family unit until October 2013. JM left the family home permanently in December 2014, in circumstances I will address below.
- [4] The parties have one natural child of the relationship, K, and two children from previous relationships, J and T. T lived with the parties as a child, and JM culturally adopted T. J also lived with the parties in a shared parenting arrangement with his mother. J was approximately 18 years old and T was approximately 16 years old at the time of separation. They are now adults and there is no issue before me with respect to their parenting or support.
- [5] K was eight years old at the time of separation and is now 16 years old. He was diagnosed with Autism Spectrum Disorder at the age of four, and attended a special school for a number of years. He now attends public high school and benefits from extensive educational and other support.
- [6] It is apparent from the materials and the proceedings in this summary trial that the relationship between JM and SM is extremely strained. JM was charged with the sexual touching of T during the time that he was still living in the family home. JM was found to be not guilty of this charge, but before me, SM and T submit evidence that JM sexually abused T starting when she was 12 years old. JM denies this.
- [7] I do not need to, nor will I, make findings in this regard. I have anonymized the parties and children's names in these reasons to reflect the publication ban pursuant to s. 486.4(2) of the Criminal Code, R.S.C. 1985, c. C-46, made to protect T in those criminal proceedings, and both T and K in these proceedings. Beyond that, it is sufficient for me to find that the mutual animosity that exists between SM and JM is not one that will be easily reconciled, and that the parties will likely continue to need assistance to communicate with each other to

promote K's best interests. I am satisfied that any risks posed to K based on these allegations of family violence are addressed through the parenting arrangements I order below.

- [8] SM continued to live with K in the family home on the Snuneymuxw Reserve until the spring of 2020. In June of 2020, SM moved (without notice to JM) to Victoria, where she worked and continued her PhD studies at Royal Roads. She has been offered and accepted a teaching position at the University of Victoria commencing in September 2021.
- [9] JM moved in with his parents for a time after the separation. In or about 2016, JM moved into a two-bedroom townhouse in Nanaimo with his now common-law spouse.
- [10] The parties agreed to the sale of the family home in 2020, and it was purchased by JM's brother later that year. The net proceeds of the sale, approximately \$168,125, currently sit in trust.
- [11] While he did have some unsupervised parenting time with K for a time after the separation, for the most part, JM's parenting time has been limited to supervised parenting time since separation by various court orders, at least since 2016. Supervision was recommended in a jointly commissioned s. 211 report of Dr. Burima in 2017, subject to JM meeting certain conditions.
- [12] Just prior to the hearing of the summary trial in November 2020, the parties received an enhanced version of the child report prepared by Dr. Elterman. The report recommends that K have increased unsupervised parenting time with JM, and that K have the opportunity to speak with a counsellor about these visits to make sure that they are going well for him and that there is no inappropriate activity. Dr. Elterman also opines that structure and consistency are particularly important for K as a child on the autistic spectrum, and does not recommend a shared parenting regime for K.
- [13] At the close of the hearing of the summary trial, I made an interim order that K have unsupervised parenting time with his father every Wednesday by videoconference at 7:00 p.m., and every Saturday from 10:00 a.m. to 6:00 p.m. Other than some initial technological difficulties and minor adjustments to that schedule over Christmas, which required a further hearing, I understand that this arrangement has been successful so far.

ISSUES

- [14] The issues that require resolution in this trial are as follows:
 - a) Parenting and guardianship for K;
 - b) Child support and special expenses for K, both prospective and retroactive, including the determination and potential imputation of income;
 - c) Spousal support claimed by JM, both prospective and retroactive; and
 - d) Division of family property and family debt.

DIVORCE

- [15] The parties both seek an order of divorce. They have been living separate and apart since October 2013. I am satisfied that the requirements for a divorce order pursuant to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) are met in this case. I therefore grant an order of divorce that will take effect on the 31st day after the date of these reasons.
- [16] This summary trial was heard pursuant to both the Family Law Act, S.B.C. 2011, c. 25 [FLA] and the Divorce Act, prior to the amendments to that Act that came into force on March 1, 2021. Other than the divorce itself, the issues were argued before me largely under the FLA, and I have prepared these reasons relying on that language and pursuant to that statutory framework. However, I have also reviewed these matters in light of the new provisions of the Divorce Act and I am satisfied that these amendments would not change the result.

PARENTING

- [17] The affidavit materials in this summary trial are full of speculation, hearsay and argument, particularly about the parties' past behaviours. Much of this is not admissible. Fortunately, both parties endorse the report and recommendations of Dr. Elterman. I have found that I do not need to reconcile the contradictory accounts of the parties' relationship prior to or after separation to determine what is in K's best interests going forward.
- [18] The one exception is the factual question of who was the primary caregiver to K prior to separation. This factual question is relevant to JM's claim for compensatory based spousal support.
- [19] Having reviewed the evidence and arguments presented, I find that both JM and SM were engaged and involved parents to K. No doubt, both parents made a huge commitment of time and patience to parenting K, and this is reflected in their accounts and affidavits. However, the evidence also establishes that both JM and SM continued to work full-time while raising K. Both also continued to advance their education and certifications during this time. While the evidence establishes that JM was very involved with K's pre-school years, the evidence also establishes that SM was K's primary advocate and health and educational contact for his autism support once he was diagnosed at the age of four.
- [20] I find these commitments and contributions ebbed and flowed as each took on different responsibilities. No doubt, in 2010 when SM was working as a treaty commissioner for multiple bands and traveling a great deal, more of the homemaking and childcare work fell to JM. However, in the year prior to separation in 2012, the evidence establishes JM was working full-time hours, and had an income of approximately \$48,000, which was close to twice that of SM. In 2013, their relative incomes were closer, but JM was still the greater income earner.

- [21] After separation, the parties were required to address the charges against JM of sexual abuse, and no claim was filed in relation to divorce, property division, support or parenting until 2016. A series of court orders granted JM supervised parenting time, and the evidence establishes that he only took advantage of a small portion of those opportunities. JM says that this is because of the cost and awkwardness of supervision, and blames SM for making his parenting time difficult to exercise. SM says that one of supervised parenting options at the local Indigenous cultural centre would have cost him nothing, and he did not exercise his parenting time even when she offered to pay for the supervision costs. She says this lack of consistency was very harmful to K.
- [22] A joint s. 211 report was prepared, recommending a number of conditions that JM could meet to reduce his restrictions and eliminate the requirement for supervision. JM did not meet those requirements, and says that SM's insistence upon them was another way she limited his parenting time.
- [23] JM had not exercised any parenting time in the approximate eight to 10 months between when the pandemic was declared and the start of this summary trial, and he did not find out that SM had actually moved to Victoria until shortly before this summary trial.
- [24] SM says that she had gone to Victoria for Spring Break in March 2020, where her mother and now fiancé live, when the Snuneymuxw Reserve essentially closed its borders. SM was still working and attending school off-reserve, and did not return to the family home on the reservation, although she says she was still ready and able to bring K there for JM's parenting time and continues to be willing to do this. She is agreeable to driving K up-Island for this purpose, and the parties have agreed to a drop-off and pick up location in Duncan, BC. SM has also agreed to provide her contact information, which she says has not changed, and her new address to JM.
- [25] Overall, the evidence establishes that JM has had limited parenting time with K since separation, and this was in part due to court orders requiring supervision (which were not appealed and I have no reason to question), and in part due to JM not exercising much of the supervised parenting time he had. I do not think it is necessary or productive for me to attempt to go any further to reconcile the factual allegations and legal accusations that the parties have made to the date of the summary trial, or to assign blame for this unfortunate circumstance.
- [26] We now have an updated and enhanced joint views of the child report prepared just before the summary trial that states that K's development is at a point where he can safely be parented by JM without supervision, with an interim period of post-parenting time counselling sessions. Supervision was ordered at a time where the expert evidence raised concerns about K's ability to effectively communicate any concerns that might arise when he was with his father. Those concerns have significantly lessened now that K is 16 and has developed more communication skills. That report also notes that JM has had a problem with consistently following through on his parenting time in the past, and that must be

corrected: "[JM] needs to be reliable and consistent in attending or lower the expectation of when he will be spending time with [K]."

- [27] Going forward, the evidence establishes that it is in K's best interests to have more time with his father, and that this time does not require supervision. SM is satisfied that, with the assistance of his current art therapist, or perhaps a registered psychologist if concerns arise, K will be able to express himself and raise any issues of concern. The parties are therefore in agreement regarding the need to increase K's time with JM, and that it does not need to be supervised. They will share the cost of the counsellor in accordance with their share of care expenses set out below.
- [28] The evidence also establishes that K loves to spend time with his father, and that JM and his family want to spend more time with K. JM needs to be consistent in exercising this parenting time. JM also needs to develop a more parental relationship with K that recognizes K's need for structure and security, but he will not be able to do that without more parenting time.
- [29] The parties are agreed that the goal is to reach a point where K is spending every other weekend with his father, from Friday evening to Sunday evening. The main disagreement between them is what steps are required to get there, and whether holiday time can accommodate K spending greater time with his father.
- [30] I have reviewed the proposed schedules for a staged increase in JM's parenting time. I have received the requested confirmation in January 2021 that JM was consistently and reliably exercising the parenting time on Saturdays that I ordered on an interim basis. It is now time to increase that parenting time to overnights.
- [31] Because K has a greater need than most children for consistency of routine, and a greater difficulty with transitions, I find that it is in his best interests to move towards a parenting schedule that can be consistently and reliably followed, without the common exceptions to routine that are often found for holidays or other special occasions. As I ordered with respect to Christmas 2020, K should be told he gets extra or extended versions of such holidays and he should be able to celebrate them with both of his parents without specific regard to the day of the week or weekend where they fall.
- [32] With respect to school holidays, JM seeks something closer to a shared parenting week-on/week-off schedule. SM takes the position that this would be hard on K's routine, is not recommended by Dr. Elterman, and that in any event, K attends special camps throughout the school holidays that are specially directed to his needs as a child on the autistic spectrum and provide him with consistency and an enriched educational and social experience.
- [33] Taking all of this into account, I set the following schedule for K's parenting time with his father:

- a) JM will continue to have parenting time every Wednesday by videoconference at 7:00 p.m.;
 - b) Commencing Saturday, April 10, 2021, JM will have parenting time with K from 10:00 a.m. on that date to 10:00 a.m. on April 11, 2021, and this Saturday overnight parenting time will continue on a weekly basis until May 8, 2021;
 - c) From Friday May 14, 2021 to June 27, 2021, JM will have parenting time with K from 6:00 p.m. on Friday to 6:00 p.m. on Sunday every other weekend;
 - d) From Friday July 9, 2021 to August 23, 2021, JM will have parenting time with K from 6:00 p.m. Friday to 6:00 p.m. on Monday every other weekend (the "Summer Schedule").
 - e) From Friday September 10, 2021 onward, JM will have parenting time with K from 6:00 p.m. on Friday to 6:00 p.m. on Sunday every other weekend, which shall be expanded to Mondays at 6:00 p.m. when holidays or professional development days fall on a Monday on a weekend where JM is with K, such as October 11, 2021 (the "Regular School Year Schedule");
 - f) For winter break 2021, JM will have parenting time with K from 6:00 p.m. on Friday December 24 to Tuesday December 28, after which K will return to the Regular School Year Schedule on January 7, 2022 for the duration of the school year and following school years, and the Summer Schedule when outside of the regular school year; and
 - g) JM will have parenting time with K from 6:00 p.m. on Friday to 6:00 p.m. on Tuesday on the weekend that falls within the school spring break and winter break schedules that correspond with his regular weekends in 2022 and onward.
- [34] Pick up and drop off shall be at the agreed upon mall location in Duncan, BC. If JM is unable to exercise his parenting time, he will provide SM 10 days' notice.
- [35] The parties will need to be able to communicate with each other about this schedule, as well as K's activities, education, successes, and needs. Because communication between the parties is so difficult, I am ordering them to purchase and use the "Our Family Wizard" platform for communicating about parenting schedules, K's activities, education, and other important information. This was agreed to by counsel at the hearing. Although there is some expense to this, right now the parties rely exclusively on their legal counsel to communicate, and this is both inefficient and unnecessarily confrontational. Both parties will be receiving equity from the family home, and I expect them to make the small financial and time investment in making this platform work for their communication about K.
- [36] Any requests to make a change to the schedule can be made through this platform, and should also be made 10 days in advance. The schedule may be changed with the written consent of both parties.

- [37] The parties shall have joint guardianship of K. Shared parenting responsibilities, however, will not work with communication between the parties as poor as it is. K primarily resides with SM, and she has been coordinating his health, education and his autism supports for many years. SM agrees to shared parenting responsibilities described in s. 41(a) (e) and (j) of the FLA, but seeks sole parenting responsibilities pursuant to the remaining responsibilities listed at s. 41, and I consider that appropriate in the circumstances.

DIVISION OF FAMILY PROPERTY

- [38] JM seeks an equal division of family property and debt under the FLA and the Family Homes on Reserves and Matrimonial Interest or Rights Act, S.C. 2013, c. 20, as at the time of trial. SM seeks an unequal division of family property and debt pursuant to these same acts in her favour. In particular, at this summary trial, SM seeks an adjustment to the equity of the family home to reflect her sole contribution to and responsibility for approximately \$60,000 of credit card debt, and to maintaining and paying down the mortgage on the family home, since separation.
- [39] JM acknowledges that he should be responsible for half of the family credit card debt at the time of separation, but says that he should not be responsible for the mortgage payments or house insurance costs that SM has paid since separation because she had the benefit of the family home. He also seeks an accounting of the rental income received by SM for the rental of a suite in the house since he left the suite in December 2014.

Statutory Framework

- [40] Section 81 of the FLA provides that, on the date of separation, each spouse is entitled to an undivided half interest in all family property as a tenant in common and is equally responsible for family debt, "regardless of their use or contribution".
- [41] Family property is described in s. 84(1)(a) as all real and personal property owned or beneficially owned by either spouse on the date of separation, unless the property is excluded. There is no issue of excluded property in this case.
- [42] Family debt is defined at s. 86, and includes all financial obligations incurred by a spouse during the period of the relationship. Debt incurred after the date of separation is only defined as family debt if it is incurred for the purpose of maintaining family property.
- [43] Under s. 87(b)(ii) of the FLA, the presumptive date for valuing family property and debt is the date of the trial. Departing from the presumptive date of valuation is effectively a reapportionment or unequal division of family property and debt, which can only be achieved through application of s. 95 of the FLA and a finding of significant unfairness: see *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 59; *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76.

- [44] The factors the court may consider in making an unequal division of family property and debt are in s. 95(2) of the FLA, and they include:
- (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;
 - (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;
- [45] While the concept of reapportionment under the former Family Relations Act, R.S.B.C. 1996, c. 128, expressly provided for consideration of the relative contributions of the spouses relating to the acquisition, preservation, maintenance, improvement or use of the property, the same breadth of discretion does not exist under s. 95 of the FLA. The parties' relative contribution to family assets and debts during the marriage is now largely irrelevant to reapportionment under s. 95(2) of the FLA.
- [46] The parties also plead the Family Homes on Reserves and Matrimonial Interest or Rights Act. That act was enacted to fill the jurisdictional gap for issues relating to matrimonial real property interests on reserves. The Supreme Court of Canada held in *Derrickson v. Derrickson*, [1986] 1 S.C.R. 285, that provincial family laws that deal with the right of ownership and possession of family property do not apply to real property on reserve lands governed by the Indian Act, R.S.C. 1985, c. C. I-5. The Court confirmed that, while courts cannot make orders about spouses' interests in real property on reserves, they may make orders for compensation that adjust the division of family assets to account for family property on reserve. In *Derrickson*, the Court held that the court may make such orders for compensation pursuant to s. 52(2)(c) of the Family Relations Act, which is now s. 97(2)(c) of the FLA.
- [47] The Act both creates a mechanism for First Nation communities to enact their own matrimonial property laws, and creates a set of provisions governing division of family property on reserve that apply to First Nation communities that have not enacted their own matrimonial property laws under the Act or other federal legislation. The Snuneymuxw First Nation has not enacted laws on matrimonial property division on reserve through the mechanism of the act, or through other federal legislation. Section 54(1)(a) of the Family Homes on Reserves and Matrimonial Interest or Rights Act states that the provisions dealing with property division for spouses (ss. 28-33) only apply to spouses "if they ceased to cohabit on or after the day on which those sections began to apply to that First Nation". Those provisions were not in force until December 16, 2014: Family Homes on Reserves and Matrimonial Interest or Rights Act s. 56; SI/2013-128. This was after the date of the parties' separation in October 2013, so the act does not apply in this case.

- [48] In any event, there is no real property on reserve in issue, as the family home that was located on the Snuneymuxw has already been sold by the parties. Any order I make dividing the interest in the funds from the sale of the family home will not have any impact on interests in property on reserve.
- [49] The family property and debt that is at issue in these proceedings is as follows:
- a) Funds held in trust from the sale of family home, that represent the net equity in the home after the mortgage and other adjustments have been paid;
 - b) Credit card debt; and
 - c) Vehicles and other small assets.

Determination

- [50] This matter came before me as a summary trial. The evidence is sufficient for me to resolve the issues before me, but not necessarily with the precise accounting either of the parties suggest, especially in relation to transactions that occurred more than five years ago in some cases.
- [51] I will first consider the credit card debt, and then move on to issues regarding the division of the sale proceeds from the family home and the other assets.

Credit Card Debt

- [52] The parties agree that SM had close to \$59,000 in credit card debt at the time of separation, and that JM had another \$1,405 on his credit card, which SM paid for. While SM has not yet fully paid off all of this debt, it is agreed that she has been solely responsible for paying it off and will continue to be. JM agrees that SM is entitled to recover from him half of the original debt as it existed at the time of separation, provided that it is proved to be family debt. He says that he requested SM's credit card statements for the year prior to separation to determine whether the full amount owing was properly accrued as family debt, but that they were not disclosed. He argues no division of this debt should occur until these statements are disclosed.
- [53] SM responds that all of this debt was incurred for family purposes, including the finishing costs of the family home that was constructed in 2012. Furthermore, she argues that this debt is presumed to be family debt because it was incurred during the marriage, and the law does not invite a searching probe of expenses prior to separation: see *Bilawchuk v. Bilawchuk*, 2014 BCSC 2067 at para. 34.
- [54] I am not prepared to adjourn the resolution of this matter pursuant to the summary trial to allow further disclosure applications to be brought. I have no evidence before me to suggest that the credit card debt of the parties was incurred for any other purpose than family purposes: there are no suspicious purchases or transactions, and no significant assets other than the family home at the time of separation. On the evidence before me at this summary

trial, SM has established that she became responsible for an approximate \$60,000 in family debt at the time of separation. JM is responsible for \$30,000 of that debt.

The Family Home

- [55] The parties bought a lot on the Snuneymuxw Reserve in 2011 and paid a family member to construct the two-storey family home, which they moved into in the summer of 2012. They used equity from the sale of another home, applied for and received grant monies for some of the construction costs, and took out a mortgage in the amount of \$213,000. SM paid the mortgage payments of just under \$1,100 per month on this home since the parties' separation, and has paid a total of \$75,800 towards the mortgage since separation. She also has established that she has paid for just over \$10,000 in home insurance.
- [56] When the home was sold in November 2020 for \$350,000, the remaining mortgage was \$169,876, indicating a substantial increase in equity since separation, in part due to the mortgage payments. After paying out the remaining mortgage, other adjustments, and paying for Dr. Elterman's report, there is \$168,125 of proceeds remaining in trust that is subject to division.
- [57] SM seeks credit for half of her contribution of approximately \$86,000 toward the mortgage and insurance from the date of separation.
- [58] JM says that SM should not be entitled to any accounting for her payment of the mortgage and insurance costs of the house because she had the benefit of the home to live in throughout that time, and the mortgage was reasonable for the size of the home. He notes that since 2016 he has had to pay toward the rent for the townhouse he shares with his current common-law spouse.
- [59] JM also seeks an accounting of the income SM received from rental of the suite in the home after he left in December 2014. He submits a value of \$4,400/year net for this suite. He values the total amount at approximately \$23,600, but he calculates this on the basis of continuous rental income since the end of 2014 when he ceased to live in the suite.
- [60] SM notes that while she lived in the family home, K did as well (and T for some of this time). She did not receive any child support for either child throughout this period from JM, and she is not seeking any retroactive child support beyond 2017. She is agreeable to paying JM half of the net rental income she received after payment of utilities and other related expenses, which she says is \$8,700. She is also agreeable to crediting JM a reasonable amount of occupational rent as against her occupation of the home, valued at the equivalent to what JM has had to pay for his own rent.

- [61] Although I appreciate the calculations prepared by each party, they suggest a level of detailed accounting that is not possible in this case, and I prefer to approach the issue differently. I agree that SM has contributed to the equity of the home through the payment of the mortgage. Had she been receiving child support throughout this period to help with the costs of housing K, I would be more inclined to agree that the mortgage costs were reasonable housing costs that she ought to bear alone.
- [62] I would deduct from her mortgage payments toward the joint equity, the joint rental income that the house generated and which SM no doubt put toward assisting with the mortgage payments. I do not have precise evidence of the rent paid or the number of months the basement was occupied by persons other than T, but on all the evidence I find that they reduced the amount SM was required to pay toward the mortgage by approximately \$20,000, making her contribution closer to \$66,000, and SM's claimed contribution from JM for the mortgage debt approximately \$33,000.
- [63] From this SM is prepared to subtract another \$18,450 as occupational rent, although such rent is not claimed by JM. Another way to view this reduction is as SM recognizing she would also have had some housing costs had she been living alone and not supporting the children, for which she is prepared not to seek any contribution from JM.
- [64] When I consider the amount SM retained from the rental income generated from the house, her contribution to the mortgage and insurance, and a reasonable amount for her own housing costs (in the absence of any support for the housing costs of the children, subject to my orders below regarding retroactive support), as well as JM's lower income in the years immediately following separation together with JM's contribution to SM's earning capacity during the course of the marriage, I would reapportion \$15,000 of the realized equity in the house to SM to reflect her contribution to the equity in the home through the payment of the joint mortgage.

Other Assets

- [65] The parties raised various other assets and debts over the course of the hearing. I am satisfied that neither party established the existence of any additional assets or debts that warrant redistribution of the assets.
- [66] Each party kept a vehicle from the marriage and disposed of it at some point. I do not have reliable evidence as to the value of either vehicle. JM deposes that he sold his vehicle for \$5,500 and SM deposes that she sold her vehicle for \$3,000. The financial statements of the parties put the values of the vehicles within \$1,000 of each other. I am not convinced that any reapportionment of the family property is warranted as a result of the retention or sale of these vehicles.

- [67] Both parties allege that the other had RRSP entitlements at the time of separation. JM initially alleged that SM cashed in some of that RRSP after separation, but the evidence does not establish that. Each party is entitled to a division of any CPP, pension or RRSP that accrued between October 2003 and October 2013, which I find to be the span of the parties' marriage-like relationship.
- [68] JM argues that SM retained a tax refund in the amount of \$2,158 in 2013 that is a family asset. I also do not consider that this is grounds for reapportioning the family property in light of JM's lack of support payments in that year and subsequent years.

SUPPORT ISSUES

- [69] JM agrees that he will have to pay child support going forward. However, he says that he cannot afford to pay any retroactive support. In addition, he seeks spousal support on both a compensatory and non-compensatory basis, retroactively, and continuing for as long as he is also obliged to pay child support.
- [70] I will address the calculation of income for each of the parties, including imputation of income, before turning to the issues of support and SM's arguments for retroactive child support, and then to JM's claim for retroactive and prospective spousal support.

The Parties' Incomes

JM

- [71] The evidence establishes that JM worked full-time and had a fairly consistent income throughout the marriage in the \$40,000 range, and in 2012 he was earning approximately \$48,000. In 2013, the year of separation, he earned \$40,500 tax-free. He also completed a diploma and certification.
- [72] However, after the breakdown of the marriage, JM's mental health suffered. He left his full-time job and was apparently unemployed for some time (his reasons for doing so are contested, but not relevant). He pleads an income of \$36,000 in spring 2016, at which time he began paying child support in the \$350/month range for approximately four months, however his evidence is that his income was far lower. In 2017 he had an income for support purposes of approximately \$21,800; in 2018 his income had climbed back to just over \$37,000 and in 2019 it was \$40,228.
- [73] SM argues that JM could obtain a job similar to his jobs during the marriage, with a salary of 50,000, and that there are many such jobs available on the Snuneymuxw Reserve to a person with his qualifications. Furthermore, she argues this on-reserve income would be tax-free. She asks that I impute an income to JM of \$50,000 tax-free for the purposes of the support calculations.

- [74] Section 19(1) of the Guidelines provides a broad discretion to impute income, including where:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [75] Imputing income for intentional unemployment or under-employment does not require a finding of bad faith on the part of the payor, only that the payor is not earning to capacity. The court considers what is reasonable in the circumstances based on a number of factors including age, education, work experience, work availability and health. The same principles apply both for the purposes of spousal and child support, although their legal foundations are different. The onus is on the party seeking to have income imputed to the other to establish an evidentiary foundation for such a finding: *M.A.T. v. K.P.T.*, 2017 BCSC 1603 at para. 91; *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 37-38).
- [76] However, I am not satisfied that this is an appropriate case in which to impute income to JM. The evidence establishes that prior to obtaining his current position as a support worker/care aid to an elderly client, his income was not consistent or stable after separation. SM herself leads evidence through her affidavit of JM's difficulties in various employment positions even during the marriage. I am satisfied that JM has found a position that pays him reasonably well and which he succeeds at. I decline to impute any additional income to him.

SM

- [77] SM also worked and studied throughout the marriage, earning an MA in 2008. Her income varied considerably with her studies and contracts, and it appears that there were times where her income exceeded JM's during the marriage, and times when it did not.
- [78] A few years before the dissolution of the marriage, SM held numerous contracts simultaneously as a treaty commissioner and made in excess of \$100,000. However, in 2013, the year of the parties' separation, she only earned approximately \$28,000.
- [79] SM has since gone on to study for a PhD at Royal Roads University, and has again had years where her income exceeded \$100,000. In 2019, JM calculates that her income was \$137,275, but he includes in that income her rent from the family home (which I have accounted for separately), and scholarship awards.
- [80] SM's reported income from 2017 through 2020 is as follows:
- a) In 2017: approximately \$84,000 tax-free;
 - b) In 2018: approximately \$111,700 tax-free;
 - c) In 2019: approximately \$124,000 tax-free; and

d) In 2020: approximately \$124,000 tax-free.

[81] SM submitted that her annual tuition fees should be subtracted from her income, and her scholarships added to her income, after it is grossed up for taxes. The authorities relied on by the respondent do not expressly support deducting tuition from her income. Nor do I see the foundation for deducting tuition amounts from a spouse's income for the purpose of calculating child support in the relevant sections of the Guidelines, specifically ss. 16 to 20 and Schedule III. Scholarships are not included as T1 income while enrolled in a university program, and therefore need not be included in her income. Overall, in this case I find that SM's Guideline income should not be adjusted for tuition or scholarships.

Child Support

[82] The Supreme Court of Canada's decision of *D.B.S. v. S.R.G.*, 2006 SCC 37, identifies the following core principles that underlie child support obligations:

- a) Child support is the right of the child;
- b) The right to support survives the breakdown of a child's parents' marriage;
- c) Child support should, as much as possible, provide children with the same standard of living they enjoyed when their parents were together;
- d) The specific amounts of child support owed will vary based on the income of the payor parent; and
- e) A payor parent who knowingly avoids or diminishes the support obligation to the children should not be allowed to profit from that conduct.

[83] The core principles articulated in *D.B.S.* were recently confirmed by the Supreme Court of Canada in *Michel v. Graydon*, 2020 SCC 24 at para. 60.

[84] Based on JM's income for 2019 of \$40,228, I direct that JM pay SM \$378/month in child support per month commencing April 1, 2021 pursuant to the Guidelines.

[85] I have reviewed the various DivorceMate calculations for the proposed division of special expenses, noting the gross-up of SM's current non-taxable income. They vary slightly each year, but I find that a 25/75 division reflects a blended and consistent division that can be adhered to over time. SM shall be responsible for 75% of K's special expenses, and JM shall be responsible for 25% of those expenses. These expenses consist of K's autism supports, which cost \$13,200 per year, for which SM has applied for and receives grants of \$6,000 per year. The net cost of K's special expenses is therefore \$7,200 per year, of which JM is required to pay \$1,800 annually or \$150 monthly as part of his child support obligations.

Retroactive Child Support

[86] SM seeks an award of retroactive child support between 2017 and the date of the summary trial in November 2020. She counterclaimed for child support in 2016 and brought her application for retroactive child support in late 2019. The leading case regarding when the court should order retroactive child support under the Divorce Act is the Supreme Court of Canada's decision in *D.B.S.* The factors to consider in whether to order retroactive child support under s. 170 of the FLA are the same as they have traditionally been under the Divorce Act, as recently confirmed by the Supreme Court of Canada in *Michel* at para. 29:

- a) Whether the recipient parent's delay in seeking support is reasonable in the circumstances;
- b) Conduct of the payor parent;
- c) Circumstances of the child; and
- d) Hardship occasioned by a retroactive award.

[87] The Supreme Court of Canada in *Michel* relied on its findings in *D.B.S.*, and commented on the importance of child support and the purpose of retroactive awards, writing at para. 31 that retroactive child support is not exceptional, as "there is nothing exceptional about judicial relief from the miserable consequences that can flow from payor parents' indifference to their child support obligations". The Court went on to articulate the role of retroactive child support payments at para. 31:

...Just as an order of child support is intended to provide children with the same standard of living they enjoyed when their parents were together (*D.B.S.*, at para. 38), an order of retroactive child support provides an (albeit imperfect) remedy where that does not occur. And as this Court recognized in *D.B.S.*, "courts are not to be discouraged from defending the rights of children when they have the opportunity to do so" (para. 60).

[88] In her concurring reasons at para. 77, Justice Martin noted that the modern understanding of a child's right to support recognizes that "children are viewed as individuals who, as full rights bearers and members of a group made vulnerable by dependency, age, and need, merit society's full protection."

[89] JM relies on the last factor of hardship to argue against an order for retroactive support. He relies on his financial statement that shows that his expenses exceed his income, and that he does not have the resources to pay a retroactive award for child support.

[90] I would have been concerned about JM's ability to pay a retroactive award if it were not for his entitlement to a substantial portion of the accumulated equity in the family home. In light of this equity, I consider that JM has the ability to pay his child support obligations retroactively.

- [91] The other factors also support such an award. In my view, JM had sufficient notice of this obligation, and even paid four months of support in 2016. His obligation was to continue to pay support, without further application. This obligation included contributing to K's autism supports, and K's circumstances only made this obligation more important. SM's delay in pursuing this application is reasonable in that she was understandably busy with the primary care of K, school and work.
- [92] Based on JM's Guideline income for 2017-2020, I find that JM is required to pay SM the following:
- a) \$2,196 for 2017;
 - b) \$4,200 for 2018;
 - c) \$4,536 for 2019; and
 - d) \$4,536 for 2020.
- [93] He is also required to pay \$1,512 for January to April 2021, and \$378/month thereafter commencing May 1, 2021. The total retroactive child support award is therefore \$16,980.
- [94] Given the importance and extraordinary nature of K's autism supports, I also order that JM should be required to contribute retroactively to these expenses. SM calculates this amount at \$7,134 based on the incomes of the two parties as set out above. However, I consider that a lesser rate is appropriate for the special expenses, as JM was not involved in selecting them and I have calculated SM's income differently. I award SM an additional \$3,020 for retroactive special expenses to the end of 2020. As I found above, JM's obligation to contribute to these expenses commences January 1, 2021 at the rate of \$1,800 annually or \$150 monthly.
- [95] Altogether, JM owes SM \$20,000 in retroactive child support, which is to be deducted from JM's entitlement to the sale proceeds from the family home.

Spousal Support

- [96] JM amended his notice of family claim in November 2020 to claim spousal support from SM on both a compensatory and a non-compensatory basis, as outlined in *Chutter v. Chutter*, 2008 BCCA 507. He seeks this award retroactively to January 2018 and prospectively of over \$2,000 per month on the basis of SM's current income.
- [97] Compensatory support is based on the principle that spouses should equitably share in the economic consequences of marriage and its breakdown where one spouse has forgone career opportunities to assume household and child-rearing responsibility, or one spouse has increased earning capacity as a result of the roles assumed by the spouses during the marriage.

- [98] Non-compensatory, or needs based support, recognizes that marriage breakdown can result in a significant discrepancy of incomes and wages between former spouses even where the compensatory basis of spousal support is not well-established. Non-compensatory support does not presume an entitlement to an equalization of income or an expectation that the parties should be able to maintain a similar lifestyle to what existed prior to separation, but does seek to narrow the gap between the means and needs of spouses, particularly where one spouse is left without resources after marriage breakdown; *Lee v. Lee*, 2014 BCCA 383 at paras. 60-61; *Cole v. Cole*, 2016 BCSC 716 at para. 122.
- [99] JM seeks support on both bases, arguing that he was the primary and day-to-day care giver, while SM managed the household finances and pursued her education and career outside of the home. He also notes what has now become a substantial discrepancy between their incomes since at least 2018.
- [100] SM says that JM is not entitled to spousal support on either compensatory or non-compensatory grounds. She says that they both equally contributed to the care of the children and the household during the marriage, and that her current success is based on her efforts since separation at advancing her education and pursuing her consulting work.
- [101] Although, I have found that JM meaningfully contributed to the care of K in his early years, the evidence falls short of establishing that he was the primary caregiver in the family throughout the marriage, or that he compromised his own career and prospects in this regard. To the contrary, the evidence establishes that both the parties were actively involved in K's care, and both advanced their educations and pursued their careers throughout the marriage.
- [102] I find that SM's current financial success is mainly due to SM's efforts post-separation at pursuing further education. However, I do recognize that some of SM's current success is built upon her earning an MA and doing significant consulting work, which was supported by the joint efforts of both parties during the marriage.
- [103] With respect to the non-compensatory grounds for support, the evidence establishes that SM's income has increased substantially since separation in a way that JM's has not. JM would have been unable to establish non-compensatory grounds for spousal support at the time of separation when his income substantially exceeded SM's. SM's income has since grown, while JM has suffered setbacks in his income between 2014 and 2017, but this is a weak foundation for a contemporary spousal support award.
- [104] Finally, I note that since 2016 JM has had the advantage of sharing the expenses with his common-law spouse who also works, and that neither have borne the cost of supporting children since 2016 (subject to my award of retroactive support to come from the equity in the family home).

- [105] All of the above are factors in my determination. I find that the most significant factor is that this application was brought more than seven years after separation, after a 10-year relationship that ended when JM was 36 years old and well qualified for the work he did. Given my findings above, any spousal support that JM might have been entitled to would have been at the low end, and I find would have not exceeded five to six years' duration for this 10-year relationship with relatively young parties. Even had such an application been brought closer to the parties' separation on a non-compensatory basis, it would have expired by the time this application was filed in 2019, and certainly by the time it was heard in 2020.
- [106] JM also seeks retroactive support from January 2018 onward. I have considered whether JM's amended notice of family claim and application in 2020 might nevertheless attract an award for retroactive spousal support for earlier years. Such an award would be unusual, and JM provided no precedent for such an award, particularly where it had not been pled at that time.
- [107] Overall, I find that the best way to address JM's claim for spousal support is to recognize that SM allowed him significant financial relief in the years since separation by bearing the costs of the family mortgage entirely upon herself, and being solely responsible for the family debt, despite her having a lower income for a portion of this time. Other than a moderate \$15,000 adjustment, JM continues to benefit from that increase in equity. Furthermore, JM did not pay any child support, other than four months in 2016, and his retroactive child support obligation only stretches back to 2017, and is very modest in that year. SM effectively relieved JM of the financial burden of the family home for which he is now reaping the benefit, and of caring for their son and his additional care needs. In light of this, I would not award JM anything for spousal support, past or future.

SUMMARY OF ORDERS

[108] In conclusion, I order that:

- a) The parties are divorced from one another. The divorce will take effect on the 31st day after the date of this order;
- b) JM shall exercise his parenting time according to the schedule set out at para. 33 above;
- c) The parties shall have the following shared parenting responsibilities pursuant to ss. 41(a) (e) and (j) of the FLA:
 - i. making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child during their own parenting time;
 - ii. making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an Indigenous child, the child's Indigenous identity;

- iii. requesting and receiving from third parties health, education or other information respecting the child;
- d) SM shall have the following parenting responsibilities, but shall first consult with JM regarding her intentions:
 - i. making decisions respecting where the child will reside;
 - ii. making decisions respecting with whom the child will live and associate;
 - iii. making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
 - iv. subject to section 17 of the Infants Act, R.S.B.C. 1996, c. 223, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
 - v. applying for a passport, licence, permit, benefit, privilege or other thing for the child;
 - vi. giving, refusing or withdrawing consent for the child, if consent is required;
 - vii. receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
 - viii. subject to any applicable provincial legislation;
- (1) starting, defending, compromising or settling any proceeding relating to the child; and
- (2) identifying, advancing and protecting the child's legal and financial interests;
- ix. exercising any other responsibilities reasonably necessary to nurture the child's development;
- e) The parties shall each purchase and utilize the application "Our Family Wizard" to consult with each other with respect to their parenting responsibilities and to communicate regarding K's achievements, activities, health, education, supports, and parenting schedule. They will provide a minimum of 10 days' notice to the other party of any requests to change that schedule, and the schedule will only be changed if agreed in writing via the Our Family Wizard platform, or through counsel;
- f) Neither party will speak negatively about the other in K's presence, and will correct anyone who does;
- g) The proceeds of sale in trust from the family home shall be divided equally between the parties, subject to the following reapportionments:
 - i. JM shall pay to SM \$30,000 for his contribution to the family credit card debt;
 - ii. \$15,000 of the sales proceeds shall be reapportioned from JM to SM in partial compensation for her sole contribution to the payment of the mortgage and insurance and increase in the equity of the family home; and
 - iii. JM shall pay to SM \$20,000 for retroactive child support and special expenses since 2017;

- h) JM shall pay SM child support of \$378/month on the first of each month commencing May 1, 2021, until K is no longer a child of the marriage;
- i) JM shall pay SM 25% of the special expenses related to K's autism supports in the amount of \$1,800/year or \$150/month commencing January 1, 2021;
- j) The parties will exchange their financial information on June 1 of each calendar year going forward, and child support shall be adjusted for any increase in JM's income in accordance with the Guidelines;
- k) The parties shall equalize their CPP, RRSP, and any other pension entitlements on the basis of the duration of the marriage between October 2003 and October 2013; and
- l) JM's claim for spousal support, both retroactive and proactive is dismissed.

COSTS

[109] In my view, both parties had some success in this case and I would be inclined to have them bear their own costs. However, if the parties wish to speak to costs, they may arrange through the registry within 30 days of receiving these reasons to appear before me for this purpose.

"Marzari J."

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