

CANADA / JUDGMENT

## J.M.M v. I.P.M.

2024 BCSC 1181

COURT

Supreme Court of British Columbia

DECIDED

4 July 2024

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2024 BCSC 1181 J.M.M v. I.P.M.

IN THE SUPREME COUT OF BRITISH COLUMBIA

Citation:

J.M.M v. I.P.M.

2024 BCSC 1181

Date: 20240704

Docket: E94058

Registry: Nanaimo

Between:

J.M.M

Claimant

And

I.P.M.

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

K. Rongve

The Respondent, appearing in person:

I.P.M.

**Place and Dates of Trial:**

Nanaimo, B.C.

April 8-12, 2024

**Place and Date of Judgment:**

Nanaimo, B.C.

July 4, 2024

**Introduction**

- [1] The principal issue in this matrimonial proceeding is the allocation of parenting time for the parties' two children, A., who is 17, and Z., who is five. Despite being separated for over four years, no interim parenting order was put in place until December 2023.
- [2] Since the parties' separation in June 2019, both children have lived primarily in the former matrimonial home with the claimant. For the most part, until the December 2023 order, the respondent's parenting time had been arranged on an ad hoc basis.
- [3] Each presented different historical views of the percentage of time the two children spent with the respondent. Nevertheless, their evidence makes clear that the respondent had frequent and meaningful contact with each child until the events of November 5, 2023 which led to the more restrictive schedule set out in Associate Judge Dick's order made December 2023 (the "Dick A.J. Order").
- [4] Both parties seek certainty as to the ongoing parental schedule as well as the allocation of parental responsibilities. Both agree the restrictions placed on transitions have been beneficial and agree that those restrictions ought to be maintained.
- [5] There are minor financial issues that require resolution as well. The parties agree on the disposition of the former matrimonial home but on little else thereafter. That said, their assets, beyond the equity in their home, are limited.
- [6] The respondent seeks to impute an income to the claimant commensurate with her having full-time employment. He suggests a figure from \$89,000 to \$92,000 (rounded) annually based on information from the claimant's employer as to her full-time earning capacity.
- [7] A. testified and made clear that her preferred parenting schedule was to remain primarily in the care of the claimant and to see the respondent as "she wished"; in effect mirroring the Dick A.J. Order.
- [8] Finally, the claimant seeks term-limited spousal support based upon the compensatory model. She was, until recently, employed part-time as a teacher. Currently, she is on medical leave due to a diagnosis of anxiety.

## Background

- [9] The claimant is currently 43; the respondent is 46.
- [10] They began living together in a marriage-like relationship in 2003, were married in 2006, and separated in June 2019.
- [11] The claimant has an education degree/teaching certificate and the respondent has a bachelor's degree. Following their graduation from the University of Victoria, the parties worked in France for a year. They returned to the Victoria area in 2005, where both resumed their education.
- [12] The claimant, after completing some prerequisites, entered the education faculty to complete a degree in education; the respondent entered a master's program in Asian studies; both at the University of Victoria.
- [13] The claimant became pregnant with A. prior to graduation and withdrew from university to devote her energy to parenting. The claimant had four years following her withdrawal to complete the coursework necessary for her education degree/teaching certificate.
- [14] The respondent withdrew from the master's program when A. was born and obtained full-time work with the British Columbia Assessment Authority, where he remains employed. The respondent never returned to university to complete his master's.
- [15] When the parties married in 2006, neither had assets of any significant value. The claimant has some unidentified debt associated with her education. The amount was not disclosed but likely was repaid during the course of cohabitation.
- [16] By mutual decision, the claimant remained at home with A. for three years while the respondent worked to support the family. Presumably, but for the birth of A., both would have carried on with their educational aspirations.
- [17] Such would have resulted in her obtaining her education credential earlier. It is reasonable to infer the claimant would have commenced employment earlier and, by the date of trial, reached her peak earning capacity with the School District (save for advancement through enhancement of her qualifications).
- [18] The claimant then enrolled at UBC in 2010, intending to obtain her teaching credential. To remain together as a family unit, the respondent transferred his employment from Victoria to Vancouver. He claims the transfer was a backward step in his career as he went from assessing commercial property to residential property.
- [19] He testified that while he did not incur a reduction in income, the transfer slowed his progress on the payment grid established by his employer. No independent evidence was presented to support this contention.

- [20] Upon successful completion of her education degree, the claimant began working part-time as a teacher and the parties moved to Nanaimo. The claimant testified the underlying reason was affordable housing. The respondent says the move was at the claimant's behest so as to obtain employment as a French immersion teacher, and, the transfer to Nanaimo required him to take a position with less responsibility thus impeding his advancement within the BC Assessment Authority.
- [21] Eventually, the parties acquired the matrimonial home, located in Qualicum Beach. The respondent worked full-time; the claimant part-time. She increased her hours as A. grew older.
- [22] Upon the birth of Z. in August 2018, the claimant went on maternity leave.
- [23] In June 2019, the parties separated. The respondent left the family home leaving the claimant and two children with her. He then initiated various reconciliation attempts.
- [24] At separation, there was a rental suite occupied by tenants. The claimant received the rent and, she says, initially used it to pay off a joint line of credit. Following repayment of the line of credit, she says she split the rental between herself and the respondent. He denies receiving any rental.
- [25] At an unidentified point in time following separation, the tenants left and the claimant and children occupied the whole of the home.
- [26] In the initial period following separation, the respondent continued to pay the costs of housing. The claimant did not seek any form of support.
- [27] Eventually, the arrangement changed such that the parties equally shared to cost associated with the former matrimonial home and the claimant agreed she would accept that contribution in lieu of support.
- [28] She does not resile from that position at trial and seeks neither retroactive child support or retroactive spousal support. Instead, the parties agreed to the commencement of child support upon the sale of the matrimonial home.
- [29] The parties attempted reconciliation periodically after separation but never reconciled or resumed cohabitation. Such, perhaps, explains the two-year gap between separation and the commencement of these proceedings in August 2021.

## Property & Support Issues

- [30] The respondent initially continued paying the mortgage on the family home together with other household expenses. Later, by agreement, the parties began splitting the mortgage payments and the claimant received the rent from a suite within the home. As noted above, there is disagreement as to the use of the rental income the claimant received.

- [31] The respondent paid neither spousal nor child support and the claimant made no retroactive claim for either.
- [32] Currently, the claimant is on a leave of absence occasioned by stress. No admissible medical evidence was tendered such that I could independently conclude the claimant was or is disabled from performing her duties as a teacher on a full-time basis and, as I understand counsel's submissions, I am not asked to do so.
- [33] The bigger question relating to the claimant's employment is whether, given Z. is now enrolled full-time as a kindergarten student, the claimant should be earning the income associated with her seniority and credentials based upon full-time work.
- [34] Historically, since re-entering the work force, the claimant has taught part-time. Her income in 2022, the last year available, was \$56,000.
- [35] The respondent continues to work for the BC Assessment Authority. He earns \$106,518 after deduction of union dues.
- [36] Each of the parties has a pension entitlement through their respective employers. No details of the plans were presented. The respondent's tenure, coupled with his full-time employment versus the claimant's part-time employment likely make his the more valuable asset.
- [37] The claimant has an RRSP, currently worth approximately \$25,000, wholly funded by her mother who makes monthly contributions of \$100.
- [38] There is an RESP for the benefit of the children valued at \$76,000. The claimant's mother provided the funding but there is no evidence suggesting this was a gift to the claimant as opposed to a gift to the children for their future educational needs.
- [39] Each of the parties deposes to debt approaching \$100,000; all borrowed since separation. Neither suggests their debt is 'family debt' to be shared.

## Parenting & Family Violence Issues

- [40] In December 2023, following an event in early November 2023 which I will shortly describe in more detail, the Dick A.J. Order was made respecting the allocation of parenting time. The order provided:
1. The Respondent shall have the following interim parenting time schedule with the Children:
    - a. The Respondent shall have the care of the Children from 9:30 a.m. on December 23, 2023 to 5 p.m. on December 24, 2023;
    - b. Commencing December 31, 2023 and continuing every second weekend thereafter, the Respondent shall have the care of the Children from Sundays at 10 a.m. to Tuesdays at 9 a.m.;

- c. Commencing January 6, 2024 and continuing every second weekend thereafter, the Respondent shall have the care of the Children from 9:30 a.m. to 5:30 p.m. on Saturdays; and
  - d. At such other times as are agreed upon by the parties.
2. Whenever possible, the exchange of care for the Children under paragraph 1 of this Order will take place by one party dropping off the Children at their schools and the other party picking up the Children from those schools but, in the event that the parenting time pick up and drop off does not take place on a school day, the parties shall exchange the care of the Children at the parking lot of the Quality Foods store located at 705 Memorial Avenue Qualicum Beach, BC, with the following process to be followed:
- a. The parent turning over the care of the Children will stay in his or her vehicle; and,
  - b. The parent receiving care of the Children will assist the Children in transferring between the two vehicles.
3. The parenting time set out in paragraph 1 of this Order between the Respondent and the oldest child [A.], shall be subject to [A.]'s discretion.
- [41] The order also provided for counselling for the children. Such never occurred. The respondent did not agree to the claimant's choice of counsellor and wanted the terms of reference clarified. He feared the counselling sessions would be used against him in court given the allegations of violence throughout the marriage.
- [42] The respondent alleges the claimant has reneged on various agreements reached between them as to his parenting time and that the denial of an equal role in the children's lives has not been in their best interests.
- [43] The claimant, acknowledging, in part, the truth of that assertion, but says the restrictions and/or limitations were warranted given the pattern of abusive behaviour on the part of the respondent towards her throughout the marriage and after separation.
- [44] The claimant testified that the respondent became physically aggressive towards her on numerous occasions throughout the marriage up to and including the altercation on November 5, 2023.
- [45] A. testified at trial as to the November 2023 incident and other instances where the respondent had acted aggressively and physically toward the claimant.
- [46] A.'s testimony was made necessary, in part, owing to contrary evidence contained in a Views of the Child report wherein A. denied any form of physical abuse by the respondent.
- [47] A. recanted that disclosure in a handwritten letter but I advised counsel I would not admit the letter on its own given what A. admittedly told the interviewer.
- [48] Following A.'s testimony at trial, the respondent accepts that A. should have a voice in the allocation of parenting time between the parties.

- [49] A.'s testimony satisfied me that family violence was a feature of the parties' relationship both prior to and after separation.
- [50] The respondent, both in his evidence and submissions, acknowledged 'inappropriate behaviour' on his part from time to time; albeit not to the extent described by the claimant.
- [51] To the respondent's credit, he has taken courses related to anger management and acknowledges his mistakes. Unfortunately, the 'inappropriate behaviour' carried on until November of last year resulting in, at least in part, A.'s more restrained view as to the relationship she wants with her father.
- [52] With exception of the incident in November 2023, there is no evidence the respondent has ever been violent toward the children.

### Position of the Parties

- [53] Neither party alluded in any detail to the "other" financial assets including their respective pension entitlements, the claimant's RRSP and the RESP established for the benefit of the children's future education.
- [54] Neither made submissions respecting the present debt in each of their names from which I conclude that each accepts responsibility for the debt which they have incurred since separation.
- [55] Each party seeks an order for divorce.

### The Claimant

- [56] On the issue of parenting time, the claimant seeks an order she be the primary caregiver to the children and that A. have the right to decide when she sees the respondent.
- [57] The claimant seeks to make 'permanent' the Dick A.J. Order, subject to future variation if circumstances warrant.
- [58] She seeks shared parental responsibilities with the respondent save for the issue of counselling for the children. She wants to be solely responsible for directing the children's counselling and to focus on the effects of the family violence she alleges occurred in their presence.
- [59] Despite concerns over anger management and violence directed towards her, the claimant does not suggest any form of supervision over the respondent's parenting time and agrees he should have extended periods of time with Z. over the summer.
- [60] As to financial matters, the claimant seeks the sale of the former matrimonial home with joint conduct of sale including liberty to apply. She says the sale proceeds should then be divided equally.

- [61] The claimant notes her 2022 income of \$56,000 and argues that historically her income has been based on part-time work.
- [62] She seeks compensatory support based upon her time out of the work force while caring for A. She seeks \$500 per month in spousal support for a period of five years.

### The Respondent

- [63] The respondent seeks equal parenting time with Z. He notes the flexibility of his work schedule and the strong bond between them, together with the expectation that the claimant will be working full-time to fulfill her obligation to provide appropriately for herself and the children.
- [64] The respondent accepts that A., now 17, has the ability to make informed decisions about her parenting choices and he accepts that A. does not wish to spend equal time in his household. He is in agreement with an order that A. spend less time with him and that she, if she wishes on any particular occasion, not be obliged to attend scheduled parenting time but rather make that time up when it is more convenient for A.'s schedule.
- [65] As to financial matters, the respondent raises the question of occupational rent and says that the claimant has had the advantage of living rent-free in the former matrimonial home for a period of almost five years. Despite not pleading same, he seeks an order that he be awarded occupational rent for the period of time the claimant and children occupied the home.
- [66] The respondent seeks to impute an income to the claimant based upon her full-time employment and her expected income as set out in the salary grid identified at trial as relating to the claimant's seniority and educational credentials within the school district that employs her.
- [67] The respondent is agreeable to the sale of the matrimonial home although he notes its development potential and hopes for its sale based upon that potential rather than its present status as a single-family dwelling.

### Division of Property

- [68] The parties agree that the former matrimonial home located at 705 Memorial Avenue, Qualicum Beach, must be sold.
- [69] The parties seek that the property be listed for sale with joint conduct of sale and liberty to apply for directions if agreement is not reached as to listing or selling prices.
- [70] In the interim, the parties also agree that they shall share the costs associated with the ongoing ownership of the property until the sale is completed and that the respondent's obligation to pay child support will be deferred until the first day of the month following receipt by the parties of their share of the sale proceeds.
- [71] Those orders are granted.

- [72] The other assets are the RESP, an RRSP in the name of the claimant and the parties' respective interests in their pensions. No other assets were referenced during the evidence or submissions save for a passing reference to chattels remaining in the former matrimonial home.
- [73] Not much detail was given as to each party's pension plan. The claimant describes entitlement to a "Teachers' Pension Plan" commencing in March 2011. The respondent's property and financial statement references his entitlement to the BC Public Service Pension Plan commencing in May 2007.
- [74] The pensions should be divided in accordance with the provisions of Part 6 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the costs of such division being shared equally by each of the parties. The commencement date of entitlement as is specified in their Form 8s and the termination date will be the date of separation: June 25, 2019.
- [75] As for the RESP, that was established by the claimant's mother and is for the benefit of the children. No division is necessary. Presumably, if either of the children is in need of financial assistance for post-secondary education, the fund will be made available to them as a first resource before requiring a contribution from either parent.
- [76] As to the RRSP, I am satisfied on the evidence that the bulk of the approximate \$25,000 is made up of the claimant's mother's monthly contributions. These funds were a gift to her, and as such are excluded property pursuant to s. 85(1)(b.1) of the FLA. That portion of the RRSP that has grown by virtue of investment returns, approximately \$9,000 (including growth following separation) would be considered divisible family property pursuant to s. 84(2)(g) of the FLA.
- [77] In my view, it is appropriate to apportion the non-excluded portion of the asset unequally 100% in favour of the claimant given my determination that the agreement respecting the non-payment of child support during the parties' lengthy separation is not offset by the respondent's somewhat disproportionate contribution to the expenses of maintaining the family home.
- [78] The only remaining issue is the personal property of the respondent which may remain in the former matrimonial home. If the parties are unable to agree as the division of personal property they are at liberty to apply with the caveat that where disagreements arise over personal property, the likely result is the sale of that property and the division of the proceeds equally as between them. Most see this as a most unsatisfactory result to a problem that ideally should be resolved through give-and-take.
- [79] Otherwise, except as set out above, each of the parties shall retain the assets in their name as at the date of these reasons for judgement and be responsible for all debts in their name.

## Imputation of Income

- [80] The respondent's income is readily determined from his T1 General. The last available information as to his income is as set out in his 2022 tax return. Net of union dues, he earns approximately \$106,000 annually.
- [81] By the date these reasons are released, the respondent and claimant will have each filed their 2023 T1 General tax returns disclosing their income for the year.
- [82] The respondent argues that I should impute an income to the claimant based upon her earning capacity; not what she chooses to earn through part-time employment.
- [83] To be clear, counsel did not suggest nor would the evidence sustain a conclusion that the claimant is precluded from full-time work. While she may be on temporary leave presently, there is no admissible medical evidence sustaining a conclusion that she is anything other than 100% capable of teaching on a full-time basis.
- [84] Z. is now in full-time attendance in school and will be in Grade 1 in September 2024.
- [85] The respondent referred me to information from the claimant's employer indicating a salary for a full-time teacher with the claimant's qualifications and seniority.
- [86] Based on this information, it is open to the claimant to earn approximately \$92,000 annually if she works full-time. According to the respondent, the claimant's earning potential as a Category 5, Step 7 teacher will increase in July 2024 per the claimant's union contract. Equally, with another year's full-time employment, her earning capacity would rise to approximately \$100,000.
- [87] I conclude that the claimant is intentionally underemployed and, pursuant to s. 19 of the Federal Child Support Guidelines, impute an income to her based upon full-time employment. See *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-38: where Smith J.A. noted as follows:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

- [38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, [2006] 1 S.C.R. 920 at para. 29).
- [88] Given Z.'s full-time attendance in Grade 1 as of September 2024 and the absence of any admissible evidence, either medical or otherwise, suggesting the claimant is not able to secure and work a full-time position with her current employer there is no reason she should not be working full-time.
- [89] Accordingly, based on her current position on the salary grid that is Category 5, Step 7, I impute an income of \$92,000 annually to the claimant. That imputed income is to be adjusted annually to conform to the claimant's placement upon her employer's salary grid or her actual T1 General line 150 income (minus union dues), whichever is higher.
- [90] The respondent's income will be determined by reference to his 2023 T1 General return (minus union dues) and similarly adjusted annually June 1 of each year commencing June 2025 to provide for the proper child support payable.
- [91] The parties are to exchange tax returns and Notices of Assessment for so long as child support is payable.
- [92] Section 7 expenses are to be shared in proportion to their incomes as determined above.

## Child Support

- [93] According to the respondent's 2022 tax return and the information provided by his employer as of March 1, 2024, his annual salary is \$108,628 from which union dues of approximately \$2,000 need to be deducted.
- [94] Having said that, the respondent's child support obligation should be set on the basis of the table amount based upon his 2023 T1 General income tax return which I direct shall be provided forthwith to the claimant through her counsel.
- [95] If there is any disagreement as to the income (after deduction for union dues) the parties are at liberty to apply. Otherwise commencing on the first day of the month following the sale of the home, the respondent shall commence paying child support at the table amount for two children and thereafter until further order of the court or written agreement between the parties.

- [96] Section 7 expenses are to be agreed to in advance or as otherwise determined by the court upon application. The parties shall contribute in proportion to the incomes as I have found them. The party incurring the s. 7 expense shall produce and provide receipts of such expense to the other party and the receiving party shall pay the proportionate share within 14 days of receipt.
- [97] By agreement, there is no claim for any past child support and/or s. 7 expenses.

### Occupational Rent

- [98] The respondent's pleadings do not raise the issue of occupational rent. Had he sought an amendment to the pleadings I would have allowed it but, in any event, I will deal with the claim as if it were properly pleaded.
- [99] As I noted to the respondent during submissions, claims for occupational rent are dependent upon a myriad of circumstances and, the end objective, is a just result taking into account those circumstances.
- [100] In *Lennox v. Lennox*, 2022 BCCA 44 the proposition was stated as follows:
- [51] Returning to the case at hand, I am unable to agree with Mr. Lennox that, in assessing the equities of the case, Groves J. erred by not taking into account all of the benefits received by Ms. Lennox. In particular, Groves J. did not ignore the fact that Ms. Lennox derived a benefit from living on the property. He was simply not persuaded that an award of occupational rent ought to be made. On appeal, Mr. Lennox has failed to identify any reversible error made by Groves J.
- [52] In exercising his discretion, Groves J. did not misdirect himself on the law. He understood that occupational rent is an equitable claim and that the equities had to be assessed in all the circumstances of the case.
- [53] Justice Groves did not come to a decision that was so clearly wrong that it amounted to an injustice. He carefully reviewed the circumstances of the case and identified valid reasons for denying Mr. Lennox's claim for occupational rent. In my view, it was appropriate for Groves J. to consider the family context of the claim, Mr. Lennox's extreme delay in bringing his claim, and the fact that the entire property had never been rented out. It was also appropriate for Groves J. to consider the fact that Mr. Lennox had not been ousted from the property, had not lived (or even sought to live) on the property for over 20 years, and had left Ms. Lennox to maintain the property over many years with no contribution or assistance from him.

- [54] Though not specifically articulated by Groves J., one reason the entire property was not rented out at all times was that Mr. Lennox's children were living there for some of the material period. Given the nominal child support Mr. Lennox paid, it strikes me as particularly inequitable for Mr. Lennox to now seek full market rent from Ms. Lennox in relation to the years when the children lived in the home.
- [55] Further, on the issue of delay, had Mr. Lennox informed Ms. Lennox at an early stage that he expected her to account to him for occupational rent starting in 1996, Ms. Lennox may have made different decisions with respect to her ownership, maintenance and management of the property. It was open to Groves J. to conclude that it was unfair of Mr. Lennox to look to Ms. Lennox to account to him for occupational rent after so many years, without any notice whatsoever.
- [56] Finally, Groves J. did not fail to give any or adequate weight to relevant factors. While Ms. Lennox derived benefit from living on the property, Groves J. measured that benefit by making her account to Mr. Lennox for the net rent she received over the years. As noted, an award of occupational rent was not automatic. In my view, in all the circumstances, it was within Groves J.'s purview to make no award for occupational rent.
- [57] At a high level, it is hard to conclude that Mr. Lennox has been hard done by. He left the property over twenty years ago. More than fifteen years ago, he valued his interest in the property at \$30,000. According to Iyer J.'s factual findings (which were not appealed), \$30,000 represented 28% of the equity in the property at the time the parties entered the property agreement. Since then, Mr. Lennox has passively participated in the significant growth in the value of the property. Ms. Lennox has benefitted from that same growth. She also lived on the property, but in the defensible view of Groves J., that was fair.
- [101] Similar factors are at play here. By agreement, the respondent paid the mortgage for a number of months without contribution by the claimant. Thereafter they shared the expenses of the house but the respondent, throughout, did not pay child support or spousal support.
- [102] In my view, implicit in the agreement, which the claimant has not resiled from, was that the claimant and children would have the use and occupation of the home together with the respondent's contribution towards one-half the expenses thereof in exchange for the non-payment of child support. A position the claimant has not resiled from.
- [103] I am satisfied from the evidence that the rent received by the claimant, as she described, was initially used to pay off a joint line of credit and thereafter, whether shared, as the claimant asserts, or not shared, as the respondent asserts, the retention of the rental income by the claimant (if that was the case) does not shift the equities such that the respondent should receive occupational rent or an accounting of rent received from the tenant.
- [104] As in Lennox, the respondent has benefitted from the accretion to the home's value.

[105] As such, even were it pleaded, I would dismiss any claim for adjustments from the sale proceeds for either occupational rent or the receipt of rent by the claimant during the period of time the suite in the home was rented.

## Parenting

[106] The claimant alleges the separation was occasioned by ongoing family violence by the respondent directed at her but often in the presence of the children.

[107] Family violence is defined in the FLA, s. 1, as follows:

"family violence" includes, with or without an intent to harm a family member,

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

[108] The totality of the evidence satisfied me that the respondent, both before and after the parties' separation, was physically violent towards the claimant and that the assaults she described, and to which the respondent admitted, occurred, from time to time, in front of the children.

[109] Despite the claimant's allegations, which in large measure have been proven, the claimant is and has been content to allow Z. to spend overnights and extended holidays with the respondent. She does not agree to shared parenting of Z. on any of the respondent's proposed schedules noting that she has been the primary caregiver to Z. since her birth; whether while on maternity leave following her birth in August 2018 or after separation in June 2019.

[110] That said, it is clear from the evidence that Z. has been in the care of the respondent for significant periods since separation regardless of which party's schedule I look at.

- [111] Further, it is clear Z.'s time with her father expanded as it met the work needs of the claimant and contracted when she was working less or not at all.
- [112] That pattern caused the respondent considerable frustration over the ad hoc arrangements for both children that seem primarily based on the claimant's schedule. The parties disagree on the extent to which Z. has been in the respondent's care since separation. The respondent says the percentage of time Z. has been in his care varied from 25% to 30% depending on the mood of the claimant at any given time during the period post separation.
- [113] Each prepared calendars ostensibly indicating times when the respondent had one or both children. The respondent gave evidence regarding text exchanges which he argued showed breaches by the claimant of agreed parenting arrangements thereby frustrating his efforts to equally parent the children.
- [114] I have considered and reviewed s. 37(2) of the FLA which provides a detailed roadmap of the considerations underlying the determination of parenting time:
- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
    - (a) the child's health and emotional well-being;
    - (b) the child's views, unless it would be inappropriate to consider them;
    - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
    - (d) the history of the child's care;
    - (e) the child's need for stability, given the child's age and stage of development;
    - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise the person's responsibilities;
    - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
    - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in the person's ability to care for the child and meet the child's needs;
    - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
    - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

- [115] I accept the respondent has been a concerned, caring parent throughout the marriage and after separation. His behaviour towards the claimant, while admittedly "regrettable", in the respondent's words, has seemingly not eroded his relationship with the children; particularly Z. However, A. has withdrawn from the same level of contact as was occurring before the November 2023 incident.
- [116] In the time the respondent has had Z. in his care, he notes, and I agree, there have been no complaints arising from the level of care provided nor does the claimant question the bond between the respondent and Z.
- [117] With that said, there is no question raised as to the bond between Z. and her mother or the level of care provided by the claimant while Z. is in her care.
- [118] The current parenting order arose following an incident that reflects badly, in my view, on both parties. In November 2023, the claimant attended at the respondent's residence to drop off A. She arrived late; interfering, according to the respondent, with pre-existing plans.
- [119] Instead of simply dropping off A. and leaving, the claimant engaged the respondent on a relatively unimportant matter relating to the replacement of a lock on the garage at the family residence.
- [120] To say the respondent reacted badly is an understatement. He refused to engage with the claimant as she knocked repeatedly on his door, with both children inside his residence. When he eventually engaged, he grabbed and threw her cell phone to the ground breaking the screen.
- [121] The respondent physically assaulted the claimant at his doorway and, when A. intervened, she was pushed or thrown to the ground, inadvertently as part of the melee.
- [122] Both the RCMP and MCFD became involved but, following interviews, nothing emerged from the incident by way of charges or protection concerns.
- [123] In the intervening time between the November incident and the Dick A.J. Order, the respondent had little contact with the children.
- [124] The contact provided in the order is more restrictive than the historic involvement of the respondent as dictated by the claimant. There is no question that following separation, the respondent has sought more parenting time than the claimant would agree to.
- [125] The order provided two days of parenting time each fortnight. It provided Christmas parenting time but, because of the pending trial date, did not deal with other holiday periods.
- [126] It directed counselling, which has not taken place because of the respondent's concern, as stated above, that the counselling "might be used against him".

- [127] The provisions of the order relating to pick ups and drop offs are working well and have had the intended effect of limiting contact between the parties. As such, the provision of the Dick A.J. Order, specifically, paras. 2, 4 and 5 shall remain in effect until further court order or the written agreement of the parties.
- [128] The Dick A.J. Order also directed that the respondent's parenting time with A. was subject to A.'s discretion. That, too, will remain in place until further order of the court, as per A.'s stated wishes at trial.
- [129] A.'s testimony was made necessary because of the Views of the Child report commissioned by the parties in which A. made no reference to any of the family violence alleged by the claimant.
- [130] In the face of that report, I made clear to claimant's counsel that I would rely on it being truthful and would not consider hearsay evidence attributed to A. which might contradict the clear statement.
- [131] A. testified and made known (1) she had witnessed her father mistreat the claimant; (2) that "usually dad started it" and (3) that A., a mature and confident 17-year-old has clear and understandable reasons for her preferred interaction with the respondent.
- [132] Following A.'s testimony, the respondent seemed willing to accept A.'s terms regarding her ongoing relationship with the respondent.
- [133] A. noted, in a letter she adopted as true, the events of November 5, 2023. A. did not see the respondent for sometime after the event because of her anger over the incident.
- [134] During cross-examination by the respondent, A. denied suggestions the claimant had discouraged A. from visiting the respondent, noting the many activities that she and the respondent engaged in together over the years post separation.
- [135] A. expressed a desire to spend Friday overnight with the respondent and attend rowing sessions with him. None of that time involves time the respondent will be with Z. under the Dick A.J. Order.
- [136] Given the respondent's acknowledgement of family violence, although not to the degree or frequency testified to by the claimant, his acceptance of A.'s preferred parenting schedule makes sense.
- [137] Hopefully time will heal any remaining wounds that arose from the November incident. Regardless, every parent needs to recognize the time will come when a child 'votes with their feet'. A. has 'voted' and the respondent accepts her decision.

- [138] Accordingly, the order I make is that the respondent will have parenting time with A. as per her stated preference: Friday overnight from early evening to Saturday morning and 'rowing evenings'; an activity she has historically shared with the respondent. School holidays are to be arranged directly between A. and the respondent. Ideally, A. will choose to spend time with the respondent during his parenting time with Z.
- [139] In my view, the order I have made respecting A. accords with the intent of both the federal and provincial legislation that I should, where appropriate, take into account the views of the child, particularly one so close to the age of majority. I must also recognize that A.'s wishes as to the interaction between her and the respondent is as a result of a considered assessment of the relationship between her parents, particularly family violence, and of her need to maintain a strong healthy relationship with the claimant. Those objectives have been similarly recognized by the respondent.
- [140] Z., however, is different. Her views, owing to her age, are unstated but on all of the evidence it is clear there is a significant bond between herself and the respondent. It is equally clear from the claimant's concession, if not explicit, then implicit, that the respondent's violence has been directed, save for the November incident, towards her. Despite the violence that I have found has occurred, the claimant remains comfortable with Z. spending extended periods of time with the respondent without fear for her emotional or physical safety.
- [141] That said, it is clear, given Z.'s birth shortly before separation, that the claimant has provided the majority of care. The claimant, coupled with the presence of A., comprise a unique family unit to which Z. is most accustomed.
- [142] Given A. will not necessarily have the same presence in the respondent's home as he might hope for Z., it is inappropriate, in my view, to restrict contact between the respondent and Z. in the fashion done in the Dick A.J. Order.
- [143] That order, while no doubt appropriate on the facts before Dick A.J., must be seen in the context of all of the evidence and is too restrictive at present.
- [144] On whatever schedule I look to, it is clear that Z. spent between 20 to 30% of her time in the care of the respondent prior to the Dick A.J. Order. That time ebbed and flowed depending upon the then requirements of the claimant through work or otherwise.
- [145] The ad hoc nature of the respondent's contact with both children was governed, I find, by the mood of the claimant at any given time and her needs for assistance with Z. This was a catalyst for, but by no means excuses, some of the respondent's behaviour.
- [146] Both parties now seek consistency and transition arrangements that will maintain the peace and calm that has been in effect since December 2023.
- [147] Therefore, in my view, the appropriate arrangement with respect to Z. is as follows, based upon a two-week rotation.

- [148] In week one, the respondent shall have parenting time with Z. from after school Friday until Sunday at 5:00 p.m. In the alternate week, the respondent shall have Z. in his care Sunday at 5:00 p.m. until Tuesday morning at which time he shall return Z. at her school or, if school is not in session, to the claimant under the same terms and conditions as set out in paras. 2, 4 and 5 of the Dick A.J. Order.
- [149] In addition, the parties shall equally share Christmas and spring break (in regard to Z.) each having one week of the holiday. I will firstly allow the parties to try and work out the division of Christmas Day and Boxing Day so as each will see Z. one of those days if not both. In the event the parties are unable to agree, they may return this matter to me by way of a request to appear and I will establish more precise timelines.
- [150] Further, the respondent, regardless of whose day it is, shall have Z. from 10:00 a.m. until 8:30 p.m. on Father's Day. Similarly, the claimant, regardless of whose day it is under this schedule, shall have Z. in her care from 10:00 a.m. until 8:30 p.m. on Mother's Day, provided she will allow the respondent to make up time in the event Mother's Day falls on a Sunday in which he would otherwise have Z. in his care.
- [151] Each of the parties shall be entitled to two weeks where Z. is exclusively in their care each summer. Again, I leave to the parties, in the first instance, to agree whether the two weeks should be consecutive or one week at a time. If they are unable to agree, they may return this matter before me for a decision.
- [152] In odd-numbered years, the respondent shall choose the two weeks that Z. will be in his care and advise the claimant by no later than March 31 of his wishes. In even numbered years, the situation will be reversed and the claimant shall have first pick of the weeks in which Z. is in her care and notify the respondent of her choice, before March 31.
- [153] Parenting responsibilities are to remain shared, save and except for the matter of counselling. The claimant shall have sole responsibility for choosing counselling for one or both of the children as per the Dick A.J. Order. This will be on the condition she keep the respondent informed of all developments surrounding counselling including the name of the counsellor, the contact details and to the extent any reports are provided to or from the counsellor in respect of either child. The claimant shall immediately pass those details on to the respondent if, for any reason, he does not have direct access to the counsellor.

## Spousal Support

- [154] Relying upon *Chutter v. Chutter*, 2008 BCCA 507, leave to appeal to SCC ref'd, 33002 (28 May 2009) the claimant argues that she is entitled to compensatory support given the role she played as a homemaker and mother.

- [155] Chutter makes clear that compensatory spousal support does not come to an end simply based on the entitled party attaining self-sufficiency. Lifestyle equivalency is an increasingly important factor corresponding to the duration of the relationship and the extent of the economic disadvantage visited upon one of the spouses by virtue of a role assumed during the relationship.
- [156] In Chutter, following a 28-year relationship, the wife appealed an order of the Supreme Court dismissing her claim for spousal support. Each party received approximately \$4 million in assets. The trial judge concluded support was not payable either on a needs-based or compensatory basis. The respondent continued to work; the appellant wife, although a trained dental hygienist, had health issues affecting her ability to work.
- [157] The denial of spousal support was overturned on appeal.
- [158] As here, the wife's career had been interrupted for several years to act as primary caregiver. But for health issues, there was no basis on which to find she had not attained her highest and best income as a result of that interruption.
- [159] Commencing at para. 50 of Chutter, Justice Rowles discussed the objectives of compensatory support as follows:
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow, at paras. 24, 41). 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 (Moge, at 861-863; Bracklow, at para. 39). In Moge, the Supreme Court of Canada observed, at 867-868:
- The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.
- [51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in Moge at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other

spouse" (emphasis added).

[52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. 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.

[Emphasis added and internal citations omitted in *Chutter*.]

[53] In *W. v. W.*, 2005 BCSC 1010, 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:

[11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).

[Emphasis added in *Chutter*.]

[160] Here, the relationship is lengthy; sixteen years. The claim is advanced under the compensatory model.

[161] While conceding some disadvantage accrued to the claimant by virtue of her role as homemaker and mother, the respondent notes that the claimant, unlike himself, obtained her post-graduate education degree during the marriage. Further, by virtue of transfers taken to support either her educational aspirations or career, he suffered career setbacks resulting in lower earning expectations than had he stayed in his original position with the BC Assessment Authority in Victoria.

- [162] Much of the disadvantage can be characterized as delayed entry into her chosen field of employment. But for her withdrawal from university in 2006, the claimant would have, by now, obtained the maximum salary available to a teacher with her qualifications. As it is, she will need to wait several more years before achieving that benchmark.
- [163] The respondent currently earns \$108,000 (rounded).
- [164] For reasons noted above, I find that the claimant was capable in 2023 of earning approximately \$92,000 annually. That income will increase to approximately \$100,000 by the end of the 2025 school year, by virtue of her reaching Step 8 in the payment grid and the increase contained in the governing collective agreement.
- [165] While undoubtably the claimant has been delayed in achieving the highest available pay scale for her chosen vocation (based on current qualifications), she has, or will in the upcoming year, achieve the highest level of income subject only to the cost of living and/or negotiated wage increases in the future.
- [166] No similar information was provided for the respondent but his income, over the course of the years leading up to the trial, has not increased in 'leaps and bounds'.
- [167] Based on DivorceMate calculations utilizing the incomes I have found for 2023--\$106,000 (rounded after union dues) and \$92,000--the Spousal Support Advisory Guidelines provide no spousal support payable by the respondent either based upon support payments for one child or for two.
- [168] On the current parenting arrangement, the claimant will be entitled to receive child support for Z. for the next 13 years.
- [169] On the evidence available, the parties have suffered both advantages and disadvantages by their actions taken during their marriage-like relationship. The claimant was disadvantaged in that her entry into the workforce was delayed by virtue of her role as mother and homemaker. However, the claimant was also advantaged in that she was able to complete her education during the relationship. This disadvantage is ameliorated by the claimant's progression through the teacher salary grid steps during the relationship.
- [170] As noted, by the conclusion of the 2024/25 school year, the claimant will be at the top of her salary grid, if she chooses to work full-time--as I find she can. This is subject only to her determination as to whether she further upgrades her education, which would move her from Category 5 to either 5+, 6 or 7.
- [171] The respondent, while being able to advance his career by virtue of steady employment in the period of cohabitation to date, has moved twice to support either the educational aspirations or employment aspirations of the claimant. In saying that, I recognize that the second transfer from Vancouver to Nanaimo may have been, at least in part, to facilitate homeownership by the parties as well as facilitate the claimant's career.

- [172] The respondent gave up aspirations to obtain his master's degree when the claimant withdrew from her education program. The economic consequences of that election are unknown but it is safe to infer that the additional credential, a master's degree, would not have adversely impacted the respondent economically and might well have led to greater economic opportunities for him.
- [173] The claimant argues that the compensatory entitlement should be satisfied by five years of support at \$500 monthly. That submission, as I understood it, was not based upon the income I have imputed to the claimant but rather her historical part-time earnings.
- [174] As noted, the DivorceMate calculations, presuming continuation of the incomes I have found/imputed to the parties, would provide the claimant with zero spousal support for so long as she is in receipt of child support.
- [175] While the exception to the Spousal Support Advisory Guidelines provides for an expansion of the time period or amount of support payable where the support is based on the compensatory model, I am not persuaded that in these circumstances it is either appropriate or in keeping with the objectives of the DA to burden the respondent with a spousal support order presently or at the expiry of his obligation to pay child support.
- [176] Absent the obligation to pay child support, their two incomes are so similar as to afford the comparable lifestyles noted in Chutter.
- [177] Instead, as earlier noted, I have made a modest readjustment to the division of property so that the claimant retains the whole of her RRSP.
- [178] Accordingly, the claim for spousal support is dismissed.

## Divorce

- [179] The parties have been separated for in excess of one year. Both parties seek an order for divorce. As such, subject to s. 12 of the DA there will an order the parties are divorced.

## Costs

- [180] In my view, success has been divided on the primary issues: parenting time, spousal support and occupational rent.
- [181] However, if the parties cannot agree as to the issue of costs, either may apply for an appearance before me to make submissions on the issue provided they notify Scheduling within 30 days of the release of these reasons.

"Harvey J."

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