CANADA / JUDGMENT

K.W. v. A.G.

2023 BCSC 629

COURT
Supreme Court of British Columbia

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2023 BCSC 629 K.W. v. A.G.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.W. v. A.G.,

2023 BCSC 629

Date: 20230419

Docket: E58439

Registry: Kamloops

Between:

K.W.

Claimant

And

A.G.

Respondent

Before: The Honourable Mr. Justice Hori

Reasons for Judgment

Appearing on her own behalf:

K.W.

Counsel for the Respondent:

H.A. Lloyd

Place and Date of Trial:

Kamloops, B.C.

October 18-21 and 24-28, 2022

Place and Date of Judgment:

Kamloops, B.C.

April 19, 2023

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Introduction

[1] The parties in this family law dispute lived in a marriage-like relationship for approximately four years between 2015 and 2019. The exact dates of cohabitation and separation are not well-defined in the evidence. Therefore, those dates are issues in this action.

[2] The only child of this relationship is C., who is five years old.

[3] When the parties began living together, the respondent had a child, L., from a previous relationship, who is 10 years old. The respondent shared parenting time equally with L.'s mother. Therefore, during the parties' relationship, L. lived with them approximately 50% of the time.

[4] Although the claimant became heavily involved with the parenting of L., she claims no parenting orders with respect to L. in this action.

[5] The parties disagree on the parenting time and parental responsibilities each should have with respect to C.

[6] The claimant claims child support for C. in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines] from the date of separation.

[7] During the relationship, the parties acquired personal and real property both jointly and individually. The claimant claims an interest in property registered in the respondent's sole name and claims an equal distribution of family property.

[8] The claimant also claims spousal support from the date of separation.

Background Information

[9] The claimant is 36 years old. She currently works approximately 40 hours per month, or about five to six hours per week, as a house cleaner. However, she must rely on social assistance and subsidized housing due to her financial situation.

[10] The respondent is 32 years old. He works for Canadian National Railway as a rail car technician and serves as an infantry soldier in the Canadian Armed Forces Reserves.

[11] The respondent is in a new relationship with R.P. Ms. P. is employed as a pharmacy technician.

[12] The respondent and Ms. P. live in a five-bedroom house. C. and L. stay in the respondent's home during the periods where the respondent has parenting time. Ms. P. has four children who also stay in their house when she has parenting time with them.

Dates of Cohabitation and Separation

[13] A real property appraisal report prepared for the respondent provides a historical appraisal of the real property as of September 13, 2015.

[14] On cross-examination, the claimant agreed that September 13, 2015, was the date on which she and the respondent began living together. In his evidence, the respondent testified that the parties began living together in September or October 2015.

[15] Based upon the claimant's confirmation that the date of co-habitation was September 13, 2015, and the respondent's general agreement that the parties began living together in September or October 2015, I accept that the parties began living together on September 13, 2015.

[16] The claimant does not remember the date of the parties' separation but testified that she feels like it was August or September 2019. The respondent testified that the claimant left the relationship and went to live with her sister in August 2019.

[17] Whether the date of separation was August or September, 2019, will not make any significant difference in this case. Therefore, I will establish the separation date as September 1, 2019.

Parenting

[18] Section 37(1) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] requires the court to consider only the best interests of the child when making an order respecting guardianship, parenting arrangements or contact with a child. In determining what is in the best interests of the child, the court is to consider "all of the child's needs and circumstances", including those factors listed in s. 37(2) of the FLA.

[19] The respondent does not raise any concerns about the claimant's parenting skills or her ability to care for C. The respondent seeks to become more involved in the parenting of C. than the claimant or the interim parenting orders have allowed.

[20] The claimant seeks to limit the respondent's involvement in C.'s parenting because she has concerns about:

a) the health and emotional well-being of C.;

b) the respondent's ability to exercise his responsibilities for parenting; and

c) family violence;

Health and Emotional Well-being

C.'s Illness

[21] The claimant alleges that when the respondent returns C. to her, C. is often sick and has a fever. The claimant refers specifically to one occasion when the claimant took C. to the hospital where the doctor advised her that C. had pneumonia.

[22] There is no evidence that the respondent was responsible for causing the pneumonia or for causing any other illness in C. There is also no evidence that the respondent failed to properly care for C. when ill.

Potty Training

[23] The claimant alleges that when she was potty training C., she noticed a regression after the respondent returned C. to her. The respondent denies observing any such regression in potty training.

[24] The evidence does not support a finding that any regression in potty training was the result of the respondent's inability to care for C.

Diaper Rash

[25] The claimant alleges that C. often came home to her with significant diaper rash. The claimant attributes the diaper rash to the respondent failing to change and properly clean C. The respondent agrees that there were instances when C. had diaper rash, but he testified that he treated the rash with appropriate medication.

[26] On the evidence presented, the claimant has not established that the diaper rash she observed was caused by the respondent failing to change or properly clean C. or that the respondent failed to properly treat it when it occurred.

Bite Marks

[27] The claimant seeks to limit the respondent's involvement in the parenting of C. because there were bite marks on C.'s arm after spending time with the respondent. The respondent admits that there were bite marks on C.'s arm. The respondent also admits to advising the claimant that he made the bite marks.

[28] However, at trial, the respondent testified that he did not bite C. but that his brother-in-law made the marks on C.'s arm. The respondent testified that he took the blame for the bite marks in order to protect his brother-in-law from repercussions from the claimant. The respondent has spoken to his brother-in-law about the biting which has not occurred again since.

[29] The Ministry of Children and Family Development (the "Ministry") investigated the biting incident. In a letter dated January 12, 2021, the Ministry indicated that they had completed their investigation and had determined that C. was not in need of protection.

[30] Therefore, I am satisfied that the respondent dealt with the biting incident appropriately and that it no longer poses any risk to C.

Lactose Intolerance

[31] The claimant suggests that C. is lactose intolerant and that she has told the respondent not to allow C. to eat dairy. The claimant alleges that the respondent should not be fully involved in the parenting of C. because notwithstanding the lactose intolerance, the respondent allows C. to eat dairy products.

[32] The respondent acknowledges that C. may be lactose intolerant. However, he claims that testing for lactose intolerance is not complete. It is the respondent's view that they should not remove all dairy products from C.'s diet because exposure to some dairy products may assist him in overcoming this condition.

[33] There is no medical evidence to establish the existence or non-existence of lactose intolerance in C. There is also no medical evidence recommending that C.'s diet exclude all dairy products. Therefore, I am not satisfied that allowing C. to have dairy products is contrary to his best interests.

Respondent's Ability to Parent

Use of the Car Seat

[34] The claimant alleges that the respondent unsafely places C. in his car seat. She testified that she observed C. wearing a "puffy jacket" in his car seat and having insufficient room for his feet between the car seat and the front driver's seat. The respondent testified that the "puffy jacket" was a car seat approved coat and that there is sufficient room for C.'s feet when sitting in the car seat.

[35] The evidence of the claimant and the respondent about the car seat use is contradictory. However, the claimant adduced no independent evidence to establish that wearing a "puffy jacket" while in the car seat or having a lack of space between C.'s feet and the front seat is unacceptable. The onus is on the claimant to establish her allegations. Therefore, the claimant has not satisfied me that the seating arrangements for C. in the respondent's vehicle are unsafe.

Parenting Time with C.

[36] The claimant submits that when C. is with the respondent, he leaves C. with others while he is at work. She claims that Ms. P., the respondent's parents, and the respondent's previous wife care for C. when the respondent is at work.

[37] Based on the complainant's experience during the parties' relationship, the claimant suggests that the respondent spends little time with C. because he is always at work.

[38] The respondent admits that when he is at work, other people in his family care for C. However, he testified that he has reduced his work schedule significantly since the parties' relationship ended. The respondent claims that he no longer takes additional hours over his regular shifts.

[39] There is no evidence that the respondent's family do not care for C. appropriately when the respondent is not at home. Even if the respondent cannot spend parenting time with C. while at work, C. has parenting time with the respondent after work.

[40] Therefore, having other members of the respondent's family care for C. is not contrary to his best interests.

Health Care Responsibilities

[41] The respondent had C. treated by an optometrist in Merritt without the claimant's knowledge. Ms. P. made the arrangements for C. to see the Merritt optometrist because her children were patients there. The optometrist referred C. to a specialist who prescribed glasses for C.

[42] The claimant's concerns with C. seeing an optometrist in Merritt are:

a) that the respondent did not advise her that C. was seeing an optometrist in Merritt;

b) that the contact person listed in the optometrist's records was Ms. P.; and

c) that there was no mention of the claimant in the optometrist's records.

[43] The claimant expressed that her real concern with C. seeing an optometrist in Merritt was that C. would develop a close relationship with Ms. P.

[44] In my view, the concern that C. may grow close to Ms. P. is not contrary to C.'s best interests. There is no evidence that Ms. P. is a negative influence on C. or that growing close to her is not in C.'s best interests.

Sleeping Arrangements

[45] The claimant raises a concern that C. shares a bedroom in the respondent's home with Ms. P.'s 17-year-old daughter who has a learning disability.

[46] The evidence is that C. and Ms. P.'s daughter get along well together and that there have been no concerns with that arrangement in the respondent's home. Accordingly, there is no evidence to establish that such an arrangement is contrary to the best interests of C.

Injuries to C.

[47] On November 24, 2020, C. returned to the claimant with a bruise on his right ear and bruises on his eyes. The respondent advised the claimant when he returned C. to her that C. had been running in the hallway, slipped, and hit a bench.

[48] The Ministry investigated the injuries sustained by C. on November 24, 2020. In the letter of January 12, 2021, the Ministry indicated that C. was not in need of protection.

[49] The claimant's concern about C.'s injuries was not that C. sustained an injury while in the care of the respondent, but that the respondent did not inform her about it until C. returned to her care.

[50] In fact, the claimant is well aware that accidents and injuries can happen without a parent being at fault. She agreed, on cross-examination, that C. had sustained a skull fracture while in her care. She also confirmed that shortly after the skull fracture, C. was with her when she was in a motor vehicle accident. She also agreed that C. sustained a concussion when he fell off a change table while in her care.

[51] Nothing about the incident of November 24, 2020 causes me concern about the respondent's ability to parent C.

Family Violence

[52] There are allegations of family violence on the part of both parties. The claimant alleges that during her pregnancy, the respondent chased her out of the house and threatened to smash the window of her vehicle.

[53] On the other hand, the claimant admits that she has bitten the respondent and has physically pushed him. The respondent testified that the claimant has hit him in the face and that both parties have yelled at each other both during their relationship and after the separation.

[54] In my view, the allegations of family violence do not detract from either party's ability to parent C. The incidents of family violence are few. They occur when the parties are interacting with each other and neither of the parties have directed the violence toward C.

C.'s Relationship with Others

[55] One of the factors to consider when assessing the child's best interests under s. 37 of the FLA is the nature and strength of the relationships between the child and significant persons in the child's life.

[56] The claimant has only one family member who lives in close proximity to Kamloops. The claimant's sister lives in Pritchard, B.C. but the claimant no longer has a relationship with her.

[57] On the other hand, the respondent has both his parents living in Kamloops. He has two sisters in Kamloops, both of whom have families of their own. The respondent's relationship with his family is strong. He testified that his family is always there when needed. The respondent fosters and encourages contact between C. and members of his family.

[58] In addition, unlike the claimant, the respondent continues to have a close relationship with the claimant's sister, her husband and her two children. The respondent and C. see the claimant's sister and her family regularly.

[59] The respondent is in a new relationship with Ms. P. Ms. P. has four children, ranging from nine years of age to 19 years. The evidence is that C.'s relationship with all of Ms. P.'s children is positive. There is no evidence that suggests that any of those relationships are contrary to C.'s best interests.

[60] C. also has a relationship with L., the respondent's ten-year-old son from his previous marriage. L. has been in C.'s life since he was born and continues to be in C.'s life currently. The relationship between L. and C. is positive and there is no evidence suggesting that the relationship is contrary to C.'s best interests.

Conclusion on the Best Interests of the Child

[61] After considering all of the factors set out in s. 37(2) of the FLA, I am of the view that it is in C.'s best interests to have the respondent more involved in his life than the interim parenting order or the claimant presently allows.

[62] It is my view that having the respondent involved in C.'s parenting will enhance C.'s health and emotional well-being. It is in C.'s best interests to maintain and further develop his relationships with the respondent's extended family, including the family of Ms. P. Enhancing the respondent's involvement in C.'s parenting will also allow C. to maintain and develop his relationships with the claimant's sister and her family.

[63] With respect to the history of C.'s care and his need for stability, even though the claimant has been the primary caregiver for C., I find that the respondent is capable and willing to provide the care necessary to meet C.'s needs. Once a parenting arrangement is finalized, I am confident that both parties will provide C. with the stability in his life that he requires.

[64] The only concern with having the respondent more involved in C.'s parenting is whether the parties can communicate and co-operate on issues affecting C. I am not concerned that any inability to co-operate would create any risks to the safety, security or well-being of C. I am concerned that the parties may not be able to agree on what is in C.'s best interests when having to make decisions. However, I will address that concern with an order defining the parties' authority to make decisions about C.

Parenting Time

[65] The claimant seeks to limit the respondent's parenting time with C. to every other weekend from Friday at 2:30 p.m. to Monday at 2:30 p.m.

[66] In my view, it would not be in C.'s best interests to limit the respondent's parenting time as suggested by the claimant. It is in C.'s best interests to have the respondent involved in C.'s parenting to the fullest extent possible.

[67] Therefore, the parties will share parenting time with C. equally on a seven-and-seven rotation. Commencing on May 1, 2023, the parties will share parenting time with C. equally. Exchanges will occur on Monday of each week at 9:00 am. This parenting time order will commence with the respondent having parenting time from 9:00 a.m. on Monday, May 1, 2023.

[68] The parties will make the parenting time exchanges as follows:

a) If C. is attending daycare at the time of the exchange, then the exchange will occur at the daycare;

b) If C. is attending school at the time of the exchange, then the exchange will occur at the school; and

c) If C. is not attending daycare or school at the time of the exchange, then the exchange will occur in a public place approximately halfway between the respective residences of the parties at a location agreed to in advance by the parties.

[69] The parent who is not exercising parenting time will have communication with C. by electronic means on Wednesdays and Fridays between 5 p.m. and 5:30 p.m.

[70] Regardless of the regular parenting schedule, holiday parenting time will be as follows:

a) Christmas holidays will alternate year-by-year with the respondent having parenting time on December 24 to December 26 on even years and the claimant having parenting time on those dates in odd years. Exchanges for the Christmas holidays will occur at 3 p.m;

b) Thanksgiving and Easter holidays will alternate between the parties with the respondent having parenting time on those holidays in odd years and the claimant having parenting time on those holidays in even years. Exchanges will occur at 3 p.m;

c) The regular parenting schedule will not change during spring break;

d) Each party will have two consecutive and uninterrupted weeks for vacations with C. on 60 days prior notice to the other party; and

e) Each party must arrange their schedules and family plans to ensure that they do not encroach on the other parent's holiday time, vacation time or spring break time.

Guardianship and Parental Responsibilities

[71] Pursuant to s. 39(1) of the FLA, the claimant and the respondent are the guardians of C.

[72] As guardians, the claimant and the respondent will, under s. 40(2) of the FLA, share equally all of the parental responsibilities set out in s. 41 of the FLA pursuant to the Joyce model as follows:

a) In the event of the death of a guardian, the surviving guardian will be the only guardian of C.;

b) Each guardian will have the obligation to advise the other guardian of any matters of a significant nature affecting C.;

c) Each guardian will have the obligation to discuss with the other guardian any significant decisions concerning C., including significant decisions about health (except emergency decisions), education, religious instruction and general welfare;

d) The guardians will have the obligation to try to reach agreement on significant decisions;

e) In the event that the guardians cannot reach agreement on a significant decision despite their best efforts, the guardians will apply to the court for directions pursuant to s. 49 of the FLA; and

f) Each guardian will have the right to obtain information concerning C. directly from third parties, including, but not limited to, teachers, counsellors, medical professionals and third-party caregivers.

[73] I am not prepared to give either party the final decision-making authority on matters affecting C. Given the significant animosity that exists between the parties, I am concerned that without court intervention one party may use the final decision-making authority as leverage against the other.

Child Support

[74] The level of child support payable by a parent is based on the income of the payor parent as established under the Guidelines.

[75] In this case, I have ordered that the parties share parenting time with C. equally. Therefore, the incomes of both parties become relevant in establishing the appropriate child support payable.

Claimant's Income

[76] The claimant is 36 years old. When the parties began their relationship, the claimant was working as a waitress earning minimum wage.

[77] During the parties' relationship, the claimant completed a millwright/machinist course and secured a job with Kamloops Precision Machining. However, the claimant sustained a workplace injury and, as a result, was off work for approximately five months. When her injury resolved, the claimant returned to work with Kamloops Precision Machining for a short period of time until that company let her go in 2017.

[78] The claimant testified that she has not sought re-employment as a millwright/machinist because she does not wish to go back to this kind of work.

[79] The claimant then obtained a job running a band saw at a mill. She worked at this job until she became pregnant. After she became pregnant, she was unable to continue at this job because she sustained an injury to her stomach muscles. As a result, the claimant went on medical leave and collected employment insurance benefits. Once the medical leave was over, the claimant went on maternity leave.

[80] The claimant remained on maternity leave until C. was approximately 11 months old. She testified that once she completed her maternity leave she enrolled C. in daycare and started to look for work.

[81] After the parties separated, the claimant took an insulation installation course and found work with Beattie Insulation. She worked for Beattie Insulation from July to October 2020.

[82] Beattie Insulation dismissed the claimant in October 2020 because she could not work 40 hours per week. The claimant testified that she was unable to commit 40 hours per week to the job because C. was often sick and her family law proceedings in Provincial Court required her to be in court.

[83] The claimant's evidence that she could not commit 40 hours per week to her job with Beattie Insulation is not credible. On cross-examination, the claimant confirmed that C. was ill only three or four times during her employment with Beattie Insulation. She also confirmed that the only court order made during her employment with Beattie Insulation was an order in these proceedings made on August 25, 2020 at the judicial case conference ("JCC").

[84] In any event, the work she received from Beattie Insulation did not generate very much income. Her payroll records show that for the ten-week period between August 4, 2020 and October 12, 2020, the claimant earned a total of $4,340 or $434 per week. Had she continued at this rate of pay for an entire year, her annual income would have been $22,568.

[85] The claimant testified that she has looked for work since the parties separated but, other than her work as a house cleaner, she has not worked because:

a) She needs to find work that is suitable for her given the ongoing symptoms from her workplace injury at Kamloops Precision Machining;

b) C. does not have daycare; and

c) Any wages she earns would go towards paying for daycare.

[86] The claimant testified that instead of paying for daycare, she would rather stay home and raise C. herself.

[87] With respect to the claimant's workplace injury, there is no medical evidence to establish a diagnosis for the injury. There is no medical evidence to establish the claimant's limitations as a result of the injury or what work she is incapable of performing.

[88] Further, since the injury in 2017, the claimant has returned to work as a machinist. She has also returned to work running a band saw, and installing insulation. There is no evidence that the claimant's job performance was substandard in those positions or that her injury limited her ability to perform her work.

[89] Accordingly, the claimant has failed to establish that any workplace injury she sustained in 2017 compromised her ability to work once that injury resolved and she returned to work at Kamloops Precision Machining.

[90] On these facts, the respondent submits that the claimant has been intentionally unemployed or under-employed since the date of separation and that, as a result, I should impute income to her for child support purposes.

[91] Section 147 of the FLA provides that each parent of a child has a duty to provide support for the child. The Guidelines establish the appropriate level of support. Section 1(a) of the Guidelines states that one of the objectives of the Guidelines is to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation.

[92] The financial means of a parent is determined under the Guidelines by reference to the parent's annual income as reported in their T1 general tax return.

[93] However, s. 19(1)(a) of the Guidelines gives the court discretion to impute income to a parent in order to account for a parent's actual income earning potential.

[94] Section 19(1)(a) of the Guidelines provides that the court may impute such amount of income to a spouse as it considers appropriate in the circumstances, including where:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[95] In Marquez v. Zapiola, 2013 BCCA 433, the Court of Appeal confirmed that the test for deciding whether to impute income for intentional under-employment or unemployment is that of reasonableness in light of the spouse's particular circumstances. At para. 37, the Court held:

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See Van Gool v. Van Gool (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, Barker v. Barker, 2005 BCCA 177,

45 B.C.L.R. (4th) 43 at para. 19, and McCaffrey v. Paleolog, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

[96] The generally accepted interpretation of the meaning of "intentionally under-employed or unemployed" was set out in the Ontario Court of Appeal decision of Drygala v. Pauli (2002), 61 O.R. (3d) 711 (C.A.) at para. 28:

[28] Read in context and given its ordinary meaning, "intentionally" means a voluntary act. The parent required to pay is intentionally under-employed if that parent chooses to earn less than he or she is capable of earning. That parent is intentionally unemployed when he or she chooses not to work when capable of earning an income. The word "intentionally" makes it clear that the section does not apply to situations in which, through no fault or act of their own, spouses are laid off, terminated or given reduced hours of work.

[97] The Supreme Court of British Columbia accepted this definition in R.T.C. v. N.M.C., 2021 BCSC 2273 at para. 134.

[98] Further, the British Columbia Court of Appeal held that a desire for a parent to stay home with children is not sufficient to invoke the exception in s. 19(1)(a) of the Guidelines, without evidence that the needs of the children require that parent to remain home and unavailable for employment: McCaffrey v. Paleolog, 2011 BCCA 378 at para. 49, citing Llewellyn v. Llewellyn, 2002 BCCA 182.

[99] In this case, with her previous experience as a server, her training as a millwright/machinist and her insulation course, the claimant has the capacity to earn income.

[100] The claimant alleges that she has taken steps to find work, but, other than minimal hours as a house cleaner, she has not worked. However, the claimant has presented little or no evidence about whom she has approached for work, how she made those applications for work, and what responses she received. The claimant makes only very general statements that she has made attempts and has been unsuccessful.

[101] I have already determined that the claimant has failed to establish that her workplace injury in 2017 prevents her from working more than she does.

[102] The claimant would rather stay at home with C. than place him in daycare and look for work. However, as set out in McCaffrey, the claimant's desire to stay at home with C. is not sufficient reason for her to remain under-employed. The evidence does not establish that the needs of C. require the claimant to remain at home.

[103] Accordingly, I find that the claimant is intentionally under-employed. Therefore, it is appropriate to impute income to the claimant.

[104] The respondent submits that I should impute income of between $50,000 and $60,000 to the claimant. In my view, imputing income anywhere near that level is unreasonable given the claimant's past earning history. The claimant has never earned anywhere near $50,000 per year since 2016.

[105] The claimant testified that while she was employed by Beattie Insulation, her rate of pay was $18 per hour. Even if she had received full-time hours at 40 hours per week, her annual income would have only been $37,440 per year. In actual fact, in the ten weeks for which the court has payment information from Beattie Insulation, the claimant earned only $4,340, meaning that her annual income would have been $22,568.

[106] The claimant's highest reported income was in 2017 when she reported annual earnings of $27,602. The claimant's lowest earnings year was in 2019 when she earned $15,360. Based on this earnings history, the appropriate amount of income to impute to the claimant is $25,000 per year.

[107] I have arrived at the imputed income of $25,000 by considering that working full-time hours at minimum wage, or $15.65 per hour as of the trial date, would result in an annual income of $32,552 per year. I am not satisfied that the claimant can secure full-time work at this time. Based on her employment history, it is more likely that she will be working part-time only. Therefore, in my view, an imputed income of $25,000 accounts for the claimant working only part-time and reasonably reflects her earning potential at this time.

Respondent's Income

[108] The respondent's notice of assessment for 2021 shows an annual income of $114,607. The respondent claims a deduction for union dues in 2021 in the amount of $1,169.31. Therefore, after deducting his union dues, the respondent's Guidelines income is $113,438 per year.

Prospective Child Support

[109] Using an imputed income of $25,000 per year, the claimant's child support obligation according to the Guidelines is $209 per month. Therefore, the claimant will pay $209 per month in child support for C.

[110] Based on the Guidelines income of $113,438 per year, the respondent's child support obligation is $1,059 per month. Therefore, the respondent will pay $1,059 per month in child support for C.

[111] As a result of the shared parenting arrangement, the claimant's child support payments will be off-set against the respondent's payments. Therefore, the net amount payable by the respondent for child support is $850 per month.

[112] Accordingly, the respondent will pay child support in the net amount of $850 per month. The respondent will pay child support to the claimant commencing on May 1, 2023 and will continue those payments on the first day of each and every month thereafter until further order of the court or further agreement between the parties.

[113] For as long as child support is payable for C., the parties will exchange copies of their respective income tax returns for the previous year, including all attachments, no later than June 1 of each year. In addition, the parties will exchange copies of all notices of assessment or re-assessment received by them from the Canada Revenue Agency, as soon as reasonably possible upon receipt.

[114] The parties will adjust the child support payable in accordance with the Guidelines to reflect their actual incomes as of July 1 of each year. The imputed income for the claimant will continue unless the claimant's actual annual income exceeds $25,000, in which case the claimant's income will be the income reported in her tax returns.

Property Division

[115] The property division issues in this case relate to the following three properties:

a) 880 Pine Springs Road, Kamloops, B.C.

b) 647 Harrington Road, Kamloops, B.C.; and

c) 6850 Barnhartvale Road, Kamloops, B.C.

[116] The claimant makes reference to the division of a camping trailer. However, the claimant presents no evidence of the value of that trailer other than the purchase price in 2017, which was $7,000. There is no evidence of the trailer's value as of the trial date. Whatever the value of the trailer is, it is now less than $7,000 and will not make any significant difference in the property division result. Therefore, I will not place any value on the parties' respective interests in the trailer.

Excluded Property Claims

[117] Both the claimant and the respondent allege that they brought excluded property to the relationship. Pursuant to s. 85(2) of the FLA, the onus is on the party seeking to exclude property from the family assets to establish the exclusion on a balance of probabilities.

Claimant's Inheritance Exclusion

[118] The claimant received an inheritance of $100,000. She received part of the inheritance in 2015 and part of it in 2016. The claimant argues that the inheritance funds should be returned to her in the property division determination as excluded property.

[119] Section 85(1)(b) of the FLA provides that inheritances are excluded from family property. However, it is not clear how the claimant spent her inheritance money. The claimant did not give evidence accounting for the inheritance funds. Therefore, it is not clear how much of the inheritance, if any, the claimant used for her personal benefit as opposed to purchasing family property or reducing family debts.

[120] Accordingly, I am unable to determine how much of the inheritance is excluded. On the other hand, I am satisfied that the parties used at least some of the inheritance for family purposes. Therefore, I will account for it in a more general way in the property division analysis.

880 Pine Springs Road Exclusion

[121] Section 85(1)(a) of the FLA states that property acquired by a spouse before the relationship began is excluded property. The respondent has an excluded property claim related to 880 Pine Springs Road. The respondent purchased 880 Pine Springs Road in 2011, before the parties began their relationship. A historical appraisal of this property establishes the fair market value at $280,000 as of the co-habitation date of September 13, 2015.

[122] The balance outstanding on the mortgage registered against title to this property was $223,594 as of August 31, 2015. Therefore, the equity in this property as of the co-habitation date was $56,406. Accordingly, I find that $56,406 is the value of the respondent's excluded property from 880 Pine Springs Road.

Division of 880 Pine Springs Road

[123] When the parties began living together, they lived at 880 Pine Springs Road. They lived there until the winter of 2017, when they moved to 647 Harrington Road. When the parties moved out of this property, they rented it to tenants.

[124] The respondent paid for most, if not all, of the expenses related to the Pine Springs Road property. However, the parties treated this property like a family residence for which the respondent paid the majority of the expenses since he was the main income earner for the family unit.

[125] Accordingly, when the parties began living together, 880 Pine Springs Road became family property. As family property, the claimant has an interest in the increase in the equity of 880 Pine Springs Road from the time of their co-habitation.

[126] The 880 Pine Springs Road property sold on September 3, 2020 for a purchase price of $397,500. The net sale proceeds, after paying closing costs and financial obligations registered against the property, was $135,098.79. The net sale proceeds are in trust pending the resolution of this action.

[127] When the parties separated on September 1, 2019, the balance outstanding on the mortgage against 880 Pine Springs Road was approximately $195,000. However, when this property sold, the lender required $247,095.33 to pay out this mortgage.

[128] The respondent's evidence was that the mortgage registered against title to 880 Pine Springs Road included a line of credit and a loan for a vehicle purchased for the claimant.

[129] The respondent claims that following separation, he incurred a number of expenses to maintain and renovate this property. He also maintains that he continued to make contributions to the mortgage in order to keep the mortgage in good standing.

[130] Accordingly, the respondent submits that he should have credit for the cost of the after-separation renovations and mortgage contributions that he made. However, the respondent acknowledges that the claimant should have credit for rental payments from this property after separation.

[131] The respondent presented no detailed explanation for the significant increase in the mortgage from the separation date to the date of sale other than the evidence that he made renovations to the property after separation. If the increase in the mortgage value was the result of expenses incurred for improvements to the property, I will off-set those expenses and the respondent's after-separation mortgage payments, by the claimant's excluded inheritance and her post-separation rental payments. Because I have no evidence upon which to conduct a detailed accounting of the off-setting amounts, I will consider that each of those items exactly off-set the other. Therefore, the net effect of these unvalued excluded property claims is zero.

[132] The value of the respondent's excluded interest in 880 Pine Springs Road is properly established in the evidence. Therefore, I am able to place a value on this claim and apply the excluded value to the property division claim assessment.

[133] I see no reason to depart from an equal division of the equity in 880 Pine Springs Road after recognizing the respondent's excluded value in the property. The net sale proceeds from the sale of this property are $135,098.79. After deducting the value of the respondent's excluded property ($56,406), the amount remaining for division is $78,692.79. The parties' 50% share of this net equity is $39,346.39 each.

[134] The parties may disburse the funds held in trust from the sale of this property in accordance with this decision.

Division of 647 Harrington Road

[135] 647 Harrington Road is a duplex purchased just before Christmas 2017. The respondent is the sole registered owner of this property. However, there are two other parties who invested equally in the purchase of the property. While the respondent is the sole owner registered on title, the understanding between the three investors is that they each own a one-third interest in the property.

[136] The claimant and the respondent resided at 647 Harrington Road after leaving 880 Pine Springs Road. They lived in the Harrington Road residence until moving to the Barnhartvale Road property in July 2018.

[137] The respondent purchased his interest in 647 Harrington Road during the parties' relationship and he continued to own the property at the date of separation. Therefore, it is clear that the respondent's interest in 647 Harrington Road is family property.

[138] The respondent relies on s. 95(1)(a) of the FLA to claim an unequal division of his interest in 647 Harrington Road. Section 95(1)(a) of the FLA provides that a court may order an unequal division of family property if it would be significantly unfair to divide it equally. The respondent claims that it would be significantly unfair to divide this asset equally because he claims to have made significant financial contributions to the property where the claimant has not.

[139] I am not prepared to accept the respondent's position on the distribution of 647 Harrington Road. The contributions made by the claimant may not have been financial, but she contributed to the respondent's ability to purchase his interest by supporting him at home and caring for their child while he worked long hours. The contributions made by the claimant enhanced the respondent's ability to generate income to provide for the family and to invest in property.

[140] Further, there is no evidence that any efforts made by the respondent or the other two investors to maintain, improve or update 647 Harrington Road contributed to any increase in the value of the property after separation. The evidence here is in contrast to the facts in Jaszczewska v. Kostanski, 2016 BCCA 286, where, at para. 52, the Court of Appeal agreed that an equal division was significantly unfair where the efforts of the respondent, in designing and building a new residence on the property after the relationship had ended, enhanced its value beyond market trends.

[141] Therefore, in my view, the appropriate distribution of 647 Harrington Road is an equal distribution of the respondent's interest in this property.

[142] The respondent argues that the valuation date for 647 Harrington Road should be the date of separation. That submission is contrary to s. 87(b) of the FLA which provides that unless an agreement or order provides otherwise, the value of family property and family debt must be determined as of the date:

a) an agreement dividing the family property or family debt is made; or

b) of the hearing before the court respecting the division of property and family debt.

[143] Accordingly, as there is no agreement or order providing otherwise, the appropriate date on which to place a value on 647 Harrington Road for the purposes of the property division is the trial date.

[144] Neither party tendered evidence of an appraisal of 647 Harrington Road as of the trial date. Therefore, I have no value for this property that is related directly to the trial date.

[145] However, there is evidence of a series of property assessments conducted by the B.C. Assessment authority. The assessed value of 647 Harrington Road closest to the October 2022 trial date is the 2022 assessment notice which provides an assessed value for the property as of July 1, 2021. This is not ideal but it is evidence of value that is closest to the trial date. According to the 2022 assessment notice, the assessed value of 647 Harrington Road was $627,000.

[146] The evidence of the outstanding mortgage balance secured against the property that is closest to the trial date is the balance as of August 28, 2022. The banking records show that the outstanding mortgage balance as of that date was $298,507.32. Using a value of $627,000, the equity in 647 Harrington Road, as best as can be established by the evidence, is $328,492.68 as of the trial date .

[147] The respondent's one-third interest in the total equity is $109,497.56. The claimant's half interest in the respondent's share of the equity is $54,748.78.

[148] The balance outstanding on the mortgage registered against 647 Harrington Road was $328,581.01 as of August 31, 2019. This represents the mortgage balance as of the date of the parties' separation. From the date of separation to the trial date, the respondent and his partners reduced the mortgage balance by a total of $30,073.69.

[149] The respondent's one-third share of the mortgage reduction in this period is $10,024.56. As the claimant had no part in reducing the mortgage after the separation, she should contribute her half share of the reduction. Therefore, the respondent should receive credit for half of the respondent's share of the mortgage reduction which is $5,012.28. In Yousefian v. Jafarmadar, 2018 BCSC 855, the court reached a similar conclusion at para. 100:

[100] First, I rely on s. 95(f) and find that Ms. Yousefian, after the date of separation, caused a significant increase in the value of family property beyond market trends. As set out above, Ms. Yousefian's contributions post-separation reduced the mortgage by $45,565, a substantial amount. While I did not accept the quantum put forth by Ms. Yousefian as compensation for renovation expenses, I do accept that she also increased the value of the property by funding the work of Mr. Jafarmadar and others in renovating Karley Crescent post-separation. Taken together, these factors weigh in favour of reapportionment. At the very least, Mr. Jafarmadar should compensate Ms. Yousefian for half of the mortgage

reduction or $22,782.

[150] Therefore, the claimant's half share in the respondent's interest in 647 Harrington Road is $49,736.50.

Division of 6850 Barnhartvale Road

[151] 6850 Barnhartvale Road is comprised of six acres of land on which the parties planned to build their permanent family home. The parties purchased the property during their relationship with the assistance of the respondent's parents. They moved into a trailer on the property when they left the residence on Harrington Road.

[152] The parties were owners of a one-half interest in this property as joint tenants. The respondent's parents were owners of the other half interest in the property.

[153] The respondent's parents and the parties agreed to share equally all costs associated with this property. The claimant agreed to contribute $500 per month towards the expenses. However, she was unable to meet that $500 commitment every month. As a result, the respondent commenced making contributions to the property expenses. However, his financial contributions ended in November 2019.

[154] After the parties separated, the respondent's parents commenced a legal action against the claimant and the respondent. The action brought by the respondent's parents resulted in an order that the claimant and the respondent release their interest in the property for $36,000. Accordingly, the value of the parties' interest in 6850 Barnhartvale Road is $36,000.

[155] I understand that the respondent's parents paid $36,000 into a trust account in exchange for a transfer of the property to them. Those funds are in trust until the property division issue is determined in this action.

[156] The respondent claims that he contributed $17,325 towards the purchase and the improvement of the property while the claimant contributed only $3,000. Accordingly, the respondent claims a division of the value of this property on a pro rata basis based on the parties' relative financial contributions. If I were to do so, the claimant would receive 15% of the value and the respondent would receive 85%.

[157] While the claimant admits that she agreed to contribute $500 per month to the property, she was unable to do so almost from the beginning. It is important to recognize that shortly after they purchased the property, the parties' son was born. Therefore, almost immediately after the purchase, the claimant could not earn income to contribute to the property.

[158] However, the parties purchased this property with the expectation that they would reside on it as a family. While the claimant may have committed to contribute $500 per month, this is a family law case, not a breach of contract case.

[159] At the time the parties purchased the property, they were living together. They planned to build a house on this property together and, regardless of whether the claimant could contribute financially or not, they would have built their family home on the property if they remained together. The respondent was the main financial contributor to the family unit. Therefore, I find it unlikely that the relative financial contributions to the housing expenses would have been a consideration for the parties when they purchased it.

[160] Therefore, on a separation, I am not prepared to divide the value of the parties' interest in 6850 Barnhartvale Road on a pro rata basis based on financial contributions.

[161] Accordingly, the parties will share the value of 6850 Barnhartvale Road equally.

[162] However, after the parties separated, the respondent paid $375 toward expenses related to this property. Therefore, he should receive one-half of that amount from the claimant's share.

[163] Therefore, the claimant will receive $17,812.50 for her interest in 6850 Barnhartvale Road and the respondent will receive $18,187.50. The parties may disburse the funds held in trust from the purchase of the parties' interest in accordance with this decision.

Property Division Summary

Claimant's Share

Respondent's Share

880 Pine Springs Road

$39,349.39

$39,349.39

647 Harrington Road

$49,736.50

Retains his interest

6850 Barnhartvale Road

$17,812.50

$18,187.50

Totals

$106,898.39

$57,536.89

Spousal Support

[164] Section 161 of the FLA establishes the following objectives of a spousal support order:

(a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;

(b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;

(c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;

(d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

[165] In Marquez, the Court of Appeal considered the spousal support provisions of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] at s. 15.2 and established a framework of broad principles applicable to spousal support decisions. The DA provisions considered by the Court in Marquez are identical to the spousal support provisions under the FLA. Therefore, in considering spousal support pursuant to the FLA, the principles established in Marquez under the DA are applicable.

[166] The framework established by the Court in Marquez at paras. 32-34 includes the following principles:

a) Cohabitation is an economic partnership built upon the premise (albeit rebuttable) of mutual support;

b) The statutory objectives in awarding spousal support include both compensatory and non-compensatory principles;

c) The compensatory support principle recognizes the need to compensate a spouse for the economic disadvantages arising from the end of the cohabitation and to account for economic advantages conferred on a spouse as a result of the cohabitation;

d) The non-compensatory support principle recognizes the need to compensate a spouse for the loss of the economic partnership and the mutual support that both parties enjoyed during the cohabitation;

e) The DA and the FLA acknowledge both principles of compensation for spousal support because neither principle alone is sufficient to achieve a just and legal framework for spousal support; and

f) Awarding spousal support is not a question of applying one principle or the other, but rather, a matter of applying the relevant factors in striking a balance that best achieves justice in the particular case before the court.

[167] The economic disadvantages typically considered in the compensatory support principle include the withdrawal of one spouse from the workforce to assume primary responsibility for childcare and household management. Withdrawing from the workforce to assume those functions often results in an impairment of that spouse's future economic opportunities.

[168] The non-compensatory support principle acknowledges that cohabitation creates interdependencies between the parties. It allows the court to consider how the parties rely upon each other to create the standard of living they enjoyed while together. Non-compensatory support recognizes that upon the breakdown of the relationship, one or both of the parties may not be able to sustain the standard of living they enjoyed while residing together.

[169] As a result, non-compensatory support recognizes a spouse's entitlement to support to meet their needs after separation. The concept of non-compensatory support does not limit the level of support to a level that meets basic needs. It seeks to achieve a standard of living enjoyed by the parties during the relationship: Marquez at paras. 34-35.

[170] The respondent submits that neither the compensatory nor the non-compensatory principles entitle the claimant to spousal support.

[171] On the compensatory principle, the respondent submits that the claimant had training and job experience both before and after the separation. On that basis, the respondent argues that the claimant suffered no economic disadvantages from the relationship.

[172] On the non-compensatory principle, the respondent submits that the relationship between the parties was only four years in length. He submits further that no significant interdependencies existed between them with respect to their financial circumstances and that currently his standard of living is no better than the claimant's.

[173] Notwithstanding the respondent's submissions, I find that spousal support is payable to the claimant on both the compensatory and non-compensatory principles.

[174] Even though the claimant had training and job experience both before and after the separation, she was out of the workforce for a significant period of time after the birth of C. The parties agree that after C.'s birth, the claimant stayed at home, provided care for C. and maintained the household. The parties also agree that during the relationship, the respondent worked significant hours and often worked out of town. He took extra shifts on an on-call basis that also required him to be away from home.

[175] When the relationship ended, the respondent continued working for the railway and continued his work with the military. On the other hand, the claimant, who had been out of the workforce for much of the parties' relationship, found herself having to return to the workforce. In these circumstances, I find that the claimant has sustained an economic disadvantage as a result of her relationship with the respondent.

[176] Further, I find the respondent was able to carry on working without interruption because the claimant remained at home to maintain the household and care for their child. Accordingly, the respondent benefitted economically as a result of the relationship.

[177] On the non-compensatory principle, I find that the claimant has not been able to maintain a standard of living comparable to the standard she enjoyed in the relationship. Since the relationship ended, the claimant has relied upon social assistance and subsidized housing to maintain herself and C.

[178] Living on social assistance and relying on subsidized housing cannot be comparable to the standard of living enjoyed by the parties during their relationship. When the parties were together, the respondent supported the family on an annual income that was consistently in the range of $100,000 per year and the family lived in homes that the parties owned.

[179] I do not accept that the claimant's current standard of living is not much different that the respondent's standard of living. The respondent is working at a job that pays over $100,000 annually. He lives in a five-bedroom house with his new partner and up to six children depending on their parenting times.

[180] Accordingly, I am satisfied that the respondent must pay spousal support to the claimant.

Prospective Spousal Support

[181] In order to determine the level of spousal support payable by the respondent, it is appropriate to use the same income levels as determined for the purposes of child support. Accordingly, for spousal support purposes, the claimant's income will be set at $25,000 per year. The respondent's income will be $113,438 per year.

[182] The spousal support range for these income levels, according to the Spousal Support Advisory Guidelines, is $1,484 per month at the low end of the range, $1,879 per month as the mid-range and $2,263 per month at the high end of the range.

[183] Spousal support will be set at the mid-range of $1,879 per month for an indefinite duration. In this case, the mid-range of spousal support balances the claimant's compensatory claim and her financial needs against the respondent's need to support his new family.

[184] However, the spousal support will be subject to variation and review after two years. The spousal support payments will commence on May 1, 2023 and continue on the first day of each and every month thereafter until further order of the court or agreement between the parties.

Relevant History of the Proceedings

[185] The claimant commenced this action on December 20, 2019. In her notice of family claim, the claimant seeks the following:

a) an order respecting children, including orders respecting parenting arrangements and child support;

b) an order for spousal support; and

c) orders relating to the division of family property and family debts.

[186] On January 30, 2020, the respondent filed a response to family claim in which he responds to each of the claims set out in the notice of family claim.

[187] On January 30, 2020, the respondent also filed a counterclaim in which he seeks orders respecting parenting arrangements, child support and the division of family property and family debts.

[188] The parties attended at a JCC on August 25, 2020. Both parties had legal representation at that JCC. The orders made at the JCC (the "JCC Order") included the following orders:

a) By consent, the Respondent will retain ownership, for his own use, the sea-can and he will pay to the Claimant, $1,000.00 for her interest (para. 6).

b) By consent on an interim without prejudice basis, that the Respondent will pay the Claimant the sum of $433.00 per month for the support of the Child, due payable on the last day of each month, commencing August 31, 2020 (para. 9).

[189] By October 2021, the claimant no longer had legal counsel representing her in this action.

[190] The claimant filed a financial statement on December 14, 2021, in which the claimant deposes that her income was $15,360 from income assistance. There was no financial statement filed on behalf of the respondent until September 26, 2022.

Retroactive Child Support

[191] The claimant claims child support to the date of separation based on the amounts that the respondent should have paid from the separation date.

[192] The respondent resists the retroactive child support claim on the principles established by the Supreme Court of Canada in D.B.S. v. S.R.G., 2006 SCC 37.

Does D.B.S. Apply?

[193] The Court in D.B.S., at para. 133, established that when deciding whether to award a retroactive child support order, the factors to consider are:

a) delay in seeking a child support order;

b) blameworthy conduct;

c) circumstances of the child; and

d) hardship for the payor parent.

[194] During the parties' submissions, I raised a concern about whether the D.B.S. principles apply to a case such as this where:

a) There is no separation agreement dealing with child support issues;

b) The respondent was on notice that the claimant seeks child support from the date of separation when he was served with the notice of family claim; and

c) The only child support order is a consent order made on an interim and without prejudice basis.

[195] My concern was whether, in these circumstances, the court should preclude the claimant from establishing and enforcing an obligation on the respondent that existed from the date of separation. To preclude the claimant from doing so may render meaningless the interim and without prejudice nature of the JCC Order.

[196] In addition, the logical extension of such a conclusion would make all claims for support from the separation date retroactive support claims that must satisfy the factors in D.B.S. If that is the case, then, where there is no child support agreement or pre-trial child support order, the D.B.S. factors may shorten the support claim due to the length of time that it takes to get the action to trial.

[197] Counsel for the respondent argued that the analysis in D.B.S. must apply because the Supreme Court specifically recognized this circumstance in its reasons. The respondent also relied on Sampley v. Burns, 2018 BCCA 178, where the Court of Appeal applied the D.B.S. principles to a trial decision granting child support from the date of separation.

[198] As the claimant represented herself in this trial, I did not have submissions on the law from the opposing position. Therefore, I have conducted the analysis that follows without hearing argument from the contrary position.

[199] The decision in D.B.S. starts with terminology that suggests that the decision applies where one party seeks to increase the amount of support payable pursuant to a previous order or a separation agreement. At para. 1 of the reasons, Justice Bastarache defined the nature of the question on appeal as follows:

[1] The present appeals involve the parental obligation to support one's children, and the question of whether this obligation compels parents to make child support payments for periods of time when the responsibility to do so was never identified, much less enforced. This question will arise when the parent receiving child support (the "recipient parent") determines that (s)he should have been paid greater amounts than (s)he actually received, despite the fact that no court order or separation agreement provided for these higher payments.

[200] Throughout the balance of the reasons, Bastarache J. referred to the circumstance where the recipient parent seeks to increase the support payments. This wording suggests that the principles in D.B.S. apply when a court order or agreement has already established the amount of child support payable and one party seeks to vary that order or agreement.

[201] However, in the section titled "Situations Where Retroactive Awards May Be Ordered", starting at para. 61, Bastarache J. described three situations in which the court may order retroactive support:

a) where there has already been a court order for child support to be paid;

b) where there has been a previous agreement between the parents; and

c) where there is no previous court order or agreement for child support.

[202] After identifying the three situations, Bastarache J. did not differentiate between the situations when applying the factors affecting the retroactive support awards. In other words, Bastarache J. did not single out, for special treatment, the situation where there is no previous child support order or agreement. Therefore, I must conclude that it was the Court's intention to apply the principles it established for retroactive support orders to all three situations, including where there is no previous support order or agreement.

[203] In discussing the principles for awarding retroactive support, Bastarache J. sought to minimize disruption to the "delicate balance between certainty and flexibility" surrounding the payment of support. At para. 96 of the decision, Bastarache J. stated:

[96] Unlike prospective awards, retroactive awards can impair the delicate balance between certainty and flexibility in this area of the law. As situations evolve, fairness demands that obligations change to meet them. Yet, when obligations appear to be settled, fairness also demands that they not be gratuitously disrupted. Prospective and retroactive awards are thus very different in this regard. Prospective awards serve to define a new and predictable status quo; retroactive awards serve to supplant it.

[204] Therefore, Bastarache J. referred to one distinguishing feature of the situation where there is no previous support order or agreement. He recognized that, because there is no previous order or agreement, the payor parent's interest in certainty is not compelling in this situation. At para. 80, Bastarache J. found:

[80] Unlike the previous two situations, in this third one, the status quo does not involve any existing payment of child support. This fact immediately differentiates the present context in a very important way: absent special circumstances (e.g., hardship or ad hoc sharing of expenses with the custodial parent), it becomes unreasonable for the non-custodial parent to believe (s)he was acquitting him/herself of his/her obligations towards his/her children. The non-custodial parent's interest in certainty is generally not very compelling here.

[205] Accordingly, I have concluded that I must apply the principles established by D.B.S. in this case keeping in mind that the respondent's interest in having certainty in his child support obligations is not a compelling reason to deny or limit the award of retroactive child support.

[206] In my view, the existence of a child support order made by consent on an interim and without prejudice basis does not change the situation. The wording of the order suggests that the parties agreed that the order would not preclude them from pursuing a higher or lower amount at trial.

[207] Counsel for the respondent argues that the without prejudice term refers to the claimant's ability to apply, at a later date, to change the amount of support, but not on a retroactive basis. However, the wording of the order does not expressly limit its retroactive effect in the way suggested by the respondent. There is no evidence about the intentions of the parties when they agreed to the order. In my view, the most reasonable interpretation of the interim, without prejudice order is that the order would not preclude a retroactive child support claim.

Application of D.B.S.

[208] The two issues addressed by D.B.S. for retroactive child support are whether retroactive support is appropriate and, if so, to what date it is retroactive.

[209] In D.B.S., Bastarache J. established the following principles for awarding retroactive child support:

a) Parents have an obligation to support their children in a way that is commensurate with their incomes (para. 54);

b) The parental obligation to support their children exists independently of any statute or court order (para. 54);

c) Payor parents who do not increase their child support payments to correspond with their income will not have fulfilled their obligation to their children (para. 54); and

d) The award of retroactive support is the enforcement of an obligation that existed at the relevant time (paras. 2 and 82).

[210] As discussed above, in making a retroactive support order, the court must exercise its discretion by considering the following factors from D.B.S.:

a) whether there is a reasonable excuse for not seeking support sooner (paras. 100-104);

b) whether the payor parent is guilty of "blameworthy conduct" (paras. 105-109);

c) the circumstances of the child (paras. 110-113); and

d) whether the retroactive award will lead to hardship for the payor parent (paras. 114-116).

[211] D.B.S. also established the following principles with respect to the date of retroactivity:

a) The date to which the support award is retroactive should generally be the date when payee parents give effective notice that they seek an increase in support (para. 118);

b) It is usually inappropriate to make a support award retroactive to a date more than three years before the payee parents give formal notice of their intention to seek an increase in support (para. 123); and

c) The date of retroactivity may be extended to the date on which the increased support should have been paid where the payor parent engages in blameworthy conduct (para. 124).

[212] The respondent submits that based on the principles of D.B.S., I should deny the claimant's retroactive child support claim because:

a) The claimant has unreasonably delayed seeking an increase in support because she has not done so since the JCC Order pronounced August 25, 2020;

b) The respondent has not engaged in blameworthy conduct because he has paid support to the claimant in accordance with the JCC Order; and

c) A retroactive award will be a hardship for the respondent.

[213] The respondent submits further that he did not receive effective notice that the claimant was seeking an increase in support until the first day of trial.

Delay and Reasonable Excuse

[214] The first question in the D.B.S. analysis is whether the claimant has a reasonable excuse for not seeking child support sooner.

[215] The parties separated on September 1, 2019. The claimant commenced this family law action on December 20, 2019, claiming child support and spousal support. The parties participated in the JCC on August 25, 2020, where the court made an order with the consent of both parties for interim child support on a without prejudice basis. After the interim child support was set, the claimant took no further steps to increase the amount of support payable, but instead waited for a determination of the appropriate child support at trial.

[216] In my view, in the circumstances of this case, it was not unreasonable for the claimant to wait until trial for a final determination of the appropriate child support amount.

[217] Based on the financial evidence, it is apparent that the claimant had very little financial resources with which to apply for an increase in child support. At some point after the JCC, the claimant became self-represented. By August 12, 2021, it became evident that the claimant was representing herself because she appeared on her own behalf in an application for compensatory parenting time with her child.

[218] The Supreme Court of Canada in D.B.S. held at para. 101:

[101] Delay in seeking child support is not presumptively justifiable. At the same time, courts must be sensitive to the practical concerns associated with a child support application. They 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. Equally, absent any such an anticipated reaction on the part of the payor parent, a reasonable excuse may exist where the recipient parent lacked the financial or emotional means to bring an application or was given inadequate legal advice

[219] One of the concerns addressed by not awarding retroactive child support when there has been unreasonable delay by the recipient is the payor parent's interest in certainty (D.B.S. at para.102). As discussed earlier in these reasons, the respondent's interest in certainty is not a very compelling reason to deny retroactive child support in this case.

[220] Further, the terms of the JCC Order are without prejudice with respect to child support, so the respondent should have been aware of the risk that a trial decision could set child support at a higher amount than the interim order.

[221] Therefore, I find that no unreasonable delay on the part of the claimant in seeking child support because:

a) the claimant lacked the financial resources to apply for increased child support in the interim period leading up to trial;

b) the claimant was entitled to wait until the trial process determined a final order for child support;

c) the respondent's expectations with respect to certainty are not compelling.

Blameworthy Conduct

[222] The next question is whether the respondent engaged in blameworthy conduct by failing to pay the appropriate level of child support commensurate with his income.

[223] The Supreme Court of Canada in D.B.S. determined that parents have an obligation to support their children to a level that is commensurate with their incomes. To that end, the Guidelines establish an easily accessible and public record of the child support levels that are payable based on income levels and the number of dependent children.

[224] In D.B.S., Bastarache J. also determined that payor parents who do not pay child support that corresponds with their income do not fulfil their obligations to their children (para. 54). Accordingly, Bastarache J. took an expansive view of what constitutes blameworthy conduct. He suggested that blameworthy conduct includes anything that privileges the payor parent's own interests over their children's entitlement (paras. 106-107).

[225] The respondent's historical income levels show that the child support established by the JCC Order was significantly lower than the child support amount commensurate with the respondent's income. The respondent's 2019 Guidelines income was $88,933. The table amount of child support payable under the Guidelines for this level of income should have been $851 per month. The JCC Order required the respondent to pay only $433 per month.

[226] Even after the JCC Order, the respondent did not increase his child support payments as his income increased. Therefore, from the date of separation, the respondent has enhanced his personal financial position at the expense of his child.

[227] Further, based on my previous interpretation of the "without prejudice" clause, the respondent did so at the risk that a trial decision would require him to make up the difference. Accordingly, I find that the respondent's conduct falls within the expansive definition of blameworthy conduct established in D.B.S.

[228] The respondent seeks to justify his conduct on the basis that he paid child support in accordance with the terms of the JCC Order. In that regard, the respondent relies on paras. 108-109 of D.B.S. Specifically, the respondent relies on the following passage from para. 108:

[108] On the other hand, a payor parent who does not increase support payments automatically is not necessarily engaging in blameworthy behaviour. Whether a payor parent is engaging in blameworthy conduct is a subjective question. But I would not deny that objective indicators remain helpful in determining whether a payor parent is blameworthy. For instance, the existence of a reasonably held belief that (s)he is meeting his/her support obligations may be a good indicator of whether or not the payor parent is engaging in blameworthy conduct. In this context, a court could compare how much the payor parent should have been paying and how much (s)he actually did pay; generally, the closer the two amounts, the more reasonable the payor parent's belief that his/her obligations were being met. Equally, where applicable, a court should consider the previous court order or agreement that the payor parent was following. Because the order (and, usually, the agreement) is presumed valid, a payor parent should be presumed to be acting reasonably by conforming to the order. However, this presumption may be rebutted where a change in circumstances is shown to be sufficiently pronounced that the payor parent was no longer reasonable in relying on the order and not disclosing a revised ability to pay.

[229] While the respondent in this case complied with the terms of the JCC Order, he knew or should have known that he was paying significantly less than the amount that was commensurate with his income.

[230] The respondent also relies on Dyck v. Bell, 2015 BCCA 520, where Justice Harris held that the chambers judge made a reversible error by finding blameworthy conduct on the part of the payor parent. In that case, the payor parent made support payments in accordance with a consent order. The consent order incorporated the terms of a final agreement settling all issues arising from the marriage breakdown. Justice Harris held that the court

should give considerable weight to agreements reached by the parties. At para. 37 of his reasons, Harris J. cites para. 78 from D.B.S.:

[78] In most circumstances, however, agreements reached by the parents should be given considerable weight. In so doing, courts should recognize that these agreements were likely considered holistically by the parents, such that a smaller amount of child support may be explained by a larger amount of spousal support for the custodial parent. Therefore, it is often unwise for courts to disrupt the equilibrium achieved by parents.

[231] The facts in Dyck were different from the facts of this case in that the parties in this case had no final agreement settling all issues arising from their separation. Further, the JCC Order is an interim and without prejudice order. By those terms it is clear that the terms of the JCC Order were not final terms and that they were subject to change following a trial of the issues.

[232] In my view, the respondent cannot hide behind the terms of the JCC Order to absolve himself of any blameworthy conduct in this case.

Circumstances of the Child

[233] The respondent does not raise the circumstances of the child as a reason for denying a retroactive child support order. However, I will consider this factor because it is one of the considerations established by D.B.S.

[234] The claimant provides for herself and C. by relying on social assistance and by living in low income housing. On the other hand, the respondent earns income close to or exceeding $100,000 per year.

[235] The respondent has paid no spousal support and paid child support at a level significantly lower than his level of income would require. Therefore, it is not difficult to conclude that C. needs support from his father and has needed that support since the date of separation.

Unfortunately, the support that C. should have received was not forthcoming from the respondent at levels commensurate with the respondent's income.

[236] Receiving retroactive child support now may not be as beneficial to C. than had he received it periodically from the date of separation. However, a retroactive payment now will go a long way to improve C.'s standard of living overall.

[237] Therefore, I find that the circumstances of C. favour the making of a retroactive support order.

Hardship

[238] I have little doubt that a retroactive award will cause financial hardship of some degree to the respondent. However, the claimant has been dealing with hardship since the date of separation in that she has received no spousal support and has received child support in an amount significantly less than what the respondent should have paid.

[239] Further, when the respondent agreed to limit his child support on an interim and without prejudice basis, he knew or ought to have known that when this matter proceeded to trial he ran the risk that there would be a retroactive award to make up the difference.

[240] At para. 116 of D.B.S., Bastarache J. recognized that "While hardship for the payor parent is much less of a concern where it is the product of his/her own blameworthy conduct, it remains a strong one where this is not the case".

[241] In the circumstances of this case, I find that while some degree of hardship to the respondent is unavoidable, it is the product of his own previous conduct. That is, he is only required to make a lump sum retroactive support payment now because he previously failed to pay the appropriate incremental amounts commensurate with his income.

[242] I understand that the respondent has taken on additional financial responsibilities by entering into a relationship with his current partner and her four children. However, the respondent's new partner is employed and is earning income to contribute to their relationship.

[243] Based upon the foregoing, I will order that the respondent pay retroactive child support for C.

Date of Retroactive Child Support

[244] The respondent will pay child support for C. from October 1, 2019, which is the first month following the date of separation.

[245] The respondent submits that the date of effective notice was the first day of trial. I am not prepared to accept that submission.

[246] The respondent knew or ought to have known that he had child support obligations for C. from the date of separation. He should not have required notice of this obligation from the claimant. In any event, the respondent had notice that the claimant was seeking child support mere months after separation, when the claimant filed her notice of family claim.

[247] The respondent did not fulfill his child support obligations in any way until the JCC Order and then did not pay child support commensurate with his income. He should have known that the payments he made for child support were inadequate and would increase after trial.

Quantum of Retroactive Child Support

[248] During the period between the separation date to the trial date, C. resided primarily with the claimant. Therefore, the income of the respondent during this period of time is the only income that is relevant.

[249] Based on the respondent's income tax information, his annual income between 2018 and 2021 is as follows:

Year

Respondent's Income (Net of Union Dues)

2018

$94,148

2019

$88,933

2020

$112,491

2021

$113,438

[250] The child support payable by the respondent based on the table amounts under the Guidelines and his income from the previous years are as follows:

Respondent's Income

Monthly Child Support

Total Child Support for Period

Oct.1/19 to May 31/20

$94,148

$896

$7,168

June 1/20 to May 31/21

$88,933

$851

$10,212

June 1/21 to May 31/22

$112,491

$1051

$12,612

June 1/22 to May 1/23

$113,438

$1059

$11,649

Total

$41,641

[251] The respondent paid $433 per month in child support from August 31, 2020 pursuant to the JCC Order. The total paid by the respondent to May 1, 2023 will be $13,856. Therefore, the net amount payable by the respondent for child support from October 1, 2019 to May 1, 2023, is $27,785.

Retroactive Spousal Support

[252] The Supreme Court of Canada in Kerr v. Baranow, 2011 SCC 10 held that similar considerations to those established for a retroactive child support award by D.B.S. are relevant to deciding the suitability of a retroactive spousal support award. The Court directed that, in a retroactive spousal support analysis, the court must weigh the D.B.S. considerations in light of the different legal principles and objectives applicable to spousal support: para. 207.

[253] In Kerr, Justice Cromwell summarized the difference between child support and spousal support in the following passage at para. 208:

[208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. It that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the

child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see D.B.S., at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, for example, M.L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.

[254] Accordingly, the considerations of delay, blameworthy conduct, the circumstances of the claimant and hardship to the respondent require a fresh analysis for retroactive spousal support to account for the differences between child support and spousal support as articulated by Cromwell J.

Delay

[255] For the same reasons that I found there was no unreasonable delay in the claimant seeking child support, I find that there is no unreasonable delay in her seeking spousal support.

Blameworthy Conduct

[256] The respondent's blameworthy conduct in the context of his child support obligations was failing to pay child support in the appropriate amount and at the appropriate time. The blameworthy conduct arises in the child support context because the child's entitlement to support is "automatic" and the amount payable is dependent only on the payor parent's income.

[257] The situation with respect to spousal support is different in that the obligation to pay spousal support is not "automatic". There are questions of entitlement, questions related to the income levels of each spouse and questions of quantum. Therefore, the obligation to pay spousal support does not arise automatically upon separation as it does with child support.

[258] There is no evidence of any blameworthy conduct on the part of the respondent for the purposes of retroactive spousal support.

[259] Accordingly, in this case, I find that the failure of the respondent to pay spousal support from the date of separation is not blameworthy conduct.

Circumstances of the Claimant

[260] I have already determined that the parties' separation financially disadvantaged the claimant. Accordingly, the claimant would have benefitted from spousal support had she received it earlier.

Hardship on the Respondent

[261] A retroactive spousal support award to the claimant will likely cause hardship to the respondent. Just by virtue of the orders made in this action, the respondent will have significant financial responsibilities.

Conclusion on Retroactive Spousal Support

[262] In order to determine whether retroactive spousal support is appropriate in this case, I must balance the circumstances of the claimant against the hardship to the respondent. After weighing these two factors, I have concluded that the hardship to the respondent in having to pay retroactive spousal support outweighs the circumstances of the claimant.

[263] The orders previously made in these reasons will mitigate the claimant's needs. While the claimant would have benefited from periodic spousal support from the date of separation, receiving a lump sum amount now as retroactive support will not have the same beneficial effect because:

a) The claimant will receive a total of $106,898 from the property division award;

b) The claimant will receive $1,879 per month in prospective spousal support and $850 per month in prospective child support from May 1, 2023; and

c) The claimant will receive $27,147 in retroactive child support.

[264] On the other hand, the orders made in this case will require the respondent to raise significant funds to comply with his obligations. There are sufficient funds held in trust from the sale of 880 Pine Springs Road and 6850 Barhhartvale Road to pay the claimant's interest in those two properties. However, in addition to paying out the claimant's interest in those two properties, the respondent must pay to the claimant:

a) $49,736.50 for her interest in 647 Harrington Road;

b) $27,785 in retroactive child support;

c) $850 per month in prospective child support; and

d) $1,879 per month in prospective spousal support.

[265] In my view, the orders made in these reasons achieves an appropriate balance of the financial circumstances of the parties without a retroactive spousal support award. Accordingly, the claimant's retroactive spousal support claim is dismissed.

Costs

[266] In my view, the parties had divided success in this action. Therefore, the parties should bear their own costs of the action.

[267] However, if the parties wish to make submissions on costs, then they have leave to do so but they must, within 60 days of these reasons, schedule a costs hearing.

"D.K. Hori J."

HORI J.

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