

CANADA / JUDGMENT

Jacinto v. Mariano

2020 BCSC 1990

COURT

Supreme Court of British Columbia

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2020 BCSC 1990 Jacinto v. Mariano

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Jacinto v. Mariano,

2020 BCSC 1990

Date: 20201216

Docket: E123249

Registry: Vancouver

Between:

Patrick Dean Jacinto also known as Dalmacio Barcelon also known as Dalmacio Jacinto Barcelon

Claimant

And

Maria Ligaya Catchuela Mariano also known as Maria Ligaya Barcelon also known as Maria
Ligaya Mariano

Respondent

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

Counsel for the Claimant, appearing via teleconference:

J.G. Cuenca

The Respondent, appearing via teleconference:

M.L.C. Mariano

Place and Date of Hearing:

Vancouver, B.C.

November 23, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 16, 2020

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I. Introduction

[1] This is an application by the claimant, Patrick Dean Jacinto, in this matrimonial proceeding for judgment by way of a summary trial pursuant to Rule 11-3 of the Supreme Court Family Rules. Mr. Jacinto seeks with this application to resolve all of the issues still outstanding between him and the respondent, Maria Ligaya Barcelon, arising from their marriage that ended with a divorce granted by this Court in separate proceedings on November 3, 2010, over a decade ago.

[2] In particular he now seeks:

- a) a division of family property and debt;
- b) ten years of occupation rent in respect of the former family home;
- c) lump sum spousal support; and
- d) cancellation of two orders obtained by Ms. Barcelon nearly a decade ago in separate proceedings in the provincial court, being:

- i. an order dated August 8, 2011 granting her sole custody and guardianship of the parties' three children (two of whom are now adults); and
 - ii. an order dated February 2, 2012 requiring Mr. Jacinto to pay Ms. Barcelon \$728 per month in child support, along with the associated arrears, which he has never paid.
- [3] Ms. Barcelon did not formally respond to the application, although she appeared at the telephone hearing and I permitted her to make oral submissions in response to it.
- [4] This application is unusually complicated for a number of reasons. Among other things, Mr. Jacinto commenced this action on October 26, 2012 but he has taken virtually no steps to advance it since the parties convened two judicial case conferences early in 2015, apparently because he suffered a stroke and had been living in a group home for persons with brain injuries until recently. Since February 2019, he has been living on his own on government assistance as a person with disabilities. Second, this action appears to be one of at least three actions (two in this court and one in the provincial court) involving the breakdown of the relationship between these parties over a decade ago. Third, the parties were formally divorced on November 3, 2010 by order made in the other action commenced in this court, but Ms. Barcelon appears to have obtained that order by means of false pretenses.
- [5] For the reasons that follow, I have concluded that this is an appropriate case for summary disposition and that the application should be allowed in part.

II. The Facts

- [6] The parties were married on October 23, 1989 in Vancouver. Mr. Jacinto is now 61 and Ms. Barcelon 55. They have three children, the youngest, a son named Chad, is now twelve. The two older daughters are no longer children of the marriage, having already reached the age of majority. Nevertheless, all three children continue to reside with Ms. Barcelon in the former family home at 11437 Kingcome Avenue in Richmond, British Columbia.
- [7] The parties purchased that property in February 1996, while they were still married. They paid \$225,000 and financed the purchase price with a mortgage. They took title together as tenants in common. The property continues to be held in that manner today. In July 2010, the parties took out a line of credit secured against the property and had drawn approximately \$115,000 on it by the time of their divorce. In December 2015, both parties executed a second mortgage in the amount of \$112,000 but Mr. Jacinto says that this debt was incurred solely for the benefit of Ms. Barcelon.
- [8] Mr. Jacinto moved out of the family home when the parties separated. He has deposed that the separation occurred in 2010. Ms. Barcelon has alleged in the other proceedings that the separation occurred in 2008, but she has adduced no evidence before me to substantiate that fact.

- [9] What is clear is that on September 9, 2009, Ms. Barcelon commenced an action in this court under Action No. E092784 (the "Divorce Action") seeking sole custody of the children and a divorce. Just over a year later, she obtained a divorce order from this court on November 3, 2010 relying on three affidavits sworn June 30, 2010, as follows:
- a) an affidavit of a process server proving service of the writ and statement of claim on Mr. Jacinto on April 19, 2010, while he was at the Vancouver International Airport on his way to the Philippines via Hong Kong;
 - b) an affidavit setting out the grounds for the divorce and stating, among other things, that she and Mr. Jacinto are "both agreed that the three children [will] live with me and I will have sole custody and he will have very liberal access" and that Mr. Jacinto "provides substantial support of \$1,000 a month for the children"; and
 - c) a child support affidavit asserting her guideline income to be \$6,000 and Mr. Jacinto's to be \$40,000, but that there was no agreement or order dealing with support of the children.
- [10] Mr. Jacinto does not recall being served with any of those materials. He alleges that Ms. Barcelon's affidavits contained a number of falsehoods. First, he says that her income was not \$6,000 in 2010 as she reported it to be, but rather \$7,619 (in 2009) and \$32,240 in (2010), according to her tax returns. His income was not \$40,000 but \$9,952 (2009) and \$599 (2010), according to his tax returns. Second, Mr. Jacinto denies that there was ever any agreement between the parties with respect to the custody or care of the children or that he was paying \$1,000 toward their support at that or any other time. Ms. Barcelon did not seek a division of family property in that action.
- [11] In addition, Ms. Barcelon appears to have commenced a second proceeding, this one in the provincial court in the Richmond Registry (File No. F6022). On June 30, 2011, she obtained an order in that action granting her sole custody and guardianship of the children, apparently without notice to Mr. Jacinto. He has no memory of being served with the application materials that led to that order. The order expressly dispenses with the need for him to be served. On February 2, 2012, Ms. Barcelon obtained a second order in that proceeding, this one requiring that Mr. Jacinto pay \$728 per month in child support, based on an imputed income of \$48,000. He has never paid child support pursuant to that order or otherwise.
- [12] Mr. Jacinto could not have been earning \$48,000 in 2011 or 2012 because in November 2011 he suffered a stroke that left him partially incapacitated. He has been unemployed since then. The effects of the stroke were anticipated to be permanent, according to contemporaneous medical records. Those effects were said to have included "poor memory, poor organizational skills, poor attention/concentration" as well as "poor executive planning."

- [13] Mr. Jacinto had another episode that led him to be hospitalised in December 2013. In April 2014 he moved into a care home in Langley known as "Connect Communities" for persons suffering from brain injuries. He continued to reside there until his discharge in April 2019. Since then, he has been living off social assistance he receives as a person with disabilities.
- [14] Mr. Jacinto commenced this action on October 26, 2012. Ms. Barcelon was served with the claim on February 5, 2013 and eventually filed a response, with the assistance of counsel, on April 14, 2014. The parties attended two judicial case conferences in early 2015 but were unable to reach a settlement. No substantive steps have been taken in the action since then.

III. Discussion

A. Suitability for Summary Trial

- [15] Mr. Jacinto seeks to have the action resolved in its entirety by way of summary application. Ms. Barcelon has not opposed the application. During the hearing, she indicated her willingness to have the matter proceed as scheduled. Nevertheless, the Court retains the discretion to refuse to grant final judgment at this stage if it appears that the matter should instead proceed to a full trial.
- [16] The test to be applied in determining whether an action lends itself to summary disposition in this way was set out by the Court of Appeal in *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.). There, the question was said to turn on the following two factors:
- (a) Whether the requisite factual findings can be made on the evidence presently before the court; and
 - (b) Whether it would be unjust, for some other reason, to decide the case by way of a summary application.
- [17] D. Smith J.A., writing for the Court, *Gichuru v. Pallai*, 2013 BCCA 60, summarised the applicable test, as follows, at paras. 30-31:
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: .
- [18] For reasons that I will set out below in my discussion of the substantive issues themselves, I have concluded that I am indeed able to make sufficient findings of fact on the record before me to dispose of the entire action at this stage. It is doubtful that the evidentiary record in this case would improve sufficiently to justify the additional expense and delay that a full trial would entail.
- [19] I have also concluded that it would not be unjust to render final judgment at this stage, considering the parties' jointly-stated preference for a final disposition of the action now in light of the need for efficiency and proportionality in judicial decision-making: *Hryniak v. Mauldin*, 2014 SCC 7.
- [20] A decision is also urgently needed to address parenting issues for the parties' twelve-year-old son, which is another factor militating in favour of granting judgment now.

B. The Provincial Court Orders

- [21] Ms. Barcelon does not object to an order terminating the two provincial court orders respecting the children. I agree that the orders were obtained without proper notice to Mr. Jacinto, founded on incorrect information and in any event do not reflect current realities. It is in Chad's best interest that provision be made for him to have at least some contact with his father.
- [22] Mr. Jacinto relies in this regard on ss. 37, 38, 47, 60, 152, 174, 194(4) and 215 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Those provisions state as follows:

Best interests of child

37 (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.

Assessing family violence

38 For the purposes of section 37 (2) (g) and (h) [best interests of child], a court must consider all of the following:

- (a) the nature and seriousness of the family violence;
- (b) how recently the family violence occurred;
- (c) the frequency of the family violence;
- (d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;
- (e) whether the family violence was directed toward the child;
- (f) whether the child was exposed to family violence that was not directed toward the child;

- (g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;
- (h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;
- (i) any other relevant matter.

Changing, suspending or terminating orders respecting parenting arrangements

47 On application, a court may change, suspend or terminate an order respecting parenting arrangements if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

Changing, suspending or terminating orders respecting contact

60 On application, a court may change, suspend or terminate an order respecting contact with a child if satisfied that, since the making of the order, there has been a change in the needs or circumstances of the child, including because of a change in the circumstances of another person.

Changing, suspending or terminating orders respecting child support

152 (1) On application, a court may change, suspend or terminate an order respecting child support, and may do so prospectively or retroactively.

- (2) Before making an order under subsection (1), the court must be satisfied that at least one of the following exists, and take it into consideration:
 - (a) a change in circumstances, as provided for in the child support guidelines, has occurred since the order respecting child support was made;
 - (b) evidence of a substantial nature that was not available during the previous hearing has become available;
 - (c) evidence of a lack of financial disclosure by a party was discovered after the last order was made.

Reducing or cancelling arrears

174 (1) On application, a court may reduce or cancel arrears owing under an agreement or order respecting child support or spousal support if satisfied that it would be grossly unfair not to reduce or cancel the arrears.

- (2) For the purposes of this section, the court may consider

- (a) the efforts of the person responsible for paying support to comply with the agreement or order respecting support,
 - (b) the reasons why the person responsible for paying support cannot pay the arrears owing, and
 - (c) any circumstances that the court considers relevant.
- (3) If a court reduces arrears under this section, the court may order that interest does not accrue on the reduced arrears if satisfied that it would be grossly unfair not to make such an order.
- (4) If a court cancels arrears under this section, the court may cancel interest that has accrued, under section 11.1 of the Family Maintenance Enforcement Act, on the cancelled arrears if satisfied that it would be grossly unfair not to cancel the accrued interest.

Overlapping court jurisdiction

194 (4) Despite subsection (2), the Supreme Court may change, suspend or terminate, under section 215 [changing, suspending or terminating orders generally], an order of the Provincial Court if

- (a) the Supreme Court is making an order that affects an order of the Provincial Court, and
- (b) the parties would have to go back to the Provincial Court to have the Provincial Court's order changed, suspended or terminated as a result.

Changing, suspending or terminating orders generally

215 (1) Subject to this Act, a court on application by a party may change, suspend or terminate an order, if there has been a change in circumstances since the order was made.

- (2) A court may not change, suspend or terminate an order made under Part 5 [Property Division] or 6 [Pension Division] except as provided under those Parts.
- (3) The Provincial Court on application by a party may change, suspend or terminate an order, including an interim order, made by a decision maker who is
 - (a) appointed under the Provincial Court Act, and
 - (b) in a class of decision makers prescribed under this Act.
- (4) For certainty, the Provincial Court may make an order under subsection (3) despite the following provisions:
 - (a) subsection (1);
 - (b) section 47 [changing, suspending or terminating orders respecting parenting arrangements];

- (c) section 60 [changing, suspending or terminating orders respecting contact];
 - (d) section 152 (2) [changing, suspending or terminating orders respecting child support];
 - (e) section 167 (2) [changing, suspending or terminating orders respecting spousal support];
 - (f) section 216 (3) and (4) [court may make interim orders].
- [23] I am also satisfied that it is appropriate to order the arrears of child support that have accumulated pursuant to the February 2, 2012 provincial court order cancelled, given that it would be grossly unfair not to do so in light of the circumstances in which the orders were made and Mr. Jacinto's disability that has arisen since then: *Lewis v. Lewis*, [1999] B.C.J. No. 2537; *P.L. v. J.D.L.*, 2013 BCSC 1492; *Jacobs v. Jacobs*, 2015 BCSC 94.
- [24] In their place, I am ordering that the parties will be joint guardians of Chad, with Ms. Barcelon having primary parenting responsibility and ultimate decision making authority. Mr. Jacinto is to have parenting time with Chad for up to one hour per week by telephone, and Ms. Barcelon is to facilitate such contact by providing Mr. Jacinto with a telephone number at which he can speak to Chad for that purpose.

C. Division of Property and Debt

- [25] The property and debt issues that Mr. Jacinto has raised fall to be determined pursuant to the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] by virtue of s. 252 of the FLA, which states as follows:

252 (1) This section applies despite the repeal of the former Act and the enactment of Part 5 [Property Division] of this Act.

(2) Unless the spouses agree otherwise,

(b) a proceeding respecting property division started under the former Act

must be started or continued, as applicable, under the former Act as if the former Act had not been repealed.

- [26] The parties' divorce in November 2010 was a triggering event under s. 56 of the FRA, which conferred an undivided half interest on each of them in all "family assets": s. 56(2).

- [27] The apportionment of family assets is governed by ss. 65 and 66, which state in relevant part as follows:

Judicial reapportionment on basis of fairness

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

(a) the duration of the marriage,

- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

Determination of ownership, possession or division

66 (1) In proceedings under this Part or Part 6 or on application, the Supreme Court may determine any matter respecting the ownership, right of possession or division of property under this Part, including the vesting of property under section 65, or under Part 6 and may make orders that are necessary, reasonable or ancillary to give effect to the determination.

- (2) Without limiting subsection (1), the court may do one or more of the following in an order under this section:
 - (a) declare the ownership of or right of possession to property;
 - (b) order that, on a division of property, title to a specified property granted to a spouse be transferred to, or held in trust for, or vested in the spouse either absolutely, for life or for a term of years;
 - (c) order a spouse to pay compensation to the other spouse if property has been disposed of, or for the purpose of adjusting the division;
 - (d) order partition or sale of property and payment to be made out of the proceeds of sale to one or both spouses in specified proportions or amounts;
 - (e) order that property forming all or a part of the share of either or both spouses be transferred to, or in trust for, or vested in a child;
 - (f) order that a spouse give security for the performance of an obligation imposed by order under this section, including a charge on property and may order that the spouse waive or release in writing any right, benefit or protection given by section 23 of the Chattel Mortgage Act, R.S.B.C. 1979, c. 48, or section 19 of the Sale of Goods on Condition Act, R.S.B.C. 1979, c. 373;
 - (g) if property is owned by spouses as joint tenants, sever the joint tenancy.

- [28] In *Janis v. Janis*, 2016 BCCA 364, Garson J.A., writing for the Court, summarised the propositions to be taken from the authorities discussing the application of those provisions, as follows, at paras. 54-55:
- [54] In summary, the foregoing authorities support the following propositions. When considering reapportionment under FRA s. 65, the presumptive valuation date is the date of the triggering event. When considering a compensation order under s. 66, the presumptive valuation date is the date of trial. However, the court retains the discretion to determine a different valuation date for the purpose of achieving fairness between the parties. Setting a different valuation date may be appropriate where there has been an increase or decrease in the value of a family asset between the triggering date and the date of trial. The conduct of one party as it relates to an increase or decrease in value may be a relevant consideration.
- [55] I emphasize, however, that the ultimate goal is achieving fairness. Lotzkar [*Lotzkar v. Lotzkar*, 2003 BCCA 581] indicates that a mechanical application of any of these principles is not desirable and may be antithetical to achieving a fair result.
- [29] Under the FRA, the court may reapportion family assets in order to achieve what it considers to be a fair outcome. It is not necessary to show that an equal division would be "significantly unfair" before reapportioning, as under the FLA.
- [30] The materials before me disclose only two assets and perhaps only one: the former family home and a life insurance policy with Canada Life that Mr. Jacinto remembers purchasing for \$50,000. He is unsure if the policy is still extant.
- [31] The current assessed value of the former family home is \$950,400. The best evidence available as its value at the time of the party's divorce is to be found in Ms. Barcelon's financial statement made February 15, 2013, in which she listed the former family home as having a value of \$669,000. Her financial statement made no mention of the line of credit. In his financial statement made November 13, 2014, Mr. Jacinto valued the former family home at \$619,000 and listed a mortgage charging it in the amount of \$159,150. Banking records suggest, however, that the outstanding balance owing on the line of credit has been approximately \$114,000 since January 2011.
- [32] Applying the principles set out in *Janis*, I have concluded that it is appropriate to grant Mr. Jacinto a compensation order reflecting the net equity that the parties had in property at the time of the divorce in 2010, as reflected in the average valuation provided by the parties in 2013 and 2014 (\$644,000) less the \$114,000 owing on the line of credit (\$644,000 - \$114,000) = \$530,000. Mr. Jacinto's half share of that amount is \$265,000.
- [33] I am not persuaded that it would be appropriate, despite the presumptions referred to in *Janis*, to use the value of the property at the time of trial for this purpose, given that it is Ms. Barcelon who has maintained the property and paid all of the expenses in relation to both the home itself and the parties' three children without any assistance from Mr. Jacinto in the decade that has passed since the parties' separation. In those circumstances, it is she who

should receive the benefit of its increase in value over the years. Moreover, I am satisfied that there should be an unequal division in her favour to account for those factors.

- [34] On the other hand, there are other factors that militate in favour of Mr. Jacinto. This was a 20-year marriage. Mr. Jacinto has developed a disability since the parties separated, although I am unable to find that it is attributable to the marriage or the circumstances of its breakdown. For those reasons, I have concluded that Mr. Jacinto is entitled to spousal support on the basis of his need and in light of the apparent disparity between the parties' respective incomes for the foreseeable future.
- [35] Given that an award of spousal support is to be made, I have concluded that the parties' respective interests should be reapportioned to yield a net compensation order payable by Ms. Barcelon in favour of Mr. Jacinto of \$175,000. Upon receipt of that amount, Mr. Jacinto is to convey his half interest in the property to Ms. Barcelon.
- [36] I agree with Mr. Jacinto that the second mortgage should be treated as a debt of Ms. Barcelon alone, since the funds have been used exclusively for her benefit. I have therefore not considered it in the foregoing analysis.
- [37] With respect to the insurance policy, I agree with Mr. Jacinto that the appropriate order, if the policy is still extant, is that the children be made the sole beneficiaries.

D. Occupation Rent

- [38] Mr. Jacinto seeks occupation rent for the decade that Ms. Barcelon has had exclusive possession of the former family home.
- [39] In *Piderman v. Piderman*, 2015 BCSC 475, McEwan J. conveniently summarised the considerations to be weighed in assessing a claim for occupation rent, including the consequences of advancing such a claim for the first time only at trial, as follows, at paras. 50-53:
- [50] With those adjustments, the respondent's claim for occupation rent fails. While he was notionally kept out of his half of the enjoyment of the house, he made no suggestion of any such claim while the claimant occupied the house. In the aftermath of a marriage breakdown the accommodation of one or the other spouse in the family home, particularly while it remains a "home" to children (even as adults) is often a sensible way to mitigate the effects of the family break-up.
- [51] In *Ross v. Ross*, 2013 BCSC 1716, Verhoeven J. cited *Casey v. Casey*, 2013 SKCA 58, on the principles pertinent to occupations rent:
- [47] I observe that in other Canadian jurisdictions, the law does not focus upon the question of ouster, or of claims for expenses by the spouse remaining in occupation. The principles applicable in Saskatchewan were recently summarized in *Casey v. Casey*, 2013 SKCA 58, at para. 48:

From the jurisprudence the following principles may be drawn regarding the awarding of occupational rent on a matrimonial home:

1. Occupational rent is a remedy which may be utilized to obtain justice and equity in appropriate circumstances.
2. The remedy is exceptional and should be used cautiously.
3. The following factors, where relevant, are appropriately considered:
 - The conduct of both spouses, including failure to pay support, the circumstances under which the non-occupying spouse left the home, and if and when the non-occupying spouse moved for a sale of the home (Peltier at paras. 16-17; Wilgosh at paras. 99 and 109; Good at para. 90).
 - Where the children are residing and who is supporting them (Good at para. 90; Peltier at paras. 16-17; Wilgosh at para. 108).
 - If and when a demand for occupational rent was made (Wilgosh at paras. 100 and 106, Good at para. 90, and Peltier at para. 16).
 - Financial difficulty experienced by the non-occupying spouse caused by being deprived of the equity in the home (Peltier at paras. 16-17; Wilgosh at para. 106).
 - Who is paying for the expenses associated with the home. This includes who is paying the mortgage and other upkeep expenses (maintenance, insurance, taxes, etc.). If there is no mortgage, occupational rent may be needed to equalize accommodation expenses (Good at para. 90; Peltier at paras. 16-17; Wilgosh at paras. 105-106 and 108).
 - Whether the occupying spouse has increased or decreased the selling value of the property (Peltier at paras. 16-17).
 - Any other competing claims in the litigation that may offset an award of occupational rent (Wilgosh at para. 108; Good at para. 92).
4. The remedy is a discretionary one requiring the balancing of the relevant factors to determine whether occupational rent is reasonable in the totality of the circumstances of the case.

[52] At para. 50 Verhoeven J. made the following observation:

[50] On the approach used by other jurisdictions, as I interpret it, the overriding question is whether occupational rent, as a discretionary remedy to be used cautiously, should be utilized in order to achieve justice and equity in all of the circumstances of the case. This approach appropriately places little if any emphasis on the question of fault or blame for the decision of one spouse or the other to leave the matrimonial residence.

[53] I think this is the proper way to approach occupation rent, that is, as a tool to achieve fairness. Were I to take a stricter approach, treating occupation rent as something akin to an entitlement, the outcome would, I think trigger other issues about fairness. I would think

that, in general, claims for occupation rent ought not to be hoarded and advanced for the first time at trial. Failure to give notice of such a claim is apt to be interpreted, in the complex emotional aftermath of a marriage, as acquiescence, or a form of spousal or child support. I find that to be the case here. I dismiss the claim for occupation rent.

[Emphasis added.]

[40] Having regard to the authorities referred to by McEwan J. in *Pederman*, I am not persuaded that an order for occupation rent should be made in the circumstances of this case. Mr. Jacinto did not seek occupation rent in his pleaded claim. Indeed, he never sought it before bringing this application. He has paid no child support while Ms. Barcelon has raised the parties' three children on her own since the separation. She has also maintained the property and paid the joint mortgage and all of the associated expenses herself.

[41] The claim for occupation rent is therefore refused.

E. Spousal Support

[42] Mr. Jacinto seeks an order for retroactive and prospective spousal support, payable as a lump sum.

[43] Pursuant to s. 15.2(4) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA], the Court must take into consideration the condition, means, needs and other circumstances of each spouse, including:

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

[44] Section 15.2(6) provides that the objectives of a spousal support order are to:

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

[45] Entitlement to spousal support is also governed by ss. 160 and 161 of the FLA, which state as follows:

Duty to provide support for entitled spouse

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[46] In *Paisley v. Paisley*, 2009 BCSC 879, Ballance J. conveniently summarised the principles that can be taken from the jurisprudence considering those provisions, as follows, at paras. 86-87:

[86] The Supreme Court of Canada has articulated the conceptual models for determining entitlement to spousal support in the leading decisions of *Moge v. Moge*, 1992 CanLII 25 (SCC), [1992] 3 S.C.R. 813, 99 D.L.R. (4th) 456 and *Bracklow v. Bracklow*, 1999 CanLII 715 (SCC), [1999] 1 S.C.R. 420, 169 D.L.R. (4th) 577. In *Moge*, the Court introduced the notion of entitlement to spousal support based on compensatory principles recognizing that the purpose of spousal support is to relieve the economic hardship that results from a marriage or its breakdown. In broad terms, compensatory support is meant to recognize that when a marriage is over, the spouses are entitled to be compensated for contributions to it and for losses incurred on its breakdown. The underlying premise is that career and work opportunities lost to the spouse who remains at home to raise children ought to be

shouldered by both spouses. In *Bracklow*, the Court enlarged the basis for claims of compensatory support. It also expanded the conceptual basis of support to encompass non-compensatory or needs based, and contractual principles. The three conceptual bases for support are not mutually exclusive.

- [87] It is settled that financial need alone of one spouse may be enough to establish entitlement to support: *Chutter v. Chutter*, 2008 BCCA 507; *Kerr v. Baranow*, 2009 BCCA 111 (CanLII), [2009] B.C.J. No 474. However, it does not inevitably follow that the quantum or duration of spousal support must fully address those needs: *Bracklow*; *T.N.P. v. R.P.*, 2004 BCSC 1627. In *Bracklow*, the Court confirmed that all of the factors and objectives of spousal support, not merely the means and needs of the spouses, must be considered in assessing quantum. In evaluating need, if the financial means are available, then the appropriate standard of living to look at is a reasonable standard, bearing in mind the standard of living enjoyed during the marriage. The basis of entitlement for spousal support, being contractual, compensatory or needs based, or a combination, will influence the quantum and duration of a support award.
- [47] Any award of spousal support must be crafted in light of the division of family assets that I have ordered. Justice Ballance summarised the law in that regard, as follows, at paras. 91-92:
- [91] The nuanced relationship between reappportionment and spousal support was considered in the majority judgment in *Toth v. Toth* (1995), 1995 CanLII 1917 (BC CA), 13 B.C.L.R. (3d) 1 at para. 59:

In discussing the relationship between maintenance and the division of property under Part 3 of the FRA, it useful to note that ss. [65(1)(e) and (f)] of the FRA, relating to reappportionment of property, incorporate concepts which are also found in the maintenance provisions of both the Divorce Act, 1985 and the FRA. Thus, property division and maintenance are closely intertwined. One advantage of this legislative tie is that [s. 65] may be utilized in the division of property to reflect the relative abilities of the parties to become or remain economically independent and self-sufficient ([s. 65(1)(e)]), and the respective capacities and liabilities of the parties ([s. 65(1)(f)]). These concepts are also relevant to determinations of spousal maintenance. The potential pitfall presented by this legislative link between property and maintenance, however, is the danger of double recovery where, for example, property is reappportioned under [s. 65] and then further reappportioned by an award of lump sum maintenance.

- [92] In *Tedham*, [*Tedham v. Tedham*, 2005 BCCA 502] the Court of Appeal identified, at para. 64, a further potential pitfall arising from the interplay between of the two sections:

the court could mistakenly conclude that by reappportioning property under s. 65 of the FRA, it had necessarily addressed the full extent of the economically disadvantaged spouse's claim for support under s. 15.2 of the Act, (or its equivalent under the FRA). The fact that there has been a reappportionment does not mean that there should not be an award of spousal support. That decision will turn on the extent to which the reappportionment has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage or its breakdown, and any continuing need the spouse may have for support arising from other factors and objectives

set forth in s. 15.2 (and the equivalent provision of the FRA).

- [93] This analysis must also hold true where the spouse who is claiming support has been reapportioned less than an equal division of the family assets. The apportionment of family assets to Ms. Paisley does not extinguish or otherwise satisfy her entitlement to spousal support where, as here, there is a significant disparity in the parties' respective incomes such that Mr. Paisley has the resources to pay support, and Ms. Paisley has a current extreme financial need to receive it. Even though Ms. Paisley's knee injury and likely temporary severe decline in income, is not causally related to the marriage, they are proper considerations in assessing her financial need: *Taylor v. Taylor* (1998), 1998 CanLII 6096 (BC CA), 38 R.F.L. (4th) 408 (B.C.C.A.), supplementary judgment, [1998] B.C.J. No. 2345 (Q.L.); *Newton v. Newton*, 2003 BCSC 333.
- [48] Similar principles echoed by Dardi, J. in *S.C. v. K.M.*, 2011 BCSC 1358:
- [119] In *Chutter v. Chutter*, 2008 BCCA 507, Rowles J.A. observed as follows:
- [78] Tedham noted that while Toth cautioned against the danger of double recovery through both property division (specifically reapportionment) and spousal support, there is an equally real danger that a spouse will be inadequately compensated from property division alone (paras. 63-64, 70). In *Tedham*, the Court held that the wife was entitled to indefinite spousal support as well as reapportionment of the family assets in her favour.
- [120] In *Chutter*, the Court considered whether the wife was entitled to support under the non-compensatory model of support. The wife had medical problems that prevented her from working more than a minimal amount. The Court found that it was not realistic to expect her to work more, whereas her husband earned a substantial income and would be able to live without depleting any of his capital assets. In addition to reapportionment the wife was awarded non-compensatory support: *Holland* at para. 143.
- [121] The rationale articulated in *Chutter* also applies in circumstances where the spouse claiming spousal support, while receiving some reapportionment on account of need, has been reapportioned less than an equal share of family assets: *Zavari v. Zavari*, 2008 BCSC 317.
- [49] As I indicated above, there is no basis in the evidence to justify the conclusion that Mr. Jacinto has forgone a career opportunity or suffered any economic loss or hardship as a result of the marriage or the role that he took in it. Both parties appear to have been working during marriage and earning very modest incomes. Mr. Jacinto's disability arose later and was, it appears, unrelated to the marriage or its breakdown.
- [50] But I have concluded that Mr. Jacinto, given his disability, has made out a viable claim to non-compensatory spousal support based on his current level of need. He is living on social assistance. His condition appears to be permanent. It is unlikely that he will ever be capable of earning any more than the \$10,800 he is currently receiving by way of social assistance.

- [51] Ms. Barcelon has had and will continue to have the benefit of the former family home, although she has also borne the cost of maintaining it and raising the parties' three children alone. This was a 20-year marriage. I have virtually no evidence before me as to the parties' lifestyle during the marriage, other than that they were able to purchase the family home during that time. There is a disparity in the parties' incomes today, but unlike in many of the cases cited above, neither party appears to have sufficient resources at their disposal to be able to pay support without significantly depleting their limited capital asset base.
- [52] It is also significant that this application has been brought a decade after the marriage ended. In the meantime, Ms. Barcelon has raised their three children alone. She continues to be responsible for Chad and I am told that the two older daughters still remain in the home with her as well. She is now 55 years old and no longer has decades of wage-earning years ahead of her. While I have some evidence of her earnings in 2013, I have nothing more recent than that and what information I do have about her earnings before that suggests that her income has fluctuated, and has generally been considerably lower than that.
- [53] Mr. Jacinto seeks spousal support payable as a lump sum. His counsel has prepared a DivorceMate calculation suggesting that an award of between \$158,149 and \$206,281 would be appropriate, based on the parties' circumstances as he presents them.
- [54] The factors that have been held to justify a lump sum award of spousal support were set out conveniently by Dickson J.A., writing for the Court in *Parton v. Parton*, 2018 BCCA 273, where she stated, as follows, at paras. 47-48:
- [47] In some cases, a lump sum spousal support award is preferable to an order for periodic payments. When deciding whether to make such an award, the court should weigh the advantages and disadvantages of a spousal support order in lump sum form compared to those of an order made in the more common periodic payment form. In *Davis v. Crawford*, 2011 ONCA 294, the Ontario Court of Appeal discussed the relevant factors for consideration and, in doing so, emphasized the need to distinguish the purpose of a lump sum spousal support award from the effect of such an order. As the Court noted, any lump sum spousal support order will, in effect, involve the transfer of property from one spouse to another, although the redistribution of assets is not the purpose of spousal support:
- [60] It is well accepted - and undisputed - that a lump sum award should not be made in the guise of support for the purpose of redistributing assets: *Mannarino; Willemze-Davidson v. Davidson* (1997), 1997 CanLII 1440 (ON CA), 98 O.A.C. 335 (C.A.), at para. 32. Moreover, the governing legislation does not recognize redistribution of assets as one of the purposes of a spousal support award.
- [61] That said, a lump sum order can be made to "relieve [against] financial hardship, if this has not been done by orders under Parts I (Family Property) and II (Matrimonial Home)": *Family Law Act*, s. 33(8)(d).

- [62] In any event, the purpose of an award must always be distinguished from its effect. Any lump sum award that is made will have the effect of transferring assets from one spouse to the other. The real question in any particular case is the underlying purpose of the order: Willemze-Davidson at para. 32.
- [63] Similarly, it is well accepted that an important consideration in determining whether to make a lump sum spousal support award is whether the payor has the ability to make a lump sum payment without undermining the payor's future self-sufficiency.
- ...
- [66] Most importantly, a court considering an award of lump sum spousal support must weigh the perceived advantages of making a lump sum award in the particular case against any presenting disadvantages of making such an order.
- [67] The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example, short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.
- [68] Similarly, the disadvantages of such an award can include the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.
- [69] In the end, it is for the presiding judge to consider the factors relevant to making a spousal support award on the facts of the particular case and to exercise his or her discretion in determining whether a lump sum award is appropriate and the appropriate quantum of such an award.
- [48] The factors discussed in Davis generally apply in this province when lump sum spousal support is considered. In *Robinson v. Robinson*, 2011 BCSC 1489, for example, after quoting extensively from Davis, Justice Watchuk awarded \$330,000 in lump sum spousal support. In explaining her reasoning, Justice Watchuk noted that a lump sum award is appropriate in circumstances where the payor spouse has insufficient income to pay spousal support on an ongoing basis, but has capital assets with which to make a lump sum payment. She also noted that lump sum spousal support may contribute to self-sufficiency and assist the recipient spouse to achieve an appropriate standard of living. This Court upheld her decision in reasons indexed as 2012 BCCA 497.

[Emphasis added by Dickson J.A.]

- [55] I have concluded that a lump sum award is appropriate here because the history of this and related litigation suggests that periodic payments are unlikely to be made, even if ordered. Ms. Barcelon did not respond to this application. She appears to have submitted false affidavits to obtain earlier orders in related litigation. I agree with Mr. Jacinto that the parties require finality and that a lump sum award is the best means to achieve it.
- [56] I am not persuaded that the calculation provided by Mr. Jacinto's counsel reflects the appropriate amount for such an award, however. First, it calls for indefinite support without taking into account the fact that the award is being made ten years after the parties' separation. Mr. Jacinto stated age at separation (51) is not his age today (61). The calculation also reflects that Ms. Barcelon is currently supporting only one child of the marriage, without accounting for the fact that for many years until recently she supported all three. The effect of such an order would be to include a substantial retroactive element. I am not persuaded that a retroactive support award is appropriate in this case.
- [57] It has been held that the test to be applied in determining whether retroactive spousal support should be ordered is similar to that for retroactive child support, as set out in *D.B.S. v. S.R.G.*, 2006 SCC 37 (see *Reis v. Bucholtz*, 2010 BCCA 115 and *McKenzie v. Perestrelo*, 2014 BCCA 161).
- [58] In *Kerr v. Baranow*, 2011 SCC 10, Cromwell J., writing for the Court, applied the principles from *D.B.S.* in determining whether a retroactive award of spousal support should be made, stating as follows, at paras. 207-208:
- [207] While *D.B.S.* was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse. However, in spousal support cases, these factors must be considered and weighed in light of the different legal principles and objectives that underpin spousal as compared with child support. I will mention some of those differences briefly, although certainly not exhaustively.
- [208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the [DA], (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of

diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see D.B.S., at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support

[Citations omitted, emphasis added.]

[59] In this case, I have concluded that Mr. Jacinto's delay in bringing his claim for spousal support precludes a retroactive order. Moreover, because the effect of my order will be to require Ms. Barcelon to deplete her only apparent capital asset, the lump sum award must be a relatively modest one.

[60] In all the circumstances, including the division of property that I have ordered, I have concluded that a lump sum spousal support award of \$50,000 is appropriate.

F. Costs

[61] Mr. Jacinto seeks an award of special costs on the basis that this proceeding would have been unnecessary had Ms. Barcelon been truthful in the affidavits she adduced in obtaining the November 3, 2010 divorce order.

[62] He relies on three alleged falsehoods in that regard:

- a) her assertion that there were no property issues to be addressed in the divorce, without mentioning the need to divide the parties' interests in the former family home;
- b) her assertion that the parties had reached a parenting agreement, when they had not; and
- c) her assertions as to the parties' respective incomes, which misstated the amounts as reflected in the parties' contemporaneous tax filings.

[63] I am not persuaded that such an award is appropriate here.

[64] It has been held that pre-litigation conduct should not form the basis of an award of special costs, which should generally be based on the conduct of the parties in the instant litigation: *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177.

- [65] In any event, Ms. Barcelon did not assert that there were no property issues to be resolved in seeking the divorce. She merely failed to advance a property claim. It appears that Mr. Jacinto was duly served with the divorce claim. It was equally open to him to seek a division of assets in that proceeding but he failed to respond to it at all, just as Ms. Barcelon has failed to respond to this application. In that sense, he is equally responsible for the fact that the property issues were never dealt with when they should have been.
- [66] Ms. Barcelon asserted that there was an arrangement in place with respect to the children but I am not persuaded that her statements in that regard, if false, actually increased the cost of this proceeding. While I appreciate that the parties should not have been able to obtain a divorce until the parenting and child support issues were addressed, the effect of her statement was merely to accelerate the divorce and delay resolution of the ancillary claims, which still had to be addressed, whether in that action or this one.
- [67] It is troubling that Ms. Barcelon appears to have misstated the parties' incomes in obtaining the divorce order and the child support order, but given that Mr. Jacinto never paid any child support as ordered, he does not appear to have been prejudiced by those misstatements, except insofar as he has had to apply in this action to have the provincial court orders terminated. In any event, it is not entirely clear that Ms. Barcelon knowingly misstated the parties' incomes, given that they appear to have fluctuated drastically in that period.
- [68] Given the mixed result on this application, I have concluded that no cost award should be made.

IV. Summary and Disposition

- [69] In summary, I am making the following orders:
- a) the orders made August 8, 2011 and February 2, 2012 in the Provincial Court action between the parties, Richmond Registry File No. F6022, are hereby terminated;
 - b) the parties are appointed joint guardians of Chad Jermaine Barcelon, with Ms. Barcelon having primary parenting responsibility and ultimate decision-making authority;
 - c) Mr. Jacinto is to have parenting time with Chad for up to one hour per week by telephone, and Ms. Barcelon is to facilitate such contact by providing Mr. Jacinto with a telephone number at which he can speak to Chad for that purpose;
 - d) Ms. Barcelon is to pay Mr. Jacinto of \$175,000 for his share of the former family home and \$50,000 as lump sum spousal support, upon receipt of which Mr. Jacinto is to convey his half interest in the property to Ms. Barcelon; and
 - e) this action is otherwise dismissed.

"Milman J."

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