

CANADA / JUDGMENT

James v. Chase

2020 BCSC 1181

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1181 James v. Chase

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

James v. Chase,

2020 BCSC 1181

Date: 20200710

Docket: E1750874

Registry: Prince George

Between:

Kellie Jean James

Claimant

And

Michael James Chase

Respondent

Before: The Honourable Mr. Justice Verhoeven

Oral Reasons for Judgment

Counsel for the Claimant:

C.B. Hutchinson

Appearing on his own behalf:

Michael Chase

Place and Date of Trial/Hearing:

Prince George, B.C.

July 7-9, 2020

Place and Date of Judgment:

Prince George, B.C.

July 10, 2020

- [1] THE COURT: These are reasons for judgment in this matter. The reasons are being delivered orally; therefore, if a transcript is prepared at a later date, I reserve the right to edit the transcript as may be necessary for readability and reorganize the content, and also perhaps to add further references to authorities as may be needed, without changing the essential reasoning.
- [2] This is a family law case in which the issues relate to division of property and debt, and spousal support, in the context of a long marriage.

Background

- [3] The parties are the claimant, Kellie James, who I will refer to as Ms. James or the wife, born in 1957, and the respondent, Michael Chase, who I will refer to as Mr. Chase or the husband, born in 1958. Presently she is 63 years of age, he is 61 years of age, and will be 62 next month.
- [4] The parties began cohabiting at a young age in 1975 at Fort St. James where they resided. They were married the following year on September 4, 1976, at Fort St. James. There are no children of the marriage. Early on they had a child together that they adopted out. They moved to Prince George in 1989 where they continue to reside to the present.
- [5] They separated on October 7, 2015, therefore after approximately 40 years of marriage or cohabitation. At the time they were residing in a home located on a semi rural five-acre property on the outskirts of Prince George. After separation Ms. James continued to reside in the former matrimonial home, until the end of December 2015, when she moved out.
- [6] When the parties moved from Fort St. James to Prince George, they brought their belongings and they also brought their home. Their home was relocated from Fort St. James to Prince George.
- [7] The wife now resides and has resided for several years in a basement suite which is rented. It is fairly described as modest. The rent is very low at \$400 a month. The husband continues to reside in the former matrimonial home. The precise location is 10015 Mossman Road, officially in the town of Beaverly, which is on the outskirts of Prince George.

- [8] Currently Ms. James works as a house cleaner. She is self-employed. She has various clients. Mr. Chase works as a maintenance person, handyman and general jack-of-all-trades for a commercial property owner that owns several properties, eight in Prince George, two in Burns Lake, three in Smithers. Mr. Chase attends to them all.
- [9] The only substantial asset the parties owned at separation was the matrimonial home.
- [10] At the time of separation, the parties had some notable financial problems. The first was that the value of the matrimonial home was low in comparison with their debt obligations. There is an appraisal of the property and home in evidence dated August 2018. The appraised value is \$185,000. The parties agree that the value of the property at the date of separation and presently would be the same as the 2018 appraised value.
- [11] The value of the property was depressed by a number of factors. I will refer to the appraisal report. The comments by the appraiser are as follows:

Overall condition - average. The subject is an early '70s bungalow home on basement with a 16-foot by 27-foot addition added in the 1980's. The home has been left to the wilds of felines (up to 40 at one time according to the owner) for many years. There is a severe odour of cat urine that will be very difficult to remove and currently creates a health hazard. At this time, the owner has been able to get rid of the cats but is having a problem getting rid of the odour. It is expected, the flooring (including partial plywood), drywall will have to be replaced.

The home has been poorly maintained and in the midst of renovation of which none of the projects appear to be finished, the siding, flooring, addition, drywall, stairs and outbuildings are all unfinished.

- [12] So the immediately recognizable factors are the age of the property, the condition of the property, the unfinished renovations, and the effect of the cats.
- [13] The second significant financial issue at separation was that the parties were heavily indebted. The home was heavily encumbered, particularly in relation to its value. The secured encumbrances registered against the home added to \$160,388 at the time, consisting of a mortgage and also a secured line of credit. The parties also had unsecured liabilities of \$28,800 and an accumulated Canada Revenue Agency debt of \$35,572, arising out of a former business operated primarily by Mr. Chase, that had been in operation several years prior to separation and had failed.
- [14] In summary, the parties' debts exceeded the value of the property in 2015 and, on the evidence, their combined debts still exceed the value of the property currently.
- [15] The major assets and liabilities are the same now as they were in 2015. Those consist of the former matrimonial home that I mentioned, plus various motorized vehicles and trailers. The liabilities consisted of the TD mortgage and the TD line of credit that I mentioned, as well as the CRA liability arising out of the business, and the unsecured liabilities.

[16] Before moving onto the issues, I should say this is not a case that turns on credibility. There were only two witnesses; that is, the parties themselves. I found them both very honest, straightforward witnesses, doing their best to give truthful evidence within the limits of their recollection. There are some factual disputes between them, but they are relatively minor.

Division of Family Property and Debt

[17] The relevant governing provisions are set out in the Family Law Act, S.B.C. 2011, c. 25, [FLA] ss. 81 through 97. The sections that are particularly relevant are: s. 81 dealing with the fundamental principles; s. 84 dealing with what is family property; s. 86 dealing with what is family debt; s. 87 dealing with the relevant dates for determination of value; and s. 95 dealing with the concept of unequal division of property or family debt. Those sections are as follows:

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

...

84 (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:

- (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
 - (b) after separation,
 - (i) property acquired by at least one spouse if the property is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either, or
 - (ii) a beneficial interest acquired by at least one spouse in property if the beneficial interest is derived from property referred to in paragraph (a) (i) or from a beneficial interest referred to in paragraph (a) (ii), or from the disposition of either.
- (2) Without limiting subsection (1), family property includes the following:
- (a) a share or an interest in a corporation;

- (b) an interest in a partnership, an association, an organization, a business or a venture;
- (c) property owing to a spouse
- (i) as a refund, including an income tax refund, or
- (ii) in return for the provision of a good or service;
- (d) money of a spouse in an account with a financial institution;
- (e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;
- (f) property, other than property to which subsection (3) applies, that a spouse disposes of after the relationship between the spouses began, but over which the spouse retains authority, to be exercised alone or with another person, to require its return or to direct its use or further disposition in any way;
- (g) the amount by which the value of excluded property has increased since the later of the date
- (i) the relationship between the spouses began, or
- (ii) the excluded property was acquired.

(2.1) For the purposes of subsection (2) (g), any increase in value of a beneficial interest in property held in a discretionary trust does not include the value of any property received from the trust.

- (3) Despite subsection (1) of this section and subject to section 85 (1) (e), family property includes that part of trust property contributed by a spouse to a trust in which
 - (a) the spouse is a beneficiary, and has a vested interest in that part of the trust property that is not subject to divestment,
 - (b) the spouse has a power to transfer to himself or herself that part of the trust property, or
 - (c) the spouse has a power to terminate the trust and, on termination, that part of the trust property reverts to the spouse.

...

86 Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,

- (a) the value of family property must be based on its fair market value, and

- (b) the value of family property and family debt must be determined as of the date
- (i) an agreement dividing the family property and family debt is made, or
- (ii) of the hearing before the court respecting the division of property and family debt.

...

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [18] Turning to the matter of the CRA debt. The debt arose, as I mentioned, from the operations of the former business. The business was called Kodiak Truck and Trailer Repair. It operated from approximately 2003 to 2007. The proprietor, in practical terms, was Mr. Chase. He is a journeyman mechanic, as well as having two other journeyman tickets. Ms. James also worked in the business doing general office work such as bookkeeping, telephone work, accounts, invoices, and so on. However, for purposes of the CRA, the business was in some sense "in her name". There were accounting troubles. There was, according to the parties, overstatement of expenses for tax purposes. Personal living expenses were rolled into the business expenses, and were denied by CRA on an audit that occurred sometime during the midst of the operation of the business. Both parties seem to blame, to some extent, the accounting advice that they were receiving at the time.
- [19] The audit resulted in a demand for payment of either \$6,000 or \$10,000. The parties disagree as to the original amount of the liability. It no longer matters.
- [20] Unfortunately, the parties failed to or were unable to deal with the CRA debt, with the result that over the years the amount of the debt has dramatically increased, due to the addition of penalties and interest. Now, many years later, the accumulated debt is in the amount of \$36,712. CRA has registered a charge on the property, or what the parties referred to as a lien.
- [21] The CRA debt arose during the marriage and is clearly a family debt that the parties are both responsible for.
- [22] The reason the business was, as they put it, in Ms. James's name was that Mr. Chase wanted to protect his valuable mechanics' tools from potential execution if the business should fail. As he explained, as a mechanic, his tools are very valuable. They are, quite literally, the tools of his trade.
- [23] The only significant issue is the division of family property and debt.
- [24] Mr. Chase claims for reapportionment of property and, I suppose, debt in his favour. He argues for reapportionment in his favour based upon the conduct of Ms. James, in using the home to house up to 40 cats, which caused substantial damage to the home, resulting in a loss of market value. He contends that market value would be \$100,000 more, but for the cat damage issue. That argument is based upon a comparison between the appraisal that I mentioned before and the B.C. assessed value which, for 2018, was \$313,000. That was land at \$108,000 and buildings at \$205,000.

- [25] I accept that some reduction in value must be due to the issue relating to the cats. However, the extent of that damage or loss of value is not established on the evidence. I do not accept that the comparison between the appraisal and the B.C. Assessment value is any kind of reliable guide to the effect of the cats. The B.C. Assessment notice is not a reliable indicator of actual market value. There is no suggestion that any actual inspection or onsite appraisal was made. The assessment is based, as we know, on some kind of formula having to do with the values of other properties. It seems clear that there was some damage as a result of the cats, but that damage is not the only factor that reduced the market value of the property from what it might be in different circumstances.
- [26] However, and in any event, in my view, there is no basis upon which I can reapportion the assets and liabilities under s. 95 of the FLA, the governing section. To address that, I will need to review the background about the cats in a bit more detail.
- [27] The evidence is that Ms. James has always had an affinity for cats. It appears that both parties enjoyed having pets. I heard that there were up to seven dogs, as well, at one time. At some time, perhaps in the early '90s, Ms. James began working with an animal welfare group called Alley Cat. It folded at some later date, perhaps in the 1990s or during the early 2000s. After that, she carried on the work of that group on her own, through what was called Operation Street Cat. She began devoting a great deal of time, energy, and money to this charitable endeavour. I think she recognizes now that the amount of time, energy and money devoted to it was inordinate and unhealthy.
- [28] The cats initially were housed in a trailer on the property, which I mentioned is a rural or semi-rural property. However, over the course of time, the cats were permitted to transition into the house itself. She recognizes now that that was a mistake, and she accepts responsibility.
- [29] As to the amount of depreciation occurring over many years, I can only speculate. Clearly Ms. James exercised poor judgment in this area and there has been, as I mentioned, some damage to the home which she does not deny. The result was fairly dramatic. The home became uninhabitable. Mr. Chase has presented a book of photographs which vividly show that the home became essentially unfit for human habitation by the time of separation. This issue with the cats grew and became very serious as time went on. Mr. Chase attributes the ending of the relationship to this issue.
- [30] Despite its condition Mr. Chase remained in the home and, subsequent to the departure of Ms. James, did his best to clean it up. There were some expenses incurred, fairly modest, and I think more substantial efforts incurred in order to render the home habitable. That effort certainly has not been completed yet. As noted, in 2018, well after separation, the appraiser observed the effects of the animals, including the odour. Mr. James testifies that the home still reeks of cat urine, now several years later.

- [31] In addition to the damage to the home, I heard there was significant damage to the furnishings and belongings of the parties. Again, however, the amount of reduction in value due to this is not established on the evidence.
- [32] Based on the counterclaim of Mr. Chase, he argues that he should retain the house and the secured debt which, as I mentioned, is the TD mortgage and the TD line of credit. That would require an unequal distribution or division of property and debt. Those two items added to \$160,388 at the date of separation in total. They add to \$150,592 at the values established at trial, the difference between those being the payments that Mr. Chase has made since separation. It may be that, looking at the home and the appraised value, that there is some amount of equity in the property, depending of course upon the actual sale price at this point two years after the appraisal. However, there is no equity if the CRA debt is included, which I mentioned is a charge on the title. Mr. Chase suggests that the CRA debt could be negotiated, if only he were permitted to do so, but he has not had the consent of Ms. James to do that.
- [33] There is, I am satisfied, no way to address his request under s. 95.
- [34] In relation to the liability for the tax debt, I refer to my own decision in *Neely v. Neely*, 2019 BCSC 610 [Neely]. That was a more difficult case, in that the tax debt in that case was contingent and inchoate at the time of trial. Nevertheless, I held that the tax debt was a burden to be shared by both parties. In that decision, I referred to the decision of the B.C. Court of Appeal in *Jaszczewska v. Kostanski*, 2016 BCCA 286, in which the Court of Appeal provided guidance on the interpretation and application of s. 95. I referred to that decision at paras. 62 and 68 of Neely.
- [35] The test of "significant unfairness" imposes a more stringent threshold than mere "unfairness" as in the prior legislation; the legislature intended the general rule of equal division to prevail, unless persuasive reasons can be shown for a different result: *Jaszczewska*. The court stated:
40. . . . Section 95 defines both the test and the factors for a court to consider in exercising its discretion.
41. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.

[36] In looking at s. 95, the husband's argument could perhaps be placed within s. 95(1)(g). Again, that section reads as follows, first under s. 95(1):

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
- (b) divide family property as required under Part 6 [Pension Division].

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following . . .

[37] There are then a list of factors that may be considered by the court. Subsection (g)(i) states:

- (g) the fact that a spouse, other than a spouse acting in good faith,
- (i) substantially reduced the value of family property . . .

[38] One immediate difficulty with the argument Mr. Chase makes is that the statute requires a finding that the substantial reduction in value of family property occur other than through a spouse acting in good faith. Lack of good faith could cover a wide range of behaviours, but in my view is not applicable here. I am unable to make that finding in this case.

[39] I expect that the requirement for a finding that the spouse was not acting in good faith was intended by the legislature to restrict the application of that factor so that it does not become an everyday issue in family law cases, as it otherwise might.

[40] There is no medical evidence, for example, no psychological report or medical report of some other kind, that deals with the reasons for Ms. James' conduct in relation to the cats. I infer from the evidence I heard that it arose as a combination of poor judgment, together with emotional and psychological factors of some sort resulting in poor decision making, but not something that I could consider demonstrates a lack of good faith. Therefore, s. 95(g)(i) cannot be applied.

[41] Nor, in my view, can the residual category under s. 95(2)(i), (any other factor other than the considerations referred to that may lead to significant unfairness), be applied in these circumstances. There is no room for applying the general residual category where the specific factor identified by the legislature is inapplicable.

[42] Mr. Chase argues that the house and property is worth more to him than it would be on the market. It is, of course, his home. He argues, he has the skills to upgrade it, although I note that that has not occurred in the four-plus years since separation. He argues that selling the home would provide little or no benefit to the parties, given the encumbrances and, given the state of the home, it might well achieve a price lower than the appraised value from 2018. I have sympathy for this position; however, there is nothing I can do to bring about that result in the circumstances of this case. In my view, my role is limited to deciding the issues presented by the facts and law. Then the parties and their creditors, no doubt, could

potentially negotiate something that makes sense for them.

- [43] However, Mr. Chase is entitled to certain credits or offsets in the circumstances of this case. First of all, I mentioned earlier a reduction in the mortgage debt since separation. That reduction amounted to \$9,975. Mr. Chase should have compensation for half of that reduction; that would be \$4,987.
- [44] Secondly, Mr. Chase has solely taken on the responsibility for reduction in the unsecured debt at the time of separation, which was \$28,800. Mr. Chase entered into a consumer proposal under which he has paid, by way of instalments, a number of payments. A few instalment payments remain. Those will be paid by the end of this year. The total amount of payments that he has or will pay is \$16,800. Therefore, the share of Ms. James of that is \$8,400.
- [45] The third factor has to do with the cleanup of the property. There was little specific evidence as to the costs of doing so; that is, the expenses. Mr. Chase has had to bear some relatively minor expenses in order to make it habitable. Those were referred to in the appraisal report that I mentioned. More are required. There will also be expenses for removal of the damaged goods of the parties, and a considerable amount of further effort, as well. Doing the best I can on the evidence, I determine that the expense and value of that is \$10,000, of which Ms. James should bear half, which is \$5,000.
- [46] So the total of those three items is \$18,387.
- [47] In the result, there will be the following orders. First, the residence is to be divided equally. There is also to be an equal division of the vehicles and trailers which have a present value on the evidence of \$9,750. There will also be an equal division of the debts which on current values are as follows:
- 1) the TD mortgage amount of \$88,663;
 - 2) the TD line of credit at \$61,929; and
 - 3) the CRA debt currently valued at \$36,712.
- [48] I have given the values for these various items, but the order is simply that the property and debt that I have referred to is to be equally divided between the parties.
- [49] Ms. James agrees that Mr. Chase may keep his mechanics' tools. She makes no claim on them. Fairly recently Ms. James removed the few household possessions that were of value to her, and makes no claim on the remaining household or personal possessions.
- [50] And, as I mentioned, Mr. Chase is solely responsible for the unsecured liability, that he has dealt with by way of the consumer proposal.

Spousal Support

[51] I turn to the issues of spousal support. Ms. James claims ongoing spousal support and retroactive spousal support.

Legal Principles

[52] I referred to the principles involved for the assessment of both retroactive and ongoing spousal support in a decision called *McGrail v. McGrail*, 2016 BCSC 104.

[53] There, I referred to a number of leading authorities on these topics, including the decision of the B.C. Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507, the decision of the Supreme Court of Canada in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, and with respect to retroactive spousal support, *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231, and *Kerr v. Baranow*, [2011] 1 S.C.R. 269. I stated:

[95] The factors and objectives of a spousal support order for set out in ss. 15.2 (4) and 15.2 (6) of the Divorce Act. They read as follows:

15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (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.

[96] All of the factors referred to in s. 15.2(4) and all four of the objectives under s. 15.2(6) must be taken into account. No single objective is paramount. The four objectives set out in s. 15.2(6) can be viewed as an attempt to achieve an equitable sharing of the economic consequences of marriage or marriage breakdown: *Moge v. Moge*, [1992] 3 S.C.R. 813 [*Moge*].

[97] Section 161 of the FLA is substantially the same as s. 15.2(6) of the Divorce Act.

- [98] The relevant principles regarding spousal support were reviewed and summarized by Madam Justice Rowles, for the Court, in *Chutter v. Chutter*, 2008 BCCA 507 at paras. 45 to 61. Madam Justice Rowles at para. 47 states that the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support, citing *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42.
- [99] With respect to orders for retroactive spousal support, in *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231 [D.B.S.] the Supreme Court of Canada states that in determining whether to make a retroactive award of child support, the court should strive for a holistic view of the matter and decide each case on the basis of its particular factual matrix: page 275-276.
- [100] In *Kerr v. Baranow*, [2011] 1 S.C.R. 269 [Kerr] the Supreme Court stated that while D.B.S. was concerned with child as opposed to spousal support, similar considerations 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; Kerr, para. 207. Nonetheless, the same flexibility and regard for a holistic view of the matter on its merits is appropriate in the case of retroactive spousal support: Kerr, para. 212.

Background - Spousal Support

- [54] Ms. James has a Grade 11 education. When the parties began their relationship in 1975 and 1976, she worked for the Royal Bank of Canada at Fort St. James, where she worked for a couple of years. For a number of years after that, beginning in approximately 1978, she worked in an administrative, that is office, capacity for Takla Forest Products, for about 12 years in total, prior to the move to Prince George, doing bookkeeping, accounts, and other office work. For about a year she worked for another company, Gregory Forest Products, in or about 1978 or 1979. As I mentioned, the move to Prince George was in 1989. She was off work for some time after that as a result, in part at least, of the housing situation of the parties. In 1991 or thereabouts, she began working as a housecleaner, so she was self-employed.
- [55] As I mentioned previously, from about 2003 to 2007, the parties operated Kodiak Truck and Trailer repair, where she worked in the office. At the same time as she worked there for the Kodiak company, she also did housecleaning on a limited basis, approximately four hours a week. Prior to Kodiak, she had worked up to 25 hours a week doing housecleaning. Post-Kodiak, on her evidence, she worked possibly as many as 30 hours per week.

- [56] I mentioned previously her involvement with the cat rescue and rehabilitation efforts, first Alley Cat and then Operation Street Cat.
- [57] I will refer to her income at a later stage. There were no tax returns filed on her behalf, or I should say no declaration of housekeeping income, except beginning with the 2015 year.
- [58] Her work this year has been affected by the COVID-19 pandemic, resulting in the temporary loss of some clientele. However she has received some CERB benefits from the Government of Canada, which are continuing at present.
- [59] On her evidence, she can manage up to about five hours a day for five days a week if the work is available. However, she has some health issues which I will refer to in due course. Currently she is working as a volunteer, as well, a couple of times a week, for Phoenix Transition House. She also has volunteered at times for the Elizabeth Fry Society.
- [60] In relation to Mr. Chase, he did not quite complete Grade 12. He is missing one course. When the parties began their relationship, he was working as a trucker. He continued to do that for a number of years, then transitioned to become a mechanic. He worked for Arctic Manufacturing in Prince George as a mechanic, and has worked at several other trucking companies as a mechanic, as well. He operated, as I mentioned, Kodiak Truck and Trailer Repair in the 2003 to 2007 time period, roughly, then worked again after that, again as a mechanic for a trucking company, for two or three years.
- [61] Beginning in June of 2009, he began working for his present employer, Primex Properties, doing the work that I mentioned previously.
- [62] He also has a number of health conditions which I will refer to later on.
- [63] During the course of the relationship, Mr. Chase achieved his qualifications as a journeyman mechanic, as well as two other journeyman tickets. That process took approximately four years.

Analysis - Spousal Support

- [64] I will refer now to the parties' incomes since the date of separation. For this purpose I have prepared a table, so the parties can more easily follow along. A version of the table will be incorporated into any reasons for judgment. So Madam Clerk, there are three copies, one for Mr. Chase and two for the claimant and counsel.

K. James - actual

Hours and pay - imputed

K. James - imputed

M. Chase

Mid-range spousal support

2015

12,971

68,473

2016

11,600

65,443

2017

11,264

1,344 x \$22

29,568

66,000

1,368 x 10 = \$13,680

2018

11,913

1,344 x \$23

30,912

67,000

1,316 x 12 = \$15,792

2019

11,483

1,344 x \$24

32,256

67,818

\$1,297 x 12 = \$15,564

2020

?

1,344 x \$25

33,600

67,818 (expected)

1,248 x 7 (to July)

= \$8,736

\$53,772 past

Set off, payable by K. James:

\$18,387

Net payable by M. Chase:

\$35,385

- [65] So on the table, as you can see, on the left-hand column there are the earnings described as actual for Ms. James over the years 2015 through 2019 with a question mark for 2020, because we do not know what the 2020 earnings will be. The next column, and I will be coming to this, has to do with imputation of income to Ms. James, then in the next column, the actual amount of imputation. The next column deals with the earnings of Mr. Chase ranging from, as you can see, \$68,473 in 2015, to 2019 of \$67,818, the same amount for 2020 earnings expected, and with other numbers for the other years between those times.
- [66] There were no children of the marriage. However, in other respects, the marriage could be considered traditional or conventional in many respects. Ms. James, the wife, was primarily responsible for indoor domestic duties, such as cooking and cleaning and so on. She also worked throughout the relationship. The husband was more responsible for exterior sorts of chores, but she helped in relation to those as well, including some of the repair or renovation work to the residence.
- [67] More significantly, during the course of the relationship, Mr. Chase was the primary breadwinner. Mr. Chase was able to obtain the three journeyman tickets. Ms. James did not enhance her skills or education over the course of the marriage.
- [68] Ms. James has health issues. She indicates that her work capacity is limited to five hours a day. She testified that she suffers from post-traumatic stress disorder, and depression as well. These conditions, she says, affect her sleep, her ability to concentrate, and her memory. She testifies that she is no longer equipped or capable of doing the type of office work that she had done in the past. She has no formal office work training.
- [69] She testified that she suffered from depression 35 years ago and was prescribed antidepressants at that time, and she continues to use those medications. However, she does not take them consistently, for reasons of cost. Presently she is taking them as prescribed.
- [70] She also suffers from arthritis, resulting in achy hands, but she does not take medication for that.

- [71] She says as a result of the PTSD, she has panic attacks and, again, lack of sleep and poor memory, resulting in confusion and difficulties with concentration.
- [72] I can certainly accept the diagnosis of depression and some of the consequences of depression that Ms. James testified to, including problems with concentration and memory and effects on her sleep. As to PTSD, there is no medical diagnosis of that, so I am not satisfied that that condition has been established on the evidence, nor is it critical to my conclusions. I accept, as well, that Ms. James suffers from arthritis.
- [73] In addition, I accept the evidence that she suffers from a personality issue that affects her earning capacity, in that she has an aversion to working in group settings.
- [74] The result is that the income-earning capacity of Ms. James is substantially less than that of Mr. Chase.
- [75] Mr. Chase also has health issues. Unsurprisingly, given the age of the parties, they both suffer from health issues. Mr. Chase has Type 2 diabetes for which he takes medication. He also suffers from depression for which he takes medication. His work is of a physical nature. Some of the work is quite heavy. He has a right shoulder problem, and elbow problems. He has an ongoing WCB claim of some sort, perhaps related to the shoulder, and he indicates that he may undergo surgery. He also had knee surgery in the right knee two or three years ago, done arthroscopically.
- [76] So both of the parties have health issues of various kinds. Ms. James's work is also of a physical nature. The parties are getting older, and one can expect that their health issues will continue to impact their work capacities.
- [77] In my view, there is a compensatory basis for spousal support given the history of the relationship, as I have described it.
- [78] The non-compensatory basis in this case is strong. After such a long marriage with contributions by both parties, and many years of hard work by both of them, their living standards should be roughly equal on a net disposable income basis, and they are clearly not, without spousal support. Therefore, I am satisfied that there is an entitlement to spousal support.
- [79] As mentioned, Mr. Chase seeks imputation of income to Ms. James. He says she should be able to work 35 or 40 hours a week, as he does.
- [80] In relation to the principles of imputation of income, I refer to the decision of the B.C. Court of Appeal in *Willms v. Willms*, 2020 BCCA 51 [Willms]. The Willms decision also referred to retroactive spousal support and the principles applicable, in paras. 28 through 32. In relation to imputation of income for spousal support, the Court of Appeal referred at para. 41 to its decision in *Marquez v. Zapiola*, 2013 BCCA 433 [Marquez]. In Willms, the Court of Appeal quoted and apparently adopted paras. 36 through 38 of Marquez, which Justice Willcock for the Court described as the leading case in British Columbia on imputation of

income.

- [81] I refer then to paras. 36 through 38 of Marquez:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.
- [38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 at para. 29).
- [82] In my view, income should be imputed to Ms. James. On the evidence, she works part-time only, at least for remunerated work. She also does substantial volunteer work. That, of course, is her choice to do, but should not reduce her income-earning capacity, from the point of view of assessing that for spousal support purposes.
- [83] It is difficult on the evidence to determine precisely how many hours Ms. James has worked over the past few years as a house cleaner. She produced in evidence a number of calendars on which she tracked her pay on a daily basis. She then added those up and delivered them to the tax preparer at the end of the year. It appears, based on the calendar, that in 2017 she worked 150 days. Those days would be on a reduced-hours basis. What I might call normal days per year of work would be, or at least conventionally, around 235 days per year. Her days are typically four or five hours in length. A typical full-time-hour day is of course seven and a half hours or thereabouts. When one multiplies 235 days by seven and one-half hours, one gets 1,762 hours.
- [84] It is difficult to say, but it appears that the remunerated or paid work done by Ms. James is in the range of 600 hours per annum, earning presently \$25 per hour.

- [85] However, there are factors that reduce her earning capacity. First of all, she is self-employed. Work is not always available. Work depends on clients. The clients come and go. The clients may not need or want the full-time hours that I referred to earlier. Full days are not typical of her business. The hours that the clients might demand would be perhaps two hours, four hours, or five hours, so it simply is not possible for Ms. James to work conventional full-time hours.
- [86] Secondly, as I mentioned, she has significant health issues that affect her ability to work.
- [87] As mentioned, she believes that she is capable of working up to 25 hours a week, so that would be five hours per day, for five days per week. She is now 63 years of age and her physical limitations can be expected to increase.
- [88] In my view, the 25 hours per week is somewhat low compared to her actual current work capacity for spousal support purposes, having regard to all of the evidence, and also specifically having regard to the charitable work that she does. Also, I am influenced by fairness. Mr. Chase also has health issues, but works full time hours, and Ms. James asserts that his income should continue to be assessed on a full-time basis.
- [89] So I determine that Ms. James' work capacity in all the circumstances should be assessed at this time at 28 hours per week. The result is that for this year, the imputed income for Ms. James would be 1,344 hours times \$25 which comes to \$33,600. Those amounts are set out on the table.
- [90] Determination of income for spousal support purposes for Mr. Chase is quite straightforward. His employment earnings last year were \$67,818 based on the tax return. He has no other source of income. He expects this year's income to be essentially the same, so again, \$67,818.
- [91] As I mentioned he also getting older and has health problems. His work involves a lot of driving. As time goes on, I would expect that those factors might impact his work capacity.

Retroactive Spousal Support

- [92] Turning to retroactive spousal support, Mr. Chase's past income for spousal support purposes is in the same general range. It was, according to tax records, \$68,473 in 2015; \$65,443 in 2016; the amounts for 2017 and 2018, I infer at \$66,000 and \$67,000 respectively.
- [93] No notice of spousal support claim was made prior to the issuance and service of the Notice of Family Claim, which was filed February 2, 2017. No interim orders were made, and no payments were made.
- [94] Mr. Chase had no legal representation. Mr. Chase says he did not feel obliged to pay spousal support due to the cat issue I referred to earlier, and the damage to the home.

- [95] The principles of retroactive spousal support are set out in *Willms*, the case I mentioned earlier, at paras. 28 through 32. They are also referred to in another fairly recent decision of the Court of Appeal, *Morey v. Morey*, 2017 BCCA 439, at paras. 35 through 39, where Justice Hunter for the court referred to the leading authorities being *D.B.S.* and *Kerr v. Baranow*.
- [96] In relation to the factor of delay in seeking spousal support, in *Neely* at para. 123, I referred to the decision of the Court of Appeal in *Ducharme v. Rempel*, 2016 BCCA 198 at para. 17, for the proposition that delay and misconduct are more compelling in relation to spousal support than they are in relation to child support, because in the case of child support, entitlement is a very weighty factor.
- [97] In this case, there was some considerable delay in advancing the spousal support claim, from the date of separation, October 7, 2015, until the Notice of Family Claim was issued 16 months later. There is no particular blameworthy conduct identified on the part of Mr. Chase. For example, there is no evidence as to any effort to discourage a claim from being made. In my view, in all the circumstances of this case, the ordinary rule should be applied, and spousal support should be retroactive to the date of notice, which I take to be February 2, 2017.
- [98] In terms of the range for spousal support, there is no particular factor that would drive the range up or down. Therefore, I determine that the mid-range is appropriate.
- [99] Utilizing the earnings of the parties, actual or inferred for Mr. Chase, and imputed for Ms. James, I have calculated the obligations for past spousal support on a mid-range basis. Those are set out in the table. For 2017, the amount would be \$13,680 for 10 months; 2018, the amount is \$15,792; for 2019, it is \$15,564; and for 2020, it would be \$8,736 to July 1. Spousal support will be ongoing commencing August 1 at \$1,248 per month.
- [100] The total of past spousal support, then, is \$53,772, against which there is the setoff for asset and debt issues, as I mentioned previously, totalling \$18,387, leaving a net payable by Mr. Chase of \$35,385.
- [101] Unfortunately, Mr. Chase did not make payments in the past, has no assets with which to make the payment that he is required to pay, and his only source of ability to pay is his ongoing income. So he has a predicament that is of his own making, because spousal support should have been paid in the past. However, realities are what they are. In my view, if the past spousal support order is to have any meaning, it will have to be paid over the course of time. So I direct that the net indebtedness of \$35,385 be paid at the rate of \$500 per month, until the debt is extinguished.
- [102] I am mindful, as well, that Mr. Chase will be paying ongoing support in the amount of \$1,248 per month, so there will be a substantial monthly bill to be paid.

[Interruption from Mr. Chase]

[103] The ongoing spousal support order will be subject to review at the option of either party at any time after five years from the date of these reasons. The purposes of the review will be to re-examine the earning capacities of the parties, having regard to their health and income-earning capacities as they appear at that time. Otherwise, the order is, in accordance with the Spousal Support Advisory Guidelines, indefinite.

[104] The other orders that will be made are for a division of CPP benefits pursuant to the statute, and finally, the order for divorce.

[Submissions regarding costs]

[105] THE COURT: All right. The ordinary rule in family litigation is that costs follow the event. The party that is substantially successful is to be awarded costs, subject to offers to settle and so on, of which there are none. Therefore, costs are awarded to Ms. James on a party-and-party basis.

"Verhoeven J."

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