
CANADA / JUDGMENT

Kelly v. Kelly

2019 BCSC 317

COURT

Supreme Court of British Columbia

DECIDED

11 March 2019

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2019 BCSC 317 Kelly v. Kelly

N THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kelly v. Kelly,

2019 BCSC 317

Date: 20190311

Docket: E76462

Registry: Nanaimo

Between:

Patrick Lloyd Kelly

Claimant

And

Jennifer Colleen Kelly

Respondent

Before: The Honourable Madam Justice Humphries

Reasons for Judgment

Claimant Appearing in person:

P. L. Kelly (assisted in part by Access Pro Bono: Vincent Pigeon - retired)

Counsel for Respondent:

K.M.C. Duncan

J. Macey

Place and Date of Trial/Hearing:

Nanaimo, B.C.

October 10-12, 2018;

January 7, 2019

Place and Date of Judgment:

Nanaimo, B.C.

March 11, 2019

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INTRODUCTION

- [1] The claimant, Mr. Kelly, and the respondent, Ms. Kelly, began living together in a marriage-like relationship in 1998 and were married on July 30, 2011. They separated on July 17, 2015. The parties have two children, a girl aged 14 and a boy aged 10.
- [2] The main issues to be determined are the incomes of the parties, child support (including retroactive support), and division of family property and family debt.
- [3] Mr. Kelly is 55 years old. He has not worked since 2011 due to various health conditions (a broken back in 2005 and the removal of his large intestine in 2011). Since becoming totally disabled from work, Mr. Kelly's only sources of income are his CPP and disability payments. His disability does not prevent him from caring for the children.
- [4] Ms. Kelly is 43 years old. She is a part-time care aid worker employed by a continuing care facility.
- [5] The Notice of Family Claim was filed by Mr. Kelly on August 25, 2015. A Counterclaim was filed shortly thereafter. Various court applications have been heard with respect to parenting arrangements. The parties share equal time with the children.
- [6] Since separation, no child support has been ordered or paid by either party. Neither party claims spousal support.

POSITIONS OF THE PARTIES

- [7] Mr. Kelly seeks child support from Ms. Kelly, on the basis of imputed income, and retroactively to the date of separation.
- [8] Ms. Kelly claims that both she and Mr. Kelly have similar resources available to them to support the children. Thus she takes the position that as their means are roughly comparable, she should not have to pay child support.
- [9] Ms. Kelly also takes the position that Mr. Kelly is not completely unemployable and could earn a small amount to supplement his CPP and disability payments. She says this amount should be included in his income for child support purposes, thus increasing any offset, should child support be ordered.

- [10] The parties are joint tenants of the matrimonial home in Port Alberni, purchased during the relationship. The parties are not in agreement as to whether the matrimonial home should be sold. Mr. Kelly wishes to retain the matrimonial home and hopes the determinations with respect to property will allow him to do so, whereas Ms. Kelly wishes to sell it and divide the proceeds equally.
- [11] Mr. Kelly has remained in the matrimonial home since separation, and has assumed all expenses associated with it, funded largely through a line of credit which is now exhausted. Ms. Kelly moved into rental accommodation.
- [12] A joint appraisal valued the matrimonial home at \$203,000 as of November 3, 2017. Accounting for the two mortgages owing on the home, both taken out during the marriage, the parties' net equity in the home, if the 2017 appraisal is accepted as the appropriate value, is \$113,669. Ms. Kelly submits that each party's share in the matrimonial home is therefore \$56,834.50, calculated based on the 2017 appraisal. Mr. Kelly's position is that this Court should use a much lower value of the home, appraised at the date of separation.
- [13] Mr. Kelly seeks half of what he contributed to the matrimonial home since separation from Ms. Kelly, along with reimbursement for a large line of credit, which accumulated both pre- and post-separation, and which was used by Mr. Kelly to make monthly mortgage payments.
- [14] Ms. Kelly disputes the bases upon which Mr. Kelly seeks repayment. She also seeks occupation rent from him.
- [15] Each party spends a similar amount for the basic expenses for the children each month. They do not have much money and most of what they had has gone towards legal expenses. Mr. Kelly can no longer afford a lawyer; Ms. Kelly relies on her parents to assist with her legal expenses.
- [16] Ms. Kelly was represented by counsel at this trial. Mr. Kelly was not, but had the assistance of Access Pro Bono counsel for his opening and his examination in chief. He also had some assistance in putting together his final submissions.
- [17] Mr. Kelly suffered an attack of ill health as he began his submissions, and although he tried to carry on, both parties suggested that this Court should accept written submissions from each side. The Court agreed, as Mr. Kelly appeared to be in genuine distress, and advised the parties that they would be contacted if the Court required further oral submissions from them, either in person or by telephone. While oral submissions are always helpful as they provide the court with an opportunity to ask questions and clarify the parties' positions, this Court was reluctant to require the parties to spend more money on this litigation when there is very little available to either of them. However, too many issues remained unclear and the court eventually requested the parties to return to Court for further submissions. This took the form of back-and-forth discussion with the Court on a series of issues, but it was made clear that no new evidence was to be adduced.

- [18] Ms. Duncan, counsel for Ms. Kelly who attended at the latter hearing, while putting forth her client's position firmly and thoroughly, was respectful of Mr. Kelly and provided assistance to the Court where she could.

PARENTING ARRANGEMENTS

- [19] I will first turn to the issues surrounding parenting arrangements and responsibilities, as, with a few exceptions, the parties agree on these matters.
- [20] At the time of separation, Mr. Kelly remained in the family home when Ms. Kelly left with the children. Soon after, Mr. Kelly brought an application to obtain access to the children. A consent order to share parenting was entered into on September 10, 2015. Despite some difficulties at the start of the separation, the parties now share the children equally (week on, week off) and are cooperative and largely supportive of each other as parents.
- [21] The parties agree that they will continue to be joint guardians of the children with shared parental responsibilities, on a week on/week off schedule.
- [22] Christmas will be shared from December 24 at 3 p.m. to December 25 at 3 p.m. with Ms. Kelly in even numbered years and Mr. Kelly in odd numbered years.
- [23] Ms. Kelly wishes to share the actual birthday day each year while Mr. Kelly wants to have the children alternating years for their birthdays so he can make special plans for the whole day. The parties both live in Port Alberni, not far apart; there is no reason why they cannot share the actual birthday day. The children are getting older now; if there is a special plan for a particular birthday and the relevant child is happy with it, surely the other parent would agree to it. Failing that, the parties will share the actual birthdays. Unless they agree to another time or arrangement, the division will take place at 3 p.m. Ms. Kelly will take the first portion of the day in even numbered years and Mr. Kelly in odd numbered years.
- [24] Following separation, there was an issue with the son's attendance at school during the weeks he was with Ms. Kelly. He was often absent. Mr. Kelly brought an application in January of 2016 for primary care of the children, with Ms. Kelly to have alternate weekends. An order was consented to which required the children to be brought to Mr. Kelly's house half an hour before school during her parenting time. After a few weeks, this proved to be largely unnecessary and the order was not followed. Mr. Kelly brought an application for contempt but did not pursue it. Nevertheless, he wants the order to remain in effect in case the situation disintegrates again. Several years have passed since this order was made, and it is not necessary or appropriate to keep this interim order in place now that the matter has come to trial.
- [25] Mr. Kelly contends that in the event of a disagreement, he should have the decision-making power with respect to the children. His concern in this regard arises from the issue referred to above, which he acknowledges has resolved. He also agrees that the parties have been sharing parental responsibilities and will continue to do so. During submissions, Mr. Kelly

acknowledged that managing the children has "worked out fine". The parties are to be congratulated for their maturity and cooperation with respect to the children. They have agreed to share parenting responsibilities. There is no evidence before the court to support giving Mr. Kelly the decision making power.

[26] Ms. Kelly's mother takes care of the children on a regular basis when she has to work during her parenting time. Mr. Kelly is able to take care of the children on his own time, as he does not work. Mr. Kelly also wants to care for the children if Ms. Kelly is required to get a sitter, even if the sitter Ms. Kelly's mother. However, when Ms. Kelly's mother was called to testify that she minds the children, Mr. Kelly simply told her, with some emotion, that he appreciates her help. There will be no order in respect of care givers.

CHILD SUPPORT

[27] I will now turn to issues surrounding child support. The parties require a decision on:

- a) should child support be payable by Ms. Kelly to Mr. Kelly;
- b) if so, should income be imputed to Ms. Kelly;
- c) should income be imputed to Mr. Kelly; and
- d) should child support be ordered retroactively, and if so, for what period.

[28] In this section, I will deal with the first three issues and decide the parties' Guideline incomes for the purposes of ongoing child support. I will address retroactive child support separately.

Legal Framework

[29] Under the Federal Child Support Guidelines, SOR/97-105 ("the Guidelines"), the presumptive rule, which applies in this case, is as follows:

Presumptive rule

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.

[30] Section 16 of the Guidelines sets out the basic formula for calculation of a spouse's annual income for the purposes of assessing child support, as follows:

Calculation of annual income

16 Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III.

- [31] In this case, both parties wish to impute additional income on the other. Section 19 of the Guidelines allows the court to do so in a number of situations, including where 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."
- [32] Parents have a legal obligation to earn as much as they are reasonably capable of to support their children: see *S.G. v. G. W.*, 2006 BCSC 991 at para. 20. When determining whether a parent is intentionally under-employed or unemployed, the element of intention does not require a finding of bad faith. Rather, the court considers the parent's reasonable capacity to earn based on a number of factors, including age, education, experience, skills, health, availability of work, freedom to relocate, and other obligations: *Hanson v. Hanson*, [1999] B.C.J. No. 2532 at paras. 14-20 (S.C.).
- [33] Since the parties share both the children 50/50, s. 9 of the Guidelines is applicable:

Shared custody

9 Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking in to account:

- (a) the amounts set out in the applicable tables for each of the spouses;
- (b) the increased costs of shared custody arrangements; and
- (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

- [34] In *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 49, the Court stated that a set-off of table amounts, as prescribed by s. 9(a) of the Guidelines, is a useful starting point, but is not the end of the inquiry.
- [35] Under s. 9(b) of the Guidelines, the court should examine the budget and actual child care expenses of each parent, making adjustments if necessary. *Contino*, at para. 68 describes the applicable s. 9(c) analysis:

Section 9(c) vests the court a broad discretion for conducting an analysis of the resources and needs of both the parents and the children. Here again, it will be important to keep in mind the objectives mentioned earlier, requiring a fair standard of support for the child and fair contributions from both parents. The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances.

Ms. Kelly's Guideline Income

- [36] As mentioned, Ms. Kelly is a part-time care aid worker. She works 24 hours per week on average, and accepts additional shifts when they are available and when she does not have the children. She started out as a casual and on-call care aid in 2006, taking shifts when they were offered to her. Currently, she has worked her way up to a permanent position, but it is part-time.
- [37] Ms. Kelly's line 150 income for 2017 was \$31,443.73. Subtracting her union and professional dues of \$639.70, her Guideline income amounts to \$30,804.03. In 2016, her line 150 income was \$30,068.63; in 2015, \$28,429.10.
- [38] Ms. Kelly was required to repay \$1,657 in child tax credits after the separation, and now receives about \$500 a month in child benefits.
- [39] Although there appeared to be an issue in Mr. Kelly's written submission that Child Tax Benefits had been counted in his income and not hers, or vice versa, Ms. Kelly's figures clearly account for that figure in both incomes, as I will discuss below.
- [40] Mr. Kelly says Ms. Kelly is not working to her full potential. He says she is capable of working 40 hours per week, rather than the 24 hours per week she currently works.
- [41] Mr. Kelly says he should not be penalized because he is male; if the positions were reversed, he would be expected to be out working full-time and providing as much support as he could for the children. He says Ms. Kelly could easily work all day, every day, as there is a shortage of care aids, and she should be earning about \$55,000 per year. He agreed that the 2016 Statistics Canada census figures for such a position say the average income is \$32,361, but he would not agree that \$55,000 is high.
- [42] Ms. Kelly says additional income should not be imputed to her. Ms. Kelly gave evidence that she has no training or certification other than her care aid certificate. Her former job experience consists of working at McDonald's and working as a chambermaid. After starting her current job in 2006, she worked her way up to a permanent part-time position in 2011, working a set 4 days on, 4 days off, a position she still holds. Promotions are based on seniority; she currently has 10 years seniority and plans to work her way up to secure a full-time position. Until then, she continues to supplement her income with extra shifts. Although her income has increased year by year, she has never made more than the \$31,447 she earned in 2017. This is very close to the average employment income for her category in

the 2016 Canada Census.

- [43] Mr. Kelly suggested Ms. Kelly can work in other care facilities or go to nearby communities such as Parksville to pick up extra work at care homes there. Ms. Kelly acknowledged that there are 4 or 5 care facilities in Port Alberni, although one is private and wages are lower. She agreed that some residents of Port Alberni commute to Parksville for work. Ms. Kelly testified that she has not applied for extra shifts at other facilities because it would disrupt her parenting time. Instead, she wishes to pick up extra shifts at her present location and move up the seniority ladder, eventually securing a full-time position. She said she felt she needed the flexibility she has in her present position, given her son's learning and behavioural difficulties, and feels she worked as much as she could.
- [44] Mr. Kelly refers to his sister's income as a comparator for Ms. Kelly, but Ms. Kelly points out that Mr. Kelly's sister has been a care aid far longer than she has and works at a different facility.
- [45] The Court asked Ms. Kelly to explain the difference between full-time work and her present part-time position. She answered that if she were full-time, she would work 5 days a week, rather than 4 days, and her shifts would be 1.5 hours longer.
- [46] Ms. Kelly currently takes extra available shifts when she does not have the children, but not as many when the children are with her. She testified she usually picks up 2 extra shifts per month. She said she will be picking up more shifts in the coming months because she has to in order to make ends meet. She said she has not yet applied for any postings for a full-time position, but she is prepared to apply for and take on a full-time position now.
- [47] I agree that Ms. Kelly is capable of working more than 24 hours each week, but I do not agree that she should have income imputed to her in the amount sought by Mr. Kelly. There is no evidence to support an ability on her part to earn almost double the amount she is currently earning.
- [48] Her position that she has been required to be available for her children, particularly her son, has some validity, but she should have been picking up more additional shifts at least in the past year, now that their son seems to have adjusted to school. Until she finds a full-time position, she should be taking all the additional shifts offered to her.
- [49] I do not know how many shifts Ms. Kelly has turned down, nor how much she is paid per shift, but her hourly rate is \$23.93, which is affected by overtime payments. Nevertheless, on the basis that Ms. Kelly already picks up two extra shifts a month when she does not have the children, it is reasonable to conclude that Ms. Kelly could have picked up two additional shifts per month and worked at least an additional 3-4 hours per week on average. I would therefore impute some additional income to her 2017 Guideline income, which was \$30,804, up to \$35,000. Based on this new figure, the child support amount payable would be \$562 per month.

Mr. Kelly's Guideline Income

- [50] Mr. Kelly receives monthly CPP disability pension payments and additional non-taxable government benefits, including the child tax benefit and GST tax credit. He received long-term disability payments from Wawanesa until late 2017, and now receives Persons With Disability payments from the provincial government. Some of the CPP benefits are directly for the children, and his disability medical benefits also apply to the children. During oral submissions Mr. Kelly said the Persons With Disability payments have been cancelled or suspended; he is unsure of their status and is trying to work that out with his social worker. However, the Court advised him that the present decision is to be made on the basis of the evidence that was adduced at trial.
- [51] Mr. Kelly testified he had perhaps \$6,000 in an RRSP at the time the parties started living together. He used it for a down payment on the house, together with some additional money he acquired from the sale of a vehicle. At the time of separation, he had \$547 left in the RRSP. He explained that he owed the government money from borrowing against his RRSP and was repaying it at \$50 per month. In September of 2017 he cashed in \$1500, in contravention of an asset restraining order, it appears to pay for the appraisal on the house, and also used \$455 in January of 2018 for various purchases for his daughter. He now has no RRSPs.
- [52] Ms. Kelly does not take a strong position about the RRSPs. She merely submits that any credit she might be entitled to in that regard as a result of the contravention of the asset restraining order be used to set off what she might owe for repairs to the door (to be discussed below). She notes that the ongoing repayment of \$50 per month came out of the Line of Credit that has accrued since separation, and she resists paying for half of that (also to be discussed below).
- [53] Mr. Kelly tentatively raised the issue of retaining credit for the original \$6000 which he had prior to the relationship, but it is clear that he used that money for the family home. It is not an excluded asset.
- [54] Ms. Kelly does not take the position that the portion of the CPP benefits received for the children are to be included in Mr. Kelly's income.
- [55] Mr. Kelly indicated on his August 3, 2018 Financial Statement that his income for child support purposes was \$15,728.10. Ms. Kelly agrees the amount of \$1500 which was withdrawn from the RRSP is a one-time amount and should not form part of his income on an ongoing basis; thus his income in 2017 is \$14,227.44. The further withdrawal of \$455 in 2018 also does not form part of any calculations.

- [56] Mr. Kelly is permitted to earn an additional \$5,500 without impacting his disability payments or tax status. Ms. Kelly takes the position Mr. Kelly is therefore under-employed and an additional \$5,500 should be imputed to his income, making his total imputed Guideline income \$19,727.44. She points out that Mr. Kelly goes hunting, camping, and fishing, and can walk over two kilometers.
- [57] Mr. Kelly takes the position that his health prevents him from earning anything above his disability payments. He says he has trouble with daily activities; he is fatigued and feels like he has the flu all the time. Excessive activity can lead to internal bleeding. His legs and arms are often numb and he uses a cane. His doctors tell him he cannot work.
- [58] Mr. Kelly testified that he does a number of volunteering jobs, including taking phone calls at his son's school, delivering Meals on Wheels, and working a two hour shift once a month at the Legion on their burger and beer fundraisers. He is not paid for any of these tasks. Mr. Kelly says the volunteer work he does is minimal, and he has no training or skills for a sedentary office job. He worked long hours four days a week driving a truck, and continued to do so after a back injury in 2005. In 2011, he had his large intestine removed. He has not worked since, following medical advice. He testified he has chronic pain and a number of debilitating physical symptoms. He has follow-up surgery once a year to monitor his condition. Although he takes phone calls for his son's "ride safe" program at school, and is able to sit with another person at the Legion and take money on their beer and burger nights, he says he could not do comparable tasks in any meaningful fashion that would allow him to earn money.
- [59] I accept that Mr. Kelly cannot work. While he does some volunteer work, his medical condition is such that he cannot be relied upon to hold down even a small job that requires predictable attendance.
- [60] Using the income figure of \$35,000 for Ms. Kelly, the monthly Guideline amount payable by Ms. Kelly is \$562. Mr. Kelly's set-off amount, based on his Guideline income of \$14,227.44 is \$148.00. I see no reason not to use the set-off approach referred to in s. 9(a) of the Guidelines; the total amount of child support payable by Ms. Kelly is \$414.00 per month.

Should Ms. Kelly Pay Child Support?

- [61] Ms. Kelly takes the position that, despite her ability to work and Mr. Kelly's disability, their means are comparable. Thus she should not have to pay the child support, and all expenses should be shared. She asks the court to consider the factors under ss. 9(b) and (c) and order that no monthly child support should be payable in the circumstances.
- [62] Ms. Kelly relies on *Contino v. Leonelli-Contino*, 2005 SCC 63, in which the court stated that section 9(c) of the Federal Child Support Guidelines "vests in the court a broad discretion for conducting an analysis of the resources and needs of both the parents and the children." The court said the simple set-off method is not presumptively applicable:

The court will be especially concerned here with the standard of living of the child in each household and the ability of each parent to absorb the costs required to maintain the appropriate standard of living in the circumstances.

- [63] Ms. Kelly says if she has to pay child support, it would further reduce her ability to provide for the children. She argues that the increased cost of shared custody arrangements has already negatively affected her ability to provide for the children. Ms. Kelly now rents a condo owned by her mother, but is frequently short on the rent, and owes her mother \$2,480.
- [64] Ms. Kelly argues that there is no disparity between her and Mr. Kelly. She tallies the "total resources" available to both herself and Mr. Kelly, and concludes that they are relatively similar. They each spend roughly the same amount per month on the needs of the children. Ms. Kelly's rental is a two bedroom condo, and so she must share a bedroom with her son during her parenting time. Mr. Kelly, when he has the children, is able to provide each child their own bedroom in the matrimonial home. Mr. Kelly has managed to save \$3,690 in an RESP for the children, which Ms. Kelly has not contributed to.
- [65] In my view, there is no basis to conclude that Ms. Kelly should not be paying any child support. She works and is capable of working more than she does. Mr. Kelly is entirely dependent on his CPP and disability payments. He also relies on child care benefit payments to provide for the children. Neither has any significant savings or assets. However, Ms. Kelly's calculations of the "total resources" available to each party are not entirely realistic because throughout the relevant period, Mr. Kelly withdrew money from the joint line of credit to fund the household expenses until the account was exhausted, whereas Ms. Kelly does not have any significant loans, other than the small arrears in rent owed to her mother.
- [66] After considering the factors in s. 9 of the Guidelines, I conclude that it is fair and reasonable for Ms. Kelly to pay Mr. Kelly ongoing child support in the amount of \$414.00 per month, based on the parties' 2017 incomes. Assuming no change in circumstances, income tax returns will be exchanged by June 1 of each year, and child support adjusted accordingly.
- [67] Although Mr. Kelly mentioned percentages of s. 7 expenses in his written submissions, during oral submissions, the parties agreed that these expenses have been minimal so far, and they have shared them equally. That arrangement should continue.

RETROACTIVE CHILD SUPPORT

- [68] Mr. Kelly seeks retroactive child support back to the date of separation based on the imputed level of income.
- [69] The relevant factors on an application for retroactive child support are set out in *D.B.S. v. S.R.G.*, 2006 SCC 37 and they include: the circumstances surrounding the delay in seeking child support, the payor parent's conduct, the child's circumstances, and any hardship caused by a retroactive award.

- [70] Generally speaking, a retroactive child support order should not reach back more than three years: D.B.S. at para. 123.
- [71] Ms. Kelly says there is no reasonable excuse for why child support was not sought earlier; Ms. Kelly has always provided financial disclosure and has supported the children throughout the relevant time. She had a reasonable belief that she was meeting her obligations to care for the children. The parties both have modest incomes and similar resources. Ms. Kelly argues that Mr. Kelly is able to provide a higher standard of living for the children at his home whereas Ms. Kelly relies on her parents. Ms. Kelly has no disposable income left and relies on her overdraft to see her through to her next paycheque. Mr. Kelly suggests any retroactive award of child support should simply come off her share of the house, but this would result in Ms. Kelly being unable to repay debts and would take away resources she uses to support the children.
- [72] In the alternative, Ms. Kelly says that Mr. Kelly did not provide full financial disclosure until January 2018 when he finally filed his full tax returns. If any retroactive award is made, it should be from that date only.
- [73] Mr. Kelly offered no excuse as to why he did not seek child support earlier. However, from reviewing the parties' finances, it is clear that this application is spurred in part by Mr. Kelly having recently run out of options now that the line of credit that he and the children have been living off has been exhausted. As well, Mr. Kelly's overall approach throughout is to ensure that Ms. Kelly owes him enough money that he will be able to buy out her interest in the house. He does not necessarily defend this position through legal argument or logic; his rationale is that it will benefit the children.
- [74] There is nothing blameworthy in Ms. Kelly's conduct, nor is there any aspect of her behaviour that shows her to be other than an involved, concerned parent, sharing the responsibilities of the children equally. The children are well taken care of and are bonded to both parents.
- [75] Mr. Kelly not only seeks retroactive support back to the date of separation, but wishes to impute income to Ms. Kelly in the amount of \$55,600. For reasons I have already canvassed, I refuse to impute Ms. Kelly's income at the level Mr. Kelly suggests. Ms. Kelly has no assets. By Mr. Kelly's calculations, this would leave her in debt to him, and he wants the retroactive award satisfied through her share of equity in the matrimonial home.
- [76] To be faced with a large retroactive award for child support when there is no reason this issue could not have been dealt with earlier, giving her time to make her work plans accordingly, is arguably unfair. Nevertheless, child support is the right of the child. Ms. Kelly has a career and is capable of working more than she does; she acknowledged she is in a position to take more shifts and has an expectation that she will obtain a full-time position. Mr. Kelly cannot work and depends on a line of credit, which has since been exhausted, to survive.

- [77] Taking all these factors into account, I set the child support retroactive to January 1, 2018, at the imputed income of \$35,000 for the year 2018. The appropriate set-off will apply.

DIVIDING FAMILY PROPERTY AND DEBT

Statutory Framework

- [78] Section 81 of the Family Law Act provides that, on separation, each spouse is entitled to an undivided half interest in all family property as a tenant in common and is equally responsible for family debt, "regardless of their respective use or contribution". The increase in value of excluded property during the relationship is also family property: s. 84(2)(g).
- [79] Section 87 of the Family Law Act provides that the value of the family property must be determined as of the date of the hearing, unless the court otherwise orders, based on significant unfairness.

Family Debt

The Pre-Separation Balance on the Line of Credit.

- [80] Mr. Kelly received a large back-payment from CPP (\$62,000) shortly before separation, in March of 2015. Although the evidence was quite confusing surrounding this payment, it appears that he used \$43,000 of it to repay Wawanesa Life Insurance for the disability overpayments he received until he got CPP. This payment was made the day before Ms. Kelly left with the children. He needed \$3,500 to complete the payment to Wawanesa and he used the line of credit for that, so that amount was outstanding at the time of separation. The parties agree that this amount is subject to equal division.
- [81] Mr. Kelly paid \$18,472.53 toward the line of credit in April of 2015, several months before separation. The amount owing on the line of credit at that time had been used during the marriage for family purposes, including the purchase of a washer and dryer.
- [82] It was not clear to me what argument Mr. Kelly was making with regard to the \$62,000, other than he seems to want Ms. Kelly to pay him half of it, although he does not clearly say so. In his written submissions, he says simply that the \$62,000 went towards paying off family debts.
- [83] Counsel for Ms. Kelly was under the impression that Mr. Kelly was taking the position that the \$62,000 is excluded property, although the submissions are not clear on that point. However, in answer to a question during cross-examination, Mr. Kelly characterized this money as a pension, not replacement of lost income. As well, in oral submissions, he advised the court that the pro bono counsel, who had assisted him at the outset of trial, told him to argue that the \$62,000 was insurance, not replacement of lost income. He says he used it to pay off the family debt, and Ms. Kelly benefitted from that, as she left with no debt, and he was left with all the debt.

[84] It is Ms. Kelly's position that the money was received during the relationship to compensate for lost income, and thus is not excluded property under s. 85(1)(d) of the Family Law Act, which provides:

s. 85(1) The following is excluded from family property:

(d) money paid or payable under an insurance policy, other than a policy respecting property, except any portion that represents compensation for

(ii) lost income of a spouse

[85] Neither party was able to provide any cases on the nature of CPP disability benefits.

[86] I am of the view that the lump sum \$62,000 payment of CPP disability benefits is not excluded property under s. 85 of the FLA. On the limited evidence before the court, these payments constituted money to replace income that Mr. Kelly could have earned if he had not been injured. There is no suggestion that this money was for pain and suffering, or loss of amenities, or other heads of insurance damages that are personal to the injured person. This money was for lost income. As well, it was used to pay off family debt that accrued over a number of years. The family as a whole benefitted from paying off the debt. Despite Mr. Kelly's claim that he was left with debt and Ms. Kelly was not, the evidence is that neither Mr. Kelly nor Ms. Kelly were left with debt, except the \$3,500 still owing on the line of credit at the date of separation, and the car loan which Ms. Kelly has agreed to assume (see below).

Current Line of Credit Balance

[87] The joint line of credit currently has a balance of \$41,579.35, all of which has been incurred by Mr. Kelly since separation, with the exception of \$3,387.09 which Ms. Kelly withdrew in March of 2016, and acknowledges she must account for, and the \$3,500 opening balance on the date of separation which must be shared equally.

[88] The day following Ms. Kelly's withdrawal, Mr. Kelly withdrew an additional \$16,307 from the line of credit, maxing out the available limit and bringing the total amount owing to \$41,579.35, all of which is still owing as of the date of this trial. There have been no further withdrawals since March of 2016.

[89] Mr. Kelly now lives month to month on his disability payments (CPP and the provincial Persons With Disability payments), the child benefits, and GST rebate.

[90] In addition to seeking half the housing expenses and mortgage since the separation, Mr. Kelly says Ms. Kelly should pay half the line of credit because it consists of his legal expenses which are her fault because she has not acted reasonably, and he has been forced to bring applications. As well, he says she should pay half the line of credit because he used some of it for the children, or for their best interests, which includes those expenses related to maintaining the house. Since he does not trust her to repay it, Mr. Kelly says Ms. Kelly should pay him the money up front.

- [91] Ms. Kelly says to require her to pay for half the housing expenses plus half the line of credit would be to award double recovery, since the line of credit is the source of housing payments. She has also incurred legal expenses, which her parents have helped her with. As well, she has incurred similar expenses for rent and the care of the children, while Mr. Kelly has lived rent free in the family home.
- [92] I agree that since Ms. Kelly is entitled to half of the matrimonial home, she should have to pay her share of the home maintenance costs and mortgage payments incurred since separation. However, I conclude that Ms. Kelly is not additionally liable for the current balance on the line of credit. I accept her position that to require her to pay half of the housing expenses plus half the line of credit is a double recovery, since the line of credit is the source of funds Mr. Kelly has used to pay household expenses.
- [93] I do not accept Mr. Kelly's position that Ms. Kelly should have to repay half the line of credit because he used it for his legal expenses and to support the children. Her responsibilities in support of the children are satisfied through her own expenditures on them and through this Court's orders for child support. She is not responsible for Mr. Kelly's legal expenses unless there are awards of costs made by the court. The first order on September 10, 2015, was by consent and dealt with sharing the children; the second order on October 2, 2015, which was a restraining order regarding assets, was by consent; the third order on February 15, 2016, concerned delivery of the son to Mr. Kelly's house to ensure he attended school. At some point Mr. Kelly also filed an application to find Ms. Kelly in contempt but that application was withdrawn. None of the orders contain a reference to costs.
- [94] While Mr. Kelly views it as unfortunate that an order, albeit by consent, was necessary to sort out arrangements immediately after separation, it is not appropriate to seek to recover legal expenses by requiring Ms. Kelly to share the line of credit. Both parties have incurred legal expenses throughout these proceedings.
- [95] The current balance on the line of credit is not family debt and is Mr. Kelly's responsibility, subject to the amounts acknowledged to be owing by Ms. Kelly (see para 87 above).

Income Tax Debt

- [96] Ms. Kelly acknowledges she owes Mr. Kelly half of an income tax debt of \$2,273.63, or \$1,126.82, which was paid off after separation. However, she says that since Mr. Kelly repaid the debt out of the family line of credit, she should not be responsible for it twice, if she is required to assume half the line of credit.
- [97] As discussed, Ms. Kelly should not be responsible to pay half of the amount owing on the line of credit.
- [98] I therefore order that Ms. Kelly should pay Mr. Kelly \$1,126.82 which represents her share of the income tax debt.

Damaged Door and RRSP Withdrawal

- [99] These items are not connected, except by the suggestions of the parties that various alleged debts be offset against each other.
- [100] During altercations between Ms. Kelly and a neighbour, prior to separation, one of the doors to the home was damaged. The cost of repair was about \$750. Mr. Kelly wants her to pay for it.
- [101] Ms. Kelly acknowledges she damaged the door, but says this was a joint expense prior to separation and she should be responsible for only half the expense of the door. She says it should be offset against the money Mr. Kelly took from his RRSP account after separation against a court order, and both forgiven.
- [102] Mr. Kelly says he should be forgiven for withdrawing the RRSP money because he used it for the children and because Ms. Kelly has not continued to adhere to the order that she deliver the son to Mr. Kelly's house prior to school to ensure he attends. However, it is important to him that Ms. Kelly pay her share of the door repairs.
- [103] Using the RRSP money for the children is not an excuse for contravening a court order. As well, Mr. Kelly acknowledges that the order to deliver the son to him to ensure attendance at school was soon unnecessary and has not been required.
- [104] I agree with Ms. Kelly's approach, which actually appears to be to Mr. Kelly's slight advantage. The door repair and the RRSP withdrawal should cancel each other out.

Equalization of Child Tax Benefits

- [105] As mentioned, Mr. Kelly says Ms. Kelly has not accounted to him for his share of Child Tax Benefits. Ms. Kelly says she has and provided documents to support her position. Mr. Kelly's bank account indicates he received \$2,110.71 on February 11, 2016 and he could suggest no other source for that money.
- [106] During oral submissions, it became apparent that the money Mr. Kelly seeks from Ms. Kelly is the child tax credit that was paid to the family during the last year of the marriage. He seems to think this amount is an asset of Ms. Kelly's. There is no evidence that Ms. Kelly has sat on this money. She has no assets or savings. The money was paid to the family during the marriage. Ms. Kelly is not required to account to Mr. Kelly for that money.
- [107] I accept that Ms. Kelly has accounted appropriately for Child Tax Benefits.

Family Property

The Matrimonial Home

- [108] The parties require a decision on:
- (a) the value to be used for the matrimonial home;

- (b) whether Ms. Kelly should be required to reimburse Mr. Kelly for expenses incurred in maintaining the matrimonial home since separation;
- (c) whether Ms. Kelly should be required to reimburse Mr. Kelly for half the line of credit incurred since separation, which has been used for maintaining the matrimonial home;
- (d) whether Mr. Kelly should pay Ms. Kelly occupation rent.

[109] I have already indicated my views on (b) and (c).

[110] Mr. Kelly has lived in the home since separation and has paid all expenses associated with it. As described above, he has relied, in addition to his other sources of income, on the line of credit since separation to support himself and the children, to maintain the family home, and to pay his legal expenses. The line of credit is now approximately \$41,000.

[111] Ms. Kelly lived with her mother for two months after separation. Her mother then purchased a condominium and Ms. Kelly rents it from her for \$365 per month.

[112] Ms. Kelly wants the family home sold and the proceeds divided. Mr. Kelly wants to buy out her interest.

[113] The parties agree that the value of the home should be divided equally, although Mr. Kelly takes the position that the value should be set as of the date of separation, on the basis of a realtor opinion letter he obtained in January of 2016. That value is \$140,000. The parties also obtained a joint appraisal, setting a value of \$203,000, and it was my understanding that Access Pro Bono counsel thought Mr. Kelly had agreed that this would form the basis of the valuation, and it is referred to in the Claimant's opening and written submissions. However, Mr. Kelly indicated to the Court that he wants the earlier value used. He also takes the position that his maintenance of the house since separation has increased the value by \$60,000, which he says should be a factor in his favour in his claim for half the housing expenses from Ms. Kelly. He is of the view that Ms. Kelly has prevented him from keeping the house by insisting it be appraised and sold. He could have bought out her interest at the time of separation for a lesser amount, but he is now forced to deal with the increased value, which is unfair to him and to the children. He does not view the increase in equity as an advantage because his sole focus in this action is to be allowed to keep the house.

[114] In support of his position that the realtor's opinion letter from the date of separation should be used to value the matrimonial home, Mr. Kelly relies on *Slavenova v. Rangelov*, 2015 BCSC 79, and on a case he says is called *Golback v. Hamilton* from August of 2017, which a friend told him about. He was unable to provide a copy of this case, and counsel for Ms. Kelly was unable to find it.

[115] Ms. Kelly relies on *Kumagi v. Campbell Estate*, 2018 BCCA 24, which states that:

- [76] A departure from the presumptive date for valuation of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA. Section 95 expressly provides for the reapportionment of net family property if an equal division would be "significant unfair".
- [116] I can see no reason not to use the joint appraisal value of \$203,000. There is no evidence of significant unfairness if the present value is used. The purpose of this litigation is not to orchestrate the various values and offsets so that Mr. Kelly can keep the house. In many cases, the matrimonial homes have to be sold. Each party is entitled to recover their portion of the equity in the house and move on.
- [117] Mr. Kelly has paid the mortgage and house expenses since separation, largely through the line of credit, but there is no suggestion that he has significantly increased the value of the home through his actions. The value has increased, but according to the appraisals put into evidence, the increase is due to market forces, not to Mr. Kelly's efforts. He has maintained the house, but there is no evidence of extensive renovations or any steps taken to increase the value.
- [118] In any event, Mr. Kelly seeks half the payments for maintaining the property from Ms. Kelly, either as a direct debt or as part of the line of credit, and although I do not accept his position that she should be repaying him in such a way that he receives double recovery, she will be responsible for her half of the payments that resulted in the present value of the house and increase in equity.
- [119] As mentioned, there are two mortgages on the home. Both pre-date the separation. The two mortgages total \$89,331.00. The net equity, if the value of the home is based on the joint appraisal obtained by the parties (\$203,000), is \$113,669. Half of that is \$56,834.50.
- [120] Ms. Kelly says Mr. Kelly has paid, since separation, \$2,352.23 in taxes, \$2,735 for insurance, and mortgage payments of \$19,923.15. Half of the sum of these items is \$12,505, for which Ms. Kelly is responsible.

Occupation Rent

- [121] Ms. Kelly seeks occupation rent from Mr. Kelly and has pleaded it as a separate claim. She says the amount for which she should reimburse Mr. Kelly for mortgage payments, taxes and insurance (\$12,505.20) is what she should receive in occupation rent, as she has paid rent for 39 months at \$365 per month, which is \$14,235. Looked at another way, she also adduced evidence to show that the house could have been rented for \$1,200 per month based on comparable rentals, which would have rendered \$46,800 in 39 months, half of which is \$23,400 less expenses. The resulting figure is about the same as the amount owing to Mr. Kelly by her calculations.

- [122] Mr. Kelly resists the claim for occupation rent. He says he has preserved the property, which has increased in value, and should receive a contribution towards his expenses, but should not have to pay occupation rent.
- [123] Overall, his approach results in Ms. Kelly owing him a substantial amount of money. He starts from the figure of \$56,834.50 (half the equity if the house is valued at \$203,000). He subtracts Ms. Kelly's line of credit retrieval (\$3,387.09), her half of the income tax debt (\$1,136.82), the door damages (\$748.47), and the amount of Child Tax Benefit he says she owes him (\$3,017.65). Thus he says her share is \$48,544.47 and his is \$65,124.
- [124] After taking off retroactive child support, which he says is approximately \$33,500, and half the line of credit as well as furniture and other expenses, Ms. Kelly owes him several thousand dollars which he is willing to forgive.
- [125] Occupation rent is a discretionary remedy ordered to do equity between the parties, and can be triggered by a demand from the remaining tenant for property expenses. Although the authorities are not all in agreement, it appears that it is not necessarily dependent on ouster: see *McFarlen v. McFarlen*, 2017 BCSC 1737. The necessity for the absent tenant to pay for separate accommodation has also been treated as a factor to consider in the division of family assets, rather than as a separate claim for occupation rent: see *Stasiewski v. Stasiewski*, 2007 BCCA 205.
- [126] Mr. Kelly claims half the expenses associated with the home, and Ms. Kelly does not dispute her liability to pay this.
- [127] However, Ms. Kelly voluntarily left the matrimonial home. She is gainfully employed, no spousal support is sought, no child support was paid, and she rents a condominium from her mother who allows her to be short on the rent. Mr. Kelly is not employable, lives largely off a line of credit and pays all the housing expenses and children's expenses when they are with him.
- [128] In my view, occupation rent is not required to do equity between the parties in these circumstances and I decline to award it.

Pensions

- [129] Ms. Kelly agrees her municipal pension should be divided with Mr. Kelly pursuant to Part 6 of the FLA, as of the date of separation, which is July 17, 2015. The only value provided of the pension is \$14,434.30, as of December 31, 2017. I will leave it to the parties to agree on its value as of the date of separation.
- [130] The parties agree that their CPP retirement benefits credits are not to be divided.

Furniture

- [131] There is also a dispute about whether Ms. Kelly took more than her share of items from the home when she left. Mr. Kelly says he should get half the value of those items, which he says are \$25,000 to \$35,000.
- [132] Ms. Kelly says she took half or less than half of the home items, and that should be the end of it.
- [133] Other than their individual testimony and a list of taken items provided by Ms. Kelly, there is no other evidence to assist.
- [134] I am not prepared to deal further with these household items that were taken four years ago. Both parties have had to establish separate residences suitable for the children during that time. The children are well taken care of by both parents in their respective homes. In any event, as already mentioned, it seems to me that Mr. Kelly is determined to ensure that he does not have to pay Ms. Kelly anything for the house and so his values are suspect.

Vehicles and Boats

- [135] Each party has a vehicle and Mr. Kelly has two boats with a motor. Ms. Kelly's 2013 Kia is financed and she assumes responsibility for that loan, but seeks an equalization payment from Mr. Kelly.
- [136] Ms. Kelly's figures are as follows:
- Ms. Kelly's Kia: valued at \$9,100 (loan \$7,963.87), net value \$1,136.13
 - Mr. Kelly's boat: valued originally at \$2,200, now valued by Mr. Kelly at \$1,200, with a motor originally worth \$7,500, now valued at \$4,850 (according to Ms. Kelly's calculations based on Mr. Kelly's rate of devaluation of the boat)
 - Mr. Kelly's 2000 Dodge: currently valued at \$1,500
 - Mr. Kelly's second boat: \$200
- [137] Ms. Kelly says Mr. Kelly therefore owes her an equalization payment of \$3,843.07.
- [138] Mr. Kelly did not have a clear position on all of this as he takes a more global approach: that Ms. Kelly owes him so much in retroactive child support, house maintenance expenses, and reimbursement for the line of credit that he should be allowed to keep the house and will forgive any extra amount she owes him.
- [139] However, he says Ms. Kelly misunderstood the boat depreciation: the boat and motor together are worth \$1,200.

[140] I agree with Ms. Kelly's approach. The issues surrounding the division of debt associated with the matrimonial home should not be further complicated by rolling this item into the calculation.

[141] The evidence is very poor on these issues, but I will accept Mr. Kelly's explanation that the boat and motor are worth \$1,200. He should equalize these items with a payment of \$882 to Ms. Kelly.

CONCLUSION

[142] To summarize, income is imputed to Ms. Kelly in the amount of \$35,000 per year; she should pay child support based on an income of \$35,000, retroactive to January 1, 2018. With the offset of Mr. Kelly's income, that is \$414 per month.

[143] No further income is imputed to Mr. Kelly. His income is \$14,227.44.

[144] Ms. Kelly is not required to assume half of the line of credit accumulated by Mr. Kelly since separation, nor to repay the amounts used for family purposes prior to separation. She must repay half the \$3,500 that was family debt upon separation, and the amount of \$3,387.09 which she withdrew after separation.

[145] Ms. Kelly owes Mr. Kelly \$1,126.82 as half of the income tax debt.

[146] No further accounting is required from Mr. Kelly in respect of the RRSP withdrawals after separation, or from Ms. Kelly for the repairs to the door.

[147] Ms. Kelly is not required to account further to Mr. Kelly for child tax benefits.

[148] Ms. Kelly should reimburse Mr. Kelly for half the mortgage, taxes, and insurance associated with the matrimonial home, that is, \$12,505.00.

[149] The claim for occupation rent is dismissed.

[150] Ms. Kelly's municipal pension should be divided with Mr. Kelly pursuant to Part 6 of the Family Law Act, as of the date of separation, July 16, 2015.

[151] No further accounting is required in respect of furniture from the matrimonial home.

[152] Mr. Kelly owes Ms. Kelly \$882 to equalize the vehicle and boat values.

[153] The parties are entitled to equal interests in the matrimonial home. I have accepted the value as \$203,000. At the time of trial, there was \$89,331 owing against that home for which the parties are jointly responsible, leaving \$113,669 in equity to be divided equally. Mr. Kelly wishes to purchase Ms. Kelly's half interest of \$56,834.50.

[154] There are certain amounts owing by Ms. Kelly to Mr. Kelly that would further reduce that amount: \$12,505 for one half of the housing costs; \$5,796.00 for 14 months of child support for 2018 at \$414.00 per month, and \$1126.82 for half of the income debt. This is a total of \$19,427.82. Mr. Kelly owes Ms. Kelly \$882 to equalize the vehicle and boat values, thus reducing the amount to \$18,545.82. Thus Mr. Kelly must pay Ms. Kelly \$38,288.68 for her interest in the house.

[155] Mr. Kelly has until September 1, 2019 to raise the funds necessary to purchase the house. If he is unable to do so, the family home will be listed for sale as of October 1, 2019, and the parties are to have joint conduct of sale. There is liberty to apply in the event that there is disagreement as to how the property should be marketed or sold. These dates may be adjusted by agreement of the parties.

[156] A divorce was granted at this trial upon the court being satisfied there is no prospect of reconciliation and there are reasonable arrangements in place for the children.

COSTS

[157] Success has been divided. Unless there is a reason to address costs of which I am unaware, the parties will each bear their own costs.

"Humphries J."

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Prepared on 25 October 2026 · Esheria