
CANADA / JUDGMENT

Krczizanowski v. Fieseler

2018 BCSC 1545

COURT

Supreme Court of British Columbia

DECIDED

15 June 2018

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Krczizanowski v. Fieseler,

2018 BCSC 1545

Date: 20180615

Docket: E108743

Registry: Kelowna

Between:

Tina Irene Krczizanowski

Claimant

And

Perry Stewart Fieseler

Respondent

Before: The Honourable Mr. Justice Branch

Oral Reasons for Judgment

Counsel for the Claimant:

J.R. Gordon

The Respondent, appearing in person:

P.S. Fieseler

Place and Dates of Trial:

Kelowna, B.C.

June 5-8 & 11-14, 2018

Place and Date of Judgment:

Kelowna, B.C.

June 15, 2018

- [1] THE COURT: When a case requires an interim week-on/week-off custody order for a motorcycle, it does not bode well for the trial. It is a clear signal that the parties have been unable to reach the usual level of pre-trial accommodations necessary to focus the issues. That said, the parties did make certain concessions during the trial that simplified the matter somewhat, but a large number of issues remain.

I. BACKGROUND

- [2] Tina Krczizanowski, the claimant wife, was born on January 30, 1968, and is currently 50 years old. She only completed schooling up to grade 10 as she was not a strong student. Prior to meeting the respondent she worked as a construction flagger and as a waitress/manager at a Boston Pizza restaurant in Saskatoon, Saskatchewan.
- [3] Perry Fieseler, the respondent husband, was born on December 15, 1960, and is 57 years old. Before they met he was working at a potash mine and as a farmer on his father's farm in Saskatchewan.
- [4] The parties met in or about June 1990 in Saskatchewan. They were living together by at least November 1990. The respondent followed the claimant to Calgary when she moved to that city in 1991. In Calgary the claimant continued to work at a Boston Pizza restaurant as well as another bar. The claimant supported the family while the respondent obtained his licence as an insurance salesperson. Once he obtained his licence he began work with Combined Insurance.
- [5] The parties have two daughters, A.F., born October 23, 1993, and S.J. born September 23, 1996. The claimant stayed home and took care of the children.
- [6] Eventually the respondent was able to secure a more favourable position with Canada Life in Red Deer. After about a year settling their housing situation in Calgary, the claimant moved to Red Deer as well.
- [7] In the 2001/2002 period, the family moved to Kelowna. The respondent continued to work for Canada Life, now as a marketing consultant. He was encouraging insurance salesmen from across the Okanagan, the Kootenays and Northern British Columbia to sell Canada Life's products, essentially in a wholesaler role. He had to travel extensively for this position. The claimant continued working at home caring for the children. They eventually purchased a condominium in West Kelowna on the Tsinstikeptum Indian Reserve No. 9 (the "Home").

- [8] Throughout their relationship the respondent was in general control of the parties' finances. The claimant had little control over the parties' financial situation until she started her own consignment business as discussed further below. The respondent would provide the claimant with funds as required.
- [9] In or around 2006, the respondent made certain investments in what turned out to be an illegal scheme operated out of Alberta. From the respondent's own evidence, it is clear that the claimant had little involvement in this investment. The claimant actually disclaims any knowledge of it. In particular, the claimant says that she has no knowledge of a \$100,000 loan said to have been made during this period to the respondent by one Kelly Mayo, the respondent's long-time friend, which funds were apparently put into this fraudulent scheme (the "Mayo Loan").
- [10] It does appear that the claimant had some knowledge that investments were being made, but I accept that she had little control or detailed involvement. I address the issue of the Mayo Loan in greater detail below.
- [11] S.J. struggled in school. It was determined that she had a relatively serious learning disability. By grade 4 the claimant started home schooling S.J. using distance learning programs. S.J. could only focus on school work over short periods. However, she enjoyed sports, particularly hockey, so her school day would be broken up between study periods and sports periods. The level of effort required for the claimant to educate S.J. was intense. This process carried through to 2011, S.J.'s grade 9 year, at which point S.J. went to Warner Hockey Academy in Alberta. S.J.'s hockey commitments were extremely heavy and expensive. But her efforts and her parents' efforts paid off in that S.J. became a national team gold medal winner in a major tournament.
- [12] S.J. returned home only at the end of grade 10 when Warner Hockey Academy indicated they were not sure they could graduate S.J. from high school in light of her academic limitations. The claimant arranged for special assistance that did eventually earn S.J. her high school diploma. S.J. was then offered a place at Mercyhurst University in Erie, Pennsylvania to play hockey. However, her scholarship could not be activated until her academic standing improved.
- [13] In order to get her on the hockey and scholarship track, she had to attend university for her first year at her family's expense. Although the claimant disclaimed full awareness of the serious financial implications of this family decision, I find that denial incredible, notwithstanding that the respondent largely controlled the purse strings. The claimant must have known that her daughter was attending a U.S. university without the benefit of a scholarship, and without the ability to play hockey, and that this would require a heavy financial commitment from the family. This becomes germane when I consider the pre-separation family debts accrued below. Thankfully, S.J. was provided sufficient academic assistance by the university so that her scholarship and her ability to play hockey did engage for her second year. S.J. now has one more year of university remaining.

- [14] In 2011, after S.J. moved to Alberta, the claimant started working for a clothing consignment business, making minimum wage. In 2012, under what she perceived as pressure from the respondent to help improve the family's precarious financial position, she decided to try to improve her earnings by starting a clothing consignment business called Me2U Consignment Boutique ("Me2U").
- [15] The business opened in September 2012. The business was not profitable during its first two years but its sales were growing such that she was hopeful that it was about to become profitable in June of 2014. However, in June 2014 a very large wrench was thrown into this plan. A car drove through the front of the business. This unusual accident resulted in a substantially damaged stock and a business interruption. An insurance claim is still ongoing, but its pursuit has been frustrated by lack of funds, including an unwillingness on the part of the respondent to help pay the required lawyer's fees. This accident effectively ended the business as the claimant could not afford to re-establish it without fresh funds. As detailed further below, the claimant eventually obtained a loan from a friend to pay off most of the outstanding debts of the business.
- [16] The parties agree that their separation date was August 7, 2015. However, the respondent continued to live in the Home until August 2016 when the claimant was given exclusive possession by court order. The Home was transferred to the claimant in 2017, again pursuant to a court order.
- [17] After the separation the respondent continued to work as an insurance marketing consultant until his dismissal in May of 2017. His relevant line 150 income over these years was as follows:
- 2015: \$123,746, of which \$123,479 was employment income;
 - 2016: \$147,871, which included \$130,729 of employment income and \$20,012 from cashing in RRSPs as a result of a CRA identified over-contribution problem; and
 - 2017: \$187,914, of which \$118,693 was employment income and \$71,914 was earned from a severance payment when he was let go by Canada Life.
- [18] The respondent was paid a severance of \$71,914.27 in 2017, and a further severance of \$71,914 in early 2018. The respondent is now working as a self-employed insurance salesman. He hopes to clear approximately \$20,000 doing this work in 2018 as he builds back up his clientele. His most recent F8 Financial Statements puts his 2018 projected income at \$91,914.
- [19] For her part, after the separation the claimant tried to work for Boston Pizza and a few other locations but she felt that she could not keep up with the pace or the amount of effort required, particularly given her diagnosis of rheumatoid arthritis. That said, there is only one doctor's note in the record discussing her ability to work, covering one three-month period over the period from June 24 to date.

- [20] She investigated several options for upgrading her skills, such as courses on human and community services, addiction counselling, and becoming a medical office assistant, but says that all of these courses were beyond her financial means. She did secure her "Serving It Right" certification so that she is able to return to serving alcohol if her arthritis permits.
- [21] The claimant was eventually able to find full-time work at Safeway as a cashier, although she says the required level of activity was hard on her arthritis and she eventually had to go off work. She was also unable to work from January until April of 2018 due to her arthritis, according to her doctor's note. Her income was only \$2,933 in 2015; \$3,210 in 2016; and \$12,072 in 2017, disregarding spousal support payments.
- [22] At the time of the trial she was employed by Otter Co-op in West Kelowna as a cashier. She is presently working about 32 hours per week at \$12.65 per hour. Her Form 8 financial statement says she is making \$9,594 annually. However, she is within a probationary period and says there is a reasonable prospect that she will be offered full-time work at the end of this period. The current position is not as strenuous as waitressing. Her arthritis is also under control with medication, although she says it could flare up if she works too many days in a row doing heavier duties.
- [23] The daughters' relationship with their mother has unfortunately broken down to the point where they speak very infrequently. A.F. is married and financially independent. The respondent says that S.J.'s scholarship does not cover all of her expenses and that he has been filling in the gap at a rate of about \$25,000 per year.
- [24] The family's assets and debts will be reviewed in necessarily painstaking detail below in the context of the required property equalization and division.
- [25] In terms of material court interventions prior to trial:
- a) On December 8, 2015, a without prejudice consent spousal support order was issued by Mr. Justice Skolrood requiring payment of \$2,500 per month by the respondent to the claimant.
 - b) On February 2, 2016, Mr. Justice Caldwell made an order that neither party was to dispose of any assets.
 - c) On April 27, 2016, Master Wilson placed the parties' motorcycle under the week-off/week-on custody order.
 - d) On August 5, 2016, there was an order by Mr. Justice Bowden ("the Bowden Order") that, *inter alia*:
 - i. The respondent reinstate the claimant as the sole beneficiary of any life insurance policy from which he had removed her as the beneficiary.
 - ii. The respondent forthwith provide written confirmation to the claimant through counsel that he has complied with the order regarding life insurance.

- iii. Counsel for the respondent respond to correspondence received from the claimant's counsel dated August 3, 2016 on or before September 16, 2016 at 4:00 p.m.
- iv. The parties have interim joint guardianship of S.J.
- v. The claimant have occupancy of the Home.
- vi. The parties communicate only by writing, text, email or through counsel, and
- vii. The Dodge Caravan be transferred to the claimant.
- e) On May 3, 2017, Mr. Justice Betton made an order that inter alia required that the respondent file an affidavit providing a response to the letter previously referenced in the Bowden Order.
- f) On July 28, 2017, Madam Justice Hyslop made an order (the "Hyslop Order") that, inter alia:
 - i. Lowered the without prejudice spousal support order from \$2,500 to \$1,500, but the \$1,000 savings from the previous order would be added to the arrears owing, and that if the trial did not proceed on October 2, 2017, then the respondent would resume paying \$2,500.
 - ii. Declared that S.J. was no longer a child and that earlier guardianship orders would be vacated, and
 - iii. Addressed the home as follows:

The claimant may purchase and the Respondent shall transfer all of his right, title and/or interest in [the Home] to the Claimant forthwith upon payment to the Respondent of one-half the equity in the [Home] as determined by an updated appraisal of current fair market value to be done as soon as possible by a jointly-appointed expert, Mr. Chris Roworth of "Okanagan Appraisals".

The purchase price paid by the Claimant to the Respondent shall be calculated as one half the said equity less the standard MLS Commission of 7% on the First 100,000 and 3.5% on the balance.

The Claimant and the Respondent shall each pay for one-half the cost of the updated appraisal.

The Claimant shall have forty-five (45) days following the receipt from Okanagan Appraisals by both parties of the updated appraisal to complete the transfer.

In the event completion does not occur within 45 days of said receipt of the updated appraisal then and in that event, the [Home] shall be listed for sale and sold.

II. ISSUES

[26] The parties require direction on a number of issues, specifically:

- a) What is the appropriate treatment of the family's assets and debts?
- b) Should an award be made for future spousal support?

- c) If so, in what amount and for what duration?
- d) What is the proper calculation of spousal support arrears?
- e) Should a fine be imposed on the respondent for failure to comply with court orders?

[27] At trial, the respondent made one major concession that simplified the trial. He confirmed that he was no longer seeking an order in relation to past or future child support for S.J. who, as noted above, had already been declared to no longer be a child through the Hyslop Order. Neither party was seeking to vary this order to seek guardianship of S.J.

III. DISCUSSION AND ANALYSIS

- a) What is the appropriate division of assets and debts?

[28] In *Remmem v. Remmem*, 2014 BCSC 1552, Mr. Justice Butler provided a useful summary of the property division regime:

[22] Part 5 of the FLA establishes the new regime for division of property and debt between separating spouses. Pursuant to s. 81(b), the starting point is that each spouse "has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt." Subject to s. 85 which deals with excluded property, family property includes all real and personal property owned by at least one spouse on the date of separation.

...

[24] Pursuant to s. 87, the value of family property must be determined as of the date of the hearing (unless parties have entered into an agreement) and must be based on fair market value. Section 95 provides the court with a discretion to order an unequal division of family property or debt if it would be "significantly unfair" to divide it equally.

[29] I review the property and debts alleged by either party to qualify for a consideration in the analysis below.

The Motorcycle

[30] Surprisingly, given the earlier need for a motorcycle custody order, this is one area where the parties were able to reach an agreement during the course of the trial. The parties agree that title shall be transferred from the respondent to the claimant, and the appropriate valuation be set at \$2,000.

[31] That said, there remained a complication in that the registration for the motorcycle could not be located, which ICBC apparently indicated was necessary in order to carry out the transfer. I was advised that ICBC required an order that the transfer should be allowed to occur in the absence of the registration, which I am prepared to make, subject to ICBC's right to apply to set aside this order if their instructions have not been adequately communicated to me. I also direct that both of the parties co-operate in the execution of any

further documentation required to effect the transfer.

The Home

- [32] The claimant says that the Home is no longer family property because it was transferred as a result of the Hyslop Order outlined above.
- [33] However, I see no declaration in that order that the Home would no longer be treated as family property. All family property will obviously be owned by one party or another at the time of the trial, so the fact that there was a transfer from one to the other is not determinative. Barring a contrary declaration in the order, the Home certainly meets the definition of family property in s. 84 of the Family Law Act, S.B.C. 2011, c. 25 [the Act], in that it was owned by one or both of the spouses on the date of separation. It also does not fit into any excluded property categories under s. 85. It is the claimant's burden to establish that it is excluded property.
- [34] I find that the Hyslop Order does not remove the Home from the equalization calculation. Rather, given the respective parties' situations and their inability to work together to maintain the Home, the court simply gave one party an ability to purchase the Home. Even this direction was not mandatory. The order also contemplated the possibility that the Home would not be sold to the claimant at all, in which case the funds that resulted would clearly have still been treated as family property at this trial.
- [35] I find that the reference to the potential transfer of the respondent's "interest" in the Hyslop Order was simply the respondent's legal interest for real property purposes and was not meant as a final declaration of entitlement for family law property equalization purposes. Furthermore, I note that in the claimant's application that led to the order the claimant relied inter alia on s. 88 of the Act which is found in Division 3 entitled "Before Agreement or Final Order is Made". Section 88 provides that:

A spouse may make an application to the Supreme Court under this Division at any time before a final agreement or final order is made in relation to a family law dispute respecting property division.

- [36] The reliance by the claimant on this provision makes it reasonable to assume that the order should be treated as interim only, at least insofar as property division and equalization is concerned.
- [37] The most recent appraisal of the Home values it at \$375,000. While it is true that the respondent has done nothing to enhance the value of the Home since separation, there is equally no evidence that anything the claimant has done has enhanced its value. As such, I see no reason why both parties should not share in the general market upswing now that we have reached the final equalization stage of the proceeding. Hence, I use \$375,000 as the value.

- [38] However, in order to ensure that the transaction effectuated pursuant to the Hyslop Order is fairly reflected in the equalization exercise, (a) I will be treating as an offsetting family debt such amounts that the claimant had to borrow in order to purchase the respondent's interest; and (b) I will not treat the respondent's prior mortgage on the Home as a family debt given that it was wiped out as a result of the transfer before trial.
- [39] As to ownership, neither party was seeking a change to the present arrangement whereby the claimant owns the Home.
- [40] I note that parking stalls came with the transfer of the Home and that their value is incorporated into this valuation.
- [41] The claimant made much of the fact that at one point in the litigation the respondent sought to sell the Home to his friend, Kelly Mayo. However, I see no reason why that effort is material to any of the issues remaining before the court, particularly as court approval was never granted for such a sale.

Me2U

- [42] I find that the Me2U business was clearly a family asset. It was a joint effort in that the parties put both financial resources and sweat equity into its creation and operation. This business has been wound down but still has a contingent asset in the form of a lawsuit against its insurers. Given that the claimant has been controlling the litigation and the respondent has declined to participate in its prosecution since the date of separation, in my view the most workable outcome is for both the control and fruits of this litigation to remain with the claimant alone. I do not think it is realistic for the parties to work together in the prosecution of this litigation given their continued animosity.
- [43] The respondent indicated that he was prepared to accept responsibility for one-half of the debts arising from the Me2U enterprise so long as the parties simply accepted the insurers' last offer of \$23,000. Unfortunately, this offer is no longer available.
- [44] For her part, the claimant suggests that this lawsuit should not be given any value. I find that this is overly pessimistic given that there was an offer of \$23,000 forthcoming at an earlier stage.
- [45] Absent a better means of valuing the lawsuit, I assign its gross value halfway between the parties' last settlement offers of \$78,500 and \$23,000 for a figure of \$50,750. But from that there must be certain deductions in order to derive a reasoned estimate of its net value. Specifically, for this purpose I assume that:
- a) Legal fees will be 25% of this estimated gross figure. I am aware that the matter is being pursued under an hourly rate retainer and that certain accounts have already been rendered, but I find that 25% is a suitable proxy for a reasonable fee that allows determination and closure in relation to the value of this lawsuit today.

- b) I assume that disbursements will be in the range of \$5,000, which includes an amount already owing to an accounting firm for preparation of a business loss report.

[46] This leaves a net valuation of the Me2U litigation asset of \$33,062.50.

The Dodge Caravan

- [47] The claimant is in possession and has title to a 2006 Dodge Caravan. The parties are agreed that this arrangement should continue. In terms of valuation, given that it has more than 300,000 kilometres on it and there was evidence that it requires approximately \$2,000 in further repairs, I find that it has no net value.

The Smartcar

- [48] The respondent is in possession of this vehicle. The claimant agrees that this vehicle also has no value and that title should remain with the respondent.

The Holiday Park Time Share

- [49] The parties jointly own a time share in Holiday Park. The claimant puts a value on the time share of \$1,000.
- [50] At trial the respondent did not contest that valuation. The claimant stated that she is content for the respondent to have sole title to the time share and the respondent confirmed he is prepared to assume such title. I agree that the time share should be transferred into the respondent's name alone, but he will pay any associated expenses in effectuating the transfer, including paying any outstanding arrears.
- [51] This order as to the arrears outstanding on the time share is appropriate given that the claimant paid the amounts owing in 2016.

The Rings

- [52] There are rings in the claimant's possession. At trial, the claimant confirmed that she is prepared to return the respondent's father's ring, as well as the respondent's work rings. Neither party ascribes a particular economic value to these rings so I do not factor them into the economic calculation.

The RRSP

- [53] The most recent valuation of the respondent's RRSP is \$111,231.87. I find that it is properly treated as family property.
- [54] The claimant notes that \$20,012 had to be removed from the RRSP after separation due to an over contribution problem. The respondent agreed that this amount should reasonably be added back into the value of the RRSP asset for valuation purposes, bringing the total RRSP valuation to \$131,243.87.

The Work Pension and any CPP Pensions

- [55] The respondent's work pension and any CPP pensions owned by either party should be divided pursuant to ss. 81, 84 and Part VI of the Act. The claimant suggests that I should direct that the respondent make specific elections in order to facilitate an immediate cash payment to her. There was far from sufficient evidence about the economic effect of the various pension elections available to the parties on separation for me to wade into this stream. Neither party proffered expert evidence. As such, I follow the usual course.
- [56] That said, I do allow the parties 30 days before the coming into effect of this order so that they can each consult with their financial advisors and Great-West Life (who holds the pension) in order to assess and determine if there is another mutually agreeable approach. I also make an order that the claimant has the right to speak to Great-West Life to make inquiries about available options on the division of any pension.
- [57] Failing such agreement, assuming the usual approach must be followed but the parties cannot agree on the precise outcome of the application of the standard Act provisions, I direct that following a pre-hearing conference they set an appointment before the Registrar for an assessment and issuance of a certificate as to the proper result, pursuant to Rule 18-1(2) of the Supreme Court Family Rules.

The Severance Payment

- [58] As part of his dismissal, Canada Life provided the respondent an amount of \$6,434.07 on account of holiday pay. Given that this amount would have been recorded in his income in the year of receipt and that the claimant is including that in her calculation of the spousal support amount payable, I find it is not appropriate to include it as an asset. A specific sum of money cannot be both an income and an asset.
- [59] Also, as part of his dismissal, Canada Life provided the respondent with \$27,496.94 which was said to be pay in lieu of benefits, including pension accrual, during the severance period.
- [60] Although there might arguably be an element of growth in the pension asset embedded in this payment, I was not presented with sufficient information to determine such an amount. I find that the burden has not been met to justify a further inclusion within the asset calculation.

The Life Insurance Policies

- [61] Not surprisingly, given his profession, the respondent had a series of life insurance policies.
- [62] Policy 5317 is a whole life policy initially owned by the respondent with S.J. as beneficiary with a face value of \$100,000. The best evidence presented at trial was that it had a cash surrender value of \$1,834.49 as of January 25, 2016. Given that the policy had a cash surrender value, I find it reasonable to treat this amount as a family asset. The respondent

suggested that he transferred ownership of this policy to S.J. in the summer of 2017. However, given that such a disposition would have been contrary to the court order set out above, I do not find that this disposition prevents me from ascribing a valuation for the purposes of the required equalization payment.

- [63] Policy 6415 is a term insurance policy owned by the respondent with a face value of \$250,000 and on which the claimant was shown as the beneficiary by February 8, 2017. However, as a term policy it has no cash value. I do not ascribe it a value in the equalization calculation.
- [64] Policy 6485 is a Universal Life policy owned by the respondent with a face amount of \$400,000. I note that this policy has no cash value so I do not ascribe it a value in the equalization calculation even though it technically qualifies as a family asset. However, it should be noted that the respondent agrees that he failed to restore the claimant as a beneficiary to this policy as directed by Justice Bowden when he made the change to another policy that came within its terms. He only made the change sometime later after having consulted with counsel. This issue comes up again when I assess the claimant's request for a fine below.
- [65] I set aside any orders controlling the respondent's future designation of beneficiaries of any of these policies given that we are now several years post-separation and the parties are entitled to closure and a final legal separation. The claimant suggested that the designations remain as security to ensure any payments due. However, as will be noted below, I find that the respondent's RRSP will be sufficient to cover any present amount owing and the respondent's support payment practices have not been so troublesome so as to merit an order for security.

Other Chattels

- [66] The claimant says that she had a set of golf clubs that are no longer in her possession and which she suspects the respondent removed. The respondent states that he has control over a set of ladies golf clubs that he is prepared to return to the claimant. I do not otherwise ascribe a value to these clubs.
- [67] The respondent sought to include within the family assets a \$10,000 valuation for the contents of the Home for which he says the parties paid \$30,000 originally. Taking judicial notice of the steep depreciation that occurs with household items and the fact that the respondent removed certain household contents himself, I find that there is no net valuation that need be applied to the equalization formula.
- [68] The respondent wants a second set of car keys returned. I make that order.
- [69] The parties are otherwise content for the contents in each other's possession to remain where they are presently.
- [70] This moves us to the alleged family debts

The Bremner Loan and Credit Cards 6557, 1916 and 5295

- [71] On October 24, 2017, the claimant entered into a loan agreement with Mr. Bernard Bremner in the amount of \$115,259 (the "Bremner Loan"). The claimant testified that this amount was used to:
- (a) pay off debts owed by Me2U, including credit card debt held by the claimant that embedded both Me2U expenses and family expenses. The Me2U debt included utilities, taxes and rent inter alia;
 - (b) facilitate the purchase of the respondent's \$43,770.73 in net equity in the Home; and
 - (c) pay her share of the various charges required on transfer.
- [72] The corollary to my finding that the Home should be treated as family property is that any loans attributable to the purchase of the respondent's net equity should correspondingly be treated as family debt.
- [73] As to that portion of the Bremner Loan used to pay off the debts of Me2U, I find that this qualifies as a family debt since it was used to preserve the family asset Me2U: Act, s. 86(b). I find that the fact that the two exposures were consolidated does not change their essential character. The claimant should not be punished for taking the necessary steps to manage the outstanding debts efficiently by securing one loan from Mr. Bremner: K.M.J. v. J.H.D.N., 2014 BCSC 1895 at para. 160. As noted above, the respondent did not dispute that the Me2U debts were family debts.
- [74] Specifically, the Bremner Loan was used to pay off credit cards held by the claimant with numbers ending 6557, 1916 and 5295 which had amounts owing of approximately \$10,974.15, \$2,739.18 and \$6,337.21 when they were paid off. The claimant testified that these cards were used for both personal and Me2U business expenses and were largely unused after her Me2U business was destroyed, as discussed above. The credit card balances would have been properly treated as family debts but, as the Bremner Loan was used to pay them off, I do not include them in the equalization math separately in order to avoid double counting.

Remaining Me2U Debt

- [75] Beyond the debts covered by the Bremner Loan, the claimant was responsible for an overdraft on her business bank account with Interior Savings. This debt was satisfied pursuant to a payment schedule established as a result of a Provincial Court Small Claims action that required her to pay \$1,351.60. This was properly treated as a family debt.
- [76] The claimant is still responsible for \$7,087 in rent that has not been paid to her prior landlord. This is properly treated as a family debt as well. I allocate that debt to her for payment.

- [77] The claimant gave evidence that the Canada Revenue Agency is demanding payment of a residual debt owing of at least \$5,364 which she associates with the Me2U business. I am prepared to accept this as a family debt.
- [78] The claimant shall ensure that both these two outstanding debts are paid within 30 days of the respondent paying the final net amount provided for below.
- [79] The claimant also suggested that the legal fees that have been charged in the Me2U litigation in the amount of approximately \$2,300 should be included as Me2U debts. However, my order above calculating a net value for the Me2U litigation has already taken into account the legal fees associated with that litigation in a manner that accrues to her credit. As such, including it again here would be double counting.

The Infinity Mortgage

- [80] This new mortgage was also taken out by the claimant to facilitate the purchase of the Home from the respondent. The Infinity mortgage is at \$217,000. I find that this amount qualifies as family debt as it was largely in substitution for the respondent's TD mortgage 6897 which was sitting at approximately \$250,000 at the time of separation and \$232,000 at the time of the transfer and which clearly would have qualified as a family debt had it still existed at trial.

RBC Credit Line 4762

- [81] This credit line was in the respondent's name. Although the claimant had no information about this line, this was not particularly surprising in that the respondent handled all money issues in the relationship. The respondent stated that it built up through normal family expenditures, particularly the heavy cost burden created by S.J.'s hockey career which took her to several countries and many camps as well as the cost of the first year of S.J.'s university career.
- [82] At or around the time of separation this credit line was at \$19,455 which is a family debt.
- [83] I conclude that any rises or falls in this account from that date up to the date of trial are not family debts but are on the respondent's own account. I apply this same approach to the other family debts below.
- [84] The claimant did not contest that this was a family debt but asked for an unequal division on the basis that the respondent's income was higher. However, the claimant's arrears of child support claim was also driven by the variation in income. As such there was an element of "double counting" being proposed by the claimant. In any event, I find that there was an insufficient basis proffered for the unequal division of this debt or any other of the debts held by the respondent which are discussed below.

[85] The claimant also suggests that an unequal division of the debt was justified because she was not fully aware of the heavy costs run up to fund S.J.'s education and hockey. This claim carries little weight. Although she might not have been aware of the particulars, she would clearly have been aware and understood that substantial costs were being incurred and there was no evidence that she ever raised an objection to these efforts. Indeed, I find that she was always supportive of S.J.'s efforts to pursue her hockey career to its fullest.

TD Credit Line 6775

[86] The same analysis applies to this credit line which was at \$53,349.56 at the time of separation. The claimant accepts that this was a family debt subject to her reallocation request which I have rejected.

RBC Credit Card 6668

[87] The same analysis applies to this credit card which was at \$14,193.12 at the time of separation.

TD Credit Card 9917

[88] The same analysis applies to this credit card which was at \$9,158.41 at the time of separation.

RBC Credit Card 4675 (now 6603)

[89] The same analysis applies to this credit card which was at \$1,842.36 at the time of separation.

The Mayo Loan

[90] The respondent says that he borrowed \$100,000 from his friend Kelly Mayo in 2006 and that this debt was still unpaid at the time of separation. He says this was an oral arrangement.

[91] Mr. Mayo commenced a claim against the respondent in respect of this loan on August 3, 2017. The claim alleges that the loan was supposed to be repaid by November 15, 2008. Mr. Mayo's claim also alleged that demands were made on unparticularized dates. It says that on June 1, 2017 the respondent acknowledged the loan in writing but this written acknowledgement was not produced at trial. The respondent agreed to a consent order for \$100,000, a mere eight days after the claim was filed on August 11, 2017. The respondent says that he used his severance payment to partially repay this loan and that the balance was paid from the funds received from the claimant when the Home was sold. However, the paper trail in relation to these repayments is very thin.

[92] The issue here is whether this is properly treated as a family debt. The respondent bears the burden of establishing this alleged family debt. I find that he has not met his burden in light of the following:

- a) The respondent did not call Mr. Mayo as a witness, from which I draw an adverse inference.
 - b) The respondent and Mr. Mayo have been friends since the beginning of the parties' relationship and the respondent lived with Mr. Mayo after separation. The prospect that the respondent would simply leave a \$100,000 debt outstanding to his friend for eight years without any effort at repayment at some earlier point is difficult to understand.
 - c) The suggestion that Mr. Mayo would find it necessary to hire counsel and formally commence litigation against his friend in order to recover the loan, as he did, is a red flag as to the genuineness of either the original transaction and/or the litigation and subsequent repayment.
 - d) Although there is a mysterious receipt for \$30,000 in the record, apparently paid to the claimant, dated either in 2006 or 2008, there is no indication of the identity of the payor and the claimant does not recall receiving those funds, and no record was shown of the deposit of these funds into any bank account.
 - e) The respondent provided no documentary evidence supporting the deposit of the alleged \$70,000 in additional funds paid to him by Mr. Mayo.
 - f) There are no documents supporting the loan, the alleged demands or acknowledgements before the commencement of litigation.
 - g) Any claim on the debt would have been extinguished and statute-barred by the date of separation under the applicable prior statute: Limitation Act R.S.B.C. 1996, c. 266, s. 9. This is supported by the decision in *Gavriel v. Gavriel*, 2017 BCSC 1653 at paras. 43-52. The triggering event was on November 15, 2008. The date of separation was August 7, 2015, more than six years later. Even an acknowledgment would only restart a limitation period under the applicable prior statute if it issued "before the expiration of the limitation period": Limitation Act, s. 5.
- [93] The suggestion is that the respondent acknowledged the Mayo Loan on June 1, 2017. However, that acknowledgment is suspicious. The respondent suggests he did it because, as a House Lannister character might declare on "Game of Thrones," a man always pays his debts. However, why did this man wait this long to feel overcome by his moral obligation? This is left unexplained. Furthermore, the respondent also had outstanding debts owing to the claimant that did not seem to trigger the same sense of honour. In any case, if in 2017 he decided that he had a moral obligation to repay his friend, this payment is no longer considered a family debt: *Gavriel*, at para. 52.
- [94] If I am wrong in refusing to treat the Mayo Loan as a family debt, I would exercise my discretion under s. 95(2)(d) of the Act to award an unequal division making the respondent solely responsible for this debt given that it is clear that the respondent entered into an improvident transaction on his own without any consent or consultation with the claimant both at the outset and when he finally determined that it was advisable to pay the loan.

Conclusion on Property and Debt Equalization

[95] As will be seen from the chart attached as Schedule "A", the equalization of the property and debts alone supports a payment of \$13,585.50 from the claimant to the respondent as the claimant is left in a net position of \$63,250.90 with the respondent at \$36,079.91. This preliminary calculation does not include the pension which will at some point result in funds coming back in the other direction from the respondent to the claimant. It also does not incorporate any monies owing from the respondent to the claimant on account of spousal support which are considered in this next section.

b) Should an award be made for ongoing spousal support?

[96] The claimant seeks an award for future spousal support. Under the Act, the relevant provisions are as follows:

Duty to provide support for entitled spouse

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

Objectives of spousal support

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

Determining spousal support

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

...

Orders respecting spousal support

165 (1) On application, the court may order a spouse to pay to a designated person the amount the court considers appropriate as spousal support after taking into consideration section 160 [duty to provide support for entitled spouse].

- (2) An application under subsection (1) may be made
 - (a) by either spouse or both,
 - (b) on behalf of a spouse, by a designated agency under the Adult Guardianship Act after an investigation conducted under Part 3 of that Act, or
 - (c) if the right to apply for an order under this section is assigned to a minister under the Employment and Assistance Act or the Employment and Assistance for Persons with Disabilities Act, by the minister to whom the right is assigned in the name of the government or the name of the person who made the assignment.
- (3) The court may not make an order respecting spousal support if the spouses have an agreement described in section 164 (1) [setting aside agreements respecting spousal support], unless all or part of the agreement is set aside under that section.

...

Matters that may be provided for in support orders

170 In an order respecting child support or spousal support, the court may provide for one or more of the following:

- (a) that payments be made periodically, annually or otherwise, for an indefinite or limited period or until a specified event occurs;
- (b) that child support or spousal support be paid respecting any period of time before the date the application for the order is made;
- (c) that payment of a lump sum be made, directly or in trust;
- (d) that a charge be registered against specific property to secure payment;
- (e) that a person who has a contract of life insurance within the meaning of Part 3 of the Insurance Act
 - (i) designate his or her spouse or child as a beneficiary, irrevocably or for the period designated by the court, and
 - (ii) either pay all premiums on the policy, or authorize his or her spouse to pay all premiums on the policy and to compensate the spouse for doing so;

- (f) that expenses arising from and incidental to prenatal care of a mother or child, or the birth of a child, be paid, except in relation to the prenatal care of a surrogate within the meaning of section 29 (1) [parentage if surrogacy arrangement];
 - (g) subject to section 171 (1) [support obligations after death], that a duty to pay child support or spousal support continues after the death of the person having the duty, and is a debt of his or her estate for the period fixed by the court.
- [97] In *Quaife v. Quaife*, 2014 BCSC 1418, Mr. Justice G.P. Weatherill held that the court should first consider the s. 161 objectives of spousal support, then consider the condition, means, needs and other circumstances of the spouses under s. 162. The analysis is a balancing act:
- [50] According to the Divorce Act (ss. 15.2(4)(6)) and the Family Law Act (ss. 161 and 162), the starting point in determining spousal support as applied to this case's facts is: (1) recognizing the economic advantage or disadvantage arising from the marriage and its breakdown; (2) relieving the economic hardship arising from the marriage breakdown; and (3) promoting the claimant's economic self-sufficiency. In passing, I note that all four children are adults and independent, so the Divorce Act, s. 15.2(6)(b) and the Family Law Act, s. 161(b) do not apply.
- [51] With these objectives in mind, I am required by the Divorce Act, s. 15.2(4) and the Family Law Act, s. 162 to look at the "condition, means, needs and other circumstances of each spouse".
- [52] This analysis is a balancing act that includes considering how long the parties lived together, the functions each party performed in the marriage, and any order, agreement or arrangement relating to supporting, expressed or implied, each spouses' needs and standard of living.
- [53] I must consider these factors and any other relevant factors in light of the spousal support objectives and determine what the fair and appropriate amount of spousal support should be: *Bracklow v. Bracklow*, [1999] 1 SCR 420. No hard and fast rule applies to every case. The determination is always fact specific.
- [98] Here, the claimant was generally responsible for caring for the children while they were growing up. Their daughter S.J. had special needs that required a great deal of focus and attention during the claimant's work day. There was no evidence that the respondent ever expected the claimant to do more work while he worked full-time while the children were growing up.
- [99] The claimant also supported the respondent while he obtained the insurance licensing that allowed him to pursue a lucrative career in the insurance industry (up to his recent dismissal).

- [100] The parties clearly came to an understanding that the claimant should primarily stay at home and that this would advance their interests as a family unit: *H.C.F. v. D.T.F.*, 2017 BCSC 1226 at para. 209.
- [101] As such, I find that there is a clear compensatory basis for the spousal support claim.
- [102] Turning to whether needs-based support is also supported, need is defined by both the marital standard of living and the other spouse's post-separation standard of living: *H.C.F.* at para. 212.
- [103] In this regard, I cannot conclude that the claimant's standard of living has degraded more than the respondent's. Indeed, an argument can be made that the respondent's standard of living has degraded further than the claimant's given that he was recently rendered unemployed and is living in his brother's one-bedroom "fifth wheel" trailer with his brother's girlfriend and his daughter S.J. As to health concerns, the claimant is suffering from arthritis but I do not find that it is sufficiently active at this time to be a material factor in the needs-based analysis. The respondent is also suffering from health concerns in terms of ACL problems that may require surgery.
- [104] As such, I do not find that there is a needs-based justification for support. I do find that a basis for entitlement support is made out, but on compensatory grounds only.
- c) What is the appropriate amount and duration of future spousal support?
- [105] To this end, we look first to the Spousal Support Advisory Guidelines, (the "SSAG"). The SSAG, unlike the Federal Child Support Guidelines, SOR/97-175, are not legislated. They are informal guidelines that are designed to assist the court in ensuring that like cases are treated alike while providing a space for the normal process of legal development. In *Yemchuk v. Yemchuk*, 2005 BCCA 406 at para. 64 the court approved the SSAG "as a useful tool to assist judges in assessing the quantum and duration of spousal support." The court described the SSAG not as law or expert evidence, but as a synthesis or compilation of the authorities that are the product of *Moge v. Moge*, [1992] 3 S.C.R. 813, and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420.
- [106] In *Redpath v. Redpath*, 2006 BCCA 338, the court suggested that an award that falls substantially outside the SSAG range should be explained:
- [42] Now that [the SSAG] are available to provide what is effectively a "range" within which the awards in most cases of this kind should fall, it may be that if a particular award is substantially lower or higher than the range and there are no exceptional circumstances to explain the anomaly, the standard of review should be reformulated to permit appellate intervention.
- [107] For purposes of the going-forward calculation, it is necessary to settle on income levels for the parties.

- [108] In terms of the claimant's income, the facts are reviewed above. I find that the respondent presently has the capacity to work full-time at \$12.65 per hour and she may well achieve this over the next two months when her probation expires for an annual amount of about \$26,000, based on 40 hours per week. However, I do apply a negative contingency for potential missed work due to flare-ups of her arthritis. Hence, I attribute an annual income for the claimant for future spousal support purposes at \$20,000.
- [109] In terms of the respondent's income, the claimant suggests that considering the respondent's strong historical earnings pattern, but tempering expectations in light of the fact that he was recently released from his position, an attribution of \$70,000 per year would be acceptable. I agree that this figure is reasonable.
- [110] Using these figures yields a SSAG mid-point proposal of \$1,823 per month of indefinite duration. I believe that such an award is appropriate based on the evidence presently available but I provide to both parties a right to seek a review in 24 months given that:
- a) the claimant indicated an interest in improving her skills but was previously prevented from doing so by the uncertainty of constraints in her financial situation. With these family law matters being resolved in a manner in which a lump sum will be coming to her, this may create an opening for pursuit of such retraining opportunities. Hence, there is a material possibility that within two years she may be able to bring herself up to a fresh income level; and
 - b) the respondent's situation is also in a state of flux having only recently been dismissed from his long-term position. Two years from now he will hopefully be restored to his prior earning pattern.
- [111] I order that the parties exchange their full income tax returns for 2018 and 2019, including attachments, as well as any assessments or reassessments for those years, on June 1, 2020. This will facilitate their assessment as to whether a review is justified. That said, I do encourage the parties to work cooperatively in relation to the need and amount of any adjustments rather than incurring the time and expense of future court applications.
- [112] I note that the claimant requested that a review occur in 12 months. However, in my opinion, given the intensity of this litigation, resulting in no less than 115 court document filings in less than three years, both parties need some judicial encouragement to take a "breather" from their litigation efforts.
- d) What is the proper calculation of spousal support arrears and should there be a retroactive adjustment of spousal support?
- [113] In terms of arrears based solely on the interim court order for \$2,500 payable monthly, the respondent accepts the Family Maintenance Enforcement Program ("FMEP") calculation of \$11,678.56 in arrears at trial, subject to certain arguments discussed below.

- [114] The respondent suggests that he provided the claimant with about \$3,200 in cash in the four months following separation but prior to the interim court order. The claimant disputes receipt of these amounts. The respondent provides no documentary evidence of these payments or even the record of the withdrawals from his account if they were paid in cash. Given the animosity between the parties then and now, I find it difficult to believe that the respondent would have made such payments voluntarily. I do not include a credit for these amounts.
- [115] The respondent seeks a credit for the mortgage, tax and strata payments he made in relation to the Home from August 2015 to August 2016. However, the respondent was still living in the Home at that time. As such, I am not prepared to award a credit for the expenses incurred during this period.
- [116] The respondent confirmed in final argument that he was not seeking a credit for two tire replacements he was ordered to perform.
- [117] The respondent also seeks a credit for the 50 percent of the mortgage, 100 percent of the strata fees and 100 percent of the property taxes that he continued to be responsible for after he left the Home in August 2016 but before it was transferred in September 2017, which I have referred to as the "Post-departure/pre-sale Expense Contribution" credit. He says this equates to approximately \$15,804. The claimant does not oppose this credit subject to a possible reduction of up to \$600 based on an alleged adjustment of strata fees. I am prepared to accept the credit at the amount proposed by the respondent.
- [118] For her part, the claimant argues that there should be a retroactive enhancement of spousal support because, based on the evidence at trial, the \$2,500 figure has now been revealed to have been too low. Specifically:
- a) For the last five months of 2015, the mid-point monthly amount payable using the actual income levels of \$2,933 for the claimant and \$123,747 for the respondent would be \$4,405, creating a monthly shortfall of \$1,905 or a shortfall for the partial year of \$9,525.
 - b) For 2016, the monthly amount payable using actual income levels of \$23,209 for the claimant and \$147,671 for the respondent would be \$4,538, creating a monthly shortfall of \$2,038 and an annual shortfall of \$24,456.
 - c) For 2017, the monthly amount payable using the actual income levels of \$42,415 for the claimant and \$187,914 for the respondent would be \$5,305, creating a monthly shortfall of \$2,805 or an annual shortfall of \$33,660.
 - d) For the six months of 2018 leading up to trial, the monthly amount payable using the F8 financial statement expected income levels of \$9,494 for the claimant and \$91,914 for the respondent would be \$3,001, creating an additional monthly shortfall of \$501 and a shortfall for the year-to-date of \$3,006.

- [119] This mathematical adjustment proposed by the claimant suggests that the additional retroactive arrears payable by the respondent would be \$70,647. Note that the actual incomes used for the calculation above include the spousal support payments in order to assume a proper baseline for the proposed retroactive variation. The claimant's actual earnings are described more fully above.
- [120] Is the requested retroactive award of \$70,647 appropriate?
- [121] My first concern is that I find that the claimant was underemployed to a certain degree during the 2015 to 2018 period, making her own personal income figures underlying the calculations above artificially low. Her evidence was that she needed to manage the insurance claim and this litigation and that she was suffering from (medically-controlled) arthritis is not enough to justify such low levels of income. She had lost her business in June of 2014 and should have been in a position to return to work at the beginning of 2015 even if it was at a light duty minimum wage position such as she has now. There are four months off work that are explained with one month for menopause surgery and three months for a doctor-approved arthritis-related leave. But even accounting for those months, a full effort at securing even part-time work should have yielded higher incomes than those reported during the relevant period.
- [122] Furthermore, beyond the flaw in the income level used by the claimant in her proposed calculation, a collective assessment of the factors for retroactive payments also supports the decision not to award the full retroactive arrears claim: *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 94-116; *Kerr v. Baranow*, 2011 SCC 10 at paras. 206-212.
- [123] Reviewing those factors:
- a) There is no concern about delay since the original spousal support order was on consent, without prejudice, interim, and less than three years old.
 - b) I find the claimant has not engaged in any improper conduct.
 - c) Beyond the two issues I address below in relation to the request for a fine on the respondent (and hence I must try to avoid "double counting"), I find that the respondent has not engaged in additional material misconduct.
 - d) However, I do have real concerns about the potential hardship to the payor respondent from such a large retroactive award. His standard of living has fallen since the separation. He has suffered a serious reversal of fortune through the loss of his long-term employment, and he is having to rebuild his position as a self-employed insurance agent. The respondent is suffering from his own health problems that may require knee surgery. The respondent carried S.J.'s additional expenses while she was attending university during this retroactive period even though he is not seeking a child support award. As will be seen from the summary chart below, the full requested retroactive payment would actually put the respondent in a current negative net worth position, disregarding the present value of the pension.

[124] Beyond the discretion the court has in deciding whether to issue a retroactive award, I also rely on the court's discretion to reduce arrears under s. 174 of the Act.

[125] In all the circumstances I find that an appropriate award for arrears is \$45,874.56 which I reach through the following calculation:

- a) a reduction in the claimant's proposed retroactive adjustment arrears from \$70,764 to \$50,000;
- b) adding the FMEP arrears of \$11,678.56; and
- c) subtracting the Post-departure/pre-sale Expense Contribution credit of \$15,304.
- e) Should there be a fine for the respondent's failure to comply with court orders?

[126] The claimant requests a \$5,000 fine under s. 228 of the Act based on:

- a) the respondent's failure to restore the claimant to both life policies from which she had been removed as required by the Bowden Order; and
- b) the respondent's failure to respect the Bowden Order by producing answers to questions posed by the claimant in relation to his F8 Financial Statement which later required a further order from Mr. Justice Betton to simply again order compliance with the Bowden Order.

[127] Section 228 provides as follows:

228 (1) If a party fails to comply with an order made under this Division, the court may do one or more of the following:

- (a) make a further order under this Division;
 - (b) draw an inference that is adverse to the party, and make an order based on the inference;
 - (c) make an order requiring the party to pay
 - (i) the other party for all or part of the expenses reasonably and necessarily incurred as a result of the non-compliance, including fees and expenses related to family dispute resolution,
 - (ii) an amount not exceeding \$5 000 to or for the benefit of the other party, or a spouse or child whose interests were affected by the non-compliance, or
 - (iii) a fine not exceeding \$5 000;
 - (d) make any other order the court considers necessary to secure compliance.
- (2) If a party fails to comply with an order made under section 225 [orders restricting communications], the court must consider whether it would be appropriate to make an order under Part 9 [Protection from Family Violence].

- [128] In *Huitson v. Huitson*, 2018 BCSC 491, Mr. Justice Jenkins reviewed the similar s. 213 governing the failure to comply with an order for disclosure and notes that the section is permissive in the sense that it uses the term "may," which thus provides a discretion in the court as to whether or not to impose a fine: para. 5. In that case the court did impose a \$750 fine.
- [129] In *J.D.G. v. J.J.V.*, 2013 BCSC 1274, as a result of a significant delay in the production of a financial statement and relevant disclosure the court imposed a fine of \$500.
- [130] In *Cully v. Cully*, 2013 BCSC 2457, the court imposed a fine of \$2,500 as a result of an 11-month delay by the respondent in filing his disclosure.
- [131] The respondent admitted that, although he did change the designation for one of the two policies as required, he delayed in changing the other. He said that his change for the latter policy occurred only after he consulted with counsel. He admitted that he was in violation of a court order and that he was, in his own words, "guilty." I find that the fact that he was sufficiently aware of the order to change one policy but not the other shows an intentional and inherent disrespect for a court order that is worthy of a penalty.
- [132] I also find that the failure to comply with the requirement of the Bowden Order in relation to the F8 Financial Statement inquiries is deserving of rebuke, particularly given the additional cost that had to be incurred to simply have another judge order him to do the same thing.
- [133] I am prepared to issue a fine in the amount of \$2,500.

V. CONCLUSION

- [134] The net outcome of all of these findings and adjustments is set out in the chart in Schedule "A", which calls for an immediate payment of \$34,789.07 from the respondent to the claimant as well as a division of the pensions.
- [135] I provided the parties with DivorceMate calculations, as my findings were different than the assumptions contained in alternate printouts provided by the parties.
- [136] It is unfortunate that the parties could not come to an agreement before trial as I expect both parties' legal costs are a multiple of this final financial swing.
- [137] The claimant asks that if an award were going to be paid to her as a result of the various calculations that the order provide that such payment occur through the mechanism of a spousal rollover of the necessary portion of the respondent's RRSP in order to ensure the tax efficiency of the transaction. I accept that such an order is appropriate. In *Andrew J. Freedman and Paula G. White, Financial Principles of Family Law* (Toronto, Thomson Reuters, 2001), section 39.2(i), the authors state:

The availability of RRSPs to effect a tax-free transfer of property on marital breakdown ought not be overlooked. (In fact, the transfer is not tax-free; rather it is tax deferred.) When the funds are withdrawn, the recipient-spouse will be taxed at the marginal tax rates applicable to him or her in the years of withdrawal. The deferral of taxes is one of the advantages of an RRSP. The capital in the RRSP accumulates at an accelerated rate as the income earned in the plan compounds on a tax-free basis while it remains in the plan.

Consider the difference in these two scenarios:

1. No RRSP -- lump sum transfer

A lump sum transfer of \$100,000 that is invested by the recipient-spouse and earns interest at 3%, (which interest is taxed annually at 50%) will grow to \$116,000 in 10 years.

2. RRSP -- lump sum transfer

A transfer of \$100,000 from the transferor-spouse's RRSP to the recipient-spouse's RRSP, also accumulating interest at the rate of 3% per annum, will be worth \$134,000 at the end of the 10 years. The recipient-spouse will have to pay income taxes on these funds when they are withdrawn from the RRSP. When there is a dramatic difference between the marginal tax rates of the spouses and, in particular, when the lump sum amount being transferred is intended to provide for the transferee in later life when taxable income will be minimal, RRSP transfers are often the preferable way of satisfying equalizing obligations.

[138] I note that such an order was made in *Jordan v. Jordan*, 2001 BCSC 1058 at para. 56.

[139] In sum, I make the following final orders:

- a) The respondent shall pay the claimant \$34,789.07 on account of property division, spousal arrears and penalties, which amount shall be paid by way of a spousal rollover from the respondent's RRSP.
- b) Ownership and responsibility for the family property and debts shall be divided and, as necessary, transferred, in accordance with the chart above.
- c) The respondent shall be responsible for any costs associated with the transfer of the time share, as well as any arrears outstanding.
- d) The respondent shall provide the claimant with the set of ladies golf clubs in his control.
- e) The claimant shall return the second set of car keys for the respondent's vehicle to the respondent.
- f) The transfer of the motorcycle should be allowed to occur in the absence of the registration, subject to I.C.B.C.'s right to apply to set aside this order if its requirements have not been properly communicated to me.

- g) The parties shall cooperate in the execution of any documentation required to effect the necessary transfer of any property.
- h) The claimant shall pay the Me2U debts owing to the Canada Revenue Agency and her former landlord within 30 days of the respondent satisfying his obligation under the first order above.
- i) The claimant shall have a right to future monthly spousal support in the amount of \$1,823.
- j) Both parties have a right of review of spousal support after two years.
- k) The parties will exchange their full income tax returns for 2018 and 2019 including attachments and any assessments or reassessments for those years, on June 1, 2020.
- l) Failing agreement of the parties within 30 days of this judgment to another mutually agreeable manner of dividing the pensions, the respondent's work pension and any CPP pensions should be divided pursuant to ss. 81, 84, and Part VI of the Family Law Act. If the parties cannot agree on the outcome of the application of these provisions, I direct that, following a pre-hearing conference, they set an appointment before the Registrar for an assessment and issuance of a certificate as to the proper result pursuant to the Supreme Court Family Rules, R. 18-1(2).
- m) the claimant shall have the right to make inquiries of Great-West Life as to the available options on the division of any pension.
- n) The respondent is at liberty to change the beneficiary designation of any of the life insurance policies he owned at separation.

[140] In the absence of either party seeking to make submissions within 30 days based on offers of which I am unaware, given that the claimant has been successful in this matter in terms of obtaining positive orders in her favour that were unfortunately not able to be achieved absent a trial, she shall have her costs in accordance with the Supreme Court Family Rules, Appendix B.

[141] I thank the parties for their efforts and co-operation through this trial and indeed for finishing early, which is almost unheard of in this Court. I wish the best for you and hope that this judgment brings some closure to both of you and allows you to move forward with your lives.

[142] MR. GORDON: Are we allowed questions?

[143] THE COURT: That is my decision.

- [144] MR. GORDON: I just have a point of clarification. The order of any future child support commencing -- the old child support payments were required on the 15th of each month and so the next payment, were it not for this order, would have been today. So the monthly child support in the amount of \$1,823, does that commence today and substitute for that order and payable on the first day of each month thereafter? We need a commencement date in terms of drafting ...
- [145] THE COURT: Let us make it next month just to keep it simple. So that amount will commence next month.
- [146] MR. GORDON: Regarding the 121(a) the respondent shall pay the 34 [indiscernible] spousal rollover. Am I dismissing it or is the balance of the RRSP to be then divided equally after payment? Or ...
- [147] THE COURT: No. As you see in the math, it just nets out. So it stays where it is. But \$34,000 of it comes over to you.
- [148] MR. GORDON: Right. Okay. And in terms of costs. Would the court consider directing an order that \$20,000 of his RRSPs remain untouched until costs have been assessed?
- [149] THE COURT: I think I will let you deal with that. I am not going to make any further order in relation to the costs. You have got your order in your favour on costs and you can take whatever steps you need.
- [150] MR. GORDON: My only concern is that it will take time to draft a bill of costs [indiscernible] will have to be taken out. Unless a lump sum of costs is determined now.
- [151] THE COURT: I do not think I am in a position to derive a lump sum at this stage. I have not even thought about what that might be.
- [152] MR. GORDON: [Indiscernible] a nine-day trial, costs -- I am just saying that there is a process --
- [153] THE COURT: Yes, there is a cost process but that usually happens at a level that I am not involved in.
- [154] MR. GORDON: Would the court consider directing that Mr. Fieseler not dispose of his RRSPs until costs have been ascertained? Otherwise there may be nothing left to pay the costs. There be a [indiscernible] costs award. Given the history of disposition.
- [155] MS. KRCZIZANOWSKI: You get him away from me right now.
- [156] THE COURT: Sorry, Mr. Fieseler, you are to stay to that side of the courtroom.
- [157] I am prepared to add:
- o) The respondent shall not dispose of his RRSPs until the costs order is paid or for 12 months, whichever comes first.

- [158] MR. GORDON: It will take some months, but we certainly should have it resolved in 12 months.
- [159] THE COURT: So that is an additional order.
- [160] MR. GORDON: In terms of drafting the order. I appreciate this is a form of order.
- [161] THE COURT: There may be additional items. This is really a judgment, but I have tried to give you guidance. If there are sort of jots and tiddles you need in the formal court order, then obviously I will consider that. But this is --
- [162] MR. GORDON: There is a long history of drafting orders and taking months to settle and having to come back to court to settle the order.
- [163] THE COURT: I am prepared to add:
- p) I will remain seized of any hearing required to settle the order, such hearing to be set at 9:00 a.m. via videoconference or teleconference with Vancouver.
- [164] MR. GORDON: By telephone [indiscernible] Vancouver, with notice to Mr. Fieseler. A telephone conference.
- [165] THE COURT: Yes.
- [166] MR. GORDON: So what I contemplate is [indiscernible] have it draft the order, I will send it to him, perhaps he will agree, he does not -- we're stuck.
- [167] THE COURT: I will make myself available at the earliest 9:00 date and allow you to settle that order.
- [168] MR. GORDON: And I can arrange that through the Supreme Court Scheduling --
- [169] THE COURT: Correct.
- [170] MR. GORDON: In case you may need some notes on the file to that effect. Otherwise we will see. The usual route is ordering a transcript --
- [171] THE COURT: Given the difficulties in this litigation I am prepared to help you settle the order, so I am prepared to seize myself in the settlement of the order.
- [172] MR. GORDON: Thank you.
- [173] MR. FIESELER: In regards to the pension, My Lord. Is that as of date of separation? The reason why I ask is I want to make sure I understand. I spoke -- I sent an email last night and I spoke to Anita today and asked about once the division is decided, is she going to be allowed however option she wants? As an example we had before. And she just stated, well I am pretty sure it does. I says [sic] I don't need a pretty sure, I would like a for sure. My main question is, when we disperse the pension, is it from date of separation when I speak to them?

[174] THE COURT: It follows the normal rules unless you guys agree on a different route.

[175] MR. FIESELER: Okay.

[176] MR. GORDON: That would be from date of cohabitation to date of trial.

[177] THE COURT: I am not going to interpret Part VI. It is whatever the Act says it is.

[178] MR. GORDON: We went through the Act yesterday.

[179] THE COURT: You have the option to agree on a different method, but if you do not agree on that, then you apply Part VI which has lots of detailed rules and I am sure you will find your ways through it. If not, you can appear before the Registrar on that. I am not going to deal with that issue. Thank you.

"Branch J."

The Honourable Mr. Justice Branch

SCHEDULE "A"

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Prepared on 25 October 2026 · Esheria