

CANADA / JUDGMENT

K.J.P. v. B.S.J.G.

2024 BCSC 167

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 167 K.J.P. v. B.S.J.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.J.P. v. B.S.J.G. ,

2024 BCSC 167

Date: 20240202

Docket: E01002

Registry: Abbotsford

Between:

K.J.P.

Claimant

And

B.S.J.G.

Respondent

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for Claimant:

D.R. Greig

C. Anninos

The Respondent, Appearing on his own behalf:

B.S.J.G.

Place and Date of Trial:

New Westminster, B.C.

May 2-5, 8-10, 12, 2023

Place and Date of Judgment:

New Westminster, B.C.

February 2, 2024

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Overview

- [1] This family law trial deals with the consequences of the end of the parties' 16-year marriage.
- [2] The claimant is 43 years old and the respondent is 42. They began their relationship in secondary school. After their oldest child was born in 2000, the claimant and the child lived with her parents until 2002, when the parties married and began to live together.
- [3] They separated in December 2018. The respondent returned to the family home the following February, but the parties did not resume their relationship, and he left for the final time in December of that year.
- [4] Their children are: H. (22), L. (16), and C. (13). Despite his age, as of the trial dates H. was living at home in order to complete his post-secondary education.
- [5] The claimant works as an educational assistant in the public-school system. It is common ground that during the marriage she was primarily responsible for caring for the children and looking after the home.
- [6] The respondent formerly held a supervisory position with an energy utility, which was terminated in December 2019. Since losing that job he has been seeking to qualify in the HVAC (heating, ventilation and air conditioning) field. Until shortly before the trial dates he had been receiving disability benefits because of an Achilles tendon injury that he suffered in August 2022, but planned to return to work when the trial concluded.
- [7] The parties' main asset is the former family home, which had a value of approximately \$1.35 million as of the trial dates.
- [8] In addition to a divorce, which they agree should be granted, the main contested issues are:
 - The appropriate parenting arrangements for the younger two children;
 - The respondent's income for child and spousal support purposes, and whether he is intentionally underemployed;
 - Whether support is payable for their older child H., on the basis that he is unable to withdraw from their care due to his educational requirements;

- The entitlement of the claimant to spousal support;
- The effect on property division of the claimant's post-separation efforts to preserve the former family home from foreclosure, which involved a significant advance of funds from a family friend, and of the increase in its value since separation;
- The effect of the respondent's deficient pre-trial disclosure, despite orders for document production, and whether a fine should be imposed on him to address it;
- Whether a basis exists for a protection order against the respondent; and
- The relevance and proper use of the extensive evidence of pre- and post-separation misconduct by the respondent that was led by the claimant.

During the Marriage

Employment and Financial Arrangements

- [9] The claimant testified that because of her family responsibilities, she had only a part-time job at a local recreation centre while the children were young.
- [10] In 2008 she completed the ten-month educational assistant training program. She then began working in that role, with a break following C.'s birth, and has done so continuously since January 2016, by which point all of the children were in school.
- [11] Her long-term goal was to build on those qualifications and eventually become a teacher. There is a process available that allows educational assistants to obtain the necessary training to make that transition. She said that she wished to pursue the training while she was off on maternity leave after C.'s birth, but that the respondent would not agree to it. (He did not address this particular allegation in his evidence.)
- [12] The respondent agreed that the claimant had done the majority of cooking and cleaning during the relationship, and had attended to the children's medical and dental appointments and their needs at school. He noted that because of her educational assistant position, she had a strong rapport with the teachers.
- [13] In 2008, after working for a company that manufactures doors and then running a venture building decks with a friend, the respondent was hired by the energy utility. During his employment there he qualified as a journeyman gas fitter. He has what is known as an A level ticket as a gas fitter, which is the highest level of qualification in that field. He progressed to a position as an operations supervisor within the utility. In 2018, the year of the separation, he earned \$118,642.

- [14] The overall arrangement between the parties was that his earnings were to be used to cover the family's expenses. The claimant deposited her income as an educational assistant into an account to which the respondent did not have access. She explained that she did so because she did not trust him with her earnings and did not know what he would spend them on. However, she said that she was open with him about what she earned, and would attempt to discuss her proposed use of it with him.
- [15] In cross-examination she agreed that she had saved \$17,000 in this manner to pay for cosmetic surgery that she had towards the end of the relationship. At the time she felt comfortable spending the money in that manner, because he had assured her that their family was financially secure.
- [16] Her evidence was that respondent had the complete responsibility for handling the family's financial affairs, and that he refused to share any information concerning it with her, despite her repeated requests.
- [17] The respondent's position was that she had full knowledge of their financial matters, and participated in the decision-making with respect to them. On the issue of her knowledge, he referred to a document from the bank through which they obtained their Visa cards, in which she confirmed her request to cancel electronic statements with respect to one of the cards, in favour of mailed statements. (However, this letter was from March 2021, after the respondent had left the home for the final time.)
- [18] The parties bought the family home in 2010. They had bought and sold two previous properties during their relationship, increasing their equity each time.
- [19] The claimant testified that in 2017 the respondent told her that "he had taken \$150,000 out of our mortgage". Her evidence was that he had done this without consulting her, and that she was against the move because of his past difficulties in handling money. He told her that the money was interest-free for a year and that they "could give it back if they wanted". As the associated lending documents show, the process involved obtaining new mortgage financing for more than what was owed on their existing mortgage, and drawing out the difference for themselves in cash.
- [20] The respondent maintained that the claimant had been fully aware of this refinancing and had consented to it. The new lender is associated with a grocery chain and has outlets in its stores, and the respondent said that he and the claimant went to a store in Langley to sign the necessary documents. He produced a "payout statement authorization", which allowed the new lender to pay out their bank for the previous mortgage. It appears to contain both parties' signatures.

- [21] The claimant could not recall whether she had gone with the respondent to sign the document authorizing the payout for the new mortgage, which he presented to her in cross-examination. She explained that he would frequently bring her banking documents and tell her that he needed her signature. Because he was her husband she trusted him on such issues, and would sign in those situations without making any further inquiries.
- [22] The direction to pay the proceeds of the new mortgage shows that the refinancing was carried out by replacing two existing mortgages, which totalled \$393,000, with one for \$500,000. This resulted in a payout to the parties of \$106,000. The copy of this document that was produced by the respondent was unsigned.
- [23] The claimant described one of the mortgages that was paid out, for \$45,000, as a line of credit that the respondent had previously taken out without her knowledge. The other mortgage, for \$347,000, represented what they owed on the home at that point.
- [24] She said that they agreed (once she found out about the remortgaging, I took her to mean) that the funds would be used for home renovations, which were required because of the age of the house. As it turned out, only the roof, gutters and fencing were replaced, with the assistance of the respondent's friends, at a cost of about \$18-\$19,000. She was not aware of what happened to the rest of the re-mortgaging proceeds.
- [25] In cross-examination she accepted a list of other home improvements that the respondent suggested had been carried out prior to the separation. However, she pointed out that they were also carried out before this large amount of money was drawn from the mortgage. In fact, she had actually paid for some of these additional improvements from her own earnings. With respect to the ones that were carried out using joint family funds, she agreed that she was aware of how those funds were used.
- [26] The proceeds of the remortgaging went into the respondent's account, which was at a different financial institution than their joint account, and to which she had no access. The statement from the respondent's account for the month in question shows that the deposit was immediately followed by a \$7000 payment to the parties' joint Visa account (she was not aware at the time that such an amount was owing on their Visa), followed by just under \$10,000 to an American Express account in the respondent's sole name, and about \$2500 to pay an amount that he owed for taxes.
- [27] About \$86,000 of the refinancing proceeds remained after this group of payments. Other than the approximately \$20,000 in renovations that the claimant agreed had actually taken place, the respondent was unable to document what had happened to the remaining approximately \$66,000. He agreed with the suggestion that the marriage was "struggling" at this point, but not as much as it eventually did in the year of the separation.

Parenting

- [28] According to the claimant, the respondent was frequently absent from the home during his non-working hours. This was due to the extensive socializing he engaged in with teammates on the recreational sports teams he played on, his friends from high school, and work associates. His social activities frequently led to him returning home late at night in an intoxicated state. He also went on trips with his friends, with a frequency that she considered to be excessive in light of his family responsibilities. Overall, she estimated that he would be away from the home 200-250 nights per year for social purposes.
- [29] Her parents were heavily involved in the children's lives and would fill in some of the gaps left by his absences.
- [30] The respondent disagreed with this description of his absences from the home, but did not offer a specific alternative estimate, other than agreeing that he socialized in relation to his sports activities and with his friends.
- [31] He explained that the trip to which the claimant gave the greatest emphasis - to Las Vegas with friends, which she said extended well beyond its planned length - was for only three days, and that one of the photos that she referred to as depicting him on it was actually taken in a restaurant in Langley.
- [32] The claimant agreed with his suggestion in cross-examination that he had been involved in coaching the sports teams of all three of the children at various points, but added that coaching was something that he enjoyed doing for its own sake, and even did once on a paid basis when none of their children were on the team. She also pointed out that coaching did not fulfil all of his parental obligations.
- [33] J.G., the respondent's sister, testified that he was an active participant in both L. and C.'s lives from their birth, including coaching their sports. He would usually have at least one of these children in his care, if not both (while attending their sports events, I took her to mean).
- [34] The parties' oldest child H. and the respondent became estranged from each other before the separation. The claimant said that they had a contentious relationship throughout H.'s life, because of the respondent's tendency to make remarks that H. found hurtful.
- [35] The catalyst for their complete estrangement was an incident in 2018, in which H. wrecked a car that had been given to him by his grandfather, and the respondent refused to provide the insurance proceeds to H. to replace it. The vehicle and the insurance were registered in the respondent's name. This led to a heated phone conversation between them, after which they did not speak further.

Events Leading to the Separation

The Parties' Debts

- [36] The claimant testified that in the fall of 2018 she was contacted by their mortgage lender and told that the payments on their home had fallen behind. She was unable to remedy the situation because the missing payments were to have been withdrawn from the respondent's account, to which, as I have mentioned, she did not have access.
- [37] The respondent acknowledged in cross-examination that he had "potentially" missed some mortgage payments during that period.
- [38] In November of that year her card for the joint Visa account, which the respondent was responsible for paying, was declined. Her inquiries revealed that there was \$18,000 owing on it, and that it had been frozen due to a lack of payments. In cross-examination she clarified that "whether or not [she] could access the statements" for that card, she was previously unaware of the unpaid debt that had accumulated on it.
- [39] At the end of December, she received a letter from their bank advising that a line of credit that was in her and the respondent's names required attention, because the minimum required payment on it had not been made. She was not previously aware of the existence of this line of credit, which by then had a balance of \$32,000. She added that she would have been on maternity leave when it was originally obtained, and had no income of her own at that point.
- [40] Although she agreed that she received statements for another Visa card of which she was the primary holder, the claimant said that she only saw those statements "off and on", and that the respondent would usually take them. She later clarified that she was aware of the balance of that card, and of another one that was in her sole name that she had obtained many years previously.
- [41] Similarly, although she agreed that the line of credit statements were addressed to them jointly at the home address, she emphasized that this did not mean that she saw them. The respondent suggested to her that this line of credit was used well before separation to purchase the vehicle that she is currently driving, but she replied that she had "no idea" whether that had occurred or not.
- [42] The respondent agreed "a hundred per cent" with the suggestion in cross-examination that these credit card and line of credit amounts were "in all likelihood just probably family debt."

The Respondent's Behaviour

- [43] As background to these events, the claimant gave examples of his tendency to drink to excess in social situations during the marriage (I previously summarized her evidence of his intoxication in the context of his frequent absences from the home). This included drinking to the point of physical illness and incapacitation when attending weddings, attempting to drive while intoxicated and, towards the end of the relationship, parking his truck in a manner that suggested he had been intoxicated when he drove it home the previous evening.
- [44] She said that during the 2015-2016 period his behaviour became more erratic, which she attributed to his addition of drug consumption to his existing difficulties with alcohol.
- [45] One night he came into their bedroom and told her that she needed to leave because he was afraid he was "going to hurt" her. He then sat down on the toilet in their bathroom and continued to yell the same thing at her, before going downstairs.
- [46] In other incidents he would come home and claim to have been drugged, vomiting as he did so.
- [47] On another night he came home at dinner time after attending a pub after work and was "talking nonstop" and "making no sense".
- [48] One day she found some unfamiliar pills, which she photographed, scattered in the kitchen. She also took a photo of five bottles of the respondent's prescription medication in the bathroom, one of which was oxycodone.
- [49] In 2017 she confronted him about ongoing manic behaviour of this nature. In response, he told her that he had used cocaine "a few times", but would not do so again. In a related incident, he stopped them from attending a get-together at a friend's house, explaining that he "always ended up using cocaine when he was with this group".
- [50] The respondent denied that he has ever had any form of substance abuse problem. He is a social drinker, but has never consumed it in front of the children when they have been in his "direct care". He was never a cocaine user as the claimant described. His version of his refusal to attend the get-together with friends was that he did not want to be in a place where cocaine was being used, not that he was susceptible to using it himself.
- [51] He sought to dispel any negative inference about his mental state and substance issues that might arise from the presence in the home of the medications that the claimant described by referring to a provincial government record of the prescriptions that he has received since 2000, and to copies of some of the prescriptions shown in the photos she took.
- [52] He identified the loose pills as bupropion, which he had been prescribed for depression, and which is shown in the government record as having been prescribed to him in October 2019, well after the separation. He said that he only took this antidepressant for "a month or two potentially". He added that he also took counselling through his employee assistance

program, but stopped when the six sessions that were covered by the employer had been used up. He did not specify the time period in which he had the employer-sponsored sessions, and did not know why he had not paid for additional sessions himself.

- [53] The labels of the medication bottles in the bathroom photo reveal them to be oxycodone, a second type of pain medication, and a muscle relaxant - all of which were prescribed to him in 2014 in relation to a fracture of his fibula. He only took them around the time of that injury. The last bottle was an antibiotic that he was prescribed in 2015.
- [54] He did not believe that his behaviour was odd during this period leading up to the separation, but conceded that "you could just infer that, sure".
- [55] According to the claimant, the respondent's erratic behaviour continued, and matters came to a head at the end of 2018. After claiming that he would seek assistance with his substance abuse through her employee assistance program, the respondent then told her that it was "pointless", and that he would not be pursuing any further efforts towards sobriety. She asked him to leave and he agreed, ultimately doing so on December 26.
- [56] The claimant's mother, who also testified, said that she was not aware that the respondent had alcohol or drug problems until the claimant told her in 2018 that it was the reason for their separation.

Since the Separation

The Claimant's Employment and Financial Situation

[57] Her recent income has been:

- 2018: \$30,664
- 2019: \$34,142
- 2020: \$43,656
- 2021: \$41,063
- 2022: \$36,099 (projected from her T4, supplemented by employment insurance benefits in the range of \$5,000)
- 2023: \$40,676 (projected in her Form 8 financial statement).

[58] She is required to collect employment insurance benefits in June and July, when school is not in session. She also receives the federal child benefit, which amounts to about \$12,000 per year.

[59] Since 2016 she has been contributing to an employee pension plan.

[60] According to her most recent financial statement her monthly expenses are just under \$6,000.

- [61] The mortgage on the family home was approximately \$480,000 at the time of separation. According to a historical appraisal, the value of the home at that point was \$895,000.
- [62] The mortgage eventually fell into arrears after the separation, when the respondent stopped contributing to it and she was unable to cover it on her own. This was in addition to the unpaid Visa and the line of credit of which she had been previously unaware, which totalled about \$50,000.
- [63] In addition, in March of 2019 she received a letter addressed to the respondent at the family home advising that payment on an Amex credit card in his name was past due. She was previously unaware that he had such a card and as a result had no access to the account. (He suggested to her that when she had travelled to Mexico for dental implant surgery in 2016 she had used this card to withdraw Mexican currency, but she was unable to recall which one she had used for that purpose.)
- [64] The respondent testified that he paid the mortgage regularly from the separation until the fall of 2019, when he began to have difficulties at work.
- [65] He was referred to banking documents showing that he made the two required mortgage payments for January 2020, as well as an extra payment that he agreed was in relation to a missed one from the preceding months. Although there were no documents available for February and March, he said that he continued paying the mortgage for those additional months. He referred to an email exchange with the claimant on March 30, 2020, in which she requested him to pay the second of the two required mortgage instalments for that month, implying that he had paid the first of them. (However, at another point in his cross-examination he said that he had stopped paying the mortgage "in and around" January of that year.)
- [66] Also around March, he stopped paying such expenses as utilities, property taxes and insurance, as well as the phone and internet. (He advised the claimant of his intentions in this regard in an email in February 2020).
- [67] In April 2020 he advised the claimant, "Remember that circumstances have changed and I only make \$30,000 a year so now you might be paying me."
- [68] To relieve the claimant's financial situation, in December 2021 T.C., a family friend who has a very successful business, had his company assume the mortgage, which he said then stood at about \$485,000.
- [69] Over the period between April 2020 and December 2022, Mr. C. also loaned her funds through the company to cover her other essential needs, including paying off the Visa and the line of credit (on which significant interest had accumulated) and contributing to her legal fees, with the effect that she owed the company a total of \$630,000 as of the trial dates. She was referred to copies of promissory notes indicating funds advanced to her by Mr. C.'s company.

- [70] In his testimony, Mr. C. confirmed that these advances constituted a loan to the claimant.
- [71] In cross-examination he explained that there are no written terms of repayment for the loans. Because he understands that the Canada Revenue Agency requires that some interest be charged, he has set the rate as 1%. Despite the claimant's low annual income, he considers the loans to be adequately secured.
- [72] When he was shown the claimant's most recent financial statement, which listed the loan relating to "mortgage and debt" and a line of credit, as \$480,000, he recalled that the additional \$5000 paid by his company related to the associated legal fees. (The respondent did not cross-examine on it, but the claimant's financial statement lists the subsequent loans from Mr. C.'s company as totalling \$226,850, whereas the promissory notes in the evidence totalled only \$130,000, for a total indebtedness to the company of \$706,850. This is a larger amount than Mr. C. described, but she did not suggest that any amounts except the mortgage, Visa and line of credit loans were family debt).
- [73] Mr. C. was also asked about the absence of any disclosure to the respondent of the documents showing the assumption of the mortgage by his company. He said that he expected that the bank would have a statement of adjustments and documents showing the payment to it from the company's law firm. The claimant's previous counsel told him that there was flexibility as to when the mortgage was registered, and elected not to register it. Mr. C. did not know what the basis for her counsel's decision was.
- [74] He also agreed that he and the claimant had discussed the "potential" of his purchasing the home after the court proceedings have concluded.
- [75] In addition to Mr. C.'s assistance, the claimant was loaned \$15,000 by her cousin and \$64,500 by her father to address her ongoing needs since the separation. These loans were also documented by promissory notes.
- [76] Her hope is to retain the former family home for the sake of the children, but she cannot qualify for a mortgage herself on her relatively low earnings. She confirmed that she and Mr. C. have discussed some possible arrangements that would allow her to retain the home, but nothing definite has been arrived at.

The Respondent's Employment and Financial Situation

- [77] His income in 2019, the year of his termination, was \$106,345.
- [78] He received a severance "package" as part of his termination. His bank account statements show direct deposits from his former employer that total \$55,928 on January 15, 2020, which may correspond to the severance payments. In cross-examination he said that the amount was around \$66,000.

- [79] Neither he nor his friend K.M., whom he called as a witness, could remember the reason for a series of transactions shown in his bank statement for that same month. He transferred \$3000 to Mr. M., who immediately transferred it back, and then transferred \$2000 to Mr. M. later that month, without that amount being returned.
- [80] He also transferred a total of \$9000 to his mother, which he said was a prepayment of his rent and contribution to groceries for his planned stay with her after leaving the family home, as well as for a new bed for his father. The bank statement shows that he received \$3000 back from his mother shortly afterwards, which was not explained.
- [81] He said that the \$10,000 that was also shown being withdrawn that month was placed in a high-interest savings account, but he did not have any documentation of that transaction or the subsequent disposition of that money. Later in his cross-examination he said that he had spent it.
- [82] The net effect of these various transactions was to leave about \$25,000 in the account. By the time of the next available statement, which showed transactions on the account in December of that year, that amount was no longer present. The respondent said that there were "lots of reasons" for the decline, but acknowledged that he did not have a document explaining it.
- [83] In addition to the severance payment, his employee pension entitlement of approximately \$130,000 was transferred to a locked-in retirement account (a "LIRA"). The balance of that account was about \$152,000 as of the trial dates. He does not have access to the funds in it until he retires.
- [84] In the early part of 2020 he obtained employment with a mechanical contractor, to pursue qualification in HVAC. He was eventually laid off for lack of work, but later rehired. His Line 15000 income according to his notices of assessment was \$46,319 in 2020, \$32,103 in 2021, and \$62,425 in 2022.
- [85] His training in HVAC, which is a form of apprenticeship, requires both classes and a certain number of hours of work experience to complete. He is permitted to claim employment insurance benefits while he is doing the classwork.
- [86] It is a four-year program, and he has been given credit for his gas fitter training as part of it. This means that he will have to do less schooling in the final year of the program, which is intended to take four years.
- [87] When his program has completed, which should occur in two to three years, depending on the availability of the classes that he is required to complete, he expects to earn an income in the range of \$110,000 per year - essentially the same as he was earning in the position from which he was terminated. He later described this scenario as his "hope", if he "could get into the schooling portion", which would be "the tough part of it". I took him to be saying that the uncertainty was in the timeline for being able to complete his apprenticeship, not the income that he could expect to earn following completion.

- [88] Leaving aside the effects of the injury and disability payments on his 2023 income, at his current pay level, and anticipating some overtime hours, he expected to earn \$60-\$65,000 per year. In his financial statement filed just before trial, he described earning \$2240 bi-weekly, which in a year without disability payments would equal \$58,240.
- [89] On the question of why he has not pursued employment that is based on his existing qualifications, he explained that being a licenced class A gasfitter, which is a "ticket" (that is, a qualification) that is not held by a large number of people in the province. It relates to work on "industrial-sized equipment". Most of the jobs involving that type of equipment are located outside of the lower mainland or the province, and involve class A ticket holders who operate their own companies. He lost his last position at the start of the pandemic, when jobs that utilize this type of ticket were not available due to the health restrictions that were imposed. When they subsequently became available (with the lifting of the restrictions), he did not want to seek work that was mainly out of town at a time when he was "struggling" to obtain parenting time with his children.
- [90] While many plumbing companies also use class A gasfitters, he is not qualified as a journeyman plumber, so such opportunities are not available to him.
- [91] His essential point was that he is not unintentionally underemployed, but rather is working towards the realistic goal of reproducing his past earnings.
- [92] He provided the union wage scale for HVAC positions. A journeyman position, which is what I understand he seeks to qualify for, has an hourly wage of \$50.09, plus benefits that raise it to \$69.48. At 35 hours per week that is an annual income of about \$126,000, which is higher than he estimated in his evidence. Without the benefits it is about \$91,000.
- [93] He also made inquiries about jobs with the city governments of Surrey and Langley, but chose the HVAC option after a friend approached him about it. He said that it had the advantage of being something he was able to take up immediately.
- [94] He agreed that he had never complied with the request made at his examination for discovery to provide copies of his resume and evidence of the efforts he had made to find new employment after his termination. His response to the questions by the claimant's previous counsel on this subject during the discovery was, "I don't believe that it's any of your business". He also never provided that information to the claimant's present counsel in the lead-up to trial.
- [95] During the portion of his examination for discovery that was held in December of 2021, he had said that he was not working at the time. He clarified during his trial testimony that he had previously been working with the mechanical company, which he began in the early part of 2020, but had been laid off prior to the discovery. He was later rehired and continued with the qualification process.

- [96] Since beginning work with the mechanical firm, he has accumulated an RRSP of about \$9,600, to which he currently contributes \$434 per month.
- [97] In his latest financial statement, he listed his annual expenses as just over \$75,000, which is considerably more than his claimed current income.
- [98] In a further elaboration on his current financial situation, he referred to using Visa debit cards, which draw on an existing balance rather than incurring a debt, for some of his purchases, rather than credit cards. It was not made clear whether this is because he does not have any credit cards, or because he prefers not to use them.
- [99] To flesh out the respondent's limited disclosure somewhat, the claimant called his live-in partner, J.R. as a witness in her case.
- [100] Ms. R. testified that since February 2023 the respondent has been living with her and her teenage daughter, with whom she shares parenting with a former spouse, at her rented townhouse in Langley. Her relationship with the respondent began about a year before that. He contributes about \$500 per month towards expenses, either in cash or by e-transfer, and also performs his share of household chores. (The respondent testified that he had given Ms. R. "a couple of thousand dollars" in the three and a half months since he moved in.)
- [101] Ms. R. confirmed that as of the trial dates the respondent had not worked since the previous August because of his torn Achilles tendon. She was aware that before that he was doing "mechanical work", including installing air conditioning units.
- [102] He has not told her that he is short of money as a result of being off of work. She herself works Monday to Friday, coincidentally as an educational assistant like the claimant, and was not aware of what the respondent does with his time while she is out.
- [103] His friend Mr. M. testified that he observed the effects of the Achilles tendon first hand, since the respondent was living with him at the time he suffered it. In the initial stages this involved the respondent being "couch-ridden" and requiring the use of pain killers, and later using a knee cart to get around. He required Mr. M.'s assistance with daily tasks for two to three months following the injury.

Parenting

- [104] When he returned to the home in February 2019 the respondent was able to have contact with L. and C. without the claimant having to be involved.
- [105] After he left the home for the final time in December 2019, he did not cooperate with her efforts to schedule parenting time for him with those children.

- [106] The claimant said that sometimes he would call L. and C. directly and tell them that he would come by shortly to pick them up. This brief notice was very stressful for C., who was nine years old at the time, and already upset at the limited amount of time he was getting to spend with the respondent.
- [107] After confirming with C. that it would be beneficial to him, she suggested to the respondent that he could arrange a specific day of the week to exercise his parenting time. He responded by accusing her of trying to control his time with the children, and would not agree.
- [108] At other times he would make arrangements to see L. or C. and then fail to show up, which was distressing for them. For example, after making plans to take C. for lunch on C.'s birthday he was not able to follow through, and did not see C. for a further two months. C. was so upset that the next time the respondent appeared, at one of C.'s baseball games, he was unable to play.
- [109] In cross-examination the claimant elaborated that the practice of the respondent arranging parenting time directly with the children became necessary because of his inability to interact with her in an appropriate way on that topic. This eventually led to her insisting that all communications between them about the children be by email.
- [110] She estimated that he saw L. and C. once or twice per month, but promised to see them six times per month. She keeps a calendar of all of the children's appointments, in which she recorded that the respondent had seen L. and C. 77 times since he finally left the former family home in December 2019.
- [111] The last overnight visit that they had with the respondent was in 2020.
- [112] The respondent agreed that he did not have any evidence that contradicted the claimant's recording of the number of visits, and conceded that there had been "multiple disappointments for the boys over the years".
- [113] He also agreed that the last time he coached one of his children's sports teams was in 2019 (although he said that this gap was not because of unwillingness on his part), that he has not taken them on any vacations since the separation, and has not made an interim application for specified parenting time.
- [114] The claimant agreed with his suggestion that he and L. call or text each other regularly, but was not prepared to agree that it was on a daily basis. She approved of that type of communication between them, but emphasized that it is "not considered parenting" (in itself, I took her too mean).
- [115] The respondent put several documents to her in cross-examination that he suggested showed his commitment to parenting. With respect to the contents of text messages between the respondent and L. from September 2022, she agreed that "there's some positivity there", although the messages did not represent "the full picture" of that

relationship in her view. Similarly, she agreed that a series of photos depicting the children engaged in activities with him showed that they had "some good times together", but returned to her theme that such activities did not represent the "the full scope of parenting".

- [116] In general, she is supportive of the claimant having time with L. and C., if they are "happy and healthy" in relation to it.
- [117] Her specific position on parenting arrangements is that the current situation, in which the two younger children reside primarily with her and the respondent arranges parenting time directly with them as they wish, is in their best interests. She is not averse to the respondent contacting them by phone at the home, as long as it is not used as a means of tracking her whereabouts; or to keeping him informed by email about important developments relating to their health, education and activities, as long as he does not reply to her updates.
- [118] She considers co-parenting with the respondent to be an unworkable prospect, because of his persistently hostile and uncooperative attitude towards her.
- [119] A longstanding example of this uncooperativeness in parenting matters has been his withholding of his consent for the children's cross-border travel, either completely or until the very last minute. This behaviour was sometimes accompanied with threats to call the police or border services if the children attempted to go without his consent. He would also involve her counsel in disputes over the children's travel, thereby increasing her legal expenses needlessly. The result has been significant worry and uncertainty about whether the children will be able to participate in sports events that take place in the United States.
- [120] As a particularly aggravated example of this type of behaviour, he filed a missing person report with the police in relation to C.'s baseball trip to the U.S., on which the claimant had accompanied him. This resulted in an RCMP officer texting her while she and C. were there, to do a wellness check.
- [121] With respect to travel within the province, the claimant's mother testified that when she and the claimant's father took the children to visit their cousins in Duncan over a Remembrance Day weekend, they received a text message from the respondent, who told them that "he wasn't happy that we were taking the boys away for the weekend not to do it again without asking him and he might have the police meeting us there. Because it was not allowed." As it turned out, he did not actually call the police.
- [122] The respondent explained that these trips were in breach of an agreement he had with the claimant's previous counsel that the parties would inform each other of any travel involving the children.
- [123] As an example of his actual cooperativeness on this issue, he included a consent form that he had completed in relation to L.'s trip to the U.S, in 2022 in his trial documents.

- [124] He cross-examined the claimant on the fact that she had recently sent him a text message seeking his permission for L. to go to Washington State with a friend's family, despite her usual insistence on email communication. She explained that she had done "whatever was necessary" in order to ensure that L. was able to go on that trip.
- [125] In the respondent's view, it is in L. and C.'s best interests for him to spend a significant amount of time with them, since he has always been heavily involved in their lives. He currently speaks to L. daily and tries to get together with him when L.'s busy schedule allows. The only impediment to that level of communication with C. is the inability to contact him easily by phone. He provided examples of his text communications with each child, to demonstrate the positive nature of his relationship with both of them.
- [126] His preference would be equal parenting time on alternating weeks, with exchanges taking place on Friday evenings. If the children are ordered to reside primarily with the claimant, he seeks "ample" scheduled parenting time with them, with the opportunity to apply to expand it as they get older.
- [127] His work hours are currently 6:00am to 2:30pm, which is conducive to making after school pickups and driving them to extracurricular activities, efforts that his partner Ms. R. and his sister and other family members are able to supplement if necessary.
- [128] As to the allocation of parental responsibilities, he did not envision any reason that he would disagree with the claimant's decisions with respect to L. and C.'s schooling, or with respect to their medical and dental care. He said that he "trusts that she has their best interests in mind" and that "if she came to me with something I would probably agree with her "
- [129] He does not think that she would ever do anything that was not in the children's best interest, and conceded that with regard to these kinds of parenting responsibilities she had really been "parenting the children alone" for the past three and a half years.
- [130] Given H.'s age, the court obviously has no role in directing their contact, but to the extent that their estrangement is relevant to other issues, the respondent testified that after the trial concludes and "things have settled down a bit", he hopes to engage in counselling with H. to repair their relationship.
- [131] Ms. R., the respondent's partner, advised that L. and C. had been to her home about six times, although not for any overnight visits, and that she sometimes accompanies the respondent when he takes them out to a restaurant. She described them as "great kids", who are happy to see the respondent during those get-togethers. She agreed in cross-examination that they love their father and want to spend more time with him, and that her home is set up so that they could be comfortable staying overnight.

- [132] Ms. R.'s sister, J.G., has a son the same age as C., with whom C. has a close relationship, and has provided after-school care for C. by agreement with the claimant. She has also facilitated contact between the respondent and L. and C., for example by arranging for him to speak to C. when C. was at her home.
- [133] The respondent has also come up for the day to see C. during her family camping trips, which C. was invited to join.
- [134] She testified about two specific incidents in which the respondent called her trying to reach C. In both cases she examined C.'s phone and found that the respondent's number had been blocked on it, although she could not say by whom.

Child Support

- [135] Since separation the respondent has not paid child support or contributed to the children's special or extraordinary expenses pursuant to s. 7 of the Federal Child Support Guidelines.
- [136] The s.7 expenses that the claimant has had to pay since the separation are their dental costs in excess of the available insurance, and equipment and registration costs for activities for L. and C. (skiing, band, soccer, football, and baseball, including travel for the latter two). To economize in light of her restricted finances she eventually had to restrict them to one sport each. Her parents and her cousin have helped defray some of these costs.
- [137] The respondent has also not contributed to the cost (\$1500) of a brace that H. required after having knee surgery. Instead it was paid for by the claimant's father.
- [138] During the relationship the parties had contributed to an RESP for the children, which their oldest child H. has already drawn on. Only the respondent had access to the account information, so the claimant was not aware of the remaining balance at the time of separation, or what became of the funds in the plan.
- [139] After attending Kwantlen Polytechnic University for two years but being unable to qualify for its nursing program, H. enrolled in training at a private college to become a practical nurse. He had to take out a \$34,000 student loan for this program, which he is expected to complete in April of this year. The respondent did not make any contribution to the costs of that program.
- [140] After completing it, H. plans to obtain a position as a practical nurse, which is expected to pay about \$30 per hour, but to remain at home in order to pay off his student loan and pursue a full nursing degree.

- [141] The respondent maintained that he has "provided the kids with anything they've asked" of him - for example expense money to L. for a sports trip, runners, and taking them for lunches and dinners. He emphasized that those were just examples of his contributions, but acknowledged that in December 2022 the claimant's counsel had written to him demanding any evidence he had of payments in the nature of support for the children, and that he had not provided any documents in response.
- [142] As a partial explanation for his failure to pay interim child support, he referred to an email exchange with the claimant in March 2020, in which he referred to the possibility of deferring payments on the mortgage for six months, because paying both the mortgage and his own rent was not sustainable. The claimant responded that if he deferred the mortgage he was going to have to pay her \$2200 per month in child support, in accordance with his previous year's income. The point he sought to make was that the claimant considered his paying the mortgage up to that point as the equivalent of support.
- [143] A recurring theme throughout his testimony on this issue was that he would have been prepared to pay support if there had been an agreement in place to document his specific obligations. When the claimant asked him in that March 2020 email exchange whether he was refusing to pay support, he referred to the absence of such an agreement. As he put it at one point in his cross-examination:
- I should have been paying something, but I didn't know what to pay, and the second point of that is I don't believe, with all of these promissory notes and that, that [the claimant] was in any financial struggle with 200-plus-thousand dollars in loaned money [from Mr. C.].
- [144] When the claimant's counsel asked him, "Why not take a wild guess and send her a thousand bucks every 45 days ?", he said that he did not know why he had not done that.
- [145] Going forward, he has "no problem" paying support, including for H.'s post-secondary costs, once trial orders have been made.
- [146] He has extended medical coverage that applies to the children through his employer. He can maintain that coverage during his apprenticeship schooling and any layoffs by paying a modest monthly fee. Shortly before the trial dates he had provided details of this coverage to the children's dentist.

Other Alleged Misconduct by the Respondent

- [147] The claimant testified that the respondent did not notify her in advance of return to the family home in February 2019, and refused her request that he leave once she became aware of it. The erratic behaviour and his aggressive attitude towards her that he had demonstrated leading up to the separation continued until his final departure.

- [148] For example, several times when she was out playing softball he sent her accusatory text messages and then locked her out of the house. Her mother testified about such an incident, in which the claimant arrived at her home in the middle of the night because she could not get into to her own home.
- [149] In August 2019, after the respondent came home without his truck, the claimant found a document in the kitchen indicating it had been impounded in relation to an impaired driving investigation. He refused to admit to her that this was why he did not have his truck, claiming instead that he was on holidays. (In cross-examination he put a copy of his driving record to her, which referred to a "3 day immediate roadside prohibition" on September 10, 2019. In his own testimony, he pointed out his relatively minor motor vehicle record as a whole, which consists of five infractions between 2006 and 2013.)
- [150] During this period he was "going out and drinking a lot", she said, and shortly afterwards he took a leave from his job with the energy company, which continued until it was terminated.
- [151] She found out about the pending termination in December, when she saw emails from his employer on the unlocked family computer, which he had left in the kitchen. This included a copy of his work credit card statement that contained unauthorized personal expenses, incurred in pubs and restaurants. She also saw emails from him to the employer, in which he took an adversarial tone and threatened to sue them. Despite this, in their conversations the respondent maintained that he would be returning to work, and was just taking his vacation time for the rest of that month.
- [152] The respondent's position is that he was terminated without cause, pursuant to a change to a large number of management positions within the organization. Mr. M., who occupies a management position in a different department of the utility, confirmed that version of events.
- [153] The respondent conceded however, that before the termination he was "going through some struggles", including taking a leave following the impaired driving incident in September. It had involved a company vehicle that he was also allowed to use for personal purposes.
- [154] In general, his post-separation communications with the claimant, which were mainly by email or text message, were angry and rude. He sent her a large number of them. At one stage, she blocked him on her phone because of his manner of communicating.
- [155] Printouts of many of these electronic communications were referred to in the claimant's evidence. Their themes included that she was neglecting the children in favour of spending time with her boyfriend, and that C.'s academic challenges during the pandemic were due to inadequate parenting on her part.

- [156] As context for the respondent's more aggressive and threatening post-separation behavior, the claimant described him as having been extremely jealous during the marriage. He accused her of having affairs, and threatened that if she were ever to be unfaithful to him he had friends who "could throw [her] body in the Fraser River". He also told her that she would "pay" if she crossed him, although he did not elaborate further. As a result, she was afraid of him at times during the marriage.
- [157] The respondent denied having made any such comments.
- [158] When she began a relationship after separation with C.I., the respondent sent her messages telling her that she had upset people who now wanted to harm her, and that there was nothing he could do to prevent it. He also told her to "watch [her] back" and to watch what she said and did. More directly, he told her that there were people he could "put after" her.
- [159] In addition to implying that she would be harmed, in 2020 the respondent threatened to reveal unflattering things about her to her family if she did not pay him out for his share of the house. He followed through on this threat, writing to her parents, the family friend Mr. C., and her boyfriend Mr. I., revealing alleged misbehaviour on her part.
- [160] He sent a message to the claimant's mother alleging that the claimant had been having an affair with Mr. I., whom he described in unflattering terms, during the marriage, that the claimant was mentally unstable, and that she had physically assaulted him during the marriage. (The message from the claimant that he forwarded to her mother along with his message had ended with her threatening to "slit his neck" if he blamed her mother for the difficulties in their relationship.)
- [161] He clarified in cross-examination that the assaultive behaviour he had been referring to consisted of her pushing him on one occasion when they were in the garage of the family home, and on another occasion jumping on him while he was sleeping and telling him she was free to have a sexual relationship with whomever she wished.
- [162] In a subsequent letter to both of her parents, he repeated these allegations and sought to involve them in the litigation, issuing an ultimatum about his planned return to the home.
- [163] In an email to the claimant in April 2020 he threatened to post the details of her relationship on social media, so that "everyone can be involved in your relationship with a married man."
- [164] He also told her that he would disclose her relationship with Mr. I. to H., although he did not actually do so.
- [165] Mr. C., the family friend who gave her financial assistance after the separation, testified that he received confrontational emails and text messages from the respondent, accusing him of interfering in the process of their separation and divorce.

- [166] The respondent also sent messages directly to Mr. I., advising him that "I have issues with you and I am not someone you want to have issues with" and inviting him to meet. His explanation in cross-examination was that he had been told by people who knew Mr. I. that he was involved with the claimant, and was a person of disreputable character whom the respondent "should probably watch". He sent the message because "if he's going to be around my kids and my home, I want to know that he's not that way." He said that he received that information in the middle of 2019, which was of course after separation. He did not dispute the confrontational tone of the message, but said that he was "writing out of a little bit of emotion".
- [167] In a later message he wrote to Mr. I. that "you have both made many people extremely unhappy, and as you know, you can't control anyone or their actions." In the same string of text messages, he wrote, "I'll be coming to see you. We have a lot to talk about." He agreed that there was also an incident in which he followed Mr. I. into the washroom at one of L.'s baseball games.
- [168] In addition, he wrote to the claimant threatening to speak to Mr. I.'s ex-wife, observing that "I'm sure it will help in his divorce and I'm sure after I speak with her, things should go smooth", and indicating his knowledge of where Mr. I. lived.
- [169] The respondent suggested that there might be additional conversations with Mr. I. on his phone that would provide context for these communications (conversations of a more civilized nature, I took the respondent to mean), including invitations to meet so that the respondent could learn more about him, but he did not provide them as part of his documents for trial. He agreed that prior to trial the claimant's counsel had advised him of the documents that would be included in the claimant's trial binders, and had invited him to add any additional ones that he felt were relevant. He offered to go home during the lunch break and retrieve his phone in order to provide these additional messages, but the claimant's counsel did not take him up on that offer.
- [170] The claimant also found it disturbing that the respondent's identifying symbol for his WhatsApp account was a burning house that resembled the family home. He explained that it was a picture that was sent to him by a friend, and that he liked it because it depicted a situation in which "when everything's kind of crumbling around down around you and you're just trying to find some resolve". His sister testified to a similar understanding of his purpose in using the picture. Both disavowed any suggestion that it was meant to demonstrate the extent of his hostility towards the claimant.
- [171] The respondent accepted the suggestion in cross-examination that his communications with the claimant might be perceived as "harassing" and "confrontational", but not as "threatening". He also agreed that an RCMP officer had phoned him and asked him not to have any further contact with Mr. I. after the communications that I have described, and that this could be fairly characterized as a warning.

- [172] Later in his cross-examination he was prepared to "assume" that his threat to the claimant to enter the home and retrieve some personal items while she was away, which he conveyed to her then counsel in an email, would "maybe" have instilled fear in her, but not "terror".
- [173] More generally, he accepted the suggestion that he had a problem communicating politely at times, and that his communications with the claimant included some "vulgar" ones (her counsel suggested that there were more than 50 that contained vulgarities in the trial documents), which he was "not proud of". He did not believe such behaviour was a "regular event" however. He specifically apologized in court for a particularly vile allusion to her sexual activity that he had expressed in an email.
- [174] In April 2022 the respondent began renting a room from his friend Mr. M., who had a townhouse in the same development where Mr. I. lived, which is also quite close to the family home. The claimant viewed this an attempt to intimidate her and to keep track of her and Mr. I.
- [175] Mr. M., who also knows the claimant, said that he and the respondent were not aware that Mr. I. lived there until after the respondent moved in, and Mr. M. noticed her vehicle parked there. The respondent paid him rent of \$800 per month for the ten months he lived there, after which he moved in with his current partner Ms. R.
- [176] The respondent also put forward an aggressive posture in the litigation, including declaring his unwillingness to pay home-related expenses and demanding that the home be sold. More specifically, he told the claimant that he was going to make her "pay", that she would "never have anything again", and that she was "never going to get a cent" out of him.
- [177] He also demanded disclosure from her counsel of the cost of the cosmetic surgery that she had in 2017 and paid for herself out of her employment earnings. (He had been very hostile towards her after she had this surgery, she testified, addressing her in profane terms and alleging that she had undergone it in order to pursue a new relationship.)
- [178] In a similar vein, in 2022 he wrote to the claimant's former counsel demanding his share of household furnishings for his upcoming move "asap or I will go other routes that will disrupt [the claimant]'s day to day living." Since he was only going to be renting a room from Mr. M., she did not believe that he actually required a significant amount of household goods. She said that several times after this she responded to his demands to her counsel for particular items by leaving them outside the house for him to pick up, but he did not attend for them.
- [179] This aggressive posture with respect to the contents of the home, which he demonstrated several times in his dealings with the claimant and her counsel, was also in contrast to the limited number of items that he removed from the home upon separation, and his general comment to her at that time that he did not want anything. (As a reciprocal example of inappropriate post-separation behaviour on the claimant's part, the respondent said that when he and Mr. M. went to the family home in December 2019 to pick up his clothes,

personal items and tools, pursuant to his final departure, she left these items lying on the floor of the garage. Mr. M. confirmed this incident in his evidence.)

[180] He also communicated with the claimant's previous counsel in a rude and sarcastic manner. A particularly unpleasant example was the email that he sent after he became aware that counsel's health issues would prevent him from continuing with the case:

I can do without the sob story of your health issues. I far from care about them, as in the same way you cared of mine. Do your rates go down while you're working at home?

[181] He conceded that some of those emails to counsel, as well as the ones he sent to the claimant, were "very confrontational".

[182] Other actions of the same nature included threatening to report both the claimant's present and previous counsel to the police and the Law Society. In his email to the claimant's present counsel his email alleged "multiple documents which you and your client had illegally obtained." Specifically, he alleged that the claimant had opened mail addressed to him at the family home and provided it to counsel. He later realized that that he was mistaken about that particular complaint.

[183] When C.'s baseball association did not include him to access the app that lists the team's games, an action that the claimant said that she did not instigate, he contacted the Human Rights Tribunal.

[184] In support of the claimant's theory that an ongoing substance abuse problem underlies the respondent's behaviour, her counsel cross-examined him on the very large number of charges in his bank statements from pubs and other establishments that serve liquor, and for taxis, in his bank statements from December 2020 to May 2021. These apparent drinking activities had occurred despite his having an annual income at that point of only about \$45,000, and in his testimony that it was "really hard to make ends meet" during that period. His position was that he would sometimes "have a drink" at these places, many of which were restaurants, but sometimes he would not. When he was asked if he was sure that he did not have a drinking problem during this period his response was, "I don't believe so".

[185] Addressing his use of taxis during that period, he explained that while he was able to borrow vehicles from his brother, the only one available for his exclusive use had mechanical problems, and was only suitable for trips to buy groceries. He agreed however that he had purchased a motorcycle for \$2500 in February 2020, but had not yet earned the specific licence necessary to drive it as of the period in early 2021 that the bank statements covered. (He made that motorcycle purchase "because it gave [him] a little bit of freedom". He listed the motorcycle as having no value in his most recent financial statement, but conceded that what he meant is that it is no longer worth what he paid for it. As another apparent splurge at odds with his financial situation, he took a four to five-day trip to Atlanta with friends in 2019.)

- [186] His friend Mr. M. described him as being in a depressed state and being "a changed person" following the separation. During the ten months that the respondent rented a room from him - in 2022 and early 2023 - he saw no signs of "daily drinking in excess". The members of their friend group are all only social drinkers, he added.
- [187] His sister similarly described him as depressed and "almost distraught" during the period from December 2018 to December 2019, and expressing sadness about having lost his home and his children. She rejected the suggestion that he has ever had a problem with alcohol or drugs, on the basis that she is in regular contact with him and has never seen any indication of it.
- [188] His partner Ms. R. is aware that the respondent had a prescription painkiller for his injury, but has not observed him abusing that medication, nor has he abused alcohol in her presence.
- [189] With respect to the need for a protection order, the respondent emphasized that he has "no intentions of harming or disrupting [the claimant], her boyfriend or anybody else within her family going forward", or that he had ever done so to this point.
- [190] He expects that he and the claimant could communicate constructively concerning the children, using a parenting app such as "Talking Parents", once the outcome of this trial has been "signed off". In his view, this would address any "harassing or intimidating like there may have been in the past." He also pointed out that other than a message to alert her that there had been a shooting near the family home, he had not contacted her directly for about six months as of the trial dates.
- [191] Despite the claimant's position that these actions have instilled fear in her, she agreed in cross-examination that none of her counsel have sought an interim protection order on her behalf.

Non-Disclosure

- [192] The respondent agreed that despite an order in February 2020 that he provide a list of documents, he did not comply until January 2023. He described his belief that because the trial dates that were pending at the time of that order were subsequently adjourned, he did not have to produce the list immediately.
- [193] Despite this concession, he also expressed the view that he had complied with his disclosure obligations. As part of his examination for discovery he provided the claimant's previous counsel with releases allowing that counsel to access his employment records for the position from which he was terminated, as well as his banking information. He also provided her present counsel with copies of his tax returns and notices of assessment.

- [194] He agreed that during the examination for discovery in June 2021 the claimant's former counsel drew his attention to the proper format of a list of documents, and put him on notice that he risked not being able to rely on any of his documents at trial if he did not provide a list in a timely manner. During that discovery, he was unable to offer any reason why he had not completed one yet.
- [195] He agreed that the judge who presided over one of the trial management conferences had told him that he was in breach of the order with respect to disclosure, and possibly in contempt.
- [196] He also agreed that his initial list of documents from January 2023 "wasn't much good", including the fact that it did not list any of his bank or credit card statements. Although he had received examples of how to prepare such a list, in the form of the ones provided by the claimant's counsel, he still found it "challenging to do it the first time", and "was still a little bit confused about how to do it properly". He later added that he had "no idea what [he] was doing at the time". Despite this, he also agreed with the suggestion that it would have been "really, really easy" to provide his bank and credit card statements.
- [197] In response to a letter from counsel on January 30, 2023, which complained about the state of his disclosure at that time, the respondent demonstrated a defiant attitude in his replies, describing counsel's concerns as "scare tactics" and declaring his unwillingness to get into a "back and forth" on the subject.
- [198] As to the documents that he produced on the day that this trial was supposed to begin (which was one day before it actually began), which were quite minimal, he acknowledged that none of them had been created after April 11, when the claimant's counsel had written again demanding the list. He had written back explaining that his list was "very substantial" and that it was "taking some time to put it together". In his testimony, he explained that he did not provide his list at that point because he was still unsure about which documents he was going to include. Although he represented in his trial brief that he would provide the documents by April 21, he was still "acquiring" copies of some of them by that date.
- [199] His position on providing disclosure with respect to his medical situation had been even more categorical. When asked at the December 2021 discovery about a release of medical records that the claimant's then counsel had sent him, he had responded, "You're not getting my medical records that's my personal business". He could not explain why he had not provided the record that he ultimately relied on to support his tendon injury (a radiology report, which actually does not document that injury, only his old healed fibular fracture.)
- [200] As a further example of what the claimant says is his overall attitude to his disclosure responsibilities, in his communications with her counsel he referred to the "surprises" he would provide at trial with respect to his witnesses.

Discussion

Proper Use of Misconduct Evidence

- [201] Because of the significant amount of evidence of misconduct by the respondent that was led in this trial, it is essential to define the proper bases for its admissibility, confine it to those bases, and exclude from consideration anything that does not fit within them.
- [202] As a general principle, unless character is an issue in the case, or it meets the test for admissibility as similar fact evidence, evidence showing the bad character of a party is inadmissible in civil proceedings. This is because the tendency of a party to behave badly usually says nothing useful about their conduct in relation to the actual issues: Lederman, Fuerst and Stewart, *The Law of Evidence in Canada*, 6th ed. (2022) ("Law of Evidence"), at 10.7-10.9.
- [203] In family law trials, with the increased potential for reliance of the bad character of the opposing party, the use of this evidence is even more tightly circumscribed. Under the Divorce Act, which applies here because a divorce is being sought and almost all of the relief is a corollary of it, evidence of the past conduct of a party is only admissible if it is relevant to "the exercise of their parenting time, decision-making responsibility or contact with the child under a contact order" (s.16(5)). With respect to spousal support, s.15.2(5) purports to exclude the "misconduct of a spouse" from consideration entirely, although the Supreme Court of Canada has made it clear that the effect of the misconduct on a spouse's need for support remains relevant: *Leskun v. Leskun*, [2006] 1 SCR 920.
- [204] There are also situations in which evidence that is relevant to an issue tends incidentally to demonstrate bad character. Such evidence will be admissible unless its prejudicial effect exceeds its probative value: *Law of Evidence*, at 2.84.
- [205] It is appropriate for the counsel to cross-examine on such matters for the purposes of testing a party's credibility, regardless of whether those matters are substantively admissible, subject to the trial judge's discretion to disallow oppressive or vexatious questions. For questions that are not relevant to an issue, the collateral facts rule applies, and counsel is bound by the party's answer: *Law of Evidence*, at 10.4.
- [206] The most straightforward type of conduct in this case is the alleged threatening statements and harassing behaviour by the respondent towards the claimant and Mr. I. It is directly relevant to the question of whether she is an "at risk family member" whose "safety and security is or is likely to be at risk from family violence carried out by a family member", so as to support a protection order under s.183 of the Family Law Act.
- [207] To the extent that it helps to determine whether the respondent is capable of co-parenting L. and C. it is also relevant to the concerns listed under s. 16(5) of the DA.

- [208] With respect to its potential relevance to spousal support, the vast majority of it occurred after separation, and the claimant did not suggest in her evidence that it was an aspect of the marriage or its breakdown that left her in greater need of support, so I would not consider it in that respect.
- [209] The relevance of the respondent's substance abuse is more nuanced. In itself such a problem is a neutral factor - family law does not treat it as a moral failing that disentitles a party from accessing the full range of rights that would otherwise be available to them. The question is whether the specific behaviour that a party has engaged in while abusing substances relates to a matter in issue.
- [210] The obvious application in this case is whether the respondent's past abuse of alcohol and/or illicit drugs, if I find it occurred, is likely to affect his ability to parent in L. and C.'s best interests in the future. Similarly, it may demonstrate a greater likelihood of engaging in future threatening or harassment conduct while under the influence. Since it is related to the alleged extensive absences from the home during the marriage, it may have rendered the claimant's role as primary caregiver more demanding, thus affecting the impact of that role on her need for support. Finally, to the extent that it was linked to the respondent's spending patterns, both during the marriage and after separation, it may be informative on the question of whether he dissipated family resources, or spent money on that activity that should have been used to pay support.

Effect of Non-Disclosure

- [211] Failure to disclose material information has been described as the "cancer" of family law litigation: *Leskun*, at para. 34, citing *Cunha v. Cunha* (1994), 99 B.C.L.R. (2d) 93 (S.C.), at para. 9.
- [212] One of the options available to the court when it has occurred is to draw an adverse inference against the offending spouse - that is, an inference that the missing material would have supported the position of the spouse who unsuccessfully sought disclosure. This option is statutorily enshrined in s. 23 of the Federal Child Support Guidelines with respect to support orders, and with respect to non-compliance with disclosure orders generally in s. 213 of the FLA.
- [213] However, the availability of an adverse inference does not permit a court to make "something out of nothing", by inferring the existence of specific assets in the absence of some evidence about them: *Wu v. Sun*, 2011 BCCA 239 at para. 41.
- [214] On any version of the events, the respondent's disclosure of relevant documents, particularly with respect to his banking and credit card use, has been completely inadequate. I will address the consequences of this shortcoming as they arise in relation to each of the disputed issues.

[215] At this point however, I should address his argument that the releases he provided to the claimant's former counsel fulfilled his disclosure obligations. Aside from the obvious fact that they cannot be used by the claimant's present counsel because they were completed in the name of her previous one, releases do not fulfill the essential requirement of a list of documents under the SCFRs, which is to list, on an ongoing basis, "all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact": Rule 9-1(a)(i). This is in addition to the requirement to complete a Form 8 financial statement with all necessary attachments, and to update it in relation to the trial dates: Rule 5-1(18).

Credibility Assessment

- [216] Of the recognized factors that can influence the assessment of credibility (see the often-quoted and helpful compendium in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186), the ones that particularly apply to the parties in this case are: an interest in the outcome of the litigation and the extent of the witness's ability to resist that influence when giving their testimony; the reasonableness of their evidence and its resonance with reliable independent evidence; and their responses to cross-examination.
- [217] The overarching consideration of course is the consistency of the version of events that the witness provides with what a "practical and informed" observer finds is likely to have been reasonable in those particular circumstances, as described in the classic authority of *Faryna v. Chorny*, [1952] 2 D.L.R. 354 (BCCA) at para. 10.
- [218] There were actually fewer areas of factual dispute in this trial than it might initially appear. The respondent did not contest the claimant's primary responsibility for childcare and household duties during the relationship. While he has explanations for it that do not reflect any fault on his part, he was really not in a position to dispute the extent or nature of his contact with L. and C. since the separation. He certainly did not claim that the claimant had impeded it. The major transactions involving the family home are contained in banking records and the inappropriate communications by him to the claimant after the separation are preserved in emails and text messages. The respondent has also not suggested that he has made any more financial disclosure than the claimant credits him with.
- [219] Similarly, while the basis on which Mr. C. has provided financial assistance to the claimant is disputed, there is no reason to doubt that his company assumed the mortgage on the family home, or that it advanced the other sums to her that are recorded in the promissory notes.

- [220] The main areas of dispute on which there is no reliably recorded evidence have to do with the allegations of threatening behaviour by the respondent before the separation, the existence of a substance abuse problem on his part and the amount of time he spent outside of the home socializing as a result of it, and the degree of the claimant's knowledge and involvement in the family finances before and immediately following separation.
- [221] I would say that the claimant was overall a credible witness. Her testimony was to a large degree a low-key and factually-focused recitation of the key events, which contained the kinds of idiosyncratic human details that one expects to find in actual memories. For example, her descriptions of the respondent's intoxicated behaviour, especially her description of his disturbing comments in one incident about wanting her to leave so that he would not hurt her, were compelling in the details they contained. She was also quite restrained in her responses in cross-examination, despite the respondent conducting it personally, and only occasionally lapsed into hostile responses that went beyond what was required to answer the question.
- [222] There were certain points in her evidence where I thought she was overreaching a bit to paint the respondent in a negative light, such as her attempt to attribute ominous significance to the his possession of what on all of the evidence appears to have been legitimately prescribed medication, and her initial blanket denial of all knowledge of the family's finances, which she had to qualify somewhat to distinguish between her access to some bank and credit card statements and her knowledge of the extent of the family's debts.
- [223] All in all however, she impressed me as a person who was no more hostile towards the opposing party than that party's past behaviour justified, and satisfied me that her narrative of events on the essential issues was a truthful one. In general, I accept her evidence in the areas of conflict.
- [224] The respondent, on the other hand, demonstrated some serious shortcomings when testifying. He was overtly hostile to the claimant's counsel and attempted to outsmart him or put him down whenever the opportunity arose. He evaded or sought to qualify to an unhelpful degree even the simplest of questions, especially when dealing with his post-separation spending, and clung tenaciously to unbelievable positions. In particular, he sought to claim, against all evidence to the contrary, that he had effectively fulfilled his disclosure obligations, and took the opportunity whenever one of the missed deadlines for those obligations was raised to revisit his hostility towards the claimant's previous counsel. He also maintained the unreasonable position that all he was waiting for to begin to fulfil his support obligations was an agreement of some kind, and was unable to explain why he had not at least paid interim support based on his claimed reduced income until such an agreement was reached.

- [225] In overview, he gave his evidence from a posture of almost complete defiance, although to his credit he did offer select apologies for certain of his post-separation statements and actions. To be clear, I do not say that he set out to be misleading, but rather that he unfortunately allowed his hostility towards the claimant to lead him into testifying in an aggressive and positional way, rather than simply describing events as he had experienced them, as I find she largely did.
- [226] As a result, I would be extremely cautious about relying on his evidence in the absence of support for it from other reliable evidence.
- [227] None of the witnesses called by the parties - the claimant's mother, the respondent's sister or his friend Mr. M. - demonstrated any reason to be concerned about their truthfulness. All of them testified in a straightforward manner and with fairness to the opposing party. In particular, I was struck by the lack of apparent hostility of the claimant's mother and Mr. C. towards the respondent and of Mr. M. towards the claimant. Ms. G. did become a bit protective of her brother and at least implicitly critical of the claimant towards the end of her direct evidence, but in general she was fair to the claimant, and her actions in continuing to facilitate contact between the respondent and T. and C., as well as between her own children and C., speak volumes about the balance of her perspective.
- [228] I will apply these various findings as they arise when dealing with the substantive issues.

Parenting

- [229] It goes almost without saying that the sole consideration when arriving at appropriate parenting arrangements is the best interests of the children. Although s.16(6) of the DA provides that in allocating parenting time "the court shall give effect to the principle that the child should have as much time with each spouse as is consistent with the best interests of the child" (in contrast to s.40(4) of the FLA, which provides that "no particular arrangement is presumed to be in the best interest of the child"), this principle is only significant to the extent that it is in the child's best interests to maximize contact - it must not be used to detract from the best interests inquiry: *Barendregt v. Grebliunas*, 2022 SCC 22, at para. 135.
- [230] The claimant seeks to have sole guardianship of L. and C. and to exercise all of the decision-making responsibilities with respect to them. She suggests that they primarily reside with her and have parenting time every other weekend for up to 24 hours, at such times within that period that the children agree to, as well as extended time during holidays as agreed to in writing by her and the respondent. He would also be required to exercise his parenting time in a sober condition, without having consumed any intoxicating substances within the preceding 12 hours.

- [231] The respondent, as I indicated previously, seeks equal parenting arrangements, with L. and C. residing with each parent on alternating weeks. While I took him to be generally agreeable to the claimant exercising at least the initial parenting decisions in relation to the children's medical care and schooling, this was premised on his belief that nothing controversial was likely to arise in those areas.
- [232] I am certainly satisfied that the respondent genuinely cares for L. and C. and seeks to act in their best interests. It is also true however, that according to the claimant's careful records, which I accept, he has not exercised all that much parenting time since he left the family home for good, and has on occasion left the children, especially C., disappointed by his failure to follow through with plans with them. In my opinion, it would not be in their best interests to transition immediately to equal parenting without a stable period of specified parenting time, during which the respondent can become a predictable part of their regular routines, and demonstrate a consistent ability to act in their best interests.
- [233] The other factor that weighs against the parenting plan that the respondent proposes is that, despite his belief that matters will go more smoothly between him and the claimant once orders are in place, he has yet to demonstrate an actual ability to move on from his completely oppositional interactions with her on parenting in the years since separation. Before significant, let alone equal parenting can be allocated to him, he needs to amass a track record of cooperative and uneventful parenting with the claimant, so that there is reasonable certainty that the children will not be caught in the middle of more of his misbehaviour.
- [234] Although I accept the claimant's evidence that the respondent was out a lot of evenings socializing during the marriage, it does not detract from the conclusion that properly staged-in parenting time will be in the children's best interests. However unwise that approach to his parental role may have been, it has apparently not affected L. and C.'s wishes to spend time with him.
- [235] If the amount of his parenting time is enhanced somewhat, I think that the claimant's proposal offers a good foundation for the respondent to demonstrate his ability to act in the children's best interests. While it is a worthy suggestion, given L. and C.'s ages, to give them a measure of agency in arranging with the respondent when in their weekend their time with him will occur, I think that a greater degree of structure is needed in the early stages, to ensure that the respondent's ability to interact directly with the children is not abused. A meaningful period of such appropriate conduct might well support an increase in the amount of his parenting time the future.

- [236] It is similarly too early in this process to depart from the status quo with respect to decision-making for L. and C. This is due to the claimant's current familiarity with their day to day needs, and the respondent's unproven ability to work constructively with her in reaching such decisions. A duty to consult the respondent and consider his input, subject to him conducting himself appropriately during that process, ensures that his views will be incorporated into the decision-making process to an acceptable degree.
- [237] The only point on which I cannot accept the claimant's position on parenting is with respect to sole guardianship. This would deprive the respondent of a role that he currently occupies by virtue of being one of L. and C.'s parents and having lived with them before separation (see s.39(1) of the FLA). Terminating guardianship will rarely be in a child's best interests and should be done only in extreme situations, and only when a reallocation of the parenting responsibilities cannot safeguard the children's best interests: J.W.K. v. E.K., 2014 BCSC 1635, at paras.23-24.
- [238] I am unable to find that this is such a situation. Any risks to the children from the respondent's continued guardianship, and none are currently apparent to me, will certainly be eliminated by the allocation of all decision-making to the claimant, which has already occurred.
- [239] Lastly, the respondent's ability to communicate with the claimant on parenting issue must be structured in a way that ensures that he is unable to abuse it in the future. The claimant suggests a restriction to written communications, which are required to focus on the children's issues and be "brief, respectful and non-confrontational". As I have mentioned, the respondent believes that a parenting communication app would be helpful in this regard.
- [240] Accordingly, I will make the following orders with respect to parenting:
- L. and C. will reside primarily with the claimant;
 - The claimant will exercise all of the decision-making responsibilities with respect to the children that are set out in the definition of that term in s.2 of the DA, except that the claimant will advise the respondent of any significant decisions that are required concerning their health or education and seek his input before reaching a decision;
 - Pursuant to s.16.4 of the DA, the respondent will be entitled to communicate with and receive information from the children's healthcare providers, school officials and sports coaches and administrators, provided that such communication does not interfere with the claimant's exercise of her decision-making responsibilities;
 - The respondent will have parenting time with the children according to the following schedule:
Week 1 - Friday 6pm to Saturday 6pm; Tuesday from school dismissal (3pm when school is not in session) to 9pm/ Week 2 - Saturday 6pm to Sunday 6pm, Wednesday from school dismissal (3pm when school is not in session) to 9 pm;

- This schedule may be varied and/or increased by the claimant at the request of the children or the respondent, including to provide that both children do not have their parenting time on the same day or during the same hours, if that is in their best interests. The claimant may also alter the schedule to accommodate a significant need of a child, provided that the respondent is given 72 hours notice of the change and is offered equivalent makeup parenting time;
- The respondent and the children may communicate by phone or text message at any time, except that the claimant may restrict the communication if its nature and/or frequency is interfering with the children's school or other important activities;
- While he is exercising his parenting time, the respondent is responsible for ensuring that the children attend all scheduled school and sports events, or other appointments, and complete any schoolwork that is due upon their return to the claimant's care;
- While there is no evidence that the children were directly exposed to the respondent's substance use during the marriage, which I am satisfied the claimant described accurately, it is important to ensure that it does not occur in the future. Therefore, the respondent will not consume alcohol or any other intoxicating substance during his parenting time, or the 12 hours immediately preceding it; and
- The respondent will be entitled to have consecutive parenting time with the children for half of the winter break, half of the spring break and two consecutive weeks in the summer break. The order in which the winter and spring breaks are shared will alternate each year, with the claimant having the first half of each break in the first year, the respondent the second half, and so on. He must advise the claimant of the two summer weeks on which he wishes to exercise parenting time with the children by April of each year.

[241] I have vested a significant amount of discretion in the claimant in this structure, because she has demonstrated an ability to act in the children's best interests with regard to his parenting time with them despite his behaviour towards her.

[242] I will deal with any restrictions on communications between the parties that may be required when dealing with the necessity of a protection order.

Income for Support Purposes

[243] First of all, the issue of the respondent's severance pay in relation to his actual income needs to be dealt with. Even though it is a non-recurring amount, there is a presumption that severance payments should be included in Guideline income, because they are a direct substitute for employment income: *McKenzie v. Perestrelo*, 2014 BCCA 161, at para. 94. As it was expressed in *C.A.B. v. M.S.C.S.*, 2006 BCSC 1393 at para.11, *aff'd* in 2007 BCCA 271, "a severance package should be seen for what it is -- an amount that can be used to soften the blow of the changing circumstances by supplementing income through a reasonable period of transition".

- [244] Therefore, the \$55,928 that was deposited into the respondent's account by his employer in January 2020 must be included in his income for support purposes. When it is added to his reported income for that year, the total is \$102,227.
- [245] The main question under this heading is whether income should be imputed to the respondent based on intentional underemployment.
- [246] The claimant says that the same income he received the position from which he was terminated - \$110,000 -should be imputed to him, on the basis that he has provided only the vaguest explanations about why work that pays at that level is not available to him, and why he has chosen the relatively poorly-paid path of an HVAC apprenticeship. Crucially from her perspective, these vague assertions are unsupported by any reliable documentation of his job search efforts, the actual apprenticeship pathway, and the injury that has apparently had him off of work since August 2022. His demonstrated earning capacity through the preceding five years of the relationship (and, when one considers his severance pay properly as income, in 2020) is to earn in the range of \$110,000 per year, and any legitimate reason why that might have changed has been concealed by his deliberate non-disclosure.
- [247] For his part, the respondent is content to pay whatever support is ordered on the basis of the income that he has actually earned since separation, which he says accurately represents his capacity in light of his reasonable pursuit of retraining.
- [248] Section 19 of the Guidelines permits a court to impute income for the purposes of a support analysis in a variety of situations. In this case, the potentially relevant one is that "(a) the spouse is intentionally under-employed".
- [249] In determining whether this sub-section applies, there is no need to prove an intentional evasion of support responsibilities. The court is simply concerned with whether the spouse is earning what they are capable of: *Barker v. Barker*, 2005 BCCA 177, at para. 19.
- [250] The test for imputing income based on intentional underemployment "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": *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37. Persistence in un-remunerative employment or unrealistic career aspirations will not be an excuse, and a self-induced reduction in income will not justify the avoidance of child support obligations: *Hanson v. Hanson*, [1999] B.C.J. 2532 (SC) at para.14. In particular, a payor is not "allowed to load the costs of his career adjustment on the petitioner now, while he reaps the benefits in years to come": *Pierce v. Pierce*, 2004 BCSC 245 at para. 23.
- [251] The party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding: *Marquez* at para.36. As it was expressed in *Drygala v. Pauli*, (2002) 61 O.R. (3d) 711 (C.A.):

- [44] Section 19 of the Guidelines is not an invitation to the court to arbitrarily select an amount as imputed income. There must be a rational basis underlying the selection of any such figure. The amount selected as an exercise of the court's discretion must be grounded in the evidence.
- [252] Importantly however, this can include circumstantial evidence and, provided that there is some evidence on which to draw it, an adverse inference is available as a result of non-disclosure: *Poursadeghian v. Hashemi-Dahaj*, 2010 BCCA 453, at paras.23-25. Specifically, a party "cannot be heard to dispute the level of income attributed to him, nor [be] permitted to escape his support obligations because of his failure adequately to disclose income information" (para.25).
- [253] To prove his current employment and the income he receives, the respondent provided T4 slips, records of employment for EI purposes, and paystubs. As I have mentioned, he was evasive at his examination for discovery in December 2021 about having been laid off at that time, and his trial evidence about his start date in that position and his specific layoff periods were not as definite as one would expect. He also provided no documentation of his apprenticeship arrangements and was vague about its end date, which he said was dependent on the availability of the classroom training. I am satisfied that he works at the mechanical company in question and is likely pursuing an apprenticeship, but the absence of supporting material about the details necessitates a degree of caution before accepting his other employment-related assertions.
- [254] In addition, while his notices of assessment would normally provide an accurate baseline of his earnings, the exclusion of his 2020 severance pay from his income, and his reporting in his financial statement of annual expenses that substantially exceed his apprenticeship earnings without explaining how he makes up the difference (or without his partner Ms. R. hearing any complaints from him about being short of money), mean that the possibility of other unreported income remains.
- [255] All of that acknowledged, I think that the analysis of the respondent's current earning capacity has to go beyond simply asserting that his pre-dismissal earning patterns should continue. A realistic imputation of income based on his present employment situation must take into account the circumstances under which his former employment changed, and where that leaves him now. The claimant did not seek a finding that he was culpable in the loss of his previous position, so income cannot be imputed solely on the basis that he created the situation in which he now finds himself (see, for example, *Baldini v. Baldini* [1999] BCJ No 1426 (SC) at para.19.). Further, he was dismissed from a supervisory position that he seems to have progressed through the ranks of the utility to obtain, which may mean that it was more accessible to him than it would have been if he had come in off the street. There was certainly no evidence provided that comparable positions are currently available to him elsewhere.

- [256] Once his prospects are reviewed more realistically, the question becomes whether it has been shown that he is not earning what he is reasonably capable of earning by pursuing re-qualification in the HVAC field, with the four years of reduced earnings that it apparently entails. In that regard, the claimant's basic premise - that he should be focusing on the most immediately remunerative use of his skills and experience to earn income, rather than engaging in a delayed process in which he is only paid as an apprentice - is sound. The challenge is how to identify the alternatives that are reasonably available to him, and to quantify their earnings.
- [257] The only specific alternative to pursuing the HVAC apprenticeship that surfaced in the evidence was his own description of using his A level gas fitter ticket for other employment. As I have summarized, he said that during COVID the big projects that employ gas fitters with that qualification were not proceeding. To the extent they are now available post-pandemic, they tend to take place outside of the lower mainland or the province, and be carried out by gas fitters who operate their own companies. He prefers to seek a position that will allow him to remain local and maintain his relationship with L. and C.
- [258] He did not indicate the range of earnings that such a use of his ticket could generate. We also have only his testimony to demonstrate that this is the only way to make direct use of his particular ticket (the claimant did not provide evidence of other positions he could obtain using it, likely because of her position that the court should just impute his previous income).
- [259] At the end of the day, I am satisfied that the respondent's own evidence provides an evidentiary basis to find that using his qualifications as an A level gas fitter must inevitably be more remunerative than his current apprenticeship, simply by virtue of the fact that it is a journeyman position, not one at the trainee level. Again, his own evidence is that his current reason for not pursuing that employment currently, now that COVID restrictions have been lessened, is that he prefers not to travel out of town. If it is true that there are no local positions and that is the only way to access such employment, which I find doubtful, this is not a preference that he can visit on his children in pursuit of a requalification plan that has such an imprecise end date, even if his motivation is to spend more time with them.
- [260] I am therefore satisfied that the respondent is intentionally underemployed, by pursuing longer-term retraining rather than making immediate use of his A level ticket.
- [261] With respect to the pay for such employment, I consider this gap in the evidence to be largely a consequence of his non-disclosure of information relating to his job search efforts. I cannot fault the claimant's counsel for failing to elicit the pay of an A level gas fitter from him in cross-examination, since the claimant's position was that his earning capacity was unchanged following his loss of employment. Even if it had been elicited, in the absence of documentation of available positions, it would have come with the same credibility concerns that underly the rest of his evidence.

- [262] One could potentially infer that the income of a Class A gas fitter is at least commensurate with the journeyman HVAC position listed in the material that he provided, which has an hourly wage of \$50.09, plus benefits that raise it to \$69.48, given his evidence that he holds a superior ticket level to the one that is required for that qualification. The resulting annual income of about \$126,000 is higher than he estimated in his evidence, and is a further indication that his employment-related assertions are unreliable. Notably, he did not testify that he was pursuing the retraining for the higher income that it would eventually yield. The shortcoming of that inference is that we do not know how the skills of these two trades and the demand for them in the market compare to each other, or how a non-union A level gas fitter position would compare to a unionized one.
- [263] While resort to government websites has been found to be an acceptable form of judicial notice in the context of labour market statistics (*Corey v. Kruger Products L.P.*, 2018 BCSC 1510 at paras. 37-39), that case involved acceptance of the statistics tendered by a party, whereas my independent resort to such information would deprive the inquiry of its necessary adversarial context. Similarly, it would be inappropriate to re-open the trial for evidence that the parties could have led on this issue - "[t]he responsibility lies with each party to take the necessary steps to marshal the evidence required to establish their claims at trial" *Bodine-Shah v. Shah*, 2014 BCCA 191, at para.56.
- [264] I conclude that the available circumstantial evidence permits a sufficiently reliable inference about the likely income for available employment at the respondent's current qualification level.
- [265] As a baseline I would use his reported expenses, his minimal contributions to his shared household, the absence of any reference to difficulties arising from his apprenticeship earnings, and his unreliable reporting of income and his periods of unemployment as an apprentice. These satisfy me that at the very least he is capable of earning the amount of his claimed expenses - \$75,742.
- [266] At the top end in the analysis, we have the journeyman HVAC job that he eventually seeks, which pays about \$126,000 with benefits at the union level, but which cannot be treated as the equivalent of a journeyman class A gas fitter's position without further evidence.
- [267] Finally, we have his \$110,000 income in his former supervisory position, which carries some weight but, as I have pointed out, has to be moderated somewhat by the circumstances under which he lost it, even if dismissal for cause was not proven, and the possibility that his ability to obtain that position within the utility may not match his employability outside of it.

- [268] All things considered, I think that his annual expenses and his former income provide the most realistic bookends - the amount that he must be earning at one end, and the highest proven use of his current qualifications (albeit one he may be unable to replicate) at the other. With their influence in mind, I conclude that imputing an income of \$85,000 per year to the respondent would fairly reflect his actual earning capacity, without permitting him to hide behind his deficient disclosure.
- [269] However, I conclude that it is unnecessary to impute income to the respondent for 2020, because his reported income for that year has already been increased by adding in the severance payments, which were intended to help him make the transition to new employment. Therefore, this imputation for support purposes will be effective January 1, 2021, and the income for 2020 will remain \$102,227.

Child Support

- [270] The claimant seeks retroactive child support. The respondent is content to pay it, but his position is based on his actual apprenticeship earnings forming the basis of it.
- [271] Orders for retroactive child support are governed by the principles set out by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231. Consideration must be given to four factors: whether there is a reasonable excuse for support not having been sought earlier; the conduct of the payor parent, including any blameworthy conduct; the circumstances of the child, both at the time of the application and when the support would have been paid; and any hardship to the payor parent that would result from a retroactive award (paras. 101, 106-113, 115-116).
- [272] The date of retroactivity will be the date that the payor parent received effective notice that child support should be paid. Such notice does not have to be provided in a formal manner, as long as the subject has been broached by the recipient parent. Unless there has been blameworthy conduct by the payor, an award should not go back more than three years from the date of formal notice (paras. 118, 121, 123-4).
- [273] The amount awarded must follow the Guidelines, but the court can avoid any resulting unfairness by applying the undue hardship provisions of the Guidelines, or by reducing the period covered by the award, despite the date of effective notice (paras. 127, 129-30).
- [274] In a situation like the present one, where there has been no previous order for child support "absent special circumstances (e.g., hardship or an ad hoc sharing of expenses with the custodial parent), it becomes unreasonable for the non-custodial parent to believe he was acquitting him self of his/her obligations towards his children. The non-custodial parent's interest in certainty of knowing his support obligations]is generally not very compelling ": *D.B.S.* at para. 80.

- [275] Applying these factors here, my first observation is there has been enough delay between the separation date and the application for support at trial to justify a closer examination. However, D.B.S. warned that courts "should not hesitate to find a reasonable excuse where the recipient parent harboured justifiable fears that the payor parent would react vindictively to the application to the detriment of the family" (para.101). Although the claimant did not give this evidence, her counsel urges me to find that she was deterred from making an interim support application by the abuse that she would undoubtedly have had to endure.
- [276] There is certainly support for such a decision on her part. Simply having a notice of family claim outstanding and working through the necessary pretrial processes was enough to provoke the ongoing verbal aggression that I have summarized. An actual court application could well have raised it to a still higher pitch, and the claimant would not have been acting unreasonably in believing that it would. Further, the respondent's lack of financial disclosure would have presented the same obstacles to challenging his choice of employment and imputing a higher income to him on an interim application as it has presented in this trial.
- [277] Despite this, I do not think I can attribute a state of mind and a resulting decision-making process to her that she did not actually describe, or give sufficient evidence on the point from which it could be inferred.
- [278] That is not the end of the inquiry though, because the point of declining to make retroactive support orders when there has been inexcusable delay is to avoid situations in which the payor would reasonably have assumed that they were fulfilling their obligations for the intervening period, so that it would now be unfair to enforce them at a higher level. Neither of those features are present here.
- [279] The trial was adjourned three times previously, starting with a date in August 2021, and while there is no evidence on which I can attribute responsibility for those adjournments, it is not as though the matter ever lay dormant in a manner that would have caused the respondent to believe that the claimant would not pursue support. He could never have been in doubt that it was an obligation that he was eventually going to have to deal with. It is telling in that regard that he had no explanation for why he had not simply paid an arbitrary amount of support before an agreement was reached.
- [280] This distinguishes his situation from the prejudice suffered by the payor in cases where the process has been dormant, but there was every reason to believe that the recipient had abandoned it.
- [281] In the final analysis, it was the respondent's unreasonable insistence in not paying support until he had an agreement that has mainly led to the accumulation of arrears, not the claimant's failure to seek interim support in advance. The delay that has resulted is not a good reason to refuse retroactive support.

- [282] Although his conduct has been extremely blameworthy, D.B.S. uses that term in the context of the date to which retroactive support is ordered. In this case, there is almost no difference between the formal and effective notice to him of the need to pay support. The original notice of family claim was filed in May 2019, shortly after the respondent stopped paying the mortgage and other home expenses, which it appears he had been doing, with the claimant's acquiescence, in substitution for child support since the separation. Once he indicated his unwillingness to continue in March, she explicitly broached in response his need to pay support. Since the period for which support is being claimed basically coincides with the appropriateness of him paying it, his blameworthy context does not have to be considered in the D.B.S. context.
- [283] The circumstances of the claimant amply justify a retroactive award. Her employment income is modest, and but for Mr. C.'s assistance she would not have been able to address the pressing debts and cover ongoing expenses. A retroactive award would clearly benefit the children's standard of living by supplementing what she is able to provide, and would be the farthest thing from a windfall to her.
- [284] Lastly, I cannot identify any hardship, as opposed to inconvenience, to the respondent arising from a retroactive award. As I said in the context of the claimant's delay, this is not a situation in which support obligations have been imposed on a payor who had a reasonable basis for committing his financial resources elsewhere, or lacks the resources to pay the award.
- [285] Before moving in with Ms. R., he lived with his parents and then Mr. M., paying modest rent in each case, and he makes minimal contributions to his upkeep with Ms. R. He has had, as the claimant's counsel put it, "a complete holiday" from his support obligations in the time since separation, and the amounts he will be required to pay will be based entirely on what he was reasonably capable of earning. It is not a situation like the one envisioned in D.B.S., where a payor is required to pay income for years in which he earned a higher income than he is earning at the time of the order (para.115). In any event, as D.B.S. noted "it will not always be possible to avoid hardship" and it "is much less of a concern where it is the product of [the payor's] own blameworthy conduct" (para.116).
- [286] Accordingly, I am satisfied that retroactive child support is appropriate and order that it be paid from April 1, 2020 to May 1, 2023.
- [287] For the retroactive period for which support must be paid for H., s. 3(2) of the Guidelines applies. It provides that:

Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is

(a) the amount determined by applying these Guidelines as if the child were under the age of majority; or

(b)if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

[288] These are sometimes described, respectively, as the "table" approach and the "budgetary" approach. The choice between the two approaches is discretionary and will depend on the particular circumstances of the case. For example, if the child's circumstances resemble those of a child under the age of majority, it is more likely that the table approach will be appropriate: *McClement v. McClement*, 2017 BCCA 416 at para. 12.

[289] In this case the only evidence is that H. has remained at home throughout, so the usual table amount, as though he was under the age of majority, is appropriate to apply.

[290] Before dealing with prospective support, I must determine whether H. remains a child of the marriage for support purposes. The respondent did not dispute that status for the period leading up to the trial and, as I have indicated, even expressed his willingness to contribute to H.'s post-secondary expenses.

[291] In order to remain a "child of the marriage" for the purposes of receiving child support pursuant to the DA, a child who is over the age of majority must be "unable, by reason of illness, disability or other cause, to withdraw from [the parents'] charge or to obtain the necessities of life..." (s. 2(1)). The onus of proof is on the parent who claims that the child falls within the definition.

[292] Post-secondary education can be a valid reason for an adult child to be unable to withdraw from their parents' charge. The simple fact of their attendance at a post-secondary institution is not sufficient however. Instead, the court must ask "whether, considering all of the child's circumstances, the child's educational pursuits are reasonable" and if they are, "whether it is appropriate that the pursuits be financed by the parents": *Nordeen v. Nordeen*, 2013 BCCA 178 at paras. 15-16.

[293] A variety of factors will be helpful to consider when addressing these questions, including the nature of the program, the child's success in it and past programs, their career plans, their ability to contribute to the cost themselves, the parents' plans, and the unilateral termination of the relationship with the payor parent by the child. However, these "are neither a checklist nor a set of statutorily-mandated criteria": *Dring v. Gheyle*, 2018 BCCA 435 at paras.49-52.

[294] The level of contribution expected from adult children to their educational expenses ranges from 10% to 50% of the cost, and the court has a very broad discretion to determine the amount the adult child should contribute: *Hausmann v. Klukas*, 2016 BCSC 853 at para. 103.

[295] Although the respondent does not dispute the legitimacy of H.'s educational choices or his need for support, the difficulty is that the evidence was that H. would be graduating from the practical nursing program around the time of trial, and then earning \$30 an hour,

which works out to over \$54,000 per year on a full-time basis. It is not known when he will begin the full nursing training and under what schedule, or what amount of income he will continue to be able to earn and contribute to the cost. I appreciate that he has significant student loans to repay, but I am not aware of any decision holding that student debt, standing alone, will render an adult child who has completed their initial proposed training and is now capable of earning a reasonable income, incapable of withdrawing from their parents' care. The extent to which the loan should form part of H.'s special expenses during the period that he was still a child of the marriage will be addressed under the heading of special and extraordinary expenses.

- [296] Therefore, while he may well re-acquire that status upon further application if he pursues full-time nursing studies, on the present evidence H. will cease to be a child of the marriage for support purposes as of April 30, 2023.
- [297] Therefore, based on the table amounts in the Guidelines for three children at the respondent's 2020 income of \$102,227, he will pay \$2021 per month from April 1 to December 30, 2020, for a total of \$18,189.
- [298] At his imputed income of \$85,000 per year, the respondent will pay \$1715 per month from January 1, 2021 to April 30, 2023 when the trial began and, coincidentally, H. ceased to be a child of the marriage.
- [299] His retroactive support obligation for 2021 will be \$20,580 ($\$1715 \times 12$ months).
- [300] The calculations for 2022 and 2023 are less straightforward, because of the period from August 10, 2022 to April 16, 2023 when he was receiving a combination of short- and long-term disability benefits for his Achilles tendon injury, as he has reliably documented in the form of the benefits statement that is attached to his financial statement.
- [301] He received \$1500 per month from August 10 to December 6 and \$3000 per month from December 7 to April 16. For ease of calculation I would round off the months in which he received disability payments to the nearest start or end of the month, as the case may be.
- [302] This results in an annual income for 2022 of \$63,600 ($\$85,000 \times .66 + \$1500 \times 3 + \$3000 \times 1$), a table amount of support of \$1295 per month and a yearly retroactive amount of \$15,540.
- [303] The four months of 2023 for which retroactive support is payable would be based on an annual income of \$68,100 ($\$3000 \times 4 + \$85,000 \times .66$), the table amount at that income is \$1385, for a retroactive payment for those four months of \$5540.
- [304] His total retroactive child support obligation is therefore \$59,849. In final submissions the respondent said that he would prefer to set his retroactive obligations off against the amount that is payable to him on property division. That is a reasonable suggestion, one that is equally beneficial to the claimant, and I will follow it.

- [305] On a prospective basis, the claimant no longer seeks to impute an income to the respondent, but is content to base it on his 2022 notice of assessment, which is described as \$75,000 per year in her counsel's submissions but, as I have summarized, was actually \$62,425.
- [306] As I will describe, she proposes allocating the retroactive support awards that she is seeking towards property division, and this may account for her more moderate position on ongoing support.
- [307] Be that as it may, child support, as has so often been said, is the right of the child, and I am unwilling to see L. and C. receive less than the full benefit of the respondent's earning capacity, as I have imputed it, regardless of how the claimant seeks to structure a fair outcome from her perspective. Therefore, I will continue to base the respondent's obligations on his imputed income until it has been shown reliably that he is earning to his capacity but receiving a lesser amount.
- [308] Consequently, as of May 1, 2023 (effectively the date of trial) the respondent will pay the table amount at his imputed income for two children, which is \$1,653 per month.
- [309] To address ongoing support issues, the parties will exchange their tax returns as soon as they are filed, and their notices of assessment as soon as they are received, on a yearly basis.

Special and Extraordinary Expenses

- [310] In her financial statement the claimant listed these expenses for the children as \$2,500 per year. Her counsel concedes that the amounts have not been specifically quantified, but points out the longstanding participation of the children in competitive sports, and that H.'s post-secondary education (actually only his practical nursing training) was financed by his student loan. Counsel submits that a notional allowance of \$10,000 be allocated to addressing it as part of the overall resolution of her claims.
- [311] As I indicated previously, the respondent indicated his willingness to share in H.'s post-secondary costs. In submissions he also advised that he was supportive of sharing the costs of L.'s involvement in football and C.'s involvement in baseball.
- [312] Under s. 7(1) of the Guidelines, special expenses (ss.(a),(b),(c) and (e) are for child care, medical and dental insurance premiums, health related expenses that exceed the insurance reimbursement by at least \$100 per year, and post-secondary education. The test for ordering them to be paid is their necessity in relation to the children's best interests, and their reasonableness in light of the means of the parties and the child and the family spending pattern before separation.
- [313] Extraordinary expenses (ss.(d) and (f)) are for primary or secondary school education or other programs that meet the child's specific needs, and for extracurricular activities. In addition to their necessity and reasonableness, s.7(1.1) provides that such expenses must

either (a) exceed what the recipient parent is reasonably able to cover, taking into account their income and the child support they receive, or (b) be extraordinary when taking into account the amount of the expenses in relation to the recipient spouse's income and child support, the nature and number of programs and activities, any "special needs and talents" of the children, the costs of the activities and programs, and any other relevant factor.

- [314] If they are ordered, special and extraordinary expenses are generally shared by the parents in proportion to their incomes, after taking into account any contribution by the child: s. 7(2).
- [315] The D.B.S. factors also apply to s. 7 expenses: *Semancik v. Saunders*, 2011 BCCA 264 at para. 38.
- [316] All of the considerations that favoured a retroactive child support award apply with equal force to s. 7 expenses. Despite this, I do not think that the claimant's general evidence of the types of expenses she has incurred, her reference to the collection of untotaled receipts for each child that she submitted, and the yearly totals in her financial statement is specific enough to allow me to make the sort of substantial award that she seeks.
- [317] The evidence did not address whether she would have been unable to afford the various sports expenses that she referred to, and for which receipts have been provided, if she had received appropriate support from the respondent. It also did not address whether those expenses, the medical and dental expenses, and H.'s KPU tuition (in excess of whatever the RESP covered), which were also documented by receipts, were both necessary in relation to the children's best interests, and reasonable in light of the jointly-considered means of the parties.
- [318] If it turns out that she could have afford the sports expenses with the support that has been ordered, the considerations under s.7(1.1)(b) would need to be applied. Although children do not necessarily have to excel at particular activities for them to be funded, the court still has to consider the extent of any special needs or talents as one of the listed criteria. The same would true for prospective payments of these expenses.
- [319] That being acknowledged, it is obvious that the special expenses listed in the receipts - dental bills, medical supplies and H.'s KPU tuition less whatever was drawn from the RESP to fund it - were both necessary for the children and reasonable at the collective incomes and other means of these parties. Therefore, they should share them in proportion to their respective incomes during the years since separation that they were incurred. The same is true for the extraordinary expenses for football and baseball that the respondent agreed were appropriate.

- [320] With respect to H.'s student loan, s. 7(2) requires a consideration of the ability of the child, if any, to contribute to their special and extraordinary expenses. When addressing their post-secondary education expenses, the availability of student loans is merely one factor among many to be considered, and is not necessary that the child exhaust every source of funding: *W.P.N. v. B.J.N.*, 2005 BCCA 7, at para. 24.
- [321] For parents with this collective income and overall means, I think it would be reasonable for them to fund 50% of H.'s practical nursing program, so they will contribute \$15,000, in proportion to their respective incomes.
- [322] As a result, the retroactive special and extraordinary expenses will be:
- Expenses for dentist, medical supplies and the amount of KPU tuition and related expenses in excess of any RESP funding that were documented in the receipts submitted by the claimant at trial.
 - 50% of H.'s student loan for his practical nurse training.
 - Since their incomes were stable in the retroactive period (the respondent's due to income being imputed for the bulk of it) I will use incomes of \$40,000 and \$80,500 for their relative contributions, which will be 32% for the claimant and 68% for the respondent.
- [323] I will rely on the claimant's counsel to calculate the retroactive amounts owing by each party. There can be a reference to the registrar, who will certify the results, if there is any dispute.
- [324] Going forward, the parties will share the cost of the special expenses of medical and dental insurance premiums, health related expenses that exceed the insurance reimbursement by at least \$100 per year, and post-secondary education, and the extraordinary expenses of L.'s football and C.'s baseball, including any team-related travel in the proportions that I have found according to their respective incomes. The respondent will electronically transfer his share of such payments within 14 days of the claimant sending him the receipts.
- [325] He will also retain L. and C. on his work-related extended health and dental benefits, and provide details of those benefits to the children's care providers and pharmacy on the request of the claimant.
- [326] The parties will also share, in the same proportions, any other extraordinary expenses on which they agree.

Spousal Support

- [327] The claimant's position is that all of the essential requirements for an award of spousal support, both retroactive and ongoing, are present here. These include a long-term traditional marriage, the claimant's financial dependency throughout it, her assumption of the primary childcare role, a disproportionate degree of financial responsibility being assumed by her following the separation, and her inability to this point to attain financial

independence. She says that normally lump sum spousal support in the range of \$50,000-\$100,000 would be appropriate to address this claim, although she ultimately seeks to forgo it in recognition of a complete reapportionment of the family home to her.

- [328] The respondent questions the extent of the deprivation to her by her child care role, in light of the supports that were available to her from her mother and his sister, and whether in light of that support she was in fact restricted from upgrading her qualifications to become a teacher by her role. He also notes that she has not been prevented from securing ongoing employment in her chosen field as an educational assistant.
- [329] The objectives of a compensatory order of spousal support, as set out in s.15.2(6) of the DA, are to (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; and (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.
- [330] Section 15.2(4) requires the court, in making such an order to "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".
- [331] Compensatory support is intended to address the economic disadvantages that the recipient spouse suffered as a result of the marriage or its breakdown, frequently as a result of assuming primary child care and household responsibilities. It can also deal with economic advantages that were enjoyed by the other spouse as a result of the recipient spouse's efforts: *Chutter v. Chutter*, 2008 BCCA 507, reconsideration denied 2009 BCCA 177, leave to appeal refused [2009] S.C.C.A. No. 41, at paras. 50-51.
- [332] While this form of support does not guarantee either spouse the same standard of living as they had during the marriage, the longer the relationship between them and the greater their economic union, "the greater will be the presumptive claim to equal standards on dissolution": *Moge v. Moge*, [1992] 3 S.C.R. 813 at p. 870.
- [333] Where compensatory principles do not apply, a spouse's need alone can form the basis of a support order. This is known as non-compensatory or needs-based support.
- [334] The objectives of such an order, as set out in s.15.2(6) are to (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.
- [335] This type of support "aims to narrow the gap between the needs and means of the spouses upon marital breakdown": *Chutter* at para. 54. It focuses on the marital standard of living and how the recipient spouse's lifestyle has been diminished as a result of the breakdown, rather than a mere disparity in the spouses' incomes.

- [336] The fact that the recipient spouse is able to meet expenses does not mean that their needs have been met under this analysis: *Marquez v* at para.34; *Lee v. Lee*, 2014 BCCA 383 (B.C. C.A.) at para.6; *Madruga v. Madruga*, 2015 BCSC 1605, at para.39. While this form of support does not guarantee either spouse the same standard of living as they had during the marriage, the longer the relationship between them and the greater their economic union, "the greater will be the presumptive claim to equal standards on dissolution": *Moge v. Moge*, [1992] 3 S.C.R. 813 at p. 870.
- [337] As to the required self-sufficiency of the recipient spouse, the key point is that the legislations seeks to promote it only "in so far as practical". In the analysis "regard must be had to all of the circumstances, including the age and gender of the spouse, [their] skills and education, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables [them] to become self-sufficient, which may be quite a different matter": *Tedham v. Tedham*, 2005 BCCA 502 at para. 33.
- [338] A claim for spousal support need not be confined to only one of the available bases: *Chutter* at para. 49.
- [339] Once entitlement to support is found, the Spousal Support Advisory Guidelines offer a "useful tool" for calculating the amount and duration of support to be paid: *Chutter* at para. 100. They take into account such factors as the duration of the relationship, the respective ages and incomes of the parties, and whether child support is also being paid, and generate ranges of potential support based on them. Although the SSAGs do not have the force of legislation, "their advice must be taken seriously and... best practice would explain any deviation from them": *Beninger v. Beninger*, 2009 BCCA 458 at para. 28.
- [340] The SSAGs generate a range of monthly amounts for the incomes and amounts of child support involved. Chapter 9 sets out a non-exhaustive list of factors to consider when deciding where to situate the award within that range:
- the strength of any compensatory claim;
 - the recipient's needs;
 - the age, number, needs and standard of living of the children;
 - the needs and ability to pay of the payor;
 - work incentives for the payor;
 - property division and debts; and
 - self-sufficiency incentives for the recipient.
- [341] At Chapter 9.3 the authors make a useful observation:

Generally speaking, when ability to pay is in issue, the larger the number of children, the less income is left available to pay spousal support, and the ranges will be lower, consistent with s. 15.3 of the Divorce Act. In these cases of squeezed ranges for spousal support, there will be strong reasons to go higher in this "depressed" range, to generate some compensatory support for the primary parent

- [342] It is not disputed that the claimant was primarily responsible for the care of the children and the home during the marriage, or that in its early years she worked only at a part-time job, for which her mother could assist her with child care.
- [343] Similarly, after qualifying as an educational assistant, she did not engage in that work full-time until all of the children were in school. The respondent did not contradict her assertion that he was not supportive of her beginning the process of upgrading her qualifications to become a teacher.
- [344] Thus, it seems clear that when the marriage ended she was not as far along in seniority in her present occupation, or in acquiring the qualifications to progress to a more remunerative one, than she would have been if she had not assumed those household duties. I do not consider the child care support that was available to her from family members to have diminished that deprivation to any meaningful degree. The evidence is that this support simply permitted her to work in the jobs she had. It did not relieve her from the overall burden of child and home care, and leave her free to pursue whatever career aspirations she chose.
- [345] In addition to this economic detriment to the claimant, I am satisfied that her roles in the home also conferred an economic benefit on the respondent. It seems obvious that he would not have progressed from self-employment building decks to a management-level position with a respectable accompanying income, without all of the family's domestic responsibilities being looked after by the claimant.
- [346] Therefore, I find that the claimant has established an entitlement to spousal support on a compensatory basis.
- [347] If it were necessary to do so, I would also find that the claimant requires support on a non-compensatory basis. But for the financial support of Mr. C. and members of her family, which she will eventually have to repay, her standard of living would have declined steeply as a result of the breakdown of the marriage. She is unable to sustain the current mortgage or qualify for a new one in her sole name because of her relatively low income, and in the absence of the reapportionment she seeks, or long-term personal financing from Mr. C., she will have to find much more modest accommodation for herself and the children. Even if she is now free to pursue an upgrading of her qualifications to become a teacher, that will require some time to accomplish in light of her full-time job and primary parenting role.

- [348] The respondent's income for the purpose will be the one that I have previously imputed to him, once again moderated by his reduced income when he was receiving disability benefits. As in the case of child support, the respondent's obligation for 2020, which will also begin on April 1, should be based on the total income that I have imputed to him for that year of \$102,227.
- [349] Unfortunately, as Chapter 9.3 predicted, the ranges of support at the parties' respective incomes that the SSAGs generate are severely restricted by the fact that child support is also being paid. Except for 2020, when the addition of the severance payments to the respondent's income leads to a monthly payment of \$306, no spousal support is payable under the SSAGs in the ensuing retroactive years or going forward at the claimant's actual income and the respondent's imputed one.
- [350] The respondent therefore owes the claimant \$2763 ($\$309 \times 9$) in retroactive support for 2020. As in the case of retroactive child support, at the respondent's suggestion, the amount he owes may be set off against his share of family property.
- [351] This gap in pursuant to the SSAGs, despite the claimant's clear entitlement to it, will be a relevant factor when the next issue is considered.

Property Division

- [352] In view of the amount that the respondent owes her for past child support (without even considering s.7 expenses), and his ongoing obligations, the claimant advises that she is willing to forego that retroactive amount in return for having the respondent's share of the family home reapportioned to her (she also sought spousal support on the basis of the respondent's previous employment income, which would have resulted in modest retroactive and ongoing amounts, and would have been willing to waive those as well). This would be on the basis of their respective shares of its equity at the time of separation ($\$895,000 - \$535,000$ in debt = $\$180,000$ each). She is also prepared to forego her equal share of his LIRA.
- [353] She argues that such a disposition would recognize that the respondent is a "risky bet" to fulfil any of his support obligations, based on his behaviour to this point, and that without reapportionment of the home entirely to her she is unlikely to be able to remain in it, even though the children would benefit greatly from doing so.
- [354] Other relevant considerations are said to be the respondent's abandonment of responsibility for the mortgage and household expenses as of March 2020, the legal and other expenses that the claimant has incurred to deal with his abusive post-separation conduct and non-disclosure, his dissipation of his severance package, which could have been considered family property; and the effect on the claimant in her vulnerable situation of his overall financial misconduct.

- [355] Not surprisingly, the respondent submits that the property should be equally divided, at its value at the time of trial. He stresses that the claimant was an informed and active participant in all of the family's financial decisions, not just with respect to the mortgage on the family home, but also with respect to lines of credit, credit cards, and other forms of debt. He concedes that the loss of the home is undesirable from the claimant's perspective, but says that may be inevitable given the increase in its value since separation. He points out that this possibility is reduced by Mr. C.'s apparent willingness to consider options that will allow her to retain the house once the litigation has concluded.
- [356] Section 81 of the FLA provides for a presumptive equal sharing of all family property at the time of separation, in the form of an undivided half interest for each spouse as a tenant in common. Section 84 defines family property, in part, as property that is owned by at least one spouse on the date of separation.
- [357] Family debt, which includes all financial obligations incurred by a spouse during the relationship, is also presumptively shared pursuant to s.81. Such debt includes obligations incurred by a spouse after separation, if that was done "for the purposes of maintaining family property" (s.86(b)).
- [358] This presumptive equal sharing is subject to the spouses agreeing to an unequal division, or an order to that effect by the court.
- [359] Unequal division of family property or debt can be ordered pursuant to s.95(1) if it would be "significantly unfair" to divide it equally.
- [360] Section 95(2) lists the factors that the court may consider in determining whether that threshold has been met:
- (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.

[361] In accordance with the rule of statutory interpretation known as *eiusdem generis*, or the "limited class rule", the phrase "any other factor" in ss.(i) is constrained in its meaning by the nature of the specific listed considerations that precede it. Such other factors must therefore relate to the "economic characteristics of the spousal relationship": *Singh v. Singh*, 2020 BCCA 21 at paras.136-140.

[362] What is required to justify unequal division is a degree of unfairness resulting from equal division that is "compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem v. Remmem*, 2014 BCSC 1552 (B.C. S.C.), at para. 44. Put another way, it will require "something objectively unjust, unreasonable or unfair in some important or substantial sense": *Jaszczewska v. Kostanski*, 2016 BCCA 286 (B.C. C.A.) at para. 42.

[363] While a court has the discretion to change the valuation date of family property from the presumptive date of trial provided by s.87(b)(ii) of the FLA, it must be recognized that this is in effect a reapportionment of property, and all the requirements of an order for unequal division apply: *Kumagai v. Campbell Estate*, 2018 BCCA 24, at para. 76.

[364] Section 95(3) provides that:

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.

[365] This sub-section permits orders for the division of property as a means of providing spousal support where the objectives of support cannot be achieved by a periodic order. Judges of this court have divided property unequally pursuant to s.95(3) when there was a support claim to be addressed but the application of the SSAGs would result in no periodic support being paid, for example: *Delaurier v. Massicotte*, 2018 BCSC 1857, at paras.166-179; *Sophonow v. Sophonow*, 2021 BCSC 1863, at paras.160-162. A reapportionment has also been ordered when the other spouse was simply unable to pay support: *McGrail v. McGrail*, 2016 BCSC 104, at para. 86.

[366] The most straightforward question here is the allocation of family debt.

- [367] It is obvious that the mortgage, line of credit and credit card debts meet this definition, and should be included in it.
- [368] The disposition of the proceeds of the 2017 mortgage refinancing also needs to be considered.
- [369] As part of my overall acceptance of the claimant's version of events, I am satisfied that the respondent informed her of the remortgaging of the family home after the fact, and that its jointly intended purpose, once she was informed of it, was home renovations. The presence of her signature on one ancillary document does not displace my belief in her version of events, particularly in light of her further evidence that the respondent frequently sought her signature on documents without explaining them.
- [370] More to the point, regardless of her advance level of knowledge, I accept that ultimately only about \$20,000 of the funds obtained were actually allocated to the planned renovations, and that after part of the funds were used to pay off a family debt, the balance of \$66,000 is unaccounted for and was dissipated in some manner by the respondent.
- [371] That balance must be allocated entirely to him to avoid the significant unfairness that would result from the claimant being required to share responsibility for funds that remained entirely under the respondent's control, and for which he has failed to document any legitimate use to compete with the strong inference that he squandered them.
- [372] I am satisfied that the assumption of the mortgage by Mr. C.'s company, and the other funds that it advanced to the claimant to cover the line of credit and credit card are legitimate loans that the claimant is expected to pay at some point, albeit with only nominal interest and on a relaxed timeline. The situation is no different than if the claimant had gone out and secured more favourable financing from another institutional lender than what the parties had at separation.
- [373] It would have been preferable to have some form of documentation in relation to the mortgage, but Mr. C. was as straightforward and credible a witness as one could imagine, and while he has been remarkably generous to the claimant as a family friend, I was not left with any concern that he had simply given her more than \$500,000 on the debts alone, in addition to the legal and living expenses that are documented in the other promissory notes. As he drily observed in cross-examination, he is adequately secured by his company's position in relation to the mortgage.
- [374] In reaching in a conclusion, I have considered the apparent disparity between the claimant and Mr. C.'s testimony about the specific debts that his company assumed, and the larger amount that the claimant referred to in her financial statements. Regardless of the reason for that disparity, there is no doubt about the amount of the family debts that she seeks to have shared by the respondent.

- [375] When all is said and done however, this post-separation financing makes only minimal difference to the respondent's family debt obligations. These specific debts existed at the time of separation, and while paying the mortgage until approximately March 2020 entitles him to credit for maintaining the property pursuant to s.86(b) of the FLA (which the parties treated as the equivalent of child support), the reality is that Mr. C.'s company simply assumed what remained of the original family debt, less the respondent's post-separation mortgage contributions.
- [376] For her part, the claimant did not actually incur any significant personal costs for preserving the property through the payment of the mortgage, because of Mr. C.'s intervention. He candidly indicated that the 1% interest rate he has attached is there to satisfy the CRA, and absent further evidence I would not find that it will ever be enforced against the claimant. The \$5000 that he incurred to assume the mortgage should be added to the mortgage total and equally shared, because it is really a debt of the claimant that was necessary to obtain Mr. C.'s assistance.
- [377] As a result, I find that the total family debt consists of: \$485,000 for the mortgage at the point Mr. C.'s company took it over, \$32,000 for the line of credit and \$18,000 for the family Visa card, for a total of \$535,000. \$66,000 will be reapportioned to the respondent for his disposal of some of the re-mortgaging proceeds. As a result, the claimant owes \$234,500 and the respondent owes \$300,500.
- [378] Turning to the division of family property, there is some double-counting in the factors that support the claimant's proposed 100% reapportionment.
- [379] The respondent's abandonment of responsibility for the mortgage, line of credit and Visa is addressed in his equal responsibility for that debt, plus the amount that he made off with from the mortgage during the marriage. Similarly, his abandonment of responsibility for home expenses will be at least partially addressed in the award of child support, which dates back to the time he stopped paying the expenses, and which are predicated on the claimant supporting the children by means of them.
- [380] There are also some factors relied on by the claimant that simply do not support such a result.
- [381] The increase in value of the family home since separation is not a reason to divide it unequally, although valuing it at the date of separation will have the effect of doing so. In that case, one would not change the valuation date and then effectively reapportion it a second time. Since the trial was bound to proceed in any event, I am unable to identify any additional legal costs that resulted from the respondent's non-disclosure other than letters and emails from her counsel pointing it out to him. His severance pay has already been attributed to him as income and his retroactive support obligation for the year it was received has been increased accordingly. Finally, while she was certainly financially vulnerable, the child support order and unequal division of debt address all of the wrongdoing on the respondent's part to which an adverse inference could potentially apply.

- [382] Therefore, I am not satisfied that an equal division of property would be substantially unfair to the claimant according to the considerations under s.95(2) of the FLA. As I have said, all of the harm caused by the respondent's abandonment of the mortgage and other debts, and his lack of child support has been addressed by other orders.
- [383] However, I am satisfied that a reapportionment is required pursuant to s.95(3) for the purposes of compensatory support, because the objectives of such an order obviously cannot be met by periodic support. The "with child support" formula under the SSAGs is intended, quite properly, to give priority to child support, but the consequence here is that the monthly amounts payable to the claimant, both retroactively and prospectively, are nonexistent, except for the first year of retroactivity at the high end. This is despite her proven entitlement.
- [384] Periodic payments are therefore unable to address the significant disadvantage that the claimant labours under as a result of the marriage and its decline, a situation that can be expected to continue for the foreseeable future, or to apportion the consequences arising from the claimant's care of the children before and after separation or promote her economic self-sufficiency. (No lump sum support results from the application of the SSAGs either, except at the respondent's 2020 income, so it is not possible to use those guidelines as a basis for arriving at an appropriate amount).
- [385] Given the likely amount of equity that will remain in the family home after debt has been deducted based on the existing appraisal, I conclude that a moderate reapportionment is necessary to address the claimant's compensatory claim.
- [386] Using the appraisal at \$1.35 million for the family home from just prior to trial as the basis for a rough estimate, an equal division (\$675,000) minus the parties' respective shares of family debt would result in \$440,500 for the claimant and \$374,500 for the respondent. The only difference between their shares in that division would be the respondent's additional \$66,000 of debt, and her share would seem to fall short of what is needed for her to move beyond the ongoing effects of her family role.
- [387] However, apportioning the home 55% in the claimants' favour would result in respective shares of \$742,500 and \$607,500, with a net division of \$508,000 for her and \$307,000 for him once their debts have been subtracted. In my opinion, bearing in mind that the value of the home may change based on an updated appraisal, such an allocation places the claimant in a much fairer position upon leaving the marriage in light of both the sacrifices she made and the benefits she conferred.
- [388] Consequently, in order to achieve the unfulfilled objectives of spousal support, I order that the family property be divided 55% to 45% in favour of the claimant.
- [389] Because of the unfortunate amount of time that has elapsed since the end of the trial and the issuance of the reasons, the last appraisal will of course need to be updated. I order that the parties obtain a new joint appraisal within 30 days, with the cost of it to be shared

equally. If the respondent does not cooperate in the appointment of an appraiser or the payment of his share of the cost within 14 days, the claimant will be at liberty to appoint one herself, and in that case half of the cost will be deducted from the respondent's share of the divided property.

- [390] Once the appraisal has been obtained, the claimant will have the option of purchasing the respondent's interest for 45% of the new appraised value, less his share of the family debt. She must give the respondent notice of her intention to exercise this option within 30 days of the release of these reasons. If she is unable to proceed in that manner and the parties cannot agree on the terms of sale, there can be an application for further directions.
- [391] The parties' entitlements under their respective retirement funds - the claimant's pension and the respondent's LIRA will be divided equally, for the years to which the respective spouse contributed to them before separation. In view of the beneficial effects on the claimant's situation of the unequal division of the family home, I do not think it is necessary to extend that approach any farther.
- [392] The parties may also apply for a division of unadjusted pensionable earnings under the Canada Pension Plan that are attributable to each other, and will exchange whatever information is necessary to carry that out.
- [393] The respondent did not seek a division of the household furnishings or other personal property, so I infer that he has already retrieved everything that is of importance to him, and that the claimant can retain the balance.
- [394] Any other necessary calculations, or disputes on matters of calculation, that arise from these orders can be dealt with by a reference to the registrar, who will certify the results.

Fines

- [395] Section 213 of the FLA authorizes the imposition of fines for non-disclosure. The appropriateness of a fine and the amount of it will depend on the circumstances of the cases, including the degree of non-disclosure and whether there has been "a flagrant disregard for the court process": J.D.G. v. J.J.V., 2013 BCSC 1274, at para. 28; Chan v. Ming et al., 2018 BCSC 1094 at para. 44. It has been said that this section requires a "robust application": to achieve its objective of securing "proper disclosure in a timely and cost-efficient way: J.D.G. at para.25.
- [396] As I have described, the respondent has made no real effort to comply with his duty under the SCFRs to provide a list of documents, or with the orders of the court that he do so. The releases that he provided to the claimant's former counsel did not fulfil that responsibility, and were of no value to her current counsel in any event because they gave authority to the previous one. He also did not comply with the requests for documents that were made during his examination for discovery. Adding insult to injury, he sneered at, and mocked her current counsel's efforts to secure his compliance, and sought to place himself beyond

the duties of all litigants in our system. The list that he produced on the eve of trial was wholly inadequate and focused solely on advancing his own interests.

[397] In short, this is a case of open defiance of court processes. Both the respondent and other like-minded family litigants must be strongly deterred from such conduct. To achieve this purpose, pursuant to s. 213(2)(d)(ii) I order that the respondent pay \$2500 to the claimant for affecting her interests in an adverse manner by his behaviour. That is to be paid within 30 days, failing which it may also be deducted from his share of the family property.

[398] I consider that a payment directly to the claimant is justified by the degree of emotional harm that the respondent's abuse undoubtedly inflicted on her, which compromised her interest in personal security.

Protection Order

[399] The respondent's communications with the claimant and Mr. I certainly meet the definition of family violence in s. 1 of the FLA, in that they involved "psychological or emotional abuse of a family member, including (i) intimidation, harassment or threats, including threats respecting other persons". The threats against the claimant that were made after separation drew further ominous context from the ones during the marriage, which I am satisfied he made, that her body would end up in the river.

[400] The question is whether I can be satisfied that "family violence is likely to occur" and that the claimant is an "at risk family member" because her "safety and security is or is likely at risk from family violence carried out by a family member". The evidence was that except for warning her about a shooter in her neighbourhood, the respondent had not contacted her for about six months before trial (although as her counsel wryly observed, the respondent seemed to have transferred his hostility to counsel).

[401] While it is greatly to his credit that the respondent apologized at trial for this conduct, and managed to avoid repeating it in the immediately preceding months, the number, vehemence and disturbing nature of his statements satisfy me that the risk of it occurring is realistic, particularly in the aftermath of a judgment that is at least somewhat unfavourable to his position. In that sense, "family violence [of the kind that has been demonstrated to this point] is still likely to occur", and the claimant is still at risk from it.

[402] Therefore, pursuant to s. 183 of the FLA the respondent will be subject to a protection order in the following terms:

- He may only communicate with the claimant by email or text message. The content of his communications must be confined to the subjects of parenting time or the well-being of the children, and must be polite and respectful. The claimant is not required to respond to communications that do not meet these criteria, or to comply with any requests with respect to parenting time that are contained in them.

- He is not permitted to communicate with the claimant in any other manner or for any other purpose, except through counsel.
- He is not to attend at or within any place known by him to be occupied by the claimant, including her residence and place of employment, except that he may travel directly to and from her residence or place of employment for the sole purpose of picking up or dropping off L. and/or C. for scheduled or agreed-upon parenting time.
- He may attend the children's school or sports events, provided that he does not approach or communicate with the claimant during them.

[403] This order will remain in place until further order of the court.

[404] Mr. I. does not meet the definitions of "family member" in the FLA and so a protection order cannot be made in relation to him. Since further contact with him by the respondent could well "frustrate the resolution of a family law dispute" envisioned by s. 222(b) of that legislation, by requiring further applications in this matter, I will make a conduct order pursuant to s. 222 prohibiting the respondent from having any conduct with him or attending at any place known by him to be occupied by Mr. I., including his residence or place of business.

[405] These restrictions will be subject to the same exception for the children's school or sports events that applies to the protection order, since Mr. I. may want to attend some of them if his relationship with the claimant continues, and that should not preclude the respondent from doing so as well, as long as he behaves himself.

Conclusion

[406] In addition to these contested matters, the requirements for a divorce have unquestionably been met, and so the parties will be divorced from each other, to take effect on the 31st day following the release of these reasons.

[407] In the absence of submissions, I would say that the claimant has had substantial success and should be entitled to her costs at the ordinary scale of difficulty. If there are matters relating to costs that need to be addressed, the parties can arrange with Supreme Court Scheduling to make written submissions with respect to them.

"Schultes J."

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