

CANADA / JUDGMENT

J.S. v. S.K.

2023 BCSC 1065

COURT

Supreme Court of British Columbia

DECIDED

9 March 2023

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2023 BCSC 1065 J.S. v. S.K.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

J.S. v. S.K.,

2023 BCSC 1065

Date: 20230309

Docket: E62571

Registry: New Westminster

Between:

J.S.

Claimant

And

S.K.

Respondent

Before: The Honourable Justice Girn

Oral Reasons for Judgment

In Chambers

Counsel for the Claimant:

M. Goyal

Counsel for the Respondent:

S. Brar

Place and Date of Hearing:

New Westminster, B.C.

September 8

November 4, 2022 and

January 19, 2023

Place and Date of Judgment:

New Westminster, B.C.

March 9, 2023

- [1] THE COURT: These are my oral reasons for judgment. Given the number of issues argued before me and the length of these reasons, I am going to order that a transcript of them be prepared at the request and expense of the court, and be provided to the parties once they are ready.
- [2] Accordingly, I reserve my right to edit them for style, grammar, and include any citations I may have omitted, but the substance of my decision will not change.
- [3] The parties were before me on two separate applications that were heard together.
- [4] The claimant, J.S., seeks a divorce pursuant to the Divorce Act, R.S.C. 1985, c. 3. He seeks parenting time pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA] and a variation, pursuant to s. 152 of the FLA, of an order made at the Judicial Case Conference ("JCC") before Master Schwartz.
- [5] J.S.'s position changed as the hearing progressed.
- [6] S.K., the respondent, opposes.
- [7] S.K. brought a separate application in which she seeks an order for sole parenting responsibilities and that the children primarily reside with her. J.S. opposes that part of her application.
- [8] S.K. also seeks an imputation of J.S.'s income for 2021 and retroactive child support and spousal support going back to 2017. J.S. is agreeable, in part, as it relates to the claim for retroactive child support going back, but only three years. However, he opposes S.K.'s claim for spousal support.
- [9] Finally, S.K. seeks an order that J.S. provide an accounting of the proceeds from the sale of the former family home.

Background

- [10] J.S. is 41 years old. S.K. is 40 years old. They were married in India on October 14, 2006 and moved to Canada in 2010. They separated in 2017. There is some dispute on the date of separation, which I will deal with later in my judgment.
- [11] There are two children of the marriage, namely M.K. who is 14 years old and S.S.A. who is eight years old.
- [12] During the marriage, S.K. was primarily responsible for the care of the children and was a homemaker. Although she was employed from the time she moved to Canada to December 2015, S.K. did not have continuous employment after the children were born. For a period of time she worked part-time at a Subway restaurant.
- [13] J.S. is a fire technician. He has previously worked with other companies, but currently runs his own business in this field. S.K. currently works on call as an early education assistant.
- [14] The parties purchased a townhouse but sold it in 2016, and after paying off the mortgage, there was approximately \$126,000 left over.
- [15] S.K. says that the proceeds from the sale of the former family home was managed by J.S. She seeks an accounting of the proceeds as she does not have access to nor does she know what J.S. did with the proceeds.
- [16] S.K. also alleges family violence. She says that throughout the marriage, J.S. physically assaulted her on numerous occasions and, in December 2015, police intervention was required.
- [17] In August 2016, J.S. entered into a s. 810 peace bond pursuant to the Criminal Code. J.S. does not seem to deny this particular incident, although he denies any other family violence.
- [18] Despite these issues, the family travelled back to India and lived there for a period of time. However, in March 2017, S.K. says that she was physically assaulted again while in India and left with the children to reside with her father. J.S. denies family violence while they were in India.
- [19] S.K. says the date of separation is March 2017.
- [20] In July 2017, S.K. returned to Canada with the children. I do not have any sufficient information to conclude that the parties separated in March 2017. Given that S.K. came back to Canada without J.S. in July 2017, and they have been separated since then, I have determined that the date of separation to be July 2017.
- [21] J.S. continued to remain in India until September 2019. Since then he has made frequent visits back to Canada but going back and forth to India.
- [22] S.K. says that she has had little to no communication with J.S. since his return to Canada in 2019 and does not know when he is in India or when he is in Canada. J.S. denies that.

- [23] S.K. submits that J.S. has made no effort to see the children since March 2017 and has not made an effort to communicate with them, nor have the children expressed any interest to spend time with J.S.
- [24] J.S. disagrees. He says that he has made numerous attempts to contact S.K. to be able to visit with the children when he is in Canada. Specifically, when he returned to Canada in September 2021, he contacted the Ministry of Children and Family Services and police were sent to S.K.'s home. No action was taken by the police and J.S. was advised to seek parenting time through a court application. J.S. did not do so until this now.
- [25] J.S. says that he has had some telephone contact with the children and brief interactions with them outside S.K.'s home.
- [26] A JCC took place in March 2022. The parties agreed that S.K. was to have some s. 41 FLA parental responsibilities but not all. It was also agreed that J.S. would have parenting time as agreed by the parties, subject to the input of M.K. Despite this, J.S. has not been able to exercise any parenting time since the JCC.
- [27] Pursuant to the JCC order, J.S. began paying child support in April 2022 in the amount of \$670. He has not paid any child support from July 2017 (the date of separation) to April 2022.
- [28] S.K. says retroactive child support in the amount of \$28,338 is owed to her. She also submits that J.S. has not paid any spousal support and that retroactive spousal support in the amount of \$16,431 is owing. S.K. is asking those amounts go back to March 2017.
- [29] Since their return to Canada in 2017, the children have resided with S.K. in a rented one-bedroom suite for which she pays \$1,000 a month. S.K. has been on social assistance since her return to Canada and has no family in Canada to assist with childcare, given that J.S. has not been in Canada continuously to assist her with childcare.
- [30] When S.K. returned to Canada in 2017, the children were both very young. M.K. was nine years old and S.S.A. was three years old. She was unable to work, given that she had the sole responsibility of caring for the children with no family support.

Issues To Be Decided

Divorce

- [31] J.S. seeks a divorce pursuant to s. 11 of the Divorce Act R.S.C. 1985, c. 3 (2nd Supp.) [Act]. Section 11 of the Act imposes a statutory duty on the court to ensure that certain conditions are met before a divorce is granted:

11 (1) In a divorce proceeding, it is the duty of the court

- (a) to satisfy itself that there has been no collusion in relation to the application for a divorce and to dismiss the application if it finds that there was collusion in presenting it;

- (b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made; and
- (c) where a divorce is sought in circumstances described in paragraph 8(2)(b), to satisfy itself that there has been no condonation or connivance on the part of the spouse bringing the proceeding, and to dismiss the application for a divorce if that spouse has condoned or connived at the act or conduct complained of unless, in the opinion of the court, the public interest would be better served by granting the divorce.

[32] The court should refuse to grant the divorce where the petitioner's affidavit does not contain sufficient evidence to enable the court to discharge its duty under s. 11(1)(b).

[33] In *Canadian Family Law*, 2nd Edition, the authors J.D. Payne and M.A. Payne state at p. 206:

Regardless whether the divorce petition relies on adultery, cruelty, or no-fault separation, it is a statutory duty of the court to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage. In determining whether reasonable arrangements have been made for the support of the children of the marriage, the court has regard to the Federal Child Support Guidelines. If reasonable arrangements for child support could be but have not been made, the court cannot grant the divorce until such arrangements are made but a court cannot discriminate between rich and poor by denying a divorce to spouses who have insufficient means to provide reasonable support for their children. ... The reasonableness of arrangements for the support of children must be determined by the court in the particular circumstances of each case, which may include assistance from other members of the family or friends, social assistance, and any other relevant circumstances.

[34] As well, the court can exercise its discretion at common law on whether to grant a divorce. In *Mann v. Mann*, 2013 BCSC 1726, Justice Blok referred to *Kirk v. Kirk*, 2007 BCSC 67 in which Justice Arnold-Bailey discussed the relevant principles on the question of the court's discretion available at common law:

[20] This leaves the question of the exercise of discretion available at common law. In *Kirk v. Kirk*, Arnold-Bailey J. said the following:

[34] The law is clear that a judge may grant a divorce order prior to the parties settling or receiving judgment on issues of property and spousal support if there is not a significant risk of potential prejudice to the other spouse: *Hill v. Hill* (1993), 42 A.C.W.S. (3d) 468 (B.C.S.C.); *Bhullar v. Bhullar* (1997), 1997 CanLII 894 (BC SC), 49 B.C.L.R. (3d) 147 (S.C.); and *Zimmerman v. Zimmerman* (1992), 1992 CanLII 6275 (AB KB), 129 A.R. 392 (Q.B.).

- [35] In each of these cases the court declined to grant a divorce order in advance of settling property and support issues between the parties because of the risk of prejudice to the other spouse, and in the absence of compelling and urgent reasons on behalf of the spouse seeking the divorce.
- [21] From this I conclude that a judge may exercise a discretion to decline to make a divorce order where there is prejudice or risk of prejudice to the other spouse that is not outweighed by compelling or urgent reasons on the part of the applicant spouse.
- [22] The mere existence of other, unresolved issues between the parties (so long as they do not go to the issue of reasonable arrangements for the support of the children) is not, without more, a reason to decline to make an order of divorce. I do not agree that *Virk v. Somal* says otherwise; the fact that the divorce applicant in that case had yet to answer contempt proceedings brought against him was surely the material obstacle he faced since a party cannot ask a court for relief when he has yet to address outstanding contempt proceedings.
- [35] In *Dhillon v. Dhillon*, 2017 BCSC 247, Justice Harvey described the evidentiary onus as follows:
- [34] The evidentiary onus, in my view, rests on the party asserting such prejudice to establish prejudice sufficient to warrant the court to exercise its discretion. The party seeking the divorce then bears the onus, if sufficient prejudice is established, to show a compelling or urgent need for the divorce to be granted which overrides that prejudice.
- [36] In his affidavit of December 7, 2021, J.S. says he has been in a relationship since 2020 and he intends to remarry as soon as possible. In his affidavit of August 24, 2022, J.S. deposes that he urgently seeks a divorce so that he can marry his current partner.
- [37] What is lacking in these affidavits is information relating to any compelling or urgent reasons for obtaining a divorce. J.S. says that S.K.'s delay in responding is simply a tactic to harass and sabotage his happiness in his new relationship.
- [38] S.K. says that the court should not grant the divorce because it will be prejudicial to her. She argues that because J.S. has a history of living in India for extended periods of time, she is concerned that he will once again leave Canada in order to avoid paying child and spousal support. As well, she argues that if the divorce is granted, it will leave the issue regarding the sale proceeds of the former family home unaccounted for, and she will not be able to receive her fair share.
- [39] Finally, S.K. says that J.S. has not provided any information about the reasons he seeks a divorce.
- [40] I am unable to accept S.K.'s argument regarding J.S. avoiding his support obligations by returning back to India. Given that there is an order in place, albeit interim, a mechanism is in place for S.K. to enforce child support payments should J.S. try to avoid his obligations.

- [41] I note that J.S. is now seeking parenting time and he is agreeable to child support payable by him for the past three years. There is no evidence that he will once again leave Canada and not return. He now operates a business in the Lower Mainland and wants to see his children.
- [42] If J.S. chooses to ignore his child support obligations, the B.C. Family Maintenance Enforcement Program is available to S.K. to enforce any arrears that may arise. If and when J.S. returns to Canada, he will have to pay those arrears.
- [43] In terms of S.K.'s concerns about outstanding division of the proceeds of the sale of the former family home, a divorce order does not change her rights to pursue her share. I have not been provided with any evidence or case law that supports her position.
- [44] In *Cooper v. Cooper*, 2021 BCSC 2042, Justice MacNaughton granted a divorce, despite the wife arguing that she would be prejudiced if a divorce were granted before financial arrangements with respect to the parties' separation was finalized.
- [45] Accordingly, S.K.'s argument must fail as it relates to prejudice.
- [46] While I do not accept that S.K. would be prejudiced with the pronouncement of the divorce, I have concluded that the court cannot grant a divorce at this point in time. I am not satisfied that reasonable arrangements have been made for the support of the children of the marriage as required under the Act. To reiterate, s. 11(b) of the Act states:
- (11)(b) to satisfy itself that reasonable arrangements have been made for the support of any children of the marriage, having regard to the applicable guidelines, and, if such arrangements have not been made, to stay the granting of the divorce until such arrangements are made;
- [47] It is S.K.'s position that up until April 2022, she had not received any child support from J.S. and that she and the children have lived in poverty and continue to do so. J.S. denies this. He says that he has made multiple offers to support her and the children. I note that he was in India from 2016 to September 2019. It was only after he returned to Canada that he claimed to have offered to help S.K.
- [48] As well, J.S. has travelled back and forth to India on numerous occasions, despite pleading that he has no income. It is only now while seeking a divorce that J.S. has agreed to pay child support retroactive three years, but not to the date of separation. He only recently began paying regular child support.
- [49] The JCC order wherein J.S. has agreed to pay child support is an interim order and, in my view, an interim order cannot be viewed as reasonable arrangements for the support of the children. Interim orders are usually rough-and-ready orders on a minimum of evidence.
- [50] I agree with Justice Hood in *R. v. Roberts*, 2007 BCSC 236 at para. 34:

- [34] In my view, an interim child support order, without more, was never intended to represent a reasonable arrangement for the support of a child within the meaning of the words as used in s.11(1)(b); although it can be, in a given case, for example, where a divorce is urgently required and full disclosure of the spouse's financial circumstances are made to the satisfaction of the Court, so that the issue of child support can properly be resolved. Otherwise, it is simply a temporary Court ordered arrangement pending full disclosure of the financial circumstances of the parties.
- [51] Initially J.S. was opposed to any retroactive amounts owing, asserting in the Notice of Application that his income used to calculate outstanding child support was incorrect. He has subsequently changed his position and is now agreeable to pay child support based on the income that S.K. has asked the Court to impute. However, only for the past three years.
- [52] The court was also advised that J.S. would be paying the entire amount of child support owing for the past three years by December 31st, 2022. Counsel for S.K. confirmed in early January 2023 that this did not occur.
- [53] In my view, there has been no resolution with regard to child support and therefore I find there is non-compliance with s. 11(1)(b). Accordingly, I must conclude that reasonable arrangements have not been made for the support of the children of the marriage, having regard to the applicable Guidelines.
- [54] Consequently, the court must stay the granting of the divorce until such arrangements are made. I will specifically address below the quantum of child support that is still outstanding.

Parenting time

- [55] Given that J.S. has not had regular contact with the children after his return to Canada in 2017, he recognizes that his parenting time should be implemented gradually. He does not seek overnight parenting time at this point. This is a very reasonable position.
- [56] S.K. opposes J.S.'s proposal. She submits that since returning to Canada in 2017, J.S. has not shown any interest in exercising parenting time. She further submits that J.S. has primarily lived in India for the past five years and is often difficult to locate or communicate with. Consequently, she says the children do not wish to see him and their relationship is estranged. S.K. also alleges that J.S. has alcohol abuse issues.
- [57] In response, J.S. says that when he returned to Canada in 2019, he attempted to see the children; has only been able to communicate with his daughter over the telephone; and has had only brief in-person visits outside S.K.'s home. He has asked family and friends to assist him in exercising parenting time without success.
- [58] In July 2022, J.S.'s parents travelled from India to try to negotiate parenting time, but were not successful.

- [59] S.K. proposes limited parenting time as per the children's wishes. She says that if the children agree J.S. should have one hour per week of supervised parenting time in public places on Saturday or Sunday between the hours of 10:00 a.m. and 3:00 p.m.
- [60] In family proceedings, I am guided by three core purposes in modern family law:
- 1) to assure the best interests of the child;
 - 2) to reduce conflict; and
 - 3) maintain structure and encourage family relationships.
- [61] Pursuant to s. 37 of the FLA, the court may only consider the best interests of the children in making an order for parenting arrangements, including parenting time.
- [62] In arriving at my decision on parenting time being sought by J.S., I must apply several non-exhaustive factors set out in s. 37 of the FLA.
- (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.
 - (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 his or her 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 his or her 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.

- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [63] I have considered all of the factors set out above. In all of the circumstances, I am of the view that J.S.'s proposal is not only reasonable, but necessary.
- [64] J.S. must be given an opportunity to reconnect with the children. I am of the view that the children's health and emotional well-being is best achieved if they are able to re-establish a connection with J.S., especially S.S.A., who is still very young. While M.K. views are important, J.S. must also be allowed to reconnect with her.
- [65] J.S.'s parenting time will be on an interim basis, without prejudice, for now. Given that the children have not had regular parenting time with J.S., it will be important to have the views of the children respecting parenting time with their father, especially M.K.'s.
- [66] I canvassed with the parties on their position regarding a s. 211 report. They are both in agreement that one should be ordered. As such, I will order that an evaluative s. 211 report be prepared and that the children be interviewed. However, it will be done three months after J.S. has been able to exercise parenting time. This will allow J.S. and the children to reacquaint themselves and the report will be more meaningful.
- [67] I will address the terms of the specific parenting times later on in my judgment.

Parenting responsibilities

- [68] Given that the children have primarily resided with S.K. since 2017 and she has been the sole caregiver since then, I am of the view that it is not appropriate at this point to order shared parenting responsibilities. Again, as this is an interim order, J.S. will be able to bring an application in the future for a variation of such.

Child support

- [69] There are three fundamental principles that apply to all child support obligations:
- 1) parents have a joint and ongoing legal obligation to support their children;
 - 2) the children, not the parent, have the right to support; and
 - 3) support payments are based on earning capacity and not only what a parent actually earns.
- [70] A parent has a legal obligation to earn as much as he or she is reasonably capable of earning: see *M.A.G. v. P.L.M.*, 2014 BCSC 126, at para. 52.

- [71] Children under the age of majority have a need for financial support. The state of the child's relationship with parents does not diminish his or her need to be fed, housed, and clothed. It is only at the age of majority that a child's attitude and relationship with parents expected to pay child support becomes a potentially relevant consideration: *R.O.M. v. R.J.M.*, 2005 BCSC 1861, *aff'd Marsh v. Marsh*, 2006 BCCA 144.
- [72] The discretion to make a retroactive child support is found in ss. 15.1 and 17 of the Divorce Act and ss. 152 or 170(b) of the FLA (depending on whether it is a variation order or not).
- [73] The circumstances in which retroactive child support may be awarded were addressed in *D.B.S. v. S.R.G.*, 2006 SCC 37 in which the Supreme Court of Canada directed trial judges to adopt a broad and holistic approach in the application of four factors summarized at para. 133, none of which is determinative on their own:
- a) Is there a reasonable excuse for why support was not sought earlier?
 - b) Was there any blameworthy conduct on the part of the payor parent?
 - c) Is a retroactive award appropriate in light of the child's past and present circumstances?
 - d) Will a retroactive award cause hardship to the payor parent or to his or her other children?
- [74] At paras. 120-125 of *D.B.S.*, the Court stated that the commencement date of an award of retroactive child support should not be restricted to the date upon which an application to a court or formal notice is given, but rather should be the date of effective notice by the recipient parent to the payor parent.
- [75] Effective notice was defined as "any indication by the recipient parent that child support should be paid " (para. 121). The Court suggested this is generally when the topic is broached.
- [76] There are circumstances where it is reasonable to infer that effective notice has been given to a parent even in the absence of a specific request. Both parents have a legal obligation to contribute to the support of their child after separation.
- [77] As well, an order for retroactive support is discretionary but not exceptional: *D.B.S.* at paras. 5 and 97.
- [78] Since their separation in 2017 until April 2022, S.K. has not received any child support from J.S. S.K. deposes that she has been on social assistance since 2017 and receives \$1,370 per month. Pursuant to the JCC order, J.S. is now paying \$667 per month in child support. J.S. says that once he returned to Canada, he offered child support but it was refused by S.K.
- [79] Initially there was dispute on the retroactive child support owing by J.S. due to a disagreement in terms of his income. J.S. later advised that he was agreeable to pay retroactive child support based on the following imputed and reported income.

Year

Gross Income

Monthly Child Support

Annual Child Support

2019

\$25,000

389

\$4,668

2020

\$28,487.49

\$439.69

\$5,276.28

2021

\$42,200.00

\$666

\$7,992

2022(January- March)

\$24,683.00

\$666

\$1,998

Total: \$19,934.28

[80] As I have noted previously, J.S. advised that he would pay the outstanding child support by December 31, 2022. I was also advised that as of January 2023, that had not occurred.

[81] J.S. says that the court should not award retroactive child support beyond the three years because no action was taken by S.K. until J.S. filed for divorce. As well, in his affidavit of August 24, 2022, J.S. deposes that he was not able to pay child support as he did not earn any income for the years 2017 and 2018 after the marriage breakdown.

- [82] In my view, J.S. chose to stay in India rather than come back to Canada after S.K. returned with the children. He deposes that he had no financial support and remained in India because he was depressed and confused on how to stay afloat amidst financial and marital obligations. Other than his assertion, I find there is no evidence that he was incapable of working. I do not accept his explanation.
- [83] S.K. alleges family violence. She says that J.S. physically beat her regularly throughout their marriage including when the family moved to India in 2016, This prompted her to leave J.S. and reside with her father before returning back to Canada.
- [84] She submits that she did not seek child support earlier because she was fearful of J.S. and believed that he would harm her or the children.
- [85] J.S. denies family violence but as I have noted earlier in these reasons, there is a s. 810 peace bond which he entered into in 2016. He denies assaulting S.K. while in India.
- [86] S.K. also says there was a delay in seeking child support because she did not have the financial means to do so. Recently she has gone back to school and completed an education assistant program. However, she is unable to work full-time due to her ongoing childcare responsibilities without any family to assist her. She currently works on call, earning \$19 per hour.
- [87] In D.B.S. at para. 97, the court reiterated that retroactive awards need not be exceptional, stated:

It cannot only be exceptional that children are returned the support they were rightly due. Retroactive awards may result in unpredictability, but this unpredictability is often justified by the fact that the payor parent chose to bring that unpredictability upon him/herself. A retroactive award can always be avoided by appropriate action at the time the obligation to pay the increased amounts of support first arose.

- [88] Given that J.S. is agreeable to pay retroactive child support for the past three years, I will now address whether a retroactive award beyond three years to the date of separation should be made.
- [89] Accordingly, my analysis is restricted to the period July 2017 (which I have found to be the date of separation) to December 31, 2018, given J.S.'s concessions to pay child support for 2019 to March 2022. In doing so, I must take a holistic view in my assessment of the D.B.S. factors.

Is there a reasonable excuse for why support was not sought earlier?

- [90] I accept S.K.'s evidence that she feared for her and the children's safety, given that there was objective evidence of family violence prior to their separation which resulted in court intervention by way of a s. 810 peace bond. I also accept that she was subjected to violence in India which led to her returning to Canada with the children.

[91] Additionally, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application: see D.B.S. at para. 101. I accept S.K.'s explanation that she did not have the financial means to bring an application given that she was on social assistance without any family support when she returned to Canada in 2017. I do not accept J.S.'s suggestion that he offered financial support but was refused by S.K.

Was there any blameworthy conduct on the part of the payor parent?

[92] On the second factor, I find that J.S. engaged in blameworthy conduct because of his inaction. He actively chose to ignore his obligations by staying in India for extended periods of time after the parties separated, thereby avoiding child support. S.K. says it was difficult to locate or communicate with him.

[93] As the court in D.B.S. stated, a payor parent who knowingly avoids or diminishes his or her support obligations to his or her children should not be allowed to profit from such conduct: at para. 107.

[94] I do not accept that J.S. could not work in 2017 and 2018. I find that he chose not to work and the children suffered as a result.

Is a retroactive award appropriate in light of the child's past and present circumstances?

[95] S.K. has deposed that she has been on social assistance since her return to Canada in 2017. She recently commenced working on call. However, she is not able to take on full-time work due to childcare responsibilities. I do not need to decide the reasonableness of her position for the purpose of determining whether retroactive child support should be made back to date of separation. Needless to say, she and the children have lived in a one-bedroom basement suite since her return to Canada in 2017. She submits that the children are getting older and need their own bedrooms, which she is unable to afford.

[96] She is unable to make ends meet and the children's expenses are increasing as they get older. For example, S.K. says that M.K. needs braces, which S.K. will not be able to afford on her own, and J.S. has been unwilling to pay his share.

[97] I am of the view that the children went through hardship in the past which needs to be compensated for this unfortunate circumstance through a retroactive award. It is clear that the children's circumstances changed dramatically after their parents separated and they continue to do so.

Will a retroactive award cause hardship to the payor parent or to his or her other children?

[98] I have not heard any submissions from J.S. in regards to hardship in the event of a retroactive award. I note that he agreed that his income is \$42,200 for years 2021 and 2022. He pays modest rent of \$950 per month in comparison to the market rent these days in the Lower Mainland. In his financial statement, J.S. has disclosed a loan for \$53,000 for a Toyota Highlander which commenced in May 2021 but he has not listed any monthly or lease finance payments. In my view, if J.S. can afford to take out a loan for this amount and make

monthly lease payments, there is no reason why he should not provide for his children for years that he ought to have done so.

[99] I will point out that J.S. has had no financial difficulty going back and forth to India. Once again, this is while he chose not to financially support his children.

What is the effective date of retroactivity?

[100] I am mindful that the Court in D.B.S. has stated that generally retroactivity should not go beyond three years. However, the Court has also held that there may be circumstances where the date of retroactivity should be the date on which "support should have been paid", whether at first instance or as increased support. The Court noted that "this situation can most notably arise where the payor parent engages in blameworthy conduct", in which case the court may wish to emphasize the principle that "a payor parent should not be permitted again to profit from his/her wrongdoings: see paras. 124, 125.

[101] In my view, a retroactive award is warranted. While I do not place J.S.'s conduct at the high end of the scale of blameworthiness, I nevertheless find that J.S. engaged in blameworthy conduct. Accordingly, the date to which the award should be retroactive will be July 2017 when S.K. moved back to Canada, which I have found to be the date of separation.

[102] S.K. says the court should impute J.S.'s income for 2017 and 2018 as \$25,000. This amount is equal to minimum wage, although J.S. likely would have been capable of earning more, given his work as a fire alarm technician.

[103] Accordingly, I will impute J.S.'s income in 2017 and 2018 to \$25,000 for the purposes of determining retroactive child support. The child support payable from July 2017 to December 31, 2018, is as follows:

July 2017 - December 2017

$\$25,000 = \$389 \text{ per month} \times 6 \text{ months}$

\$2,334

2018

$\$25,000 = \$389 \text{ per month} \times 12 \text{ months}$

\$4,668

[104] I conclude that J.S.'s obligation for child support retroactive to July 2017 is as follows.

· From January 2019 to March 2022: \$19934.28

· From July 2017 to December 2018: \$7002

Total: \$26,936.28

Spousal Support

- [105] I have reviewed all of the affidavits filed by both parties in support of this application. Regrettably, I am of the view that there is currently insufficient evidence on which to resolve the critical factual issues. The affidavit evidence is not sufficient in order for the court to make a proper assessment under s. 15.2(4) of the Divorce Act, or under the relevant provisions of the FLA.
- [106] S.K. is seeking retroactive spousal support to date of separation. J.S. opposes. Once again, I conclude that there is insufficient evidence to determine this issue on the basis of affidavit evidence. In addition, the property division, which is the proceeds from the sale of the former family home, remains outstanding. This will likely affect the quantum for spousal support, if any is awarded.
- [107] In my view, spousal support and how much S.K. is owed from the proceeds of the sale of the family home are interconnected and should not be dealt with separately.
- [108] S.K. has asked for an accounting of the funds for which I will make an order below.
- [109] All of these issues will require credibility findings that are difficult to make on the basis of affidavit evidence alone. These are best left for a trial judge to hear the appropriate evidence in order to determine both retroactive and prospective spousal support. Accordingly, I decline to award spousal support on this application.

Accounting of proceeds of former family home

- [110] S.K. asks for an order that J.S. provide an accounting, with all relevant documents, of the proceeds of the sale of the former family home. She alleges that after the former family home was sold in 2016, but prior to their separation, the net proceeds were approximately \$126,000. That is confirmed in banking documents filed with their affidavits.
- [111] S.K. says she is entitled to an equal division of property. However, without documents, she is unable to advance this claim. S.K.'s counsel has asked that these documents be produced and has not received any to date. S.K. relies on Rule 5-1 of the Supreme Court Family Rules and s. 212 of the FLA.
- [112] J.S. managed the funds and S.K. says she does not know where the money is kept and does not have access to it. S.K. also says that some of the proceeds were used to pay off debts that are not family debts, but were incurred by J.S. alone. She also deposes that J.S. diverted some of the proceeds to Indian bank accounts.
- [113] Banking records produced by the parties confirm that \$126,000 was deposited into a joint bank account after the former family home was sold. However, my review of these bank statements reveals that large withdrawals were made to pay down certain credit cards and lines of credit. Without further documentation, it is unclear who held these credit cards and lines of credit. As well, there were large withdrawals made for bank drafts.

- [114] S.K. says that J.S. withdrew this money without her knowledge and she does not know where that money went. J.S. says that after the family debt was paid off, there remained \$40,000 which the parties took with them to India. J.S. says that when S.K. returned to Canada, she took her share of the remaining joint funds. S.K., denies this.
- [115] J.S. says that he has attempted to obtain the relevant statements from the bank without success. The latest request for banking documents made by S.K.'s counsel was in May 2022. Accordingly, I do not accept J.S.'s explanation that he has been unable to obtain these documents. J.S. has had plenty of time to obtain these records. Banking documents are not difficult to obtain when proper requests are made. J.S. has not provided any evidence to show that the bank is unwilling to provide him with the relevant documents.
- [116] Accordingly, I will make an order that J.S. produce relevant documents relating to the proceeds of the sale of the former family home, and I will specifically deal with that below.

Conduct order

- [117] A conduct order will be necessary given that the children need to be reacquainted with their father and there is certainly acrimony between the parties.

Orders

- [118] I will make the following orders.
- [119] On an interim basis, without prejudice, I will first address parenting responsibilities. At this point in time, S.K. will have all of the s. 41 parental responsibilities for the children, M.K. and S.S.A., under s. 40 of the FLA.

[DISCUSSIONS]

- [120] Specifically, S.K., will have the following s. 41 parental responsibilities for the children under s. 40(2) of the FLA, including:
- making day-to-day decisions affecting the children and having day-to-day care, control, and supervision of the children;
 - making decisions respecting where the children will reside;
 - making decisions respecting with whom the children will live and associate;
 - making decisions respecting the children's cultural, linguistic, religious, and spiritual upbringing and heritage, including, if the child is an Aboriginal child, the child's Aboriginal identity;
 - giving, refusing, or withdrawing consent for the child if consent is required;
 - receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;

- requesting and receiving from third parties health, education, or other information respecting the children;
- subject to any applicable provincial legislation,
- i. starting, defending, compromising, or settling any proceedings relating to the child, and
- ii. identifying, advancing, and protecting the child's legal and financial interests; and finally,
- exercising any other responsibilities reasonably necessary to nurture the children's development.

[121] S.K. may apply for a passport, Nexus pass, or any other identification or documentation and any renewals of a passport or Nexus pass for the children without the consent of J.S.

[DISCUSSIONS]

[122] On an interim basis and without prejudice, S.K. may travel with the children, including domestic and international travel, without requiring J.S.'s consent, written or oral.

[DISCUSSIONS]

[123] J.S. will have parenting time with the children on the following weekly schedule:

- Week 1 & 2: J.S. shall have parenting time with the children on Saturday and Sunday for 2 hours from 11:00 AM to 01:00 PM.
- Week 3 & 4: J.S. shall have parenting time with the children on Saturday and Sunday from noon to 05:00 PM.
- Post week 4: J.S. shall have parenting time with the children on Saturday and Sunday from noon to 05:00 PM.
- J.S. shall be responsible for pick-ups and drop-offs.
- S.K. is at liberty to propose a neutral location for pickups and drop-offs if she feels necessary.
- Both children will go for parenting time with J.S.

[DISCUSSIONS]

[124] Pursuant to s. 211 of the FLA, a family justice counsellor will prepare an evaluative views of the child report to assess parenting time. Costs of the s. 211 report are to be paid equally by both parties.

[125] The parties will exchange the name of two proposed assessors and are to agree on one name from their proposed list. If the parties are unable to agree, they may apply for a court order appointing an assessor, and I am not seized of that application.

[126] The assessor will commence their assessment only after J.S. has had three months of parenting time with the children. I think it is important that J.S. be able to have some time to get reacquainted with the children before their views are canvassed.

[127] J.S.'s Guideline income is imputed to be \$25,000 for the years 2017 and 2018 for the purposes of determining retroactive child support.

[128] J.S. will pay to S.K. \$26,936.28 in retroactive child support with \$20,000 payable forthwith, and the remaining payable within 30 days of this order.

[DISCUSSIONS]

[129] J.S. will provide an accounting with all relevant documents of the sale proceeds from the former family home located at #35, 12036 66th Avenue, Surrey, B.C., including documentary proof of:

- (1) where the net sales were deposited;
- (2) how the net proceeds were dispensed of;
- (3) where the proceeds are currently located;
- (4) whether any money was deposited into any Indian bank accounts, whether they are in J.S.'s name or not, and this includes copies of bank statements in Canada and India, credit card and line of credit statements, and any bank drafts.

[130] This must be disclosed within 120 days of this Order.

[DISCUSSIONS]

[131] I make the following conduct orders. The parties will:

- 1) put the best interests of the children before their own interests;
- 2) encourage the children to have good relationship with the other parent and speak to the children about the other parent in a positive, respectful manner;
- 3) make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism; and
- 4) not blame, criticize, or disparage the other parent to the children.

[DISCUSSIONS]

[132] J.S.'s application for a divorce is adjourned generally.

Costs

- [133] The general rule in respect of costs is that the party who is substantially successful is entitled to his or her costs. This general rule accords with the rule that costs follow the event, as expressed in Rule 16-1(7) and Rule 16-1(9) of the Supreme Court Family Rules, B.C. Reg. 169/2009.
- [134] Substantial success for recovery costs is generally seen as being 75% success rate.
- [135] In my view, there has been mixed success by the parties. However, I am of the view that an award would negatively affect the children of the marriage who are primarily in the care of S.K., as well I am mindful that J.S. will have to pay a large amount of outstanding child support. Accordingly, I order that each of the parties will bear their own costs.

[DISCUSSIONS]

- [136] THE COURT: Right, okay. So Madam Clerk, let me just rephrase the wording in respect to the application for divorce. The application for a final divorce order is adjourned generally. Is that sufficient?
- [137] MR M. GOYAL: Yes, adjourned generally, and Madam Justice, we'll comply with the reasons as stated here that this is adjourn -- the divorce order can only be granted after the reasonable -- reasonable support is [indiscernible/remote audio] for the children here.
- [138] THE COURT: Well, I think because my judgment actually says that the court must stay the granting of the divorce until such arrangements are made, I think that is sufficient. I do not think you need me to say anything else.
- [139] MR M. GOYAL: Yes, yes.
- [140] THE COURT: I am not denying it. I am not denying the divorce. I am just saying it must be stayed until those arrangements are made.
- [141] MR M. GOYAL: Yes, thank you, Madam Justice.

[DISCUSSIONS]

- [142] THE COURT: I want to thank both of you for being courteous to one another and also for your very detailed and helpful submissions.
- [143] MR S. BRAR: Thank you, thank you, Madam Justice.
- [144] MR M. GOYAL: Thank you, Madam Justice. Thank you, Madam Justice.
- [145] THE COURT: All right, thank you.
- [146] MR M. GOYAL: Thank you.

"Girn J."

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