
CANADA / JUDGMENT

Kandola v. Kandola

2016 BCSC 1443

COURT

Supreme Court of British Columbia

DECIDED

8 August 2016

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2016 BCSC 1443 Kandola v. Kandola

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kandola v. Kandola,

2016 BCSC 1443

Date: 20160808

Docket: E044158

Registry: New Westminster

Between:

Sroop Kaur Kandola

Claimant

And

Sukhbinder Singh Kandola

Respondent

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Claimant:

J. Alexander Thomson

The Respondent:

Appeared on his own behalf

Place and Dates of Trial:

New Westminster, B.C.

July 11-15, 2016

Place and Date of Judgment:

New Westminster, B.C.

August 8, 2016

INTRODUCTION

- [1] The principal issues in this family law proceeding are the division of family property and debt and child support.
- [2] The claimant, Sroop Kaur Kandola, and the respondent, Sukhbinder Singh Kandola, were married on June 6, 1998, separated on September 15, 2012 and were divorced on August 12, 2014.
- [3] The claimant has remarried and is now known as Ruby Dorais. Accordingly, where I refer to the claimant by name in these Reasons, I will refer to her as Ms. Dorais.
- [4] Ms. Dorais, a 42-year-old pharmacy technician, is currently employed by the Health Employees' Union as a labour relations officer.
- [5] The respondent, who is 45 years old, has resided with his parents since the parties separated. Before and during the marriage, Mr. Kandola was employed as a courier. Except for a period of approximately six weeks in 2013, the respondent has been unemployed since the parties separated.
- [6] There are two children of the marriage, Terrin Kandola born July 6, 1999 and now 17 years old; and Tristan Kandola, born April 16, 2001, now 15 years old. Since their parents separated, both children have resided with their mother.
- [7] The most contentious issue regarding the division of family property is whether, as the claimant alleges, the respondent retains possession or control of the proceeds of sale of two lots in an investment property located on East 18th Avenue in Vancouver acquired by the respondent and a business associate during the marriage and sold after the parties separated. The respondent, a recovering alcoholic, contends that when the lots were sold, he was suffering from severe alcoholism, and that unbeknownst to him, his business associate misappropriated the sale proceeds.
- [8] The division of the respondent's interest in a Prince George real estate project, the parties' pensions, registered retirement savings plans, some jewelry and household effects is also in issue.

- [9] The claimant also seeks an order that the respondent pay her ongoing child support based on an imputed annual income of \$50,000. In addition, the claimant seeks orders for the retroactive adjustment of child support and for payment of arrears of s. 7 special and extraordinary expenses.

BACKGROUND FACTS

- [10] From the marriage until separation, the parties, and later the children, lived with the respondent's parents. In lieu of rent, the claimant and the respondent paid for most of the utilities at the home owned by Mr. Kandola's parents. Upon separation, the claimant moved out, and rented a basement suite, where she took up residence with the children.
- [11] During the marriage, the parties bought and sold a number of investment properties in Surrey, Burnaby and New Westminster, and invested in two real estate development projects, located in Prince George and on East 18th Avenue in Vancouver.
- [12] The parties each made financial contributions to their various real estate investments. For example, following the death of her mother in 2004, the claimant received life insurance benefits of \$70,000 which she applied to the parties' real estate investments. Ms. Dorais also received \$30,000 in settlement of a motor vehicle accident claim. She contributed those funds to the parties' real estate investments. The claimant makes no claim in these proceedings for excluded property derived from money paid to her under an insurance policy or in settlement of her personal injury claim.
- [13] The claimant and the respondent shared a joint chequing account, a joint savings account and joint U.S. dollar account at the Bank of Nova Scotia. Until they separated their paycheques were deposited by direct deposit to the joint chequing account.
- [14] The parties also held a BMO Mastercard account for which Ms. Dorais was the primary cardholder, and Mr. Kandola was a secondary card holder. Until separation, when Ms. Dorais cancelled the respondent's card, the parties used the Mastercard account for household and personal purchases, and also to pay for some expenses related to their real estate projects. The claimant, who generally managed the family finances, paid the monthly Mastercard statements from the parties' chequing account.
- [15] On October 8, 2013, Master Caldwell pronounced an interim consent order requiring the respondent, based on a Federal Child Support Guidelines income of \$57,145, to pay child support in the amount of \$865 per month commencing on October 1, 2013. Master Caldwell's order also provided for the parties to share s. 7 special and extraordinary expenses in proportion to their respective incomes; provided that the claimant had the primary residence of the children; set out the terms on which the claimant and the respondent had joint guardianship of the children; and defined the respondent's parenting time.

[16] The respondent failed to pay monthly child support. At a judicial case conference held before Master Taylor on February 12, 2015 the parties entered into consent order by which \$15,000 was released from trust funds held by the claimant's solicitor to the claimant in payment of child support arrears from October 2013 to February 12, 2015. Master Taylor's order also provided, by consent, for the release of up to \$5,000 from Murchison, Thomson & Clarke LLP's trust fund to the claimant for s. 7 expenses, and for the parties, commencing February 1, 2015, to share equally the monthly cellphone expenses for the children as a s. 7 expense. Master Taylor also ordered, by consent, that the sum of \$1,200 be released from the claimant's solicitor's trust fund and paid to the claimant, representing a variation of interim child support in the amount of \$200 per month to be paid by the respondent on a without prejudice basis commencing March 1, 2015, and continuing to the then anticipated trial date of August 4, 2015.

[17] On August 4, 2015, the parties attended a settlement conference before the Honourable Mr. Justice Sewell. The court made orders by consent granting the claimant sole custody of the children and providing for the respondent to have access to the children as arranged between him and the children. The consent order of August 4, 2015 also provided for the respondent to pay child support of \$200 per month to the claimant commencing September 1, 2015 and continuing until further order of court, without prejudice to the right of either party to argue for a different amount at trial.

[18] Finally, the order of August 4, 2015 also provided:

By consent, the claimant and the respondent shall share equally the following extraordinary expenses:

- i. the cost of the Children's cell phones;
- ii. basketball;
- iii. soccer; and,
- iv. the net cost of orthodontic treatments that may be required by the Children that are not covered by the claimant's dental plan through her employment.

DIVISION OF FAMILY PROPERTY AND DEBT

Applicable Legal Principles

[19] Under s. 81 of the Family Law Act, on separation, each spouse "has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt." Subject to s. 85, which deals with excluded property, under s. 84(1), family property includes all real and personal property owned by at least one spouse on the date of separation, or a beneficial interest of a spouse in property. Specific categories of family property listed in s. 84(2) relevant to this action are:

...

- (b) an interest in a partnership, an association, an organization, a business or a venture;

...

- (d) money of a spouse in an account with a financial institution;
- (e) a spouse's entitlement under an annuity, a pension plan, a retirement savings plan or an income plan;

...

- (g) the amount by which the value of excluded property has increased since the later of the date
- (i) the relationship between the spouses began, or
- (ii) the excluded property was acquired.

[20] Under s. 85(1) of the FLA, the following is excluded from family property:

- (a) property acquired by a spouse before the relationship between the spouses began ...
- (b.1) gifts to a spouse from a third party;

...

- (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).

[21] The spouse claiming the property as excluded property bears the onus of demonstrating that the property is excluded property: s. 85(2).

[22] Family debt is addressed in s. 86:

86 Family debt includes all financial obligations incurred by a spouse

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

[23] Under s. 87, unless an agreement or order provides otherwise, the value of family property must be based on its fair market value. Here, in the absence of an agreement, unless the court orders otherwise, the presumptive date for valuing family property and family debt is the date of hearing.

[24] In *K.M.J. v. J.H.D.N.*, 2014 BCSC 1895, Betton J. observed:

- [140] The legislation sets the separation date as the date when property and debts are to be identified and, in the absence of an agreement, the date of hearing for valuation. Some of the challenges with interpretation seem to arise from the drafters' decision to deal with property and debts together.
- [141] A simple review of s. 85 demonstrates that family property can take many forms. In that context, the importance of identifying valuation dates is obvious and the idea of fluctuating values is easily understood. The value of a piece of real property, for example, might change dramatically between separation and hearing dates. It is entirely logical that, as a starting point, both spouses share in the positive or negative change brought on by market trends.
- [142] The definition of debt in s. 86, on the other hand, is simple: "all financial obligations incurred by a spouse". What makes it family debt is the time at which the debt was incurred or, in cases of it arising after separation, its purpose. Family debts are then, by definition, less variable in kind. One is drawn to think of debts like a line of credit and not surprisingly arguments such as those presented in this case regarding valuation arise.
- [143] The parties should generally still share in both the increases or decreases in value that may occur between separation and hearing (or agreement). However, in the case of debt, decrease in value, which is analogous to a positive change in the value of property, is almost never the result of passive market trends.
- [25] The court noted at para. 155 that the FLA specifies that one starts with the value of the property or debt at the hearing date, but provides tools in ss. 87 and 95 to ensure that the intent of the legislation is achieved.
- [26] Under s. 95(1) of the FLA, the court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to equally divide family property or debt.
- [27] In *K.M.J.*, at para. 156, the court considered, obiter, various scenarios regarding the division of family debt incurred on a line of credit. In discussing a scenario similar to this case, *Betton J.* commented as follows:

If the debt had been run up well above the separation date level, so that the value was significantly different at hearing, this significant unfairness could again be addressed through the application of ss. 87 or 95. The peculiar circumstances of each case may drive the selection of which section to use and the date to be selected.

- [28] In *Bilawchuk v. Bilawchuk*, 2014 BCSC 2067, at para. 9, *Fenlon J.*, as she then was, observed that the general rule that debts, like assets, are to be valued at the time of trial cannot be applied rigidly without regard to what has transpired since the date of separation.

Determination of Family Property

- [29] The parties agree that the family property should be divided equally.

- [30] The property in issue includes the interest in the Prince George investment property registered in the name of Mr. Kandola; the proceeds of sale of three lots in the property development project on East 18th Avenue; the parties' pensions and registered retirement savings plans, a 2001 Mazda MPV vehicle sold by the claimant following separation, jewelry and household effects.

The Prince George Property

- [31] The respondent and a Prince George businessman, Mr. Manuel Goncalves each own an undivided one-half interest in an 18-acre parcel of land located in Prince George and legally described as Lot C, District Lot 1532, Cariboo District Plan 20387 except Plan 32372.
- [32] The respondent acquired his one-half interest in the Prince George property in September 2007. He paid the full purchase price \$109,891.29, and has put up a total of \$140,000 toward the acquisition and maintenance of the Prince George property. Mr. Kandola and Mr. Goncalves acquired the Prince George property for the purpose of developing and subdividing it into seven two-acre residential lots. They agreed that Mr. Kandola would put up the purchase price and that Mr. Goncalves would pay various expenses for the development of the subdivision.
- [33] The claimant delivered a notice to admit to the respondent requesting his admission that the expenses incurred by Mr. Goncalves totalled \$306,700. By failing to respond to the notice to admit as required by Rule 9-6 of the Supreme Court Family Rules, Mr. Kandola is deemed, for the purposes of this proceeding, to have admitted that Mr. Goncalves incurred expenses with respect to the development of the subdivision of the Prince George property, and that the expenses incurred by Mr. Goncalves from March 6, 2008 to July 31, 2015 were \$306,700. Accordingly, I find that the respondent and Mr. Goncalves invested a total of \$446,700 in the Prince George property.
- [34] Neither party has adduced any evidence of the fair market value of the Prince George property at the time of separation or trial. In 2015, the British Columbia Assessment Authority assessed the value of the land, for property tax purposes, at \$132,000. However, the assessed value provides no reliable indication of the value of the Prince George property once it is subdivided. As result of inquiries she has made, the claimant understands that an investment of a further \$5,000 to \$10,000 will be necessary to complete the subdivision of the Prince George property.
- [35] Doing the best that I can with the limited evidence available, I will use \$140,000, the amount of Mr. Kandola's investment, as the value of his one-half interest in the Prince George property.

The East 18th Avenue Property

- [36] In August 2011, the respondent, and two associates, Mr. Jerry Rakhra and Mr. Kirpal Singh Boparai entered into a joint venture agreement for the purpose of acquiring, redeveloping and selling property located at 1442 East 18th Avenue. Each had a one-third interest in the joint venture. Mr. Kandola was an investor, Mr. Boparai was the builder and Mr. Rakhra managed the project. The respondent and Mr. Rakhra each held a half interest in the property. The joint venture subdivided the East 18th Avenue property into three lots, on which two new homes and a lane house were constructed. Each lot was sold after the claimant and the respondent had separated.
- [37] Mr. Kandola acquired his interest in the East 18th Avenue property during the marriage using funds from the parties' joint savings. The respondent invested \$200,000 to purchase his interest in the East 18th Avenue property. In addition, on June 20, 2011, Mr. Kandola loaned \$200,000 to Mr. Rakhra, secured by a promissory note payable on demand, or to the order of Mr. Kandola in the principal amount of \$200,000, with interest at the rate of 8% per annum, on July 20, 2012.
- [38] On February 21, 2013, the respondent and Mr. Rakhra sold the first lot, at 1440 East 18th Avenue, for the gross amount of the \$823,754. After payment of all financing costs and adjustments, the net sale proceeds of \$220,042.65 were paid into the joint account of Mr. Kandola and Mr. Rakhra at Vancity Credit Union.
- [39] The respondent and Mr. Rakhra sold the second property, located at 1442 East 18th Avenue for the gross amount of \$784,520.28. On May 30, 2013, the net sale proceeds, in the amount of \$201,192.75 were paid into the joint account of Mr. Kandola and Mr. Rakhra at Vancity Credit Union.
- [40] The third lot, located at 1438 East 18th Avenue sold on October 31, 2013. After commencing these proceedings, the claimant filed a certificate of pending litigation against title to that property. Ultimately, the respondent's share of the net sale proceeds of 1438 East 18th Avenue, in the amount of \$64,291.45 was paid into the trust account of the claimant's solicitor. By agreement of the parties, on August 27, 2014, Mr. Thomson's firm paid \$10,000 from the net proceeds of sale to the claimant and \$10,000 to the respondent.
- [41] On February 12, 2015, pursuant to the order of Master Taylor, Mr. Thomson's firm released \$15,000 to the claimant for child support arrears and a further \$1,200 representing payment of child support in the amount of \$200 per month for the months of March through August 2015.
- [42] On April 2, 2015, Mr. Thomson's firm paid out \$3,193.17 to the claimant for arrears of special and extraordinary expenses payable by the respondent. The balance of the net proceeds of sale of 1430 East 18th Avenue, held in trust by the claimant's solicitor at the time of trial was \$24,898.28.

[43] The respondent contends that Mr. Rakhra misappropriated all of the net proceeds from the sale of lots 1 and 2, East 18th Avenue. He says his business associate withdrew the funds from the Vancity joint account at a time when Mr. Kandola, as a result of his alcohol addiction, was incapable of monitoring transactions on that account. The claimant says the respondent has fabricated a story of theft by his business associate, and that he is concealing a valuable asset.

[44] The factors to be considered when assessing credibility were summarized by Dillon J. in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, as follows:

Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont. H.C.); *Faryna v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [Faryna]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Faryna* at para. 356).

[45] Mr. Kandola and Mr. Rakhra sold lots 1 and 2 East 18th Avenue after the claimant and the respondent had separated. The net proceeds of sale of each property were paid into a joint account on which Mr. Kandola and Mr. Rakhra each had signing authority. Shortly after the sale of lot 1, on March 7, 2013, \$200,000 was paid out of the Vancity joint account by cheque 173 drawn on that account. Similarly, on June 1, 2013, \$190,006 was paid out of the Vancity joint account. Neither of those cheques has been produced.

[46] In his January 21, 2015 Form 8 financial statement, Mr. Kandola did not disclose his interest in the net proceeds of sale of the East 18th Avenue property.

[47] Mr. Kandola made no demand for payment of his promissory note when it came due on July 20, 2012. Nor has produced any evidence that he has demanded payment, at any time, of his \$200,000 loan to Mr. Rakhra secured by that promissory note.

[48] The respondent only commenced proceedings for recovery from Mr. Rakhra of his investment in lots 1 and 2 in March 2016. He claimed that it was not until then that he was able to locate Mr. Rakhra. In that proceeding, Mr. Kandola makes no claim on the promissory note.

[49] The respondent has a long-standing relationship with both Mr. Jerry Rakhra and his father.

- [50] Here, where the respondent and a close associate sold lots 1 and 2 after the parties had separated, and where the respondent's efforts to recover his share of the net proceeds of sale and repayment of the monies loaned to Mr. Rakhra are belated and half-hearted at best, I find Mr. Kandola's account that Mr. Rakhra misappropriated the net proceeds of sale to be improbable. I find that it is more consistent with the probabilities of the situation existing at and since the time of separation that Mr. Kandola retains control of his share of the net proceeds of sale of lots 1 and 2 East 18th Avenue and that he has concealed the existence and location of this asset.
- [51] Bearing in mind that Mr. Rakhra has not repaid the \$200,000 loan, I find that a value of the respondent's interest in the net proceeds of sale of lots 1 and 2 is approximately \$400,000.
- [52] In *Cunha v. daCunha* (1994), 99 B.C.L.R. (2d) 93 at para. 9 (S.C.), Fraser J. described the non-disclosure of assets as the "cancer of matrimonial property litigation". The court concluded that where there has been concealment of assets, it ordinarily should be held that the concealment is ongoing, that there are assets still undisclosed, and that the division of assets should be affected accordingly. (at para. 11). In the instant case, I find the respondent has failed to make full financial disclosure and that failure of disclosure has continued to the time of trial.)

Pensions

- [53] The claimant has been a member of the Municipal Pension Plan since 1996. The respondent is a member of the Purolator Inc. Pension Plan. Neither pension has been valued.

Registered Retirement Savings Plans

- [54] The claimant holds Scotia McLeod RRSP #**477 and #**61-16, valued at \$22,501 and \$17,839 respectively, for a total value of \$40,340.
- [55] In his Form 8 financial statement sworn January 21, 2015, the respondent listed a Purolator Inc. RRSP which he valued at \$20,898 and a Scotia McLeod RRSP valued at \$19,054, for a total of \$39,952.
- [56] At trial, Mr. Kandola denied that he held the Purolator RRSP at the time he swore his financial statement. He claimed that following the termination of his employment, Purolator paid out his RRSP. Mr. Kandola produced a document from Purolator showing the sale on January 2, 2014 of shares held in his registered employee share purchase plan for the gross amount of \$10,761.34. After deduction of withholding tax in the amount of \$2,152.27, the net sale amount was \$8,609.07. Mr. Kandola testified that he received the net payout of \$8,609.07 and gave those funds to his father.
- [57] Mr. Kandola was unable to explain why, if his Purolator RRSP was paid out in early 2014, he swore in his Form 8 financial statement that he held a Purolator RRSP valued at \$20,898.

- [58] Further, Mr. Kandola's testimony calls into question the accuracy of his January 21, 2015 financial statement. Mr. Kandola swore in his Form 8 that his assets included a Purolator Inc. RRSP, which he valued at \$20,898 and a Scotia McLeod RRSP, valued at \$19,054. He also listed a Purolator Inc. pension plan as having an "unknown" value.
- [59] Because Mr. Kandola filed no tax return for 2014 or 2015, there is no record of him receiving income of \$8,609 from a registered retirement savings plan, or any other source.
- [60] Mr. Kandola did not list the disposal of his Purolator RRSP, or any other property in his Form 8 financial statement of January 21 2015, despite the fact that that he was required to list all property disposed of during the two years preceding the statement.
- [61] The respondent claimed that he was unable to remember particulars of his financial circumstances in 2012, 2013 and 2014 due to the effects of his alcohol addiction. That, however, neither explains nor excuses his failure to make full financial disclosure
- [62] Despite the respondent's unsatisfactory financial disclosure, I am persuaded by the documentary evidence of the sale of the respondent's shares in the Purolator RRSP that Mr. Kandola's former employer paid out his Purolator RRSP in or about January 2014. Doing the best I can to value the respondent's Scotia McLeod RRSP at the time of trial in the absence of a current Form 8 financial statement, I determine its value in the approximate amount of \$20,000.

Jewelry

- [63] When she married the respondent, the claimant received gifts of gold jewelry from both her family and Mr. Kandola's family. During the marriage, the claimant kept the jewelry, other than items she wore for personal adornment, in a safety deposit box she shared with the respondent's mother.
- [64] In February 2014, the claimant sold gold jewelry for \$21,149.92. Ms. Dorais testified she disposed of the jewelry she had received as wedding gifts in order to pay debts she had incurred since the parties separated, and while the respondent was making no contribution to the support of the children.
- [65] The respondent contends the gold jewelry given to the claimant by both spouses' families at the time of the marriage, and which the claimant retained at the time of separation, constituted family property. Mr. Kandola also testified that the claimant received substantially more gold jewelry than the several items she disposed of in February 2014.
- [66] The respondent produced a photograph, taken on the parties' wedding day, showing a large display of gold jewelry. He says that photo depicts all of the jewelry given to the claimant by both families. The photo depicts substantially more jewelry than the items disposed of by the claimant in 2014. Mr. Kandola contends that the claimant continues to hold some of that jewelry.

- [67] Whether or not that is so, the gold jewelry given to the claimant when she married the respondent was a gift to a spouse from third parties and accordingly constituted excluded property under s. 85(1)(b.1) of the FLA. If Ms. Dorais retains any of the jewelry given to her by the parties' families at the time of the marriage, that jewelry is excluded property of the claimant, and is not subject to division.
- [68] Neither party led any evidence of the amount, if any, by which the value of the gold jewelry had increased since it was acquired by the claimant. Accordingly, I am unable to find that any increase in the value of this excluded property constitutes family property under s. 84(2)(g) of the FLA.
- [69] The respondent also contends that the claimant possesses a 19-karat white gold and diamond ring and says it too is family property. Mr. Kandola first raised the existence of this ring as an item of divisible family property during his direct evidence at trial. Accordingly, I permitted claimant's counsel to recall Ms. Dorais to address this issue. The respondent testified the parties purchased the ring from an acquaintance for \$5,500. Mr. Kandola negotiated the purchase price. He produced an appraisal showing that the ring was valued, for insurance purposes, at \$11,500 in July 2003. The claimant confirmed the purchase price of the ring was \$5,500 and said Mr. Kandola gave her the ring as a Christmas present in 2003.
- [70] The claimant paid the purchase price for the ring by a cheque dated January 9, 2004 in the amount of \$5,500 drawn on the parties' joint chequing account with Scotia Bank.
- [71] According to the claimant, several years later, she left the ring at home when the parties went away for the weekend. Ms. Dorais said there were guests staying in the house while they were away and that when she and Mr. Kandola returned, the ring, and some cash had gone missing. The claimant believed that the guests had taken the ring and the cash. The claimant testified that the parties were unable to make an insurance claim for the ring because they had no jewelry rider to cover the loss.
- [72] The respondent asserted the ring was not lost as Ms. Dorais alleged, and maintained that she wore it until the parties separated. However, the respondent's memory of circumstances at the time of separation is not reliable, as a result of his excessive consumption of alcohol at that time. Further, in cross-examination, when asked whether the ring was stolen from the house while the parties were on vacation, Mr. Kandola said he did not remember the ring "getting stolen".
- [73] The respondent has not met his onus of establishing, on a balance of probabilities, that the claimant retained the ring at or after separation. Ms. Dorais has provided a credible explanation for why she made no insurance claim for the ring. The parties lived in a home owned by the respondent's parents. The claimant also shared a safety deposit box with the respondent's mother, where she stored some of her jewelry. In these circumstances, it is understandable that the parties did not have an insurance policy that covered the loss of the ring.

[74] I find the 19 karat ring was lost several years before the parties separated. Accordingly, that ring forms no part of the family property subject to division in these proceedings.

Mazda Vehicle

[75] After separation, the claimant disposed of her 2001 Mazda MPV vehicle. In her Form 8 financial statement sworn July 15, 2015, the claimant listed the value of the vehicle as \$1,000. As property owned by the claimant when the parties separated, the Mazda MPV was family property. The claimant will pay to the respondent \$500 as compensation for his one-half interest in the Mazda MPV vehicle.

Household Furnishings and Personal Effects

[76] After the passage of almost four years since the parties separated, it is not possible to do more than rough justice regarding the division of household furnishings and personal effects.

[77] When Ms. Dorais left the matrimonial home in September 2012, she took with her the children's bedroom furnishings, a love seat, a sofa and chest of drawers. The claimant testified she left behind her computer, the patio furniture, her bedroom furniture and various boxes of household effects. It is common ground that she later retrieved her computer and some of her personal effects. Accordingly to the claimant, the respondent retained the parties' bed, some couches, a table and chairs, dishes and other household effects.

[78] The respondent claims that Ms. Dorais removed most of the parties' furniture, including sofa sets, coffee tables, televisions, bedroom dressers, night tables, lamps and bedroom linens, and other household effects, including dishes, kitchen appliances, a microwave, a Webber barbeque and various utensils. Mr. Kandola testified that the claimant left him with only a kitchen table, a television and a mattress.

[79] The claimant requests that the respondent return the following items to her, in order to effect a final division of household furnishings and personal property:

1. cherry chest cabinet and matching night stand;
2. glass patio table, four chairs, umbrella and stand;
3. Dyson vacuum cleaner;
4. art: large canvas oil painting, painting of a tree, painting of a car, iron wall hanging;
5. DVDs/CDs;
6. dishes;
7. her East Indian clothing;

8. children's toys; and
 9. reimbursement for her washer and dryer.
- [80] The respondent denies he retains any of the art work sought by the claimant. Mr. Kandola also testified that Ms. Dorais took all of her CDs and some DVDs, that he had returned some of the claimant's Indian outfits through the children, and that Ms. Dorais retrieved all of the children's toys after the parties separated.
- [81] I find that it is consistent with the probabilities of the situation existing at the time of separation that the claimant took the children's toys when they moved with her from the family home, and that she also took with her some CDs and DVDs, which are readily portable. I also accept Mr. Kandola's evidence that he has delivered, through the children, some of the claimant's Indian outfits.
- [82] Regarding the division of the other household effects and furnishings, I prefer the evidence of the claimant to that of the respondent for the following reasons. When the parties separated, the respondent was suffering from a severe addiction to alcohol. He was drinking heavily, and has given evidence that his consumption of alcohol has affected his recollection of events at that time. Further, the claimant moved with the children from the home the parties shared with the respondent's parents to a basement apartment. I find it improbable that Ms. Dorais took with her all of the furniture and household effects the respondent claims she removed. Had the claimant removed all of the personal property listed by the respondent, it is probable that at some time in the four years since the parties separated, the respondent would have demanded the return of his share of that property. There is no evidence of any such demand. Finally, although Mr. Kandola said at one point in his direct testimony that he only retained a kitchen table, television and mattress, he also acknowledged that some of the items sought by the claimant, including the cherry chest cabinet and matching night table, the patio table and chairs and the washer and dryer remain in the former matrimonial home. In short, I find the respondent's evidence is neither reliable nor credible on this point.
- [83] In order to effect an equal division of household effects and personal property, the respondent will deliver to the claimant the cherry chest cabinet and matching night stand; the glass patio table, four chairs, umbrella and stand; the Dyson vacuum cleaner; any of the items of art listed by the claimant that the respondent retains; and any Indian outfits he has not already returned to the claimant.
- [84] I find that the claimant has already retrieved the CDs and DVDs to which she is entitled and that, on the balance of probabilities, at separation she took with her dishes and other small kitchen items required to equip her new home.
- [85] In March 2012, the claimant purchased a new washer and dryer for \$1,652. Ms. Dorais testified she purchased these appliances for her use. The respondent claimed the washer and dryer were purchased as a gift for his parents. I find that it is most likely that the

claimant acquired the new washer and dryer to do her own family's laundry, rather than as a gift for her parents-in-law. As property owned by at least one spouse at separation, these appliances are family property. The washer and dryer remain in the house now shared by the respondent and his parents. I have no evidence of the value of the washer and dryer at the time of trial. Recognizing that the respondent has had the use of these appliances since the parties separated, and admittedly somewhat arbitrarily, I value the washer and dryer at \$1,400. The respondent will retain the washer and dryer and will pay compensation to the claimant for her one-half interest in these appliances in the amount of \$700.

[86] Except as provided in paragraph 83 of these Reasons, the claimant and the respondent will each retain the household furnishings and personal effects in their possession.

Air Miles Points

[87] Mr. Kandola requested an order for the division of Air Miles points earned on the BMO Mastercard. Neither party produced documents showing the number or value of Air Miles points accumulated at the time of separation. The claimant testified that the parties retained few points at that time and that any records of the Air Miles points were in the possession of the respondent. Mr. Kandola denied he had those records. In the absence of any evidence of either the quantity or value of the Air Miles points, the court is unable to make any order for their division.

Division of Family Property

[88] Aside from the household effects retained by each party, the claimant and the respondent hold or control the following family property.

[89] The family property presently held by the claimant consists of:

- (a) the \$10,000 cash payment from the proceeds of sale of Lot 3, East 18th Avenue;
- (b) Scotia McLeod RRSPs valued at \$40,340;
- (c) Municipal Pension Plan - not valued.

[90] The total value of family property held by the claimant, excluding her pension is \$50,340.

[91] The family property in the possession or control of the respondent consists of the following:

- (a) the \$10,000 cash payment from the proceeds of sale of Lot 3, East 18th Avenue;
- (b) Scotia McLeod RRSP valued at \$20,000;
- (c) Purolator pension - not valued;
- (d) investment in Prince George property registered in the name of the respondent - \$140,000;
- (e) proceeds of sale of Lots 1 and 2, East 18th Avenue - \$400,000.

- [92] The total value of the family property held or controlled by the respondent, excluding his pension is \$570,000.
- [93] The claimant and the respondent will each retain their own pensions.
- [94] The combined value of the remaining family property held or controlled by the parties is \$620,340. Each party is entitled to an equal share of \$310,170.
- [95] The respondent's Scotia McLeod RRSP will be transferred to the claimant. The respondent will execute all documents necessary to effect that transfer without delay.
- [96] There will be an order vesting the respondent's one-half interest in the Prince George property in the claimant. Upon the sale of the Prince George property, there will be an accounting of the proceeds of sale before a Registrar of this Court. After payment of all proper costs of the sale, \$140,000 to the claimant and all amounts due to Mr. Goncalves, any profit on the claimant's one-half interest in the Prince George property will be divided equally between the claimant and the respondent.
- [97] Upon transfer of the respondent's Scotia McLeod RRSP valued at \$20,000, and the vesting of the half interest in the Prince George property in the claimant, Ms. Dorais will hold property having a total value of \$210,340. The amount required to equalize her share of the family property, before deduction of family debt and any other adjustments would be \$99,830.
- [98] In addition to the property in the hands or control of the parties, at the time of trial, the claimant's solicitors held in trust \$24,898.28 representing the remaining net proceeds of sale of lot 3, East 18th Avenue. At the conclusion of the trial, the Court ordered the claimant's solicitors to pay \$16,200 from the funds held in their trust account to the claimant as an advance on her equal share of the family property. That amount is equal to the \$16,200 previously paid from the net proceeds of sale of lot 3 in order to satisfy the respondent's obligations for arrears of child support in the amount of \$15,000, and for payment of six months of child support in the amount of \$1,200 between March and August 2015, pursuant to Master Taylor's consent order of February 12, 2015.
- [99] The remaining balance of the net proceeds of sale of lot 3, East 18th Avenue, held in trust by the claimant's solicitors in the approximate amount of \$8,698.29, will be paid to the claimant in the amounts and for the purposes discussed in later sections of these Reasons.

Division of Family Debt

- [100] The claimant and the respondent were both borrowers on a ScotiaLine personal line of credit, account # * 474, in the name of Mr. Kandola. The credit limit on the ScotiaLine LOC is \$35,000.

- [101] The respondent contends that each party is responsible for payment of one-half of the debt owing on the line of credit at the time of trial. The most recent statement produced by the respondent, dated March 16, 2016, showed the amount then owing, inclusive of interest, as \$39,622.41.
- [102] For her part, the claimant acknowledged that she continued to borrow against the line of credit until December 2012. Although the parties separated on September 15, 2012, the claimant also continued to make payments through November, 2012.
- [103] On November 2 and November 13, 2012, the claimant made payments on the ScotiaLine LOC from her personal account # * 7726 of \$2,000 and \$3,000 respectively.
- [104] The balance owing on the Scotia Line LOC as at December 31, 2012 was \$18,502.47. The claimant accepts responsibility for one-half of that amount.
- [105] The February 4, 2013 statement for the ScotiaLine LOC shows two cash advances, both made on January 11, 2013, totalling \$16,832, which increased the amount owing on the line of credit to the limit of \$35,000. Mr. Kandola has acknowledged that on January 11, 2013, he took the cash advance of \$10,832. He said he removed the maximum amount then remaining on the line of credit after he discovered that the claimant had "drained" funds from the parties' joint chequing account. Mr. Kandola also said he gave those funds to his father.
- [106] The February 4, 2013 ScotiaLine LOC statement also records a cash advance on January 11, 2013 of \$6,000 to an account numbered **02883. ScotiaLine statements also show payments on the line of credit from account number **02883 of \$500 on December 3, 2012, \$500 on January 7, 2013 and \$166 on February 1, 2013. Mr. Kandola and Ms. Dorais each professed to have no knowledge of that account, or of the \$6,000 advance from the line of credit to that account on January 11, 2013. Neither the claimant nor the respondent has produced any banking records for account **02883.
- [107] That account must have been opened by either the claimant or the respondent. It was used, at least briefly, both to pay to and withdraw funds from the line of credit. In these circumstances, liability for the \$6,000 advance of January 11, 2013 will be shared equally by the parties.
- [108] The claimant certainly made no use of the line of credit after January 11, 2013. The respondent has acknowledged that he appropriated the \$10,832 that remained available on the line of credit after the \$6,000 cash advance of January 11, 2013.
- [109] I find the total amount of family debt on the ScotiaLine LOC to be shared equally by the parties is \$24,502.47, plus accrued interest on that amount to the date of trial. The remaining balance owing on the Scotia Line LOC is not family debt, and is the sole responsibility of the respondent.

COMPENSATION ORDER

- [110] I have found that the amount required to equalize the claimant's interest in family property, before deduction of family debt and any other adjustments is \$99,830. When that amount is reduced by the claimant's share of family debt in the amount of \$12,251.24, the result is \$87,578.76.
- [111] Later in these reasons, I make orders for the payment of a total of \$6,515 from the \$8,686.29 held in trust by the claimant's solicitors to pay retroactive child support and arrears of s. 7 expenses. That leaves a balance of \$2,173.29 from the net proceeds of sale of lot 3. That amount will also be applied to the amount required to equalize the division of family property. After the sum of \$2,173.29 is deducted, the equalization amount is reduced to \$85,405.47.
- [112] After the parties separated, the claimant withdrew approximately \$10,000 from the joint chequing account and \$6,400 from the parties' U.S. dollar account. The respondent should be compensated for one half of each of those amounts. Accordingly, I deduct an additional \$8,200 from the amount required to equalize the division of family property.
- [113] In the result, this Court orders that the respondent pay \$77,205.47 to the claimant as compensation for her interest in the family property.

CHILD SUPPORT

Applicable Principles

- [114] Section 15.1 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), confers jurisdiction on the court to make an order requiring a spouse to pay support for the children of the marriage.
- [115] Section 15.1(3) requires the court making an order for child support to do so in accordance with the applicable Federal Child Support Guidelines.
- [116] Under s. 3(1)(a) of the Guidelines the presumptive rule is that the amount of basic child support for children under the age majority is the table amount, as determined by the number of children under the age of majority and the income of the payor spouse.
- [117] Under s. 16 of the Guidelines, a spouse's annual income is determined using all sources of income comprising "Total income" in the payor spouse's T1 General Income Tax Return, as adjusted in accordance with Schedule III of the Guidelines. Under Schedule III, where the spouse is an employee, union or professional dues are deducted in determining the spouse's Guidelines income.
- [118] Section 19 of the Guidelines confers a broad discretion on the court to impute income to a spouse, and provides a non-exhaustive list of circumstances where income may be imputed: *Ouellette v. Ouellette*, 2012 BCCA 15 at para. 66.

- [119] Section 19(1)(a) of the Guidelines permits the court to impute income where a spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child. Under s. 19(1)(f), the court may impute income to a spouse where he or she has failed to provide income information when under a legal obligation to do so.
- [120] A party seeking to impute income bears the onus of establishing on a balance of probabilities that income should be imputed on a rational and evidentiary basis: *Windle v. Windle*, 2010 BCSC 18.

Imputation of Income to Respondent

- [121] In determining whether the respondent is intentionally unemployed or under-employed under s. 19(1)(a) of the Guidelines, I must consider whether Mr. Kandola has taken reasonable steps to obtain employment commensurate with such factors as his age, health, education, skills and work history. In order to impute income for intentional unemployment or under-employment, the court is not required to make a finding of bad faith on the part of the payor spouse. Income may be imputed where the payor is not earning to capacity: *Barker v. Barker*, 2005 BCCA 177; *Koch v. Koch*, 2012 BCCA 378. The principles that apply in determining whether a parent is earning to capacity include the following:
1. parents who are healthy and can work have a duty to seek employment;
 2. reasonable income-earning capacity will be based on consideration of a parent's age, education, experience, skills, health, and on the job opportunities that are reasonably available;
 3. limited experience and skills do not justify failure to pursue employment;
 4. persistence in unremunerated employment or unrealistic career aspirations will not be an excuse; and
 5. self-induced reduction in income will not justify the avoidance of child support obligations.

Hanson v. Hanson, [1999] B.C.J. No. 2532 (QL) (S.C.); *Fong v. Fong*, 2011 BCSC 42.

- [122] Mr. Kandola is a recovering alcoholic. Since the parties separated, he has lived with his parents and relied upon them for financial support. He testified he was receiving welfare benefits at the time of trial.
- [123] For 20 years before and during the marriage, the respondent was employed by Purolator as a courier. In or about July 2012, his employment was terminated for misconduct related to his alcoholism. The respondent was unemployed when the parties separated in September 2012. Purolator reinstated Mr. Kandola for approximately six weeks in the fall of 2013 before dismissing him again. Mr. Kandola has been unemployed since then.

- [124] From 2009 through 2011, the respondent's annual employment income was in the range of \$51,700 to \$55,978. Mr. Kandola's line 150 total income was \$54,141 in 2009, \$53,420 in 2010 and \$57,925 in 2011.
- [125] In 2012, as the result of the termination of his employment by Purolator, the respondent's employment income fell to \$30,488 and his line 150 income totalled \$49,656.
- [126] In his 2013 T1, the respondent declared employment income of \$9,765.38 from Purolator, employment insurance payments of \$15,035 and rental income of \$1,754.11, for a total line 150 income of \$26,554.49.
- [127] While Mr. Kandola was unable to explain the source of his rental income, this appears to be a payment from his Texas real estate investment through England Securities Ltd.
- [128] The Court's task of determining Mr. Kandola's Guideline income for child support purposes is rendered more difficult than it ought to have been as a result of the respondent's failure to make current, and complete financial disclosure.
- [129] The respondent swore a Form 8 financial statement on January 21, 2015 to which he attached his 2012 and 2013 T1 General Income Tax returns. Mr. Kandola did not file an updated Form 8 financial statement. Nor has he produced his 2014 or 2015 income tax returns. The respondent testified he has not yet filed those returns with the Canada Revenue Agency. In these circumstances, the Court has no documentary evidence from which to determine the respondent's current income.
- [130] The respondent has twice participated in detoxification programs for treatment of his alcoholism. He testified the second program was successful, and that since his enrolment in that program in late April 2014, he has remained sober.
- [131] Mr. Kandola testified that he is diabetic, that he has suffered from depression since the separation and that he has a nerve injury to his feet that disables him from employment as a courier. The respondent gave evidence that, as a result of the nerve damage to his feet, he intends to make a claim for disability benefits.
- [132] However, the respondent adduced no admissible medical evidence of a condition disabling him from employment. Mr. Kandola acknowledged in cross-examination that he successfully controls his diabetes through his diet, and takes no medication for depression.
- [133] During the trial, the respondent stood for the better part of a day while conducting his defence, with no visible signs of pain or discomfort.
- [134] Mr. Kandola testified that he had no work in 2015, and has not looked for work.
- [135] Counsel for the claimant read in the following questions and answers from Mr. Kandola's examination for discovery of June 9, 2015:

77 Q I am just wondering if you are attempting to find employment or are you retired?

A When something comes up and I have to pay a bill I'll look into it.

78 Q So at this point in time you are content to remain unemployed?

A No. At this point in time I'm not employed; whether I am looking or not I don't see it is any of your business since I am paid up.

79 Q I am just wondering if --

A You can wonder. I just finished telling you that I don't owe her any money, so it's really none of her business.

80 Q So at this point you are refusing to answer whether you are looking for employment, is that correct?

A I am unemployed at the time.

82 Q So at some point you might look for work; is that your answer?

A I'm always going to attempt to look for work.

83 Q At this point are you doing so?

A I help out people.

84 Q So is that for money or for free?

A For free.

85 Q So you're not really working then or trying to work, correct?

A Yes.

[136] In cross-examination, Mr. Kandola acknowledged that he was able to coach the children's hockey, on the ice, for up to an hour at a time. The respondent also gave evidence that attends Douglas College as a part-time student. He performs part-time volunteer services as the public information officer for Surrey and Burnaby Alcoholics Anonymous.

[137] I find that the respondent is intentionally unemployed and that he has the capacity to contribute to the children's support.

[138] I accept that for the twelve months following his enrolment in the detoxification program on April 28, 2014, Mr. Kandola devoted much of his time and energy to the treatment and control of his addiction to alcohol. However, the respondent has offered no satisfactory explanation of his failure to seek and find employment in any capacity since May 2015. I conclude that Mr. Kandola has been deliberately unemployed since then.

- [139] Mr. Kandola is still a relatively young man at age 45. Before and during the marriage, he worked exclusively as a courier. Although the court received no evidence indicating that the respondent holds any other professional qualification or post-secondary vocational certification, he is both intelligent and articulate. To his credit, Mr. Kandola has succeeded in controlling his addiction to alcohol for the last two years.
- [140] The claimant invites the Court to impute to Mr. Kandola an annual Guidelines income of \$50,000, based on the income he earned during the three years before the parties' separation.
- [141] The respondent has been unemployed for the better part of four years. He was twice dismissed for cause by his former employer. There is a real possibility that Mr. Kandola will not be able to secure new employment as a courier at his former salary level. On the other side of the ledger, the respondent demonstrated for many years his ability to earn an income above the minimum wage.

Respondent's Guidelines Income

- [142] Taking all of these factors into account, I impute to the respondent an annual Guidelines income of \$25,000, which I find to be a fair measure of his present capacity to contribute to the support of the children.
- [143] Based on the respondent's imputed Guidelines income of \$25,000, the table amount of basic child support payable monthly for two children is \$391.

Claimant's Request for Lump Sum Child Support

- [144] The claimant requests an order requiring the respondent to pay lump sum child support, as provided by s. 11 of the Guidelines. Ms. Dorais submits the respondent should pay in a lump sum the child support payable for two children until the elder child, Terrin, reaches the age of 19 in July 2018. Based on the respondent's imputed Guidelines income of \$25,000, the lump sum payable for the period August 1, 2016 through July 1, 2018 would be \$8,913 (23 months times \$391 per month). The claimant proposes that child support be reviewed after Terrin attains the age of majority.
- [145] Lump sum support awards are exceptional. They should only be made where there is a special need or some specific circumstance which renders such an award appropriate: *Myatt v. Myatt* (1993), 45 R.F.L. (3d) 45 at 50 (B.C.S.C.).
- [146] In the *Donovan v. Donovan* (1986), 5 R.F.L. (3d) 1 (B.C.S.C.), the court ordered a spouse to pay lump sum child support where she lacked the earning capacity to pay periodic support.
- [147] More recently, in *Mansoor v. Mansoor*, 2012 BCSC 602 at paras. 95-97 and 103, Madam Justice Gropper ordered lump sum child support where the payor parent's only known asset was his interest in the matrimonial home and he had failed to comply with court orders. Mr. Mansoor was also unemployed. Rather than looking for work in Canada, he was seeking

employment in Bahrain, where he had permanent ties, and where an order of a Canadian court for child support could not be enforced. The court concluded these were special circumstances justifying an order for lump sum support.

[148] Here, the respondent failed to pay the child support ordered by Master Caldwell. That failure is partially explained by Mr. Kandola's struggle with his alcohol addiction in 2013 and 2014. Ultimately, arrears of child support to February 2015 were paid by the consent order of Master Taylor.

[149] I have found that the respondent has the capacity to earn an annual income of \$25,000 and to contribute to his children's support accordingly. I have also found the respondent retains a valuable asset in the form of his interest in the proceeds of sale of lots 1 and 2, East 18th Avenue. Taking all of these factors into account, I am not persuaded this is a case of exceptional circumstances warranting an order for the lump sum payment of ongoing child support.

Ongoing Basic Child Support

[150] The respondent will pay to the claimant the sum of \$391 per month as basic child support for the children commencing on August 1, 2016 and continuing on the first day of each and every month thereafter, for so long as the children remain children of the marriage within the meaning of the Divorce Act (Canada), or until further order of the court.

[151] For so long as any of the children are eligible to receive child support, the parties will exchange:

- (a) copies of their respective income tax returns, including all attachments, not later than May 31 of each year; and
- (b) forthwith upon receipt of same, copies of any notice of assessment provided by Canada revenue agency in each year.

[152] Commencing in 2017, on or before June 30 each year, the child support payable will be reviewed and adjusted to ensure it accords with the requirements of the Federal Child Support Guidelines based on the respondent's income from time to time. Any adjustment will commence on July 1 of the year in question and will not apply retroactively.

Retroactive Basic Child Support

[153] The claimant seeks an order for payment of retroactive child support in an amount commensurate with the respondent's Guidelines income for the period during which he was intentionally unemployed. I have found that Mr. Kandola has been capable of earning an annual income of \$25,000 since May 2015, and that he has been intentionally unemployed since then.

- [154] Based on his imputed Guidelines income of \$25,000, the amount of child support payable for the 15 months from May 1, 2015 through July 1, 2016 would be \$5,865 (\$391 x 15). From that amount, it is necessary to deduct \$800 paid for the months of May through August 2015 pursuant to the order of Master Taylor, and an additional \$550 in child support paid on the respondent's behalf by his father since September 2015. Accordingly, the amount of retroactive child support in issue totals \$4,515.
- [155] The core principles applicable to child support obligations as stated in *D.B.S. v. S.R.G.*, 2006 SCC 37 at para. 38, are that child support is the right of the child; the right to support survives the breakdown of the child's parents' marriage; child support should, as much as possible, provide the children with the same standard of living they enjoyed when their parents were together; and the specific amounts of child support owed will vary based on the income of the payor parent.
- [156] The factors the court will consider in exercising its discretion to make a retroactive child support order include whether the claimant has a reasonable excuse for any delay in seeking child support; the conduct of the payor parent; the circumstances of the children; and any hardship caused by the retroactive award: *D.B.S.* at paras. 99-116.
- [157] Here, there was no delay on the part of the claimant in seeking child support. The respondent's failure to make full and timely financial disclosure, his deliberate unemployment and his consequent failure to contribute to the support of the children in an amount commensurate with his earning capacity all constitute blameworthy conduct. An award of retroactive child support will provide the children with some compensation for the period during which their father's choice to remain unemployed deprived them of their right to support. I recognize that an order for retroactive child support may result in some hardship to the respondent. However, financial hardship is a less significant factor where, as here, there has been blameworthy conduct on the part of the payor parent.

Retroactive Child Support Order

- [158] Mr. Kandola will pay to the claimant retroactive child support from May 1, 2015 through July 1, 2016 in the amount of \$4,515. The retroactive payment will be made from the remaining proceeds of sale of lot 3, East 18th Avenue currently held in trust by the claimant's solicitors.

Claimant's Guidelines Income

- [159] For the proportionate sharing of s. 7 special and extraordinary expenses, it is also necessary to determine the claimant's Guidelines income. Ms. Dorais' line 150 income for 2015, the most recent year for which her federal income tax return is available, was \$64,387.48. In order to determine her Guidelines income it is necessary to deduct from that amount the claimant's union dues in the amount of \$1,394.41. Accordingly, I determine the claimant's current Guidelines income in the amount of \$62,993.07.

Special or Extraordinary Expenses

- [160] The claimant seeks an order that the parties share ongoing special and extraordinary expenses for the children in proportion to their respective incomes. Ms. Dorais also applies for an order that the respondent pay one-half of special and extraordinary expenses totalling \$4,529.88 incurred between March 2015 and March 2016, as contemplated by the consent order pronounced by Sewell J. on August 4, 2015.
- [161] Those expenses include \$783 for the portion of Tristan's orthodontics not covered by the claimant's extended health benefits plan; \$350 for soccer registration fees for Tristan; \$710 for hockey registration fees and dues for Terrin; and \$205 for ball hockey registration fees for Terrin. The remainder of the expenses claimed consists largely of cell phone bills for each child.
- [162] The parties have already shared equally special and extraordinary expenses for the children totaling \$6,858.77 incurred between January 2013 and April 2015. In addition to hockey for Terrin and basketball for Tristan, the January 2013 to April 2015 special and extraordinary expenses included the children's cell phone bills and various school fees for supplies and extracurricular activities during that period. The respondent's share of those expenses was paid largely, if not entirely, by the release to the claimant of funds from the trust account of Murchison Thomson and Clarke LLP for arrears of s. 7 expenses, pursuant to Master Taylor's order of February 12, 2015.
- [163] For his part, the respondent submits all s. 7 expenses should be shared in proportion to the parties' respective incomes.
- [164] In *Abelson v. Mitra*, 2008 BCSC 1197, Brine J. discussed the principles applicable to the payment of special and extraordinary expenses at paras. 50 through 54:
- [50] The obligation for special and extraordinary expenses is found in the Guidelines. The applicable sections are as follows:
- 3.(1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
- (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
 - (b) the amount, if any, determined under section 7.
- 7.(1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

(1.1) For the purposes of paragraphs (1)(d) and (f), the term "extraordinary expenses" means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account
 - (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
 - (ii) the nature and number of the educational programs and extracurricular activities,
 - (iii) any special needs and talents of the child or children,
 - (iv) the overall cost of the programs and activities, and
 - (v) any other similar factor that the court considers relevant.

[51] Section 7(1.1) was added to s. 7 in May 2006. It defines and limits the term "extraordinary expenses" for the purpose of s. 7(1)(d) (educational expenses) and s. 7(1)(f) (extracurricular activities).

- [52] In *McLaughlin v. McLaughlin* (1998), 167 D.L.R. (4th) 39, 57 B.C.L.R. (3d) 186 (C.A.), a decision pre-dating the enactment of s. 7(1.1), the B.C. Court of Appeal considered the meaning of "extraordinary" found in ss. 7(1)(d) and (f) and set out a two-stage enquiry for the court to undertake when considering whether to award an amount under s. 7. In an oft-quoted passage, Prowse J.A. said the following at ¶81-82:
- [81] In the result, I conclude that, in deciding whether an expense, or the totality of expenses claimed on behalf of children under s. 7(1)(f) are extraordinary, the court should take into consideration the combined income of the parties, as well as the nature and amount of the individual expense, the nature and number of the activities, any special needs or talents of the children, and the overall cost of the activities. This list is not intended to be exhaustive, as considerations may arise in other cases which may also be relevant. I note that in the only other decision of this Court dealing with s. 7(1)(f), *Cochrane v. Zarins* (1998), 36 R.F.L. (4th) 434, the Court concluded that a particular child's talents are a relevant factor in determining whether an expense for an extracurricular activity is extraordinary.
- [82] As earlier stated, once an expense or expenses are found to be extraordinary it is necessary for the court to proceed to determine whether the expenses are necessary in relation to the children's best interests and reasonable, having regard to the means of the spouses and those of the child, and to the family's spending pattern prior to separation. There appears to be a consensus in the authorities dealing with s. 7(1)(f) that those questions do not need to be addressed until the expense or expenses in question have been found to be extraordinary. That would also be true of "extraordinary" educational expenses under s. 7(1)(d). With respect to the other expenses included under s. 7(1), which fit under the rubric of "special" expenses as that word is used in the heading of the section, the expenses need not be extraordinary, but they must meet the tests of necessity and reasonableness.
- [53] As mentioned, since *McLaughlin* was decided, s. 7(1.1) has been added to the Guidelines. Under s.7(1.1)(a) the court is first required to consider whether the income of the requesting spouse, including any child support received, can reasonably cover the expense claimed, or whether it exceeds her or his ability to pay without any consideration of the factors enumerated in s. 7(1.1)(b). If the income cannot cover the expense, it is, in effect, deemed to be extraordinary and the analysis then turns to a consideration of the factors enumerated in s. 7(1) which include the best interests of the children and the necessity and reasonableness of the expense taking into account the parties' means and pre-separation spending pattern.
- [54] If, under s. 7(1.1)(a), the income can reasonably cover the expense, it may still be found to be extraordinary by considering the factors set out in subsection b(i) to (v). The list of factors is not exhaustive: s. 7(1.1)(b)(v). Again, if the expenses are considered extraordinary under s. 7(1.1), the court must then analyse the "best interests," "necessity" and "reasonableness" factors set out in s. 7(1).
- [165] Extraordinary expenses for extracurricular activities fall within s. 7(1)(f) of the Guidelines.

[166] During the marriage, both children played hockey and baseball. At present, Terrin plays hockey while Tristan plays soccer. At ages 17 and 15, Terrin and Tristan benefit from their participation in extracurricular sports. Mr. Kandola testified that he had no problem with his sons playing basketball, soccer and hockey.

Arrears of Special or Extraordinary Expenses

[167] Taking into account the amounts incurred between March 2015 and March 2016 for the boys' soccer, hockey and ball hockey; the claimant's Guidelines income of \$62,993.07; the fact she has received no more than \$200 per month in basic child support since February 2015, and in some months has received no support; and the additional s. 7 expenses incurred for Tristan's orthodontics and the children's cell phones; I find that the amounts claimed for the children's sports activities between March 2015 and March 2016 are reasonable extraordinary expenses.

[168] At trial, the claimant acknowledged that the amounts she claimed for the children's cell phones should be reduced by \$529 to eliminate duplication of cell phone expenses previously claimed and paid. In the result, the adjusted arrears of special and extraordinary expenses to March 2016 total \$4,000. In my view, those arrears of special and extraordinary expenses should be shared equally, as provided by Sewell J.'s order of August 4, 2015.

[169] Accordingly, the respondent will pay to the claimant \$2,000 for arrears of special and extraordinary expenses. This payment will also be made from the remaining proceeds of sale of lot 3, East 18th Avenue held in trust by the claimant's solicitors.

Ongoing Special or Extraordinary Expenses

[170] Going forward, the claimant and the respondent will share the costs of special or extraordinary expenses for the children in proportion to their respective Guidelines incomes. As of the date of this order, the claimant's proportionate share is 72 % and the respondent's proportionate share is 28%.

[171] For the purposes of this order, "special or extraordinary expenses" under s. 7 of the Guidelines are limited to:

- (a) health-related expenses that exceed insurance reimbursement by \$100 annually, including orthodontic treatment, prescription drugs and optical needs;
- (b) extraordinary expenses for secondary school education and other educational programs that meet the children's particular needs;
- (c) the cost of the children's cell phones;
- (d) expenses for soccer, basketball and hockey and for such other extracurricular activities as the parties may agree on from time to time or as determined by further order of the court;

which expenses will be shared by the parties in proportion to their incomes. The claimant and the respondent will perform an accounting once every three months to ensure that each of them has paid the appropriate share of the special expenses for the previous three months and the party who has paid less than required will pay the amount of the deficiency to the other within seven days of the accounting.

Costs

[172] As the successful party, the claimant is entitled to her costs under the Family Law Tariff, together with her reasonable disbursements.

"PEARLMAN J."

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