

CANADA / JUDGMENT

Klebe v. Klebe

2020 BCSC 652

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Supreme Court of British Columbia

DECIDED

28 April 2020

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2020 BCSC 652 Klebe v. Klebe

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Klebe v. Klebe,

2020 BCSC 652

Date: 20200428

Docket: E15030

Registry: Chilliwack

Between:

Kevin John Klebe

Claimant

And

Melissa Sue Klebe

Respondent

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

Counsel for Claimant:

A.T. Briscoe

Counsel for Respondent:

M.M. Patton

Place and Dates of Trial:

Chilliwack, B.C.

April 8-12, 2019

June 24-25, 2019

Place and Date of Judgment:

Chilliwack, B.C.

April 28, 2020

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I. Overview

- [1] The parties were in a nine-and-a-half year relationship that ended in 2017. The relationship produced two children under the age of 11. In addition, the respondent has three children from a prior relationship, who range in age from 16 to 20 years.
- [2] The trial of this proceeding was held over seven days before Justice N. Brown. It concluded on June 25, 2019, with Justice Brown reserving judgment. Prior to releasing his Reasons for Judgment, Justice Brown issued two Memorandums dated August 19, 2019, and September 4, 2019, with reasons to follow (the "Financial Orders"). The Financial Orders resolved most of the financial issues between the parties, including the valuation of the former family home, and the amount of indebtedness to each of the party's parents (the "parental debts"). Left for determination were matters related primarily to parenting, child support, payment of section 7 expenses, and spousal support (the "remaining issues").
- [3] Unfortunately, Justice Brown was unable to continue with the proceeding. On October 9, 2019, Chief Justice Hinkson made an Ex Mero Motu order pursuant to Rule 22-2(10) of the Supreme Court Family Rules, B.C. Reg. 168/2009, appointing myself to render a written judgment in this matter in lieu of Justice N. Brown.
- [4] Before I had rendered judgment on the remaining issues, the respondent filed an application on February 24, 2020, seeking reconsideration of the Financial Orders made by Justice Brown. The parties appeared before me on March 6, 2020 to make oral arguments in relation to the reconsideration application. In Reasons for Judgment indexed at 2020 BCSC 577, I dismissed the application.
- [5] The following are my Reasons for Judgment on the remaining issues.

II. Issues

- [6] These proceedings were commenced by the claimant by way of Notice of Family Claim filed January 19, 2018. The Response to Family Claim and Counterclaim were filed on April 23, 2018. Both the Family Claim and Counterclaim are brought under the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) [DA] and the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [7] The following issues are before me:
 - a) Parenting time for holidays and special days;
 - b) The quantum of child support for the biological children, as well as whether Mr. Klebe is required to pay child support or section 7 expenses for any of his three step-children;
 - c) Whether Ms. Klebe is entitled to spousal support, and if so, the quantum and duration;
 - d) Whether income should be imputed to either party for child support or spousal support purposes;

- e) Whether the respondent's personal injury award constitutes excluded property; and
 - f) Whether the respondent's wedding and engagement rings are a family asset.
- [8] I begin first with a word on credibility.

III. Credibility

- [9] As the trial was held before a different judge, I did not have the opportunity to observe the demeanour of the witnesses as they testified. However, I have had the benefit of listening to the audio recordings of the entire trial proceeding. This has included listening to the evidence of witnesses and hearing the oral submissions made by counsel. In addition, I have reviewed the transcripts of the entire trial proceedings, all court exhibits, written and closing arguments and briefs of authorities of the parties.
- [10] Demeanour of a witness is but a small factor in a credibility assessment. This is because a witness's presentation while testifying may be affected by a number of factors that say less about her or his credibility, and more about the personal circumstances of the witness. The witness's cultural and social upbringing, comfort level with testifying in court, and communication style are but some of the factors which may affect how that witness gives their evidence. It is for these reasons that our courts have cautioned trial judges in making credibility assessments based on demeanour alone: *R. v. S. (N.)*, 2012 SCC 72 at paras. 99-107.
- [11] Where a party's testimony is brought into question, I have weighed it in the context of the evidence as a whole, having regard to considerations such as whether the testimony: is supported by or conflicts with documentary or other objective evidence, or the evidence of other witnesses; is internally consistent; has the air of plausibility; was delivered in a forthright manner; or was shaken on cross-examination.
- [12] Rather than making any broad generalizations about either party's credibility or reliability as a witness, I have addressed credibility concerns in the context in which they arise in these Reasons.
- [13] A total of five witnesses testified in the trial: the claimant, his father Randy Klebe, the respondent, her mother Peg Pede, and her father George Pede. With the exception of some general evidence regarding the parties and their children, the evidence of George and Peg Pede and Randy Klebe, focussed on issues that are not before me, for example, the parental debts. Nevertheless, I have considered their evidence in the context of the evidence as a whole.

IV. Background

- [14] The claimant Kevin John Klebe is currently 38 years of age. Melissa Sue Klebe, the respondent, is currently aged 40. The parties began dating in 2007, and commenced cohabitation in March 2008. They were married on October 10, 2010, and separated on November 3, 2017.
- [15] KK aged 7 and CK aged 10 are the two biological children of the relationship. In addition, the respondent has three children from a previous relationship with Trevor Phillips: GP aged 16; JP aged 19; and KP who will turn 21 next month (the "step-children"). Mr. Phillips lives in Alberta and has been largely absent from his children's lives.
- [16] Following separation, the respondent and all five children continued to reside in Chilliwack in the former family home. Mr. Klebe generally saw the children every other weekend.
- [17] Shortly after the parties' separation, Mr. Klebe began making child support payments of \$1,279 per month. This amount was adjusted after the parties attended at a Judicial Case Conference (JCC) on May 16, 2018 before Master Muir. By consent, the claimant was to pay interim child support in the amount of \$1,270 per month.
- [18] On July 16, 2018, the parties appeared before Master Keighley. He made an interim order for equal parenting time of the parties' biological children, on a week on/week off basis. The parties have continued to abide by that order, and they ask that it be made into a final order.
- [19] On January 28, 2019, Master Caldwell varied Master Muir's Order, such that the claimant's child support obligations were reduced on an interim basis to \$325 per month. The reduction in child support was made to reflect the current parenting regime as well as child support payments that were being received by Ms. Klebe from Mr. Phillips. Due to the lack of evidence tendered at the hearing, Master Caldwell "ballparked" the support amount.
- [20] The trial commenced in April 2019. The evidence portion of the trial completed April 12, 2019. Closing arguments were held over two days towards the end of June.
- [21] At trial, Ms. Klebe sought to purchase Mr. Klebe's interest in the former family home based on a March 2019 appraised value of \$680,000. Mr. Klebe was agreeable to Ms. Klebe purchasing his interest but only based on a May 2018 appraised value of \$758,000.
- [22] On August 19, 2019, Justice Brown issued his first Memorandum to Counsel/Parties in which he made certain financial orders, as follows:
- [2] The parties are at liberty to obtain a current joint appraisal. At this juncture, I find that the property should be listed for sale, with the parties sharing a joint conduct of sale.
- [3] If the property is sold, after payment of:
- i. the \$294,000 mortgage,
 - ii. the real estate commission;

- iii. the usual adjustments,
- iv. legal costs associated with the sale; and
- vi. amounts owed to the parties' respective parents:

1. a payment of \$4,920.26 to the claimant's father; and
2. a payment of \$4,820.26 and \$3400 to the respondent's parents;

the remaining sale proceeds shall then be divided equally between the parties.

[4] Alternatively, the respondent may purchase the claimant's interest in the matrimonial home based on a value of \$740,000; assuming the respondent is able to payout the mortgage and one-half of the amount owed to the claimant's father. In that event, the claimant shall pay from his buy out one-half of the amount's owed to the respondent's parents.

[5] If the respondent does wish to purchase the claimant's interest in the property, she has 30 days to arrange to do so. If she requires a reasonable extension, not to exceed 14 days, she may apply for an order if the claimant does not agree to such extension.

[23] In response to a request from counsel, Justice Brown issued a second Memorandum to Counsel/Parties on September 4, 2019, in which he clarified matters addressed in the first Memorandum. The following orders were made:

[2] Para. 3(vi) of my August 19, 2019 memorandum is corrected, and should read as follows:

vi. amounts owed to the parties' respective parents:

1. a payment of \$118,151.00 to the claimant's father; and
2. payments of \$4,820.26 and \$3,400 to the respondent's parents;

The remaining sale proceeds shall then be divided equally between the parties.

[3] Further, I confirm that during the hearing the parties agreed the following debts would be paid:

- a. each party will pay one-half of the "Green" Visa (Exhibit #6), based on a total amount outstanding of \$2,896.38;
- b. the claimant will pay the respondent the sum of \$500.00, as one-half of the line of credit;
- c. the claimant will pay one-half of the property taxes that were in the total sum of \$8,691.68;
- d. each party will pay one-half of the "Gold Visa", based on a total amount outstanding of \$10,093.63;
- e. the respondent will pay the claimant one-half of his Visa (Exhibit #7) based on a total amount outstanding of \$5,000;

- f. the respondent will pay one-half of the claimant's CRA debt, based on a total amount of \$10,532.93;
- g. each of the parties will pay one-half of the outstanding MediCard debt owed to iFinance Canada and the claimant shall reimburse the respondent for one-half of the five monthly payments that she has made;
- h. there will be no adjustments for any amounts deducted by the claimant from prior support payments;
- i. each of the parties will retain their own vehicles and be solely responsible for any related debts; and
- j. the parties' unadjusted pensionable earnings under the Canada Pension Plan will be divided in accordance with the Canada Pension Plan Act.

[24] On October 25, 2019, I varied clause 5 of Justice Brown's first Memorandum, and granted the respondent 30 days from the date of release of these Reasons to purchase the claimant's interest in the former family home.

V. Parenting Arrangements

- [25] Parenting issues arise only with respect to the two youngest children. No parenting orders are sought with respect to GP, JP and KP.
- [26] To their credit, the parties were able to agree on what are often the more contentious issues related to parenting, such as the setting of a regular parenting schedule and decision-making authority over the children. Although Ms. Klebe originally sought final decision making authority, she is agreeable to a term which requires the parties to try to come to an agreement through use of a mediator.
- [27] Since July 2018, KK and CK have been alternating between the parties' homes on a week on/week off schedule, with exchanges occurring on Fridays. The parties would like to continue this schedule, though there is some dispute as to what should occur during holidays.

A. Legal Framework

- [28] The parties seek relief with respect to the children under both the DA and the FLA. Legal concepts in family law are described differently under the FLA and the DA. Despite the different terminology employed in the two statutes, the underlying purpose of the relevant provisions is identical.

- [29] While the DA does have paramountcy, in this instance, paramountcy is not triggered because the applicable provisions of the DA are not in conflict with the FLA. Both statutes require the court to consider only the best interests of the child in determining parenting responsibilities: *S.E.V. v. T.M.V.*, 2018 BCSC 30 at para. 38. In any event, the doctrine of paramountcy does not preclude applying the FLA in proceedings where a divorce was granted: *B.D.M. v. A.E.M.*, 2014 BCSC 453 at paras. 113-115.
- [30] For consistency and clarity, I will determine parenting arrangements with reference to the provisions contained in the FLA.
- [31] Section 37 of the FLA stipulates that in making an order relating to guardianship, parenting arrangements, and contact with the child, the court is to only consider the best interests of the child. To determine the best interests of the child, s. 37(2) of the FLA requires the court to consider all of the child's needs and circumstances, which include views of the child, the needs of the child, and the ability and willingness of each parent to satisfy the needs of the child.
- [32] Pursuant to s. 37(3), an order is not in the best interests of the child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- [33] Section 37(4) mandates that the court only consider a person's conduct when making an order respecting care and time with children only when that person's conduct "substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor".

B. Parenting Issues

- [34] The parties agree that their Christmas parenting time with the children should alternate each year. However, the claimant would like one parent to have the children from the afternoon of December 24 until sometime on December 27, whereas the respondent prefers a schedule where the children are with one parent from 10:00am December 24 until 10:00am December 26.
- [35] The differences between the parties' proposals are minor. However, the claimant's proposal would cause less disruption, as the children would be with one parent for three days rather than two.
- [36] I conclude that it is in the best interests of the children that the Christmas parenting time occur on an alternating basis. The following orders are made on the assumption that Mr. Klebe had the children on Christmas day in 2019: in even numbered years, the children are to spend Christmas with the respondent, from 12:00pm December 24 until 12:00pm December 27, and in odd numbered years, they are to spend Christmas with the claimant, from 12:00pm December 24 until 12:00pm December 27.

- [37] The claimant also asks for an order that both parties execute general travel authorizations and that both parties have the children for two 14-day periods of time per year for holidays, provided that the other parent is given at least 90 days' notice.
- [38] Ms. Klebe is agreeable to providing the travel authorizations, but seeks an order that in the event that a parent wishes to take a child out of the province, that parent shall provide the other parent with a complete itinerary, phone number and addresses of the places that the child will be taken to.
- [39] In my view, the proposals made by both parties regarding travel and holidays are beneficial to the children, and are therefore granted.
- [40] Given KK's young age, the respondent would like to have FaceTime contact with him every Tuesday that he is with his father between 6:00pm and 7:00pm. Mr. Klebe is agreeable to such contact, so long as it is limited to one time per week, and at the instigation of the children.
- [41] I conclude that FaceTime contact with the other parent during the week that the children are not with that parent is beneficial to the children, and the manner proposed by the respondent is fair to both parties.
- [42] Neither party shall prevent a child from initiating contact with the parent that is not currently exercising parenting time.
- [43] In her Trial Brief, the respondent seeks an order restraining Mr. Klebe from smoking in the presence of the children, and from drinking alcohol during the children's waking hours when he is exercising his parenting time. Mr. Klebe denies having an alcohol problem. Mr. Klebe testified that he was aware that he should not be smoking around the children. Though he admits to smoking near the children when they are outside, he denies smoking when he is with the children in a closed room or a car. The respondent's evidence on these issues was vague and did not adequately explain why these orders were being sought.
- [44] There is insufficient evidence to suggest that Mr. Klebe has an alcohol problem, or that he smokes in a manner that puts the children's health at risk. As such, the conduct orders sought by the respondent in relation to Mr. Klebe's alcohol and cigarette consumption are denied.

C. Summary of Parenting Orders

- [45] There is no dispute that both parties love the children and are willing to and capable of providing KK and CK with a warm and supportive environment that satisfies all of their needs, including their physical, psychological and emotional safety, security and well-being.
- [46] I confirm that both parents are guardians of KK and CK as per s. 39(1) of the FLA. I make the following parenting orders pursuant to s. 45 of the FLA.

- [47] The parties are to share equally the parental responsibilities stipulated under s. 41 of the FLA. The parental responsibilities are to be exercised in accordance with ss. 42 and 43 of the FLA. In addition:
- a) Each party will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third party care givers.
 - b) Each party has the obligation to advise the other party of any matters of a significant nature affecting the child.
 - c) Each party has the obligation to discuss with the other party any significant decisions which have to be made concerning the child, including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of the child.
 - d) Both parties have the obligation to try to reach agreement on these major decisions.
 - e) In the event that the parties cannot reach agreement with respect to a major decision despite their best efforts, either party has the right to apply to court pursuant to s. 49 of the FLA for directions respecting an issue affecting the child.
 - f) Prior to either party bringing on an application regarding a disputed issue relating to the children, they shall undertake one mediation session with a mutually agreed upon mediator. The costs of the mediator are to be shared equally between the parties.
- [48] The parties are to equally share their parenting time with KK and CK on the following parenting schedule (the "regular parenting schedule") which may be altered by consent of the parties or further court order:
- a) On week 1, the father shall have parenting time with the children from Friday after school to the following Friday after school;
 - b) On week 2, the mother shall have parenting time with the children from Friday after school to the following Friday after school;
 - c) From 6 pm to 7 pm each Tuesday of the regular parenting schedule, the parent who is not exercising parenting time with the children is permitted to speak to the children by FaceTime, Skype, or other electronic or telephonic means.
- [49] The parenting schedule shall rotate each week subject to the following variations for special days and holidays:
- a) In even numbered years, starting in 2020, the mother shall have the children from 12:00pm on December 24, until 12:00pm on December 27.
 - b) In odd numbered years, starting in 2021, the father shall have the children from 12:00pm on December 24, until 12:00pm on December 27.

- c) The regular parenting schedule shall remain in force during the spring school break and summer school break, except that each parent will be entitled to have two 14-day periods of their choosing for uninterrupted time with the children, on a minimum of 90 days' notice to the other parent.
 - d) Despite the regular parenting schedule, the father will have parenting time with the children on Father's Day and his birthday, commencing from after school that day until start of school the following day, and the mother will have parenting time with the children on Mother's Day and her birthday, commencing from after school that day until start of school the following day.
 - e) Regardless of which parent has the children for their regular parenting time, the parties shall rotate each year, on an alternating basis, parenting time on Thanksgiving, Halloween, and the children's birthdays, beginning with the parent who is normally scheduled to have parenting time on the first occurrence of these days.
- [50] If the parenting time falls on a day that is not a school day, then start of the school day shall be interpreted to mean 9:00am, and end of the school day shall be interpreted to mean 4:00pm.
- [51] It is the responsibility of each parent to arrange to pick up the children for the commencement of their own parenting time.
- [52] All parenting time transitions shall be done at the children's school, except on days when the children are not in school, in which case transitions are to be done at the parties' homes or some other agreed upon location.
- [53] The parent who is exercising parenting time shall take the child to any extracurricular activity that falls during their parenting time. However, no parent shall enrol a child in an extracurricular activity that falls during the other parent's parenting time without the other parent's consent.
- [54] The parent who is exercising parenting time shall take the child to any medical appointment, dental appointment, or school-related event that falls during their parenting time. However, no parent shall book an appointment or confirm the child's attendance at an event that falls during the other parent's parenting time without that other parent's consent, except in an emergency, in which case the other parent must be notified forthwith.
- [55] Both parties shall execute general travel authorizations to permit the other parent to take the children out of country. In the event that a parent wishes to take a child out of the province, that parent shall provide the other parent with a complete itinerary, phone number and addresses of the places that the child will be taken to, at least one week before the expected date of travel.

VI. Division of Family Property and Debts

- [56] Division of property should be determined before a support claim so that the court can assess each party's means taking into account the property division: *Hsieh v. Lui*, 2017 BCCA 51 at para. 25; see also *Narayan v. Narayan*, 2006 BCCA 561 at para. 33.
- [57] As noted elsewhere, issues related to family property and family debt were resolved by the Financial Orders. Clause 3 of the second Memorandum, referenced above, sets out the orders agreed to by the parties resolving the division of various debts, and division of the pensionable earnings under the Canada Pension Plan. Pursuant to that agreement, each party is to retain their own vehicles and any debts associated with the same.
- [58] There is no issue with respect to the household contents, which were divided prior to the trial. Neither party seeks adjustments in relation to the same.

A. Summary of Financial Orders

- [59] Table 1 summarizes the family debts that have been divided by consent between the parties as encapsulated in the Second Memorandum:

Table 1: Family Debts by Consent

Item

Total Amount

Claimant

Respondent

Green Visa

\$2,896.38

\$1,448.19

\$1,448.19

Line of Credit

\$1,000.00

\$500.00

\$500.00

Property Taxes

\$8,691.68

\$4,345.84

\$4,385.84

Gold Visa

\$10,093.63

\$5,046.81

\$5,046.82

Gold Visa Business

\$5,000

\$2,500

\$2,500

CRA Debt

\$10,532.93

\$5,266.47

\$5,266.46

Medicaid*

Unknown

Total Debts*

\$38,214.62

\$19,107.31

\$19,107.31

Medicaid credit to Respondent

+\$481

-\$481

Total Adjusted Debt to Each Party

\$38,214.62

\$19,588.31

\$18,626.31

*Amount is subject to amount of outstanding Medicaid Debts.

[60] Justice Brown also resolved the financial issues related to the parties' largest asset, the former family home, as well as the parties' indebtedness to their parents.

[61] At trial and subsequent to trial, Ms. Klebe expressed a desire to purchase Mr. Klebe's interest in the former family home. Pursuant to the Financial Orders, the former family home was valued at \$740,000 for the purposes of such a buyout. After deducting a mortgage of \$294,000, the remaining equity is \$446,000, or \$223,000 to each party. In addition to deducting the usual legal and other costs related to the sale of the transfer of title or sale of property, the parties are to deduct the parental debts from their interests in the former family home.

[62] Table 2 illustrates the financial position of each of the parties after the total debts and assets have been divided pursuant to the Financial Orders.

Table 2: Net Assets

Item

Total Amount

Claimant

Respondent

Former Family Home

\$740,000

\$370,000

\$370,000

Mortgage

-\$294,000

-\$147,000

-\$147,000

Transfer or Sale Costs*

-Unknown

Randy Klebe

-\$118,151

-\$59,075.50

-\$59,075.50

Pegg & George Pede

-\$8,220.26

-\$4,110.13

-\$4,110.13

Total*

\$319,628.74

\$159,814.37

\$159,814.37

*Net figures will need to be adjusted to account for the costs associated with the transfer of Mr. Klebe's interest to Ms. Klebe, or sale costs.

[63] The calculations in Table 2 are based on the assumption that Ms. Klebe will be purchasing Mr. Klebe's interest in the former family home. In such case, the amount of legal or title transfer-related costs should be minimal. In the event that she does not wish to purchase his interest, pursuant to the Financial Orders, the property is to be listed for sale, with the list price determined by a current joint appraisal. Deducted from the sale proceeds then will be any real estate commission, legal costs, and the usual adjustments.

[64] After accounting for the debts in Table 1, and considering the parties respective interests in the former family home at Table 2, Mr. Klebe will retain approximately \$140,000 and Ms. Klebe will retain approximately \$141,000 in family assets.

B. ICBC Settlement

[65] At trial, the respondent sought an order that \$24,000 be credited to her. This figure represents the bulk of the money paid to her as part of a settlement of her 2008 motor vehicle accident (the "settlement funds"). Justice Brown's Financial Orders are silent on this issue, and as such it is addressed herein.

[66] Ms. Klebe asks that the settlement funds be deemed "excluded property" pursuant to s. 85(1) (c) of the FLA. Under the FLA, property owned by the spouses at the time of separation is categorized as either "family property" or "excluded property". All real or personal property owned by either spouse at the date of separation is broadly defined as family property under s. 84(1).

[67] Pursuant to s. 81 of the FLA, each spouse is presumptively entitled to an undivided half interest in all family property as a tenant in common, and equally responsible for family debt. These rights and responsibilities accord to the parties regardless of their respective use or contribution. The date on which property rights vest is the date of separation: *Cole v. Cole*, 2016 BCSC 716 at para. 22.

[68] "Excluded property" is property which presumptively remains with the owning spouse, and is not subject to division, except by operation of s. 96. Section 85(1) sets out various categories of exclusions. Included in these at (1)(c) is the following:

- (c) a settlement or an award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for
 - (i) loss to both spouses, or
 - (ii) lost income of a spouse;

[69] Section 85(2) places the onus on the spouse claiming the exclusion, to prove that the property qualifies as excluded property.

[70] Section 95(1) of the FLA allows the Court to order an unequal division of family property or family debt if it would be significantly unfair to equally divide such property or debt. Section 95(2) enumerates factors the court may consider in weighing an unequal division.

[71] Section 96 prohibits the division of excluded property, except as follows:

96 The Supreme Court must not order a division of excluded property unless

- (b) it would be significantly unfair not to divide excluded property on consideration of
 - (i) the duration of the relationship between the spouses, and
 - (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

[72] The motor vehicle accident occurred on August 17, 2008 (the "first accident"). Both parties were injured, though Mr. Klebe's injuries were minor. Ms. Klebe's primary injury was to her knee. She lost a few days of work, and recovered completely from the injuries sustained in the accident. She settled her motor vehicle accident claim for \$24,296.66 in April 2011. Ms. Klebe testified that the settlement did not include compensation for any wage loss.

[73] Mr. Klebe also received a settlement from the first accident which was expended on family debts, though his settlement was small. He does not seek an accounting for his settlement funds. He argues that Ms. Klebe should not be credited for her settlement funds, as they have long since been spent.

[74] Ms. Klebe acknowledges that all of the settlement funds from the first accident were spent during the course of the marriage. She did not track the precise manner in which the funds were expended but says that Mr. Klebe had agreed she would be reimbursed these funds. This was denied by Mr. Klebe. Both parties testified that the settlement funds were used towards payment of various family expenses and family debts, such as property taxes, family vacation, and approximately \$2,000 to \$2,500 towards the Randy Klebe debt.

- [75] The respondent relies on *Dragovan v Kirkvold*, 2017 BCSC 1482, in which Justice B.J. Brown granted an exclusion of settlement funds received by the respondent as damages for personal injury. However, in *Dragovan*, the Court had considerably more evidence supporting the exclusion than I do in this case. Based on the amount that could be traced into family assets, Justice B.J. Brown granted an exclusion of \$95,000 out of settlement funds of \$166,000. One of the assets was a Mustang which the court held was a depreciating asset. In rejecting the claim for exclusion for the purchase price of the Mustang (rather than its depreciated value), the Court relied on the principle that a party cannot look to other family property to make up the loss in value of excluded property which has depreciated in value since being brought into the relationship: *Remmen v. Remmen*, 2014 BCSC 1552 at para. 29.
- [76] Here, there is no clear or reliable evidence tracing the settlement funds into any family assets. The evidence of both parties was vague at best. No documentation showing the manner in which the funds were spent was produced. It would be speculation on the court's part to try to trace that money now into any of the family assets, absent concrete evidence showing how it had been expended.
- [77] Were I to nevertheless find that the respondent has met the burden of establishing that the settlement funds qualify as excluded property, by operation of s. 96(b) I conclude it would be significantly unfair not to divide the settlement funds. The money was used by both the parties for family purposes, such as vacation and paying for various family expenses. It has long been spent.
- [78] The respondent's claim for an exclusion also fails under a s. 95(1) analysis for an unequal division, as it does not meet the significant unfairness test.

C. Rings

- [79] The claimant originally argued that his own wedding ring and the respondent's engagement and wedding rings constitute family property. He wanted them to be valued and sold, and the proceeds of sale to be divided equally between the parties. By the end of trial the claimant had abandoned this claim. I conclude that the wedding and engagement rings do not constitute a family asset.

VII. Support Issues regarding the children

- [80] Support issues arise with respect to the four younger children. There is no dispute that the claimant is required to pay child support for his biological children. At issue is the quantum of support, whether any income should be imputed to either party, and whether there should be a set-off of the respondent's child support obligations.
- [81] With respect to the claimant's step-children, the respondent seeks child support for GP, who is now 16 years old, and JP who is now 19. No support is sought with respect to KP who is a few weeks shy of her 21st birthday.

A. Legal Framework

- [82] Child support is the right of the child. It survives the breakdown of the marriage and is intended to provide the child with the same standard of living which the child enjoyed when the spouses were together: *H.U.V. v H.M.W.*, 2008 BCCA 177 at para. 41.
- [83] The specific amount of child support that is owed may vary based on the income of the payor spouse, but the duty to provide support does not. This is reinforced by s. 147(1) of the FLA, which stipulates that each parent and guardian of a child has the duty to provide support.
- [84] Both the FLA (s. 150) and the DA (s. 15.1(3)) adopt the use of the Federal Child Support Guidelines, S.O.R./97-175 [CSG] to determine the appropriate amount of child support, which is based on the parties' incomes (the "Table Amounts"). Deviation from the CSG is allowed in limited circumstances: FLA, s. 150 and DA, s. 15.1(8).
- [85] Child support calculations are generally based on the previous year's income of each spouse: *J. (K.M.) v. N. (J.H.D.)*, 2014 BCSC 1895 at para. 114.
- [86] Sections 16 to 19 of the CSG distinguish between taxable income (often referred to as Line 150 income), and income for support purposes. Pursuant to s. 17(1) of the CSG, the court may consider income patterns or fluctuations to arrive at an amount that is fair and reasonable.
- [87] Section 19(1) of the CSG provides a non-exhaustive list of circumstances where the court may impute income to a spouse, such as when the spouse is intentionally under-employed or unemployed. The court has a broad discretion to impute income to either or both spouses for the purposes of determining child and spousal support, and is not limited by the restrictions set out in ss. 16-18 of the CSG: *Yeung v. Silva*, 2016 BCSC 1682 at paras. 43-45.
- [88] The guiding principles for income imputation which emerge from the authorities, are as follows:
- a) The court must have a rational and evidentiary basis for imputing income: *Windle v. Windle*, 2010 BCSC 18 at para. 88.
 - b) The onus lies on the party seeking to have income imputed to the other spouse: *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para. 35.
 - c) Bad faith is not required for a finding that a party is intentionally underemployed. What is required is a finding that the party is not earning to their capacity: *Beissner v. Matheusik*, 2014 BCSC 1785 at para. 37, *aff'd* 2015 BCCA 308.
 - d) When imputing income, the court must consider what is reasonable given the age, education, skills, health of the parents, and availability of work: *Yeung* at para. 47.

- e) A parent who chooses to work less than full-time must justify the choice by the needs of the children: Yeung at para. 47.
 - f) Limited experience and skills do not justify a failure to pursue employment: Fong v. Fong, 2011 BCSC 42 at para. 82.
 - g) A court may impute income where a person pursues unremunerated employment or unrealistic career aspirations: Fong at para. 82.
- [89] The overriding principle underlying income imputation is to make the fairest determination of income, having regard to the evidence.

B. Claimant's Income

- [90] Mr. Klebe submits that his income for CSG purposes should be set at \$35,110, based on his Line 150 income on his 2018 income tax returns. Ms. Klebe says that he should be imputed an income of \$60,000 or \$65,000, based on a 40-hour work week and an hourly rate of \$33. The wide divergence in their positions turns on four issues:
- a) Mr. Klebe's decision to change jobs following the separation.
 - b) Mr. Klebe's decision to work a 36-hour work week rather than a 40-hour work week.
 - c) Mr. Klebe's failure to take the steps necessary to obtain his journeyman plumber ticket which would increase his annual earnings.
 - d) Mr. Klebe's historical pattern of working "side jobs" to earn additional income.
- [91] During the parties' marriage, the claimant undertook a variety of jobs. Around February 2017, Mr. Klebe completed the education portion of his training and obtained his designation as a level 4 apprentice plumber. He began working as a plumber on a self-employed basis. For the most part he worked for one employer, but near the end of 2018, the work with this company slowed down. In short order, Mr. Klebe secured a job as a plumber with Metric Modular, a construction company in Agassiz. He continues to work there as an employee. Mr. Klebe is still a level 4 apprentice plumber. He earns \$25.62 per hour, and testified that he generally works 36 hours per week.

1. Job Change

- [92] I turn first to Mr. Klebe's historical earnings which are set out at Table 3.

Table 3: Claimant's Earnings

Year

Employment Income

Gross Business Income

Net Business Income

EI

Other*

Total (Line 150)

2015

45,397

Nil

Nil

8,908

325

54,631

2016

46,832

Nil

Nil

2,560

1,233

50,625

2017

Nil

60,066

40,972

4,608

3,100

48,680

2018

2,381

51,970

32,729

Nil

Nil

35,110

*includes Workers compensation benefits, T4A income, or apprenticeship completion grant

[93] The respondent contends that Mr. Klebe's decision to change jobs constitutes intentional underemployment and was motivated by a desire to avoid his support obligations. As noted elsewhere, bad faith is not required to establish intentional underemployment. The question is whether Mr. Klebe is working to his capacity.

[94] Mr. Klebe's decision to change employers in November 2018 was not unreasonable. I accept that his work was slowing down, and it made good sense for Mr. Klebe to find a more secure job.

[95] Even if Mr. Klebe had not changed jobs, there is no evidence to support the respondent's contention that his net earnings would have been even close to \$60,000, let alone \$65,000. Were I to accept that Mr. Klebe could have earned an additional \$8,400 in 2018 to account for 29 days that he did not work, this would only bring his gross earnings up to about \$60,000; his net earnings would still fall far short of the amount that the respondent asks me to impute to him.

[96] I accept Mr. Klebe's testimony that he has looked for a job that pays more than his current employment but has been unable to find one that is suitable. While there are jobs that pay more per hour in Vancouver, with his childcare obligations, and the driving and the gas it would take to get there, he does not believe that he would earn much more money. Mr. Klebe's evidence on this issue was credible: it was logical, consistent, and had an air of plausibility.

[97] It is evident from Table 3 that Mr. Klebe has never earned \$65,000 per year. Nor has the respondent established a reasonable persuasive basis for such a figure. Using his Line 150 income, the claimant's three-year average earnings prior to the separation are \$51,312.

[98] While Mr. Klebe did have gross earnings of \$60,000 in 2017, it would be unfair to calculate his CSG obligations based on gross earnings. The business deductions claimed by Mr. Klebe during his self-employment were generally reasonable and I am unable to conclude that they were used to artificially lower his income for the 2017 and 2018 years.

[99] I also disagree that the hourly rate that he was charging while self-employed should form the basis of his CSG income calculations. I accept Mr. Klebe's explanation that his hourly rate was higher while self-employed because of overhead expenses which he does not incur as an employee. Again this explanation was logical and consistent with general business practices.

2. Reduced Hours

- [100] The respondent argues that Mr. Klebe has a history of, and is capable of, working much more than 40 hours per week. This assertion is not supported by the evidence and is based on the respondent's erroneous interpretation of the pay stubs. It is true that some of his pay stubs show him working in excess of 80 hours in a pay period. Mr. Klebe explained that because he was paid on a monthly rather than bi-weekly basis, the pay periods may range anywhere from 10-12 days. I find his explanation credible and supported by the documentary evidence. When divided over the actual number of working days in a pay period, it is evident that Mr. Klebe worked on average 40 hours per week. Any fluctuations in the hours were reasonably explained by seasonal or weather patterns, market demands or holidays.
- [101] I turn then to whether Mr. Klebe should be imputed an income based on a 40-hour work week. Although his employer is on a 40-hour work week, Mr. Klebe says that his child care obligations prevent him from working more than 36 (or at times 38) hours per week. The claimant testified that he has to leave work early on average 4 hours per week to pick up the children from school. The two younger children are not in regular daycare and require someone to drop them off and pick them up from school, and provide before and after-school care.
- [102] The claimant testified that he lives in his mother's home and is generally home from work at 4:00pm. During the alternating week that the children are with him, Mr. Klebe's mother usually drops the children off at school, and brings them home in the afternoon. In addition, he has a number of people that help him out with the care of the children for the hour or so after school when he is not home. In light of this evidence, even if Mr. Klebe does leave work early for four hours per week, it is by choice rather than necessity. Mr. Klebe has put into place childcare arrangements that obviate the need for him to miss that much work.
- [103] I note also that if Mr. Klebe was leaving work early to pick up the kids from school, one would expect to see a measurable difference in the number of recorded hours worked during the weeks that he has the children in his care versus the weeks that he does not. Such evidence is absent and raises concerns about Mr. Klebe's credibility on this issue.
- [104] Having said that, it is reasonable to assume that there are times when Mr. Klebe has to leave work early to meet the children's needs. Mr. Klebe should not be forced to pay for the additional cost of child care, or rely entirely on his family and friends to provide care - no more than I am persuaded that the respondent should be compelled to do so.
- [105] I accept that Mr. Klebe has reduced his work week somewhat to meet his childcare obligations. However, I am unable to conclude that it has been reduced by four hours a week as claimed, nor that a reduction of that magnitude is justified by the needs of the children.

[106] In the circumstances, I find that it is not unreasonable for Mr. Klebe to miss about 4 hours per month to meet the childcare needs of the children. Anything beyond that is not supported by the evidence. As such, it is fair and reasonable to base Mr. Klebe's income for CSG purposes on a 39-hour work week.

3. Red Seal Ticket

[107] I turn now to the argument that Mr. Klebe's hourly rate should be based on the rate for a journeyman plumber, rather than the level 4 apprentice plumber job that he currently does. Mr. Klebe testified that as a journeyman plumber his rate would increase by at least \$2.38/hour to \$28/hour. If the hourly wage rate of a journeyman plumber is used, then Mr. Klebe's annual earnings increase by about \$4500.

[108] Despite having completed the qualifications to become a journeyman plumber, Mr. Klebe has not obtained his red seal. This is because his sponsor and former employer has refused to send in the paperwork for Mr. Klebe to obtain his red seal until Mr. Klebe pays his outstanding debt of \$1035.

[109] Mr. Klebe was not able to provide a good rationale for why he has not obtained his red seal certification. The debt has been outstanding since 2016 and is not insurmountable. Despite Mr. Klebe's assertion, I find that his failure to pay it is not supported by reasons of financial impecuniosity.

[110] Bearing in mind that child support is the right of the child, and that each parent has an obligation to meet his/her support obligations by working to capacity, I find that it is fair and reasonable to factor in Mr. Klebe's earning potential as a journeyman plumber when determining his income for CSG purposes.

4. Side Jobs

[111] There is no dispute that Mr. Klebe often performed side jobs during the marriage in order to supplement his income. While some such earnings were reported on his tax returns, others were not. This pattern continued following the separation, although the work remained sporadic. The claimant testified that in 2018, he earned approximately \$1500 to \$2000 of additional income that was not reported in his income tax returns for that year, but that he stopped taking side jobs in order to meet the needs of the children.

[112] While there is evidence that Mr. Klebe worked on side jobs up to 2018, I have insufficient evidence to support a finding that he continued to earn income from side jobs after the parties entered into a shared parenting arrangement. Further, I have already found that Mr. Klebe was required to reduce his working hours in 2019 to about 39 hours per week to meet the needs of the children. As such, it is not appropriate to add in additional income for side jobs.

5. Conclusion

- [113] Having regard to his age, qualifications, skills, health and availability of work, I conclude that Mr. Klebe took reasonable steps to work to his capacity in 2017 and 2018. I see no reason to deviate from his line 150 income amounts on his tax returns for both those years. As such, Mr. Klebe's CSG income for 2017 is set at \$48,680, and for 2018 it is set at \$35,110.
- [114] The evidence supports a finding that his work had slowed down such that his decision to change jobs at the end of 2018 to his current employment was reasonable. However, I find that Mr. Klebe failed to take reasonable steps to work to his capacity and income should be imputed to him for 2019.
- [115] Based on his current hourly rate of \$25.62, calculated on a 36 hour work week, Mr. Klebe's earnings for 2019 should be approximately \$48,000 per year. This is about \$10,000 higher than what the claimant projects his earnings will be for 2019. Mr. Klebe explains the discrepancy by the fact that he lost time from work in 2019 due to his participation in this litigation. Allowing for the fact that he was required to miss about 10-11 days due to this litigation, this would only reduce his anticipated income to about \$46,000.
- [116] The evidence supports a finding that Mr. Klebe is capable of working 39 hours per week at a rate of \$28/hour as a journeyman plumber. After reducing his income to account for missed work due to litigation, allowing for the deduction of the \$1035 debt to the employer for the red seal ticket, and accounting for any contingencies such as lack of availability of work or unanticipated additional time required to meet the children's needs, I conclude that it is fair and reasonable to impute income to Mr. Klebe of \$52,000 for 2019 for CSG purposes.

C. Respondent's Income

- [117] Ms. Klebe is a self-employed photographer. She has a high school education with some post secondary courses. She left her education when she became pregnant with her first child. Prior to her marriage to Mr. Klebe, she worked at London Drugs in the photo lab. Ms. Klebe worked at London Drugs for about five years, and then took a job with Coast Capital Savings as a bank teller. Her hourly rate increased over time to \$16.26. She left Coast Capital Savings in February 2014 to look after the children.
- [118] In her work as a photographer, Ms. Klebe mainly does photo shoots for weddings, graduations, and other life events. She has operated this business since about 2009, but with poor financial success. Ms. Klebe argues that it would be unreasonable and unfair to impute any income to her at this time, because she is not currently earning income as a photographer, she has spent three years out of the active labour market, and she is still recovering from motor vehicle accident-related injuries. In the alternative, the respondent asks that income be imputed to her in the amount of \$12,000 to \$14,000 based on part-time work at an hourly rate of \$12.65.
- [119] Mr. Klebe argues that the respondent is intentionally underemployed, and asks me to impute income to Ms. Klebe of \$30,000, based on 36 hours per week at \$16/hour.

[120] At issue are the following:

- a) The implications of Ms. Klebe's two motor vehicle accidents on her income earning capacity.
 - b) Ms. Klebe's desire to pursue her photography business despite her lack of success.
 - c) The impact of childcare responsibilities on Ms. Klebe's ability to work full time.
1. Motor Vehicle Accidents

[121] In addition to the car accident in 2008 from which she recovered many years ago, Ms. Klebe had two further motor vehicle accidents (MVA's). The first one occurred on May 24, 2017, about five months prior to the separation; the second one occurred January 6, 2019, about three months before the commencement of this trial.

[122] As a result of the May 2017 MVA, the respondent suffered various injuries, including injury to her low back and dislodgment of her left side breast implant causing nerve pain down the side of her body. A few weeks after the parties had separated, Ms. Klebe underwent surgery related to her dislodged breast implant. Her recovery from surgery took about 8-10 weeks, although some symptoms lingered for a longer period. A follow up surgery was scheduled for February 27, 2019, however it was postponed until after the trial due to the January 2019 MVA.

[123] Ms. Klebe attended various forms of treatment in 2018 and testified that she achieved about 80% recovery from her injuries prior to the third accident. She says her recovery was set back due to her third MVA, in which she suffered a number of injuries including a concussion.

[124] The respondent's family physician, Dr. Hirst, prepared a medical legal report dated March 6, 2019. He noted ongoing MVA-related pains in the respondent's low back and left arm and shoulder. With respect to prognosis for full recovery, Dr. Hirst opines at page 4 that:

most of [the respondent's] difficulties with her shoulders and arms will improve with time and a dedication to her exercise program. It is difficult to estimate the length of time when she will achieve near normal capabilities but would certainly allow another 6 months before we could estimate a longer recovery time. The lower back injury with the spondylolisthesis is likely to be an ongoing problem with recurrence of low back pain. In future she will have to dedicate to her exercise program and core strengthening to minimize the symptoms.

there should be improvement in all of her soft tissue injuries but the lower back pain may be persistent over time and cause recurrent lower back pain. It is expected that the surgical management of her left breast prosthesis will be successful.

[125] Dr. Hirst concludes that:

Both of these motor vehicle accidents have caused difficulties in her day-to-day activities, noting that she has had to limit her work as a photographer and currently is unable to work. She is having difficulties with duties at home including cooking duties and housecleaning. I would expect the patient to be able to return to all of these preaccident activities over the next several months.

[126] Though she had returned to work doing her photography shortly following the second MVA, the respondent said that she was unable to work to capacity due to her injuries. By the time of trial, Ms. Klebe testified that she was still facing restrictions in her ability to work. She had difficulty completing shoots longer than three hours in duration, and problems carrying the heavier photography equipment.

[127] Mr. Klebe contends that the respondent's evidence about her physical limitations is not credible. He points to social media posts suggesting her involvement in arduous physical activities during the time that she says she was not capable of working.

[128] I agree that the social media posts, as well as other inconsistencies in Ms. Klebe's evidence, bring her credibility seriously into question. Consequently, I am unable to conclude that her injuries are as disabling as she claims. However, when measured against the medical evidence, I am persuaded that the respondent was restricted in her ability to earn an income in 2017 and 2018 in all types of employment. I also find that she continues to have some physical restrictions which are affecting her ability to work full-time as a photographer. However, the evidence does not support a finding that Ms. Klebe is physically restricted from performing other jobs that are reasonably available and suitable having regard to her age, skills, and qualifications, as noted below.

2. Photography Business

[129] It was not until 2014 that the respondent started to pursue her photography career more seriously, albeit with the restrictions that come with being a full-time homemaker. Aside from the family being able to enjoy additional vacations, there was very little financial benefit from this enterprise. In the two years prior to the accident, her gross revenue from the photography business was around \$11,000. But with expenses of almost the same amount, she made a profit of only \$137 in 2015, and \$1,526 in 2016. Following the accident, Ms. Klebe reported a business loss of \$4,457 in 2017, and a further loss of \$1,026 in 2018.

[130] Ms. Klebe explained her childcare responsibilities were the reason for her lack of financial success as a photographer in 2015 and 2016. She says her business was growing prior to the May 2017 MVA, and she would have been able to turn a profit had the two accidents not occurred. It is her firm belief that given time and following full recovery from her injuries, she will be able to turn her photography business into a financially successful enterprise. As such, the respondent has decided to continue pursuing her photography business to the exclusion of any other remunerative employment.

- [131] There was a woeful lack of evidence about how much Ms. Klebe could reasonably be expected to earn as a photographer when she is fully recovered. She offered only that she believes that when she has fully recovered, she will be able to generate a reasonable income in the photography business. She did not define what she meant by reasonable.
- [132] While pursuing the photography business may serve the respondent's personal goals, I conclude that it does not meet the children's financial needs and the respondent's shared obligation to provide for those needs. Ms. Klebe is obliged to find remunerative employment so that she can earn to her capacity.
- [133] The respondent has had ample opportunity to try to make her photography business into a successful enterprise. Simply put, her continued pursuit of this profession is not justified by her historical earnings or by her testimony at trial. Ms. Klebe may have good reasons for why the business has not succeeded, and it is possible that in time, she will be able to make a "reasonable" living as a photographer. However, without something more tangible than her aspirations, I am unable to conclude that pursuing this goal will meet her duty to provide for her children. The children should not have to bear the brunt of the uncertainty that comes with Ms. Klebe's decision to pursue what has thus far been non-remunerative employment.
- [134] I also have concerns about the respondent wanting to pursue the photography business given her current health. Ms. Klebe testified about her current physical limitations in performing her photography work. These would mitigate against her physical ability to work as a photographer until she has achieved further recovery.
- [135] Whereas her injuries pose challenges in her ability to earn a reasonable income as a photographer, no such restrictions are proven with respect to other employment. I am not persuaded that her injuries impair her ability to work in all jobs that are within her transferable skills, work experience, education, and qualifications.
- [136] Ms. Klebe has work experience at London Drugs and Coast Capital Savings. Pursuing similar types of jobs would obviate the need for training or upgrading of her education. Indeed, Ms. Klebe testified that her training for the bank teller job was provided while on the job. Ms. Klebe testified that she could do the bank teller's job provided that she could have a chair to sit on. There is no indication that she would not get this accommodation if she asked for it.
- [137] In my view, her inability to secure any other employment is due to her lack of serious effort to try to find alternative work, rather than her absence from the workforce or her lack of skills or qualifications. I am unable to conclude that she needs re-training to re-enter the work force in some other capacity than photography.

[138] I conclude that Ms. Klebe is intentionally underemployed and that income should be imputed to her. Having regard to Ms. Klebe's age, qualifications, skills, health and availability of work, I find that she is capable of earning at least \$14-15/hour, or \$30,000 per year.

[139] I turn now to whether the needs of the children justify Ms. Klebe working less than full-time hours.

3. Childcare and Ability to Work

[140] Ms. Klebe argues that at best, she can only work on a part-time basis as she does not have affordable daycare or family to help take care of the children before and after school. As such, she asks that any income imputed to her be for part-time employment only, i.e., between the hours of 9:00am to 2:00pm, which would allow her to drop off and pick up the children from school.

[141] The respondent does not dispute that daycare can be cost prohibitive, but argues that Ms. Klebe has a duty to look for a cheaper alternative to daycare, such as babysitting or the assistance of her family or friends. Had she done so, he says that she would be able to afford childcare and work full-time. Aside from the theory that Ms. Klebe could obtain cheaper childcare through baby-sitting, I do not have any tangible evidence supporting this contention.

[142] I accept Ms. Klebe's evidence that she cannot afford before and after school care, and is unable to rely on the help of family and friends to watch the children while she is at work. I agree that Ms. Klebe's childcare responsibilities restrict her capacity at this time to earn an income on a full-time basis. Working part-time will also allow her time to recover fully from her injuries and address any reduced ability to work full-time due to any current physical restrictions. Although the period between 9:00am to 2:00pm constitutes 25 hours per week, I find that it is reasonable to take into account the fact that Ms. Klebe may have unpaid breaks and may not be able to find employment which matches the precise hours she is available.

[143] For 2018 and 2019, income is to be imputed to Ms. Klebe on the basis of part-time employment of 20 hours per week.

4. Rental Income

[144] Following the separation, Ms. Klebe had income from renting her basement suite. The suite has been steadily rented, vacant perhaps five months of the entire duration that the suite has been available. In September 2018, she raised the rent from \$975 per month to \$1,000.

[145] The respondent's 2018 income tax return declares gross rental income of \$10,000, with expenses of \$494. Her net rental income for 2018 was thus \$9,506. When accounting for her business losses in the photography business, Ms. Klebe's tax return shows a total income in 2018 of \$8,479.

[146] Allowing for deduction of expenses, and for contingencies such as periods of time where the suite might not be rented, I impute \$10,000 as the net rental income to the respondent for 2019.

5. Conclusion

[147] Based on the medical and other evidence it is reasonable to conclude that the respondent's accident-related injuries prevented her from earning income for the better part of 2017 and a portion of 2018, even on a part-time basis. While she recovered sufficiently to return to work in 2018, I accept that she maximized her earnings in that year given her injuries. I set her CSG income for 2018 at \$8,479.

[148] However, I am unable to conclude that Ms. Klebe earned to her capacity in 2019. Ms. Klebe was capable of working 20 hours per week. At 20 hours per week with a rate of \$14.50/hour, she could earn \$15,000.

[149] Having regard to her age, education, skills, health, and availability of work, I find that it is fair and reasonable to impute an income to Ms. Klebe in the amount of \$12,000 for 2019. This allows for contingencies such as Ms. Klebe requiring time off for health-related reasons (e.g., her pending corrective surgery for her breast implants) or availability of work.

[150] After adding in the rental income of \$10,000, I set Ms. Klebe's income for CSG purposes for 2019 at \$22,000.

D. Support for Biological Children

[151] The parties agree that the biological children are children of the marriage and entitled to support as long as they qualify under the DA. Mr. Klebe is the payor parent with respect to child support for KK and CK prior to July 2018. Following the implementation of the shared parenting regime in July 2018, both parents incur support obligations with a right of set-off to the parent who has the greater support obligation.

E. Support for Step-children

[152] When Mr. Klebe consented in May 2018 to pay interim child support of \$1270/month, all four children were living primarily with Ms. Klebe. In December 2018 he learned that Ms. Klebe had been receiving child support from the children's biological father. Mr. Klebe successfully had his own child support obligations reduced to \$325/month by court order in January 2019.

[153] Mr. Klebe does not dispute that he has financial obligations towards the step-children. Rather, he submits that the obligations of the children's biological father supersede his own, and that he should not be obliged to pay child support or section 7 expenses from the date of separation onwards. He argues that any child support he has paid for the step-children constitutes an overpayment for which he should be compensated. He postulated that this figure was over \$5,500 by the time of trial.

1. Legal Framework

[154] The key consideration in determining child support obligations of parents and step-parents is to preserve the standard of living enjoyed by the children during the period of cohabitation: *Sullivan v. Struck*, 2017 BCSC 816 at para. 17, quoting *H.U.V.* at para. 41.

[155] Pursuant to s. 11(1)(b) of the DA, the court must satisfy itself that reasonable arrangements have been made for the support of any children of the marriage before a divorce can be granted.

[156] Under s. 2 of the DA, a "child of the marriage" is defined as follows:

2. (1)

child of the marriage means a child of two spouses or former spouses who, at the material time,

- (a) is under the age of majority and who has not withdrawn from their charge, or
 - (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life;
- (2) For the purposes of the definition child of the marriage in subsection (1), a child of two spouses or former spouses includes
- (a) any child for whom they both stand in the place of parents; and
 - (b) any child of whom one is the parent and for whom the other stands in the place of a parent.

[157] Section 146 of the FLA defines a "parent" and "stepparent" as follows:

"parent" includes a stepparent, if the stepparent has a duty to provide for the child under section 147 (4);

"stepparent" means a person who is a spouse of the child's parent and lived with the child's parent and the child during the child's life.

[158] Section 147(4) and (5) of the FLA sets out the duty of a step-parent to provide support for a child:

- (4) A child's stepparent does not have a duty to provide support for the child unless
- (a) the stepparent contributed to the support of the child for at least one year, and

- (b) a proceeding for an order under this Part, against the stepparent, is started within one year after the date the stepparent last contributed to the support of the child.
- (5) If a stepparent has a duty to provide support for a child under subsection (4), the stepparent's duty
 - (a) is secondary to that of the child's parents and guardians, and
 - (b) extends only as appropriate on consideration of
 - (i) the standard of living experienced by the child during the relationship between the stepparent and his or her spouse, and
 - (ii) the length of time during which the child lived with the stepparent.

[159] Section 15.1(1) of the DA governs child support awards. All child support awards must be made in accordance with the CSG, unless the court is specifically authorized to depart from the guidelines. Section 5 of the CSG permits such a departure in the case of step-children as follows:

Where a spouse against whom a child support order is sought stands in the place of a parent for a child, the amount of the child support order is, in respect of that spouse, such amount as the court considers appropriate, having regard to these Guidelines and any other parent's legal duty to support the child.

[160] These provisions were interpreted by Justice Groves in *Mancuso v. Weinrath*, 2005 BCSC 1606 at para. 21 to mean that "once the court determines that a spouse stands in the place of a parent, the court has discretion to determine how much the spouse must pay". At paras. 22-29 of *Mancuso*, Justice Groves delineates some guiding principles for the exercise of such discretion. I have summarized these principles as follows:

- a) the court should have regard to the objectives set out in s. 1 of the CSG, which are aimed at establishing fairness, efficiency, consistency and reducing conflict and tension between spouses;
- b) without displacing the duty of the step-parent to provide for the child, the biological parents should bear the primary responsibility for support of their children;
- c) the upper limit of the support obligation for the step-parent should generally be the amount set out in the CSG corresponding to the step-parent's income;
- d) the court may apply a structured approach to the exercise of its discretion, but it must avoid a formulaic approach and decide each case on its particular facts; and
- e) section 5 does not require the court to simply subtract the obligation of the natural parent to that of the step-parent - rather, the court should apply a broad approach to the factors that may be considered.

[161] Justice Groves referenced additional considerations for the exercise of the court's discretion, as noted by Master Powers in *Singh v. Singh*, 1997 B.C.J. No. 2195, such as:

- a) the condition, means, needs and circumstances of the parties and the children; and
- b) the relationship between the step-parent and the children, including the length of that relationship, whether it continues and the extent to which the children have come to rely on that person for support.

[162] In *E.G.P. v. S.L.P.*, 2009 BCSC 685 at paras. 131-132, Hinkson J. (as he then was) noted the distinction between the support obligations of a step-parent to those of a biological parent. As opposed to the inflexible obligation of biological parents, a step-parent's obligation is flexible and can be reduced to zero. However, where one of the biological parents is not present or is not able to pay support, the step-parent may have to pay the full Table Amount of support. In exercising the discretion to fashion an order that is "appropriate" under s. 5 of the CSG, the court must focus on the children and their needs.

2. Support from Biological Father

[163] When the respondent separated from Mr. Phillips in 2004, the children were all under six years of age. Mr. Phillips was not involved in the children's lives post-separation.

[164] In 2007, Ms. Klebe obtained support orders in the Provincial Court of Alberta against Mr. Phillips. Mr. Phillips did not pay the support as required. In 2009, Justice Yamanchi of the Alberta Court of Queens Bench cancelled all spousal support arrears that had accrued, and reduced child support arrears to \$30,000. He ordered Mr. Phillips to pay:

- a) \$695.54 per month as ongoing child support;
- b) his proportionate share of section 7 expenses; and
- c) \$100/month towards the child support arrears.

[165] Ms. Klebe testified that she received some support payments from Mr. Phillips in 2011, and sporadic payments thereafter. By 2018, Mr. Phillips' child support arrears had ballooned to \$83,858.

[166] Unbeknownst to Mr. Klebe, Ms. Klebe began to receive support payments from Mr. Phillips in August 2018, following her enrollment in the Family Maintenance Enforcement Program (FMEP). Mr. Phillips child support obligation at that time was \$526/month, although the payments Ms. Klebe received varied from \$512 to \$571/month. Ms. Klebe testified that she received payments for August, September, October and December 2018, as well as January and February 2019. During her testimony in April 2019, Ms. Klebe stated that she did not know if Mr. Phillips would continue paying beyond February 2019. However, during closing arguments in June 2019, her counsel advised the court that Ms. Klebe had received a further child support payment from Mr. Phillips in May 2019.

- [167] Despite this, Ms. Klebe argues that she cannot rely on receiving further child support from Mr. Phillips. She says she does not have the ability to undertake any enforcement action and denies knowing his whereabouts. Mr. Klebe says that the respondent has not tried hard enough to pursue Mr. Phillips. He says there is sufficient information for Ms. Klebe to locate Mr. Phillips to enforce the support order.
- [168] Ms. Klebe's failure to promptly disclose to Mr. Klebe that she had been receiving payments from Mr. Phillips causes me significant concerns about her credibility on this issue.
- [169] Ms. Klebe says that she was acting on legal advice to not disclose this information to the claimant. I find it implausible that a lawyer, as an officer of the court, would tell Ms. Klebe to hide material facts from the opposing party. Even if Ms. Klebe was given such advice, she had the wherewithal to know that it was improper to hide this information from Mr. Klebe, who was making child support payments predicated on the assumption that she was not receiving child support from Mr. Phillips. Ms. Klebe's failure to be forthright with the claimant leads me to conclude that she was intentionally withholding this information from Mr. Klebe in an effort to improve her financial position.
- [170] I am also troubled by the respondent's lack of candour during the trial. Her testimony regarding the amount of child support paid by Mr. Phillips and her efforts to pursue him was inexplicably vague. Although she admitted to receiving money from him between August 2018 and February 2019, she was unable to quantify these amounts. She supplied no objective proof of payments received from Mr. Phillips aside from a printout from FMEP showing only the December 2018, January 2019 and February 2019 payments.
- [171] During closing arguments, Ms. Klebe's counsel sought to rely on an email Ms. Klebe said she received from FMEP on May 16, 2019 in response to her query about the status of further support payments from Mr. Phillips. The email was not admitted into evidence and I can place no reliance on it. Even thus, the email does not advance the respondent's case. It is vaguely worded and provides little clarity about Mr. Phillips status with the FMEP program, what enforcement action would be taken by the Alberta authorities, or what enforcement options are available to Ms. Klebe to compel Mr. Phillips to meet his child support obligations.
- [172] Finally, I note that with little effort and shortly after Ms. Klebe registered with FMEP, Mr. Phillips re-commenced paying child support. Although he did not make all of the payments, he was nevertheless paying with a frequency that undermines Ms. Klebe's argument that he cannot be relied upon to pay any further child support.

3. Support Obligations of the Claimant

- [173] I have no difficulty concluding that Mr. Klebe's obligations as a step-parent are established, first by the fact that Mr. Klebe stood in the place of a parent for the step-children as contemplated by s. 2(2) of the DA, and second because Mr. Klebe contributed to the support of the step-children from the date of marriage until the date of separation, in contemplation of s. 147 of the FLA.
- [174] At issue is the amount of support and its duration, having regard to s. 5 of the CSG, the obligations of the biological father, and the conditions, needs, means, and circumstances of the parties.
- [175] I turn first to the duration of support for each of the step-children.
- a) KP
- [176] No claim for child support or section 7 expenses is made with respect to KP, who is almost 21 years old. Given KP's circumstances, it is common ground that Mr. Klebe does not have child support obligations to her. The evidence supports this conclusion.
- [177] KP was 18 years old at the time the parties separated, living on her own, and attending university. She had moved out prior to the parties' separation and has not lived with the respondent since. There is no dispute that KP was self supporting and paying for her own schooling through employment, scholarships, and student loans. For the past four summers, she has stayed with Mr. Klebe's parents free of room and board, while working at her summer job. She maintains a good relationship with Mr. Klebe's parents and currently attends UBC Okanagan at the Kelowna campus. There is no evidence that she is in need of financial assistance from her parents to obtain the necessities of life.
- [178] Having regard to all of the evidence, and the positions taken by the parties, I conclude that Mr. Klebe has no child support or section 7 expense obligations to KP.
- b) JP
- [179] JP was 16 years old when the parties separated and is currently 19. At the time of trial, JP was working as a waitress and had been accepted into the University of the Fraser Valley for the September 2019 session. Her plans were to live with the respondent while attending university. No claim is made for support for JP after September 2019.
- [180] The respondent has taken varying positions with respect to whether child support is being sought for JP prior to her commencing university.
- [181] There is a lack of evidence establishing that JP withdrew from her parents' charge prior to attaining her 19th birthday. Bearing in mind that child support is the right of the child, I conclude that JP is entitled to financial support from Mr. Klebe from the date of separation until she turned 19 in March 2020. No child support is payable following that date, as there is no evidence to suggest that JP was unable to withdraw from her parents charge or to obtain the necessities of life.

c) GP

[182] GP was 13 years old when the parties separated. He is currently 16 and still in high school. I find that GP is entitled to receive child support from Mr. Klebe so long as he is a child of the marriage under s. 2(1)(a) of the DA.

F. Amount of Child Support Payable

[183] I now turn to the question of the amount of child support payable for each of the children. The parties' respective Table Amounts are summarized in Table 4. Table 4 also accounts for the shared parenting regime with respect to CK and KK, as well as the termination of support for JP after March 2020.

Table 4: Summary of CSG Income and Table Amounts per Month

Name

2017

Nov to Dec

2018

Jan to Jun

2018

Jul to Dec

2019

Jan to Dec

2020

Jan to Jun

Claimant Income

\$48,680

\$35,110

\$35,110

\$52,000

\$52,000

CSG 4 Children

3 kids after Mar/20

\$1204

\$904

\$904

\$1277

^\$1277

1067

KK & CK

\$762

\$564

\$564

\$810

\$810

JP & GP

GP after Mar/20

\$442

\$340

\$340

\$467

^\$467

\$257

Respondent Income

Nil

\$8,479

\$8,479

\$22,000

\$22,000

*Set off Amount KK & CK

n/a

n/a

0

\$348

\$348

Due from Claimant for KK & CK

\$762

\$564

\$564

\$462

\$462

*shared parenting after July 2018

^the amount to March 2020

1. Amount of Support for KK and CK

[184] Mr. Klebe's total support obligation for KK and CK from the date of separation to the date of judgment is \$15,684, calculated as follows:

November to December 2017 at \$762/month = \$1,524

January to December 2018 at \$564/month = \$6,768

January to December 2019 at \$462/month = \$5,544

January to April 2020 at \$462/month = \$1,848

2. Amount of Support for JP and GP

[185] As noted, s. 6 of the CSG provides this court with the discretion to veer away from the Table Amounts with respect to support payable for the step-children.

[186] In considering the means, needs and circumstances of the parties, I have looked at the amount of money Ms. Klebe admits to having received from Mr. Phillips following separation. In the absence of documentation showing the actual amounts, I have picked \$550/month (which is between the two ranges she provided) to estimate the child support she received from Mr. Phillips. Thus, for four months between August and December 2018, Ms. Klebe received \$2,200 from Mr. Phillips. Between January and May 2019, she received \$1,650 for three months. These amounts total \$3,850.

- [187] In contrast, if Mr. Klebe was required to pay the full Table Amounts for the step-children in each of those years, this would amount to \$1,700 for five months from August 2018 to December 2018, and \$2,335 for five months from January to May 2019. This totals \$3,985. Thus, despite receiving support from Mr. Phillips on an irregular frequency, Ms. Klebe is in the same financial position that she would have been in if Mr. Klebe was obliged to pay full Table Amount support for all of the months during that time period.
- [188] I conclude that the standard of living enjoyed by the step-children when the parties were together can be maintained without Mr. Klebe's continued financial support. As noted in s. 147(5) of the FLA, Mr. Klebe's obligation to the children is secondary to that of Mr. Phillips.
- [189] Though Ms. Klebe argues that she cannot rely on continued child support payments from Mr. Phillips, the evidence suggests otherwise. Her modest effort in 2018 resulted in Mr. Phillips resuming payment of the child support almost immediately after she registered with FMEP. I also reject Ms. Klebe's contention that she does not have the financial ability to pursue Mr. Phillips through legal means. She has enough equity in the family home to enable her to pursue him should she so desire.
- [190] I am also not moved by Ms. Klebe's suggestion that she could alleviate any concerns of over-compensation by providing Mr. Klebe with a printout from FMEP every three months, to allow him to deduct any money she receives from Mr. Phillips. This gives her very little incentive to pursue Mr. Phillips. Further, such an arrangement will only serve to prolong the tension and conflict between the parties. It is in the long-term best interests of all the children that there be a clean break between the parties.
- [191] The evidence supports a finding that with some diligence, Ms. Klebe should be able to recover an amount equivalent to but likely greater than the maximum Table Amount for Mr. Klebe. While I accept that there may be months where Ms. Klebe may have difficulty collecting from Mr. Phillips, given the size of his support obligations, even with some missed payments, she stands to receive more money from Mr. Phillips than what Mr. Klebe would be obliged to pay under the Table Amounts. This is without accounting for the large amount of retroactive support that Mr. Phillips still owes her. Most of that support obligation was accumulated during the time that Mr. Klebe was supporting the children in spite of Mr. Phillips obligations.
- [192] I conclude that it would be unfair and unjust to require Mr. Klebe to pay any child support for the two step-children after July 2018, when Ms. Klebe started receiving support payments from Mr. Phillips.
- [193] From the date of separation to July 2018, Mr. Klebe is required to pay child support for GP and JP, after which his monthly support obligation for both children is reduced to zero. This support obligation totals \$3,264, based on his full Table Amounts using Mr. Klebe's CSG income for the requisite year, as follows:

November to December 2017 at \$442/month = \$884

January to July 2018 at \$340/month = \$2,380

[194] To address the possibility that Ms. Klebe is unable to recover any further support from Mr. Phillips, Mr. Klebe's child support obligation towards GP may be reviewed in July 2021, on application by the respondent. To that end, the respondent shall take all reasonable steps to enforce the child support court orders pronounced in Alberta requiring Trevor Phillips to pay retroactive and ongoing child support for GP, JP, and KP.

3. Adjustments for Child Support

[195] An adjustment of child support is justified based on the child support order that I have made pursuant to these Reasons.

[196] The parties did not provide a calculation of how much support Mr. Klebe has paid to the date of trial. I have therefore calculated the adjustments for child support on the assumption that Mr. Klebe has made payments in accordance with the agreements and court orders. In the event that I am wrong, the parties are at liberty to adjust the calculation of overpayments by consent, failing which they have leave to appear back before me to seek a correction.

[197] The total amount of support paid by Mr. Klebe to the date of judgment, is \$23,988, calculated as follows:

November 2017 to May 2018 at \$1,279/month = \$8,953

June 2018 to January 2019 at \$1,270/month = \$10,160

February 2019 to April 2020 at \$325/month = \$4,875

[198] Mr. Klebe's child support obligations for the same period total \$18,948. This results in a total overpayment of child support by Mr. Klebe of \$5,040. This amount will be set-off for amounts owed by Mr. Klebe for retroactive section 7 expenses.

4. Prospective Child Support

[199] The following orders are made regarding ongoing support of the children:

- a) KK, CK, and GP are children of the marriage as defined by s. 2(1)(a) of the Divorce Act.
- b) The claimant has no child support or section 7 expense obligations to KP.
- c) JP ceased being a child of the marriage as defined by s. 2(1)(a) of the DA on March 14, 2020, and the claimant has no support obligations towards JP after that date.
- d) The claimant's prospective monthly child support payment for GP is nil. This may be reviewed in July 2021 on application by the respondent in the event that Trevor Phillips does not meet his child support obligations.

- e) The respondent shall take all reasonable steps to secure child support payments from Trevor Phillips.
- f) The claimant's CSG income for 2020 is set at \$52,000, resulting in a child support obligation of \$810 per month for KK and CK.
- g) The respondent's CSG income is set at \$22,000 for 2020, resulting in a child support obligation of \$348 per month for KK and CK.
- h) Based on the shared parenting of KK and CK, the claimant is entitled to a right of set-off pursuant to s. 9 of the CSG. After set off, the claimant shall pay child support for KK and CK to the respondent in the amount of \$462 per month.
- i) For child support payments commencing July 1, 2020, the CSG income for both parties will be their imputed income for 2019, or the actual line 150 income from their 2019 income tax returns, whichever is greater.
- j) The parties are to exchange income tax returns and any related income tax assessments, by June 30 of each year.
- k) Child support payments shall be adjusted each year effective July 1, based on the parties' income tax returns from the previous year. The first review of child support is to occur in July 2021.

G. Section 7 Expenses

[200] The parties agree that Mr. Klebe should be responsible for his proportionate share of the section 7 expenses for KK and CK, on both a retroactive and prospective basis. However, there is some dispute with respect to which items constitute reimbursable section 7 expenses, and the amounts payable by each party.

[201] In relation to the step-children, Mr. Klebe argues that he should not be required to contribute either retroactively or prospectively to their section 7 expenses on the same grounds that were advanced in relation to child support.

1. KK and CK

[202] The respondent has established that she incurred the following expenses in 2018 with respect to CK:

- a) Eye examination - \$35.27;
- b) Glasses - \$389.91;
- c) Transportation costs to school - \$75; and
- d) Transportation costs to school - \$87.50.

- [203] Mr. Klebe is required to contribute towards the cost of the eye examination and the glasses. I do not accept Mr. Klebe's argument that the cost for the glasses is excessive. I also dismiss his concern that he was not consulted prior to Ms. Klebe incurring the expense. Whether or not the respondent consulted with Mr. Klebe prior to purchasing the glasses, I find that the glasses are a necessary medical expense for the child, and Mr. Klebe is responsible to contribute his proportionate share.
- [204] However, I agree with Mr. Klebe that he should not be responsible for the transportation costs for CK. Those expenses were incurred by Ms. Klebe for her benefit alone, on occasions where she was not able to attend to pick up the children herself. The parties are responsible for making their own arrangements to pick up the children while they are in that party's care.
- [205] The respondent has established that she incurred the following expenses with respect to KK:
- a) Eye examination - \$35.27;
 - b) Glasses - \$389.93;
 - c) Transportation costs to school - \$75;
 - d) Transportation costs to school - \$87.50; and
 - e) Dental expense - \$138.92
- [206] With the exception of the dental expense, all of the other expenses claimed for KK are identical to the ones claim for CK. For the same reasons I provided in the case of CK, I will allow the expenses for KK's eye examination and glasses, and disallow the expenses for the transportation costs.
- [207] The dental expense for KK arose after the separation but was incurred prior to separation. I find that it is a reasonable medical expense and Mr. Klebe should be required to pay his proportionate share.
- [208] In addition, Mr. Klebe is required to contribute on a proportionate basis to KK and CK's prospective section 7 expenses as long as they each remain a child of the marriage within the definition under s. 2 of the DA.

2. JP and GP

- [209] The respondent asks that Mr. Klebe contribute towards the section 7 expenses for JP and GP from the date of separation onwards. The respondent's position was somewhat inconsistent with respect to the claim for section 7 expenses. Taken at its broadest, the respondent's position is that Mr. Klebe should be responsible to pay the section 7 expenses for JP until July 2019, and for GP as long as he continues to remain a child of the marriage within the definition of the DA.

- [210] For the same reasons advanced under the spousal support claims for the step-children, Mr. Klebe argues that he should not be responsible for the section 7 expenses for the step-children following separation.
- [211] However, the situation with respect to section 7 expenses is materially different than that of child support. There is no evidence that Mr. Phillips has made any contribution towards JP and GP's section 7 expenses. Although the Alberta order did require that he share proportionately the children's section 7 expenses, I accept Ms. Klebe's evidence that she did not receive any contribution from Mr. Phillips for the section 7 expenses of the children during the marriage with Mr. Klebe, or after the parties' separation. Because the Alberta order does not include a specific amount of section 7 expenses, I accept that Ms. Klebe will not be able to easily enforce it against Mr. Phillips.
- [212] Having regard to the lifestyle enjoyed by GP and JP during the marriage, I find that Mr. Klebe should be responsible for his proportionate share of the section 7 expenses incurred post-separation for GP and JP.
- [213] The respondent claims the following section 7 expenses for JP:
- a) dentist - \$294.39;
 - b) optometrists - \$35.27;
 - c) school yearbook - \$47; and
 - d) driving lessons - \$733.95.
- [214] I conclude that all of the above listed expenses for JP are reasonable, and Mr. Klebe is required to contribute his proportionate share towards them. There was a reasonable expectation that Mr. Klebe would assist in paying for driving lessons for JP, given that KP had been provided with driving lessons when the parties were together.
- [215] Based on the evidence, Mr. Klebe's responsibility for section 7 expenses for JP is terminated as of July 1, 2019.
- [216] The respondent asks that the claimant pay for his proportionate share of the orthodontic expenses for GP totalling \$6,250. As at March 1, 2019, the respondent had paid \$4,410. The remaining amount was to be paid in eight equal instalments of \$230 per month.
- [217] I find that the orthodontic expense of \$6,250 for GP is reasonable, and Mr. Klebe is required to contribute his proportionate share.
- [218] In addition, Mr. Klebe is required to contribute on a proportionate basis to GP's prospective section 7 expenses as long as GP remains a child of the marriage within the definition under s. 2 of the DA.
- [219] The respondent shall take all reasonable steps to obtain court orders requiring Trevor Phillips to pay specified special expenses to the respondent for GP.

[220] The order with respect to prospective section 7 expenses for GP is reviewable by Mr. Klebe after July 1, 2021.

3. Proportionate Share

[221] The calculation of the parties' proportionate share of retroactive section 7 expenses was not a straightforward exercise. It was complicated by the fact that the DivorceMate formula does not fit the parties' unique situation.

[222] The CSG income for special expenses is to account for any spousal support received or paid by a party, and any governmental child care benefits for the children for whom the section 7 expenses are sought.

[223] The "with child support" formula in DivorceMate adjusts for governmental child benefits for the purposes of calculating the parties' proportionate incomes for section 7 expenses. However, it does this on the assumption that the parties are sharing benefits in accordance with their parenting arrangements. That was not the case here. Rather, in 2018 Ms. Klebe received all of the approximately \$18,500 in Canada Child Benefits (CCB) for the four children. This includes Mr. Klebe's share that he should have received (and the DivorceMate calculations assume he did receive) after the parties entered into a shared parenting arrangement for the two younger children. Ms. Klebe was still in receipt of Mr. Klebe's share until the trial date in 2019. Mr. Klebe testified at trial, that he had recently applied for his share of the CCB for KK and CK. I do not have any reliable evidence as to when he would start receiving his share of the CCB benefits, or the precise amount of his share.

[224] For the above reasons, it is not possible for me to come up with an exact calculation of the parties' proportionate shares for retroactive section 7 expenses. Doing the best that I can with the evidence I have, I have set Mr. Klebe's proportionate share of retroactive section 7 expenses for all four children at 75% and Ms. Klebe's at 25%.

[225] The section 7 expenses above total \$8,349.91, resulting in a payment of \$6,262.43 owed by Mr. Klebe to Ms. Klebe. After setting off \$5,040 in overpayments for child support, Mr. Klebe owes a net amount of \$1,222.43 to Ms. Klebe for retroactive section 7 expenses.

[226] For calculation of the parties' proportionate share of section 7 expenses from the date of judgment until June 2021, the CSG income for special expense calculations will be based on their imputed income for 2019, or the actual line 150 income from their 2019 income tax returns, whichever is greater.

[227] The parties' proportionate share of section 7 expenses is to be reviewed annually, with the first review to start in 2021, at the same time and in the same manner as the annual child support review.

- [228] Subject to written agreement of the parties or court order, the following will be deemed to be section 7 expenses towards which each party is required to contribute proportionate to their incomes as long as any of the children remain children of the marriage within the definition of s. 2 of the DA: dental, orthodontic, eye glasses and eye examinations, school fees, school trips, camps, medical costs not covered by medical services plan for extended health plans of either party, counselling, and speech therapy for KK.
- [229] Each party is responsible to cover their own cost of before and after school care for any of the children.
- [230] Where it is reasonably possible, each party shall notify the other party prior to incurring any section 7 expense, and obtain the other party's consent if the section 7 expense intended to be incurred is in excess of \$100. Where prior consultation is not possible for exigent reasons, the party incurring the expense must notify the other party as soon as possible and supply them with a copy of the receipt for the expense.
- [231] No party shall enroll the child in any extracurricular activity without prior written consent from the other party.

VIII. Spousal Support

- [232] Ms. Klebe seeks spousal support for a minimum of two years.
- [233] In accordance with s. 15.2(6) of the DA an award for spousal support is intended to: recognize the economic advantages or disadvantages to the spouses arising from the marriage or its breakdown; apportion between the spouses any financial consequences arising from the care of their children over and above any obligation for support of that child; relieve any economic hardship of the spouses arising from the breakdown of the marriage; and as far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time. This provision is virtually identical to that found in s. 161 of the FLA.
- [234] Consistent with these objectives, our courts have recognized three grounds for entitlement to spousal support: compensatory, non-compensatory and contractual: Bracklow v. Bracklow, [1999] 1 S.C.R. 420 at para. 15; and Chutter v. Chutter, 2008 BCCA 507 at para. 47, leave to appeal ref'd [2009] S.C.C.A. No. 41.
- [235] Orders for spousal support under the DA are made pursuant to s. 15.2, which states:
- 15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

- [236] The factors set out in s.15.2(4) require the trial judge to balance the circumstances of each spouse, bearing in mind the objectives of spousal support stipulated in s. 15.2(6), to achieve an equitable alleviation of the adverse consequences of the breakdown of the marriage: Bracklow at para. 36.
- [237] In making a spousal support order, the Court must find entitlement to receive spousal support, with the attendant liability to pay on the part of the payor spouse. Once entitlement has been established, issues of duration and amount arise.
- [238] The respondent seeks spousal support on both compensatory and non-compensatory (needs based) grounds. However, she concedes that the compensatory claim in this case carries less weight because she worked during part of the marriage and was only out of the work force for three years during the marriage.
- [239] The needs-based entitlement is advanced on the assertion that the respondent is earning minimal income from employment. It is argued that Ms. Klebe has to rely on child support, rental of a basement suite, and child benefits in order to meet her financial needs.
- [240] The claimant argues that the respondent is not entitled to spousal support on any grounds and that her claim should be dismissed. He submits that the respondent was not economically disadvantaged by the marriage. Further, he points to the lack of income disparity between the parties after factoring in rental income and child benefits, and the fact that Ms. Klebe is in a new relationship with a partner who provides her with financial support. It is argued that she enjoys essentially the same standard of living that the parties had during their marriage.
- [241] The parties did not provide any DivorceMate calculations with the income figures I have imputed. Nor did they provide me with a methodology for how to account for the parties' specific circumstances when determining income for spousal support purposes. For example, the fact that Ms. Klebe was in receipt of support from the biological father, with a concomitant reduction in support from Mr. Klebe, the change to shared parenting for only two of the four children, and Ms. Klebe's receipt of Mr. Klebe's share of government benefits.
- [242] Thus, to ensure that Ms. Klebe has not suffered any long-term financial repercussions on account of the marriage or its breakdown, and to address any economic consequences to Ms. Klebe of staying at home for three years to look after the children, I have considered all of the parties' financial circumstances following their separation.

- [243] I begin with the DivorceMate calculations. The "with child support" formula in DivorceMate adjusts for child support and child benefit payments to arrive at the parties' respective incomes for spousal support purposes. DivorceMate also allows for an adjustment where the recipient parent is receiving money from the biological father rather than from the payor parent.
- [244] Based on the parties SSAG incomes, the DivorceMate calculations result in no support payable to Ms. Klebe in 2017 or 2018. Rather than an income disparity favouring Mr. Klebe, these calculations suggest that Ms. Klebe's net disposable income is actually higher than Mr. Klebe's throughout this period.
- [245] With respect to Ms. Klebe's physical health and income earning ability, I note that any physical limitations that Ms. Klebe currently suffers, are due to the second accident, which occurred over one year after the parties separated. Thus, they cannot be said to be due to the long-term financial repercussions on account of the marriage or its breakdown.
- [246] I turn now to Ms. Klebe's living situation. Since June 2018 Ms. Klebe has been in a stable common law relationship with David McCallum, who is gainfully employed with an engineering company. They share expenses, with Ms. Klebe generally paying the mortgage and Mr. McCallum taking care of the groceries. Following Ms. Klebe's most recent MVA, Mr. McCallum has also helped with the mortgage payments and otherwise "helps her out" financially. Beyond this, it was very difficult to elicit evidence from Ms. Klebe about Mr. McCallum. She was vague and evasive when it came to questions about his financial circumstances and their financial arrangement. For example, though she admitted that she and Mr. McCallum have applied for a joint mortgage to purchase Mr. Klebe's interest in the former family home, Ms. Klebe professed not to know anything about Mr. McCallum's income.
- [247] Though Ms. Klebe contends that her common-law partner's financial circumstances are not relevant to spousal support considerations, the case authorities indicate otherwise. Both s. 9 of the CSG and s. 15.2(4) of the DA require the court to consider the "conditions, means, needs and other circumstances of each spouse". As such, while Mr. McCallum's income cannot be characterized as income that is available to Ms. Klebe, it is relevant to support considerations under the rubric of the "conditions, means, needs and other circumstances of each spouse": *B.P.E. v. A.E.*, 2016 BCCA 335 at para. 52; see also *C.N.G. v. S.M.R.*, 2007 BCSC 822 at paras. 47 and 48. See also *A.H.B. v. C.L.B.*, 2019 BCCA 349 at para. 37, where the court ordered production of the mother's new spouse's financial information on the grounds that it may be relevant to a full analysis pursuant to *Contino v. Leonelli-Contino*, 2005 SCC 63.
- [248] I conclude that when considering the conditions, needs, means and circumstances of the spouses, no spousal support is payable to Ms. Klebe. First, the DivorceMate calculations do not support a finding for spousal support. Second, any income disparity, if it exists, is due to a motor vehicle accident which occurred after the marriage and is unrelated to the

marriage or its breakdown. Third, Ms. Klebe is in another common law relationship and is financially supported by her new partner. Finally, there is no evidence that Ms. Klebe's standard of living following the separation is measurably different than it was prior to the separation.

[249] Ms. Klebe's claim for retroactive or prospective spousal support is dismissed.

IX. Divorce

[250] I am satisfied on the evidence and record before me that a divorce order should be granted pursuant to section 8(1) of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.). The requisite criteria for granting a divorce have been satisfied. Both parties want a divorce. There is no chance of reconciliation, and there has been no collusion. This divorce order will take effect 31 days from the date of this Order.

X. Costs

[251] Ordinarily, costs follow the event. In family cases, the party who has substantial success is entitled to their costs. It is my preliminary view that Mr. Klebe has had substantial success. I therefore propose to make the following costs order. Given that the claimant had substantial success, he is entitled to his costs at scale B as a matter of ordinary difficulty.

[252] If either party wishes to make submissions regarding costs, they have 30 days to do so, by providing written submissions up to a maximum of five pages in length. The responding party has 14 days from the receipt of these submissions on costs, to provide their response. Any reply submissions are to be provided within seven days of receipt of the response submissions. All submissions should be forwarded for my consideration, via email through SC Scheduling.

[253] Absent a party making submissions on costs, the costs order above will stand.

"Shergill J."

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