
CANADA / JUDGMENT

Legge v. Legge

2020 BCSC 1221

COURT

Supreme Court of British Columbia

DECIDED

19 August 2020

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2020 BCSC 1221 Legge v. Legge

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Legge v. Legge,

2020 BCSC 1221

Date: 20200819

Docket: E103466

Registry: Kelowna

Between:

Russell Wayne Legge

Claimant

And

Cheryl Noreen Legge

Respondent

Before: The Honourable Mr. Justice Wilson

Reasons for Judgment

The Claimant appearing on his own behalf:

R.W. Legge

Counsel for the Respondent:

A.N. Svetlichny

Place and Date of Trial/Hearing:

Kelowna, B.C.

June 23 - 26, 2020

Place and Date of Judgment:

Kelowna, B.C.

August 19, 2020

- [1] The parties in this family law proceeding were together for a little over eight and a half years, but have now been separated for almost 10 years. The fact that the trial has taken place so long after the separation makes some aspects of this decision more complicated, but other issues have fallen away with the effluxion of time.
- [2] The former family home was sold recently - the closing occurred during the trial. At issue are division of family property and family debt, and spousal support and child support, both prospective and retroactive.

Background

- [3] The parties met in the summer of 2001. At that time, the respondent was in post-secondary schooling full-time in Kelowna but was working on Vancouver Island, where the claimant lived, for the summer. The claimant was 23 years old and the respondent was 21. Following a visit to the claimant's sister in Fort McMurray that fall, the claimant obtained an apprenticeship position as a heavy-duty mechanic and the couple moved to Fort McMurray at the beginning of January 2002.
- [4] The apprenticeship program takes four years and involves periods of schooling of some six to eight weeks, but consists largely of paid, on-the-job training. The respondent gave up her schooling to pursue the move and worked at various jobs to earn income for the family, including as a conveyancer with a law firm.
- [5] The parties lived in Fort McMurray for approximately 18 months before moving to Lloydminster. They then relocated to Edmonton, in part because the respondent wanted to go to the University of Alberta and finish her degree. They were living in Edmonton when they married on May 28, 2006.
- [6] Both wanted to return to British Columbia. In 2007, the parties relocated to Princeton, BC. The claimant got work at a local pellet plant. The respondent decided to transfer to the University of Athabasca and do her courses remotely. At the time she left the University of Alberta in Edmonton, she needed only five more courses in order to complete her degree. They bought the family home and shortly afterwards they moved.

- [7] The parties' only child, Tairyn, was born September 8, 2008. The respondent had difficulties during and after the pregnancy and she gave birth to the baby at BC Children's Hospital.
- [8] The respondent delayed taking courses through the University of Athabasca both because of the move and also because she was pregnant. She applied for various jobs in the Princeton area following her maternity leave and took a job as a coordinator with an organization called Safe Homes. The job was not full-time and paid her 60 hours per month at \$20 per hour; however, it afforded her some flexibility in terms of her hours.
- [9] The parties separated in September 2010. The parties had acquired a substantial level of debt prior to their separation. Some of the unsecured debts were paid off in the summer of 2010, just months before the separation, when the parties refinanced the home.
- [10] Following a very brief period when both resided in the family home after separation, the respondent moved to live with her parents in Osoyoos and subsequently to a furnished cabin owned by a family friend. The claimant remained in the family home. The claimant made all of the mortgage payments until the house was sold in June 2020. The net sale proceeds available to the parties after payment of the mortgage and adjustments is \$107,791.64 ("Net Proceeds").
- [11] The respondent applied for orders from the Provincial Court in October 2010. The parties shared parenting of Tairyn thereafter until May 2015, at which time she went to live with the claimant on a full-time basis. She continues to live primarily with him today. Parenting of Tairyn is not before the Court and was dealt with by way of Provincial Court order.
- [12] A few months after separation, the claimant obtained work in Elkford, BC, because the pay was better than what he was earning at the pellet plant. After a short time, he returned to Princeton and obtained full-time employment at the newly-opened Copper Mountain Mine as a heavy-duty mechanic. He remains in that employment today.
- [13] The respondent currently works for her parents' trucking company, Iron Bull Holdings Ltd., in an administrative role. She started working for Iron Bull in December 2014, but has only been full time since April 2019. She has not completed her degree despite a number of attempts both before and after separation. The respondent's income post-separation prior to April 2019 is a matter of contention in this case.
- [14] The parties each had children from new relationships in 2016. The claimant started to live in a marriage-like relationship with Niki in 2016, when Niki moved into the parties' former home. The claimant and Niki married in January 2020. The respondent continues her relationship with the father of her child, Tim Bay, but they do not live together. Mr. Bay continues to reside in Princeton, but spends time with the respondent and their child in Osoyoos at weekends.
- [15] The parties were divorced by order of Justice Hori in 2019.

Issues

- [16] Both parties seek to have the Net Proceeds reapportioned in their favour. The respondent says she was entitled to spousal support arising out of the separation, and while she acknowledges that her entitlement to periodic support has now expired, she seeks a reapportionment of the net sale proceeds to reflect her entitlement.
- [17] The claimant, for his part, seeks a reapportionment of the net sale proceeds to compensate him for paying what he says was more than his share of the family's significant debt load. He also claims arrears of child support. The respondent acknowledges that she was obligated to pay child support commencing in June 2015, but says her entitlement to spousal support exceeds any amount she may owe.
- [18] Underlying the support issues is a dispute about the respondent's income and whether an income should be imputed to her that is higher than is reflected on her income tax returns.
- [19] The issues to be decided are:
- a) whether the respondent is entitled to prospective child support, and if so, in what amount;
 - b) the effect of family debt on reapportionment of the Net Proceeds, and in particular:
 - i. what debts were assumed by each party after separation;
 - ii. whether the claimant is entitled to credit for having paid the mortgage since separation, and if so, whether he is liable to pay occupational rent; and
 - iii. whether the claimant is entitled to credit for having paid the loan on the family travel trailer;
 - c) whether the respondent is entitled to retroactive spousal support; and
 - d) whether the claimant is entitled to retroactive child support.

The trial

- [20] The only two witnesses who testified at the trial were the parties. The claimant had previously been represented by counsel, but attended at the trial on his own. He was unsure whether he was capable of conducting the trial on his own, but had prepared an affidavit that summarized the main points he wished to make. Counsel for the respondent agreed that the claimant could read from his affidavit during his direct evidence, and also agreed that the claimant's wife could assist him with reference to the various documents that were entered into evidence. Because of these accommodations, the trial was able to proceed.
- [21] Even though this trial was primarily about finances and the parties had separated almost ten years ago, both parties limited their documents at trial to those that were material, as opposed to providing the Court with every piece of paper. Cross-examination was largely limited to those matters material to what the Court had to decide, and I note that the claimant chose not to cross-examine on topics that were extremely upsetting for the

respondent and would have been of only marginal relevance. In the result, the trial proceeded in an orderly and respectful manner and completed within the time allotted.

Prospective child support

- [22] Child support is payable in accordance with the Child Support Guidelines. The parties agree that Tairyn was in a shared custody arrangement from the parties' separation in September 2010 until May 2015. Thereafter, Tairyn has resided primarily with the claimant. The respondent is therefore obligated to pay prospective child support based upon her income.
- [23] The respondent's current income with Iron Bull is \$37,200 per year. As such, the basic table amount of child support payable by the respondent to the claimant is \$350 per month.
- [24] The claimant does not argue that the respondent is underemployed at the present time, although he suggests that she derives the benefit of a company fuel card from her parents' business. I decline make any adjustment for this item.
- [25] First, I am not satisfied that the value of the benefit is sufficiently significant so as to warrant an adjustment. Second, and more importantly, a significant portion of the respondent's driving obligations pertain to her exercising her parenting time with Tairyn. The parties both agree that the respondent does all or substantially all of the driving, even if it is by her choice.
- [26] The respondent will pay child support in the amount of \$350 per month, commencing July 1, 2020.

Property and debt

- [27] Section 95(1) of the Family Law Act, S.B.C. 2011, c. 25 provides that the court may order an unequal division of family property if an equal division would be significantly unfair. Section 95(2) enumerates factors a court may consider, with (f) being the operative clause in this case:

95(1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];

- (c) a spouse's contribution to the career or career potential of the other spouse;
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith,
- (i) substantially reduced the value of family property, or
- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[28] The parties had various unsecured debts at the time of separation. The respondent assumed responsibility for the following debts:

CIBC line of credit:

\$20,000

Alberta student loan:

\$3,635

National student loan:

\$18,495

CIBC overdraft:

\$800

Total:

\$42,930

[29] For his part, the claimant paid the following:

RBC line of credit:

\$10,000

CIBC overdraft:

\$1,228

HSBC line of credit:

\$10,713

CIBC Visa:

\$2,566

Total:

\$24,507

- [30] Curiously, the claimant testified that he thought the respondent had paid the CIBC Visa; however, the respondent pointed out in her evidence that she had not and that the claimant had paid it.
- [31] There are two other debts that require separate consideration, both secured: the mortgage and the loan on the family's travel trailer. There is no question that the claimant made all of the payments. The issue is whether the claimant is entitled to reimbursement by the respondent because he lived in the home and had use of the travel trailer.

The mortgage and occupational rent

- [32] At the time the parties separated, they had just refinanced the home to pay off other unsecured debt. The mortgage was approximately \$356,000 at the date of separation. When the family home finally sold in June 2020, the balance owed on the mortgage was \$297,890.45. The claimant says he is entitled to credit for the reduction in the principal amount that results from his having paid the mortgage over the almost 10 years since separation.
- [33] The respondent says that the claimant has had use of the home, and says that he should receive no credit. If he is entitled to some credit, the respondent advances a claim for occupational rent.
- [34] At common law, a co-tenant is entitled to pay occupational rent if the tenant has been ousted from the property. Ouster is not required in the family law context: *McFarlen v. McFarlen*, 2017 BCSC 1737 at para. 20.
- [35] Although occupational rent is frequently claimed in family law proceedings, it has been found in this province to be "an exceptional remedy and should be used cautiously": *Bishop v. Wang*, 2018 BCSC 781.

- [36] The respondent has not advanced a claim for occupational rent in this case as a standalone claim. Rather, she says that if the claimant is entitled to credit for the reduction in the balance owed under the mortgage, she should be entitled to compensation for the claimant's use of the home.
- [37] Shortly after the parties separated, the home was listed for sale. The list price was \$399,000; however, the property did not sell at that price and the parties' realtor recommended a price reduction.
- [38] The parties disagree as to what happened next. The claimant says that the recommended price reduction from the realtor would have resulted in a shortfall on the mortgage such that an additional debt would result, or alternatively, the parties would have been unable to clear the title. For her part, the respondent says that the claimant refused to reduce the list price, and that he unilaterally took the property off the market.
- [39] From time to time, at least in the initial years, the claimant had renters who rented a room in the home. After the birth of his child with his wife Niki, she moved into the home.
- [40] The claimant's position is that throughout the intervening years, the real estate market in Princeton was depressed and that the home was in a negative equity position, which he said prevailed for several years.
- [41] I am unable to conclude that the claimant was put in the position of having to keep the home even though he would have preferred to sell it. There is no admissible evidence regarding either the value of the home, or the real estate market in Princeton generally. While I acknowledge that the claimant had to bring an application to sell the home in 2019, which application was opposed by the respondent, there is no evidence that he requested the respondent's cooperation to arrange for a sale earlier.
- [42] There is also no evidence either that the mortgage payments made by the claimant exceeded what he would have had to pay as market rent for alternative accommodation.
- [43] In the absence of any evidence that the mortgage exceeded market rents, and considering the claimant received rental payments from others, I am not satisfied that it would be unfair to divide the proceeds equally on account of his mortgage payments. It is therefore unnecessary to consider the respondent's alternative argument with respect to occupational rent.
- [44] Subject to other adjustments, the Net Proceeds should be divided equally.

Travel trailer loan

- [45] During their relationship, the parties bought a travel trailer in Alberta financed by a loan from RBC in the principal amount of \$25,552. The closest statement to the date of separation that was available for the trial was dated December 31, 2009, and indicated a balance of \$22,622.41. The travel trailer remained in the claimant's possession until it was sold in 2019. The sale price was \$10,000, and the claimant paid an additional \$400 to pay off the balance of the loan on March 25, 2019.
- [46] The respondent says that the claimant should not receive credit for payment of this debt because he also enjoyed the benefit of the travel trailer over the intervening eight and a half years. The claimant does not deny using it, but says that there was a period of time when he was unable to do so.
- [47] First, the respondent removed the insurance plates from the trailer so he was not able to take it anywhere, an allegation that is not denied by the respondent. Second, there were periods of time when he would have been unable to tow it if he had wanted to as he did not have a vehicle with sufficient towing capacity.
- [48] The evidence does not establish that the claimant enjoyed frequent use of the travel trailer, but he nonetheless made use of it. Overall I accept that the loan was more of a burden than the travel trailer was a benefit. It was only in the spring of 2019 that the loan had been paid down to an amount whereby a sale of the travel trailer resulted in proceeds that were almost sufficient to pay off the loan.
- [49] The loan was paid down by approximately \$12,000 between the date of separation and retirement of the debt. Because the claimant made some use of the travel trailer, he should not get full credit for the reduction in the loan principal and I conclude that one-half of the reduction, or \$6,000, should be credited to the claimant.

Spousal support

- [50] The respondent seeks spousal support pursuant to the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.). The relevant statutory provisions are as follows:

15.2 (1) A court of competent jurisdiction may, on application by either or both spouses, make an order requiring a spouse to secure or pay, or to secure and pay, such lump sum or periodic sums, or such lump sum and periodic sums, as the court thinks reasonable for the support of the other spouse.

...

- (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.
- ...
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
 - (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [51] Compensatory support is intended to provide redress to a spouse who suffers an economic disadvantage arising from the marriage. It recognizes the sacrifices made by a spouse whose non-financial contributions to the marriage resulted in a lower earning capacity and more limited economic opportunities.
- [52] The leading case on compensatory support principles is the Supreme Court of Canada's decision in *Moge v. Moge*, [1992] S.C.J. No. 107, in which the Court stated the following at para. 84:
- [84] Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement (see *Mullin v. Mullin* (1991), *supra*, and *Linton v. Linton*, *supra*). Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution (see Rogerson, "Judicial Interpretation of the Spousal and Child Support Provisions of the Divorce Act, 1985 (Part I)", *supra*, at pp. 174-75).
- [53] In *W. v. W.*, 2005 BCSC 1010, Justice Martinson observed the following about the interpretation of *Moge* in British Columbia at paras. 11 and 12:

- [11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.
- [12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide* (1996), 23 R.F.L. (4th) 127 (B.C.S.C.); *Rattenbury v. Rattenbury*, [2000] B.C.J. No. 889, 2000 BCSC 722; *Rinfret v. Rinfret*, [1999] B.C.J. No. 2945 (S.C.); *O'Neill v. Wolfe* (2001), 14 R.F.L. (5th) 155 (B.C.S.C.); *Walton v. Walton*, [1997] B.C.J. No. 1089 (S.C.); *Ulrich v. Ulrich*, [2003] B.C.J. No. 836, 2003 BCSC 192; and *Carr v. Carr* (1993), 46 R.F.L. (3d) 326 (B.C.S.C.).
- [54] If support is payable based upon compensatory principles, the quantum of support will tend to be at the higher end of the range. By contrast, non-compensatory support focusses more on the means and needs of the parties, albeit with reference to the standard of living enjoyed by the parties prior to separation.
- [55] The respondent says she was economically disadvantaged by the breakdown of the marriage and is entitled to spousal support, both for compensatory and non-compensatory reasons. She argues that her claim to spousal support should commence effective July 2011, which was some eight months after separation. She argues for this effective date because prior to then, the claimant continued to make all of the payments on a Mazda Tribute that was driven by the respondent. The Mazda Tribute was subsequently repossessed by the lender.
- [56] The respondent does not seek ongoing spousal support, but rather seeks a determination of her past entitlement. She says her entitlement would have ended at the end of 2017. The respondent proposes that spousal support be calculated according to DivorceMate calculations from July 2011 to December 2017, based upon the parties' line 150 incomes. She provided calculations to justify a retroactive claim of \$107,610.
- [57] The claimant does not agree the respondent is entitled to spousal support.

Facts

- [58] At the time of separation, the claimant was working at the pellet plant and the respondent was working part time with Safe Homes.

- [59] Shortly following separation, the respondent filed an application in Provincial Court seeking both spousal support and child support. I find that it was agreed, following some meetings between the parties and their counsel, that the claimant would continue to deposit his paycheques into the joint account, that the respondent would still have access to that account, and that the parties agreed their debt situation was such that their monthly debt servicing overwhelmed any ability to pay support in the short term.
- [60] When the claimant took the job in Elkford, BC, he had costs associated with that employment, including travel costs and some nominal rent because he rented a room from a co-worker. Shortly after the claimant obtained employment at the Copper Mountain Mine, he started to make child support payments in the amount of \$706 per month, generally by way of two instalments. Although the respondent initially refused to accept the payments, she subsequently did so and the payments continued until May 2015. At no time has spousal support been paid.

The claimant's income

[61] The claimant's income is not in issue. Through the years he has made the following:

- a) \$63,213.01 in 2009;
- b) \$63,977.70 in 2010;
- c) \$93,254.94 in 2011;
- d) \$102,566.77 in 2012;
- e) \$111,327.55 in 2013;
- f) \$117,625.00 in 2014;
- g) \$114,003.00 in 2015;
- h) \$113,391.00 in 2016;
- i) \$111,683.21 in 2017;
- j) \$120,331.00 in 2018; and
- k) \$124,940.00 in 2019.

[62] He continues to be employed at the Copper Mountain Mine.

The respondent's income

[63] The respondent's income and in particular, her ability to earn income, is disputed by the claimant. The respondent's income for the years since separation is as follows:

- a) \$11,629.00 in 2011;
- b) \$12,195.00 in 2012;

- c) \$15,887.00 in 2013;
- d) \$3,884.00 in 2014;
- e) \$16,672.00 in 2015;
- f) \$16,672.00 in 2016;
- g) \$18,224.00 in 2017;
- h) \$19,904.00 in 2018; and
- i) \$32,321.28 in 2019.

- [64] I will review the respondent's post-separation employment history. Shortly after separation the respondent obtained full-time employment at a dental office where she received some training as a dental assistant. However, she suffered two injuries in close succession in early 2012: the hood of her car fell on her head and then she fell off a fence. She claimed medical benefits from employment insurance, and she gave up the job at the dental office.
- [65] Following her two injuries she attended physiotherapy, and in the spring of 2012 she was hired by the physiotherapy office where she was a patient to work four days per week in an administrative capacity. She gave up that work to return to school but did not complete it.
- [66] The respondent's educational pursuits were discussed at some length during the trial. Those educational pursuits are relevant for two reasons. First, the claimant argues that the respondent, by virtue of her education, is capable of making a good income. Second, he argues that she has chosen at various times to withdraw from the workforce to pursue her post-secondary education goals, but has not completed them.
- [67] The respondent first attended post-secondary education before the parties' relationship in Kamloops, where she intended to pursue a degree in science. She then transferred to Okanagan University College in Kelowna, where she changed her goal to a psychology degree. She completed two years in Kelowna. She was enrolled at Okanagan University College when the parties met.
- [68] She withdrew when the parties moved to Fort McMurray in 2002 and did not return to her education for approximately three years or so when they moved to Edmonton. She enrolled at the University of Alberta where she wanted to pursue neuropsychology. She was five credits short of completing her degree when the parties moved to British Columbia.
- [69] Following the parties' move to Princeton, the respondent was enrolled through the University of Athabasca but did not complete the online courses.
- [70] Following the parties' separation in September 2010, the respondent signed up for courses during the summer semester at the University of Alberta. Her expectation was that she would relocate there permanently and take Tairyn with her. However, the claimant, who by this time had moved back to Princeton and taken the job at Copper Mountain Mine, objected

to the relocation. During a Provincial Court family case conference, the parties agreed on a schedule that would have the respondent in Edmonton for her classes and then return to Princeton; classes were on Tuesdays and Thursdays only. The respondent's parents were willing to look after Tairyn where needed. Unfortunately, the summer semester at the University of Alberta was not successful. The respondent initially deferred some work into the second of the two six-week blocks of the summer semester.

- [71] In 2013, the respondent decided to try to resume her education at the Penticton campus of the Okanagan College, where she intended to pursue a business degree. The majority of the respondent's 2013 income was from employment insurance; her 2014 income was negligible. As such, she worked very little in those two years. She did not complete her school program and went to work at her parent's business in December 2014.
- [72] The respondent gave evidence of certain medical issues. She has been a Type I diabetic since she was a child, and was diagnosed as celiac in early adulthood. She also reported difficulties with her joints. I accept that she is diabetic and celiac as she reports. However, there is no evidence that these conditions, either individually or in combination, have precluded full-time work. The respondent works full-time at present, and has held full-time jobs in the past.
- [73] In the absence of medical evidence, I have no basis upon which to conclude that the respondent's medical circumstances prevent her from working or attending school full-time.

Discussion

- [74] I am satisfied that the respondent has established an entitlement to spousal support, both compensatory and non-compensatory. However, for the reasons that follow, I conclude it would not be in the interests of justice to make a retroactive order for spousal support.
- [75] I accept that the respondent made sacrifices for the benefit of the claimant in the course of their relationship. While her education plans have meandered unsuccessfully through the years, she gave up her schooling in Kelowna when the parties commenced cohabitation in Fort McMurray, and gave up the University of Alberta when the parties returned to British Columbia.
- [76] The sacrifices made by the respondent were to the benefit of the claimant and the family. The claimant pursued and completed his heavy-duty mechanic apprenticeship while the parties were in Alberta, and while the decision to return to British Columbia was not motivated by the claimant's employment, he nonetheless was able to secure a well-paying job in his field in Princeton less than a year after separation.
- [77] The respondent worked part-time after the birth of the parties' child, accepting a part time job that afforded a high level of flexibility which was important due to both the claimant's schedule and the lack of available childcare in Princeton.

- [78] I accept that the respondent would have been entitled to spousal support, both on compensatory and non-compensatory grounds had she sought such support sooner. I have concerns, however, about the amount of spousal support she seeks, and her delay in seeking it.
- [79] The respondent's ability to earn income and thus her claim for spousal support would have been impacted by the change in the parenting arrangements in May 2015. Once Tairyn went to live with the claimant full-time, the respondent was no longer precluded from trying to find work that would fit with afterschool care.
- [80] Accepting as I do that the respondent's employment possibilities were limited or reduced during the period of shared parenting, there is no evidence as to why the respondent would not have been able to maintain full-time employment after Tairyn went to reside with the claimant.
- [81] The respondent's various jobs through the years, while they have not all been full-time, have paid her more than minimum wage, including her current job and her jobs in Alberta and prior to the parties' relationship. I am satisfied that the respondent was capable of full-time work and earning at least minimum wage from when Tairyn went to live with the claimant until the end of 2017, which is the end date suggested by the respondent, subject to a break for her maternity leave with her child with Mr. Bay in 2016.
- [82] In addition to the concerns I have about the respondent's income, there are a couple of other additional concerns with regard to the respondent's proposed approach, which is to calculate spousal support based on the parties' actual incomes from 2011 to the end of 2017.
- [83] First, the DivorceMate calculations assume that spousal support is taxable in the hands of the recipient and tax-deductible by the payor. However, this tax treatment presumes periodic payments. Since no orders for periodic payments were ever made and the respondent's entitlement has now ended, this approach absent adjustment would not provide for reasonable amounts. It would be too late to expect a recalculation of previous years taxes from 2011 to 2017 or earlier.
- [84] Second, and more significantly, there has been substantial delay in pursuing the claim for spousal support. The parties have now been separated for almost 10 years and the respondent concedes that her period of entitlement has passed.
- [85] Because no Provincial Court order was ever made, this Court has the jurisdiction to make an order. The question is therefore whether an order should be made in the circumstances.
- [86] In *Kerr v. Baranow*, 2011 SCC 10, the Supreme Court of Canada explained that the principles for retroactive awards of spousal support are similar to those for child support:

- [207] While D.B.S. was concerned with child as opposed to spousal support, I agree with the Court of Appeal that similar considerations to those set out in the context of child support are also relevant to deciding the suitability of a "retroactive" award of spousal support. Specifically, these factors are the needs of the recipient, the conduct of the payor, the reason for the delay in seeking support and any hardship the retroactive award may occasion on the payor spouse.
- [87] Justice Cromwell for the Court explained that the considerations were nonetheless different in a claim for arrears of spousal support because child support is based on different principles. At para. 208 he said:
- [208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see D.B.S., at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.
- [88] Cromwell J. then went on to identify in para. 209 the concerns that arise in the case of substantial delay, both of which apply in this case:
- [209] Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see D.B.S., at paras. 100-103).

- [89] In *Lee v. Lee*, 2011 BCSC 286, there was an unexplained delay of eight years between seeking spousal support in a pleading and making an application for it to the court. Although the court awarded a short duration of prospective support, Justice Pearlman concluded that the delay disentitled the recipient from any retroactive award.
- [90] In *Segura v. Segura*, 2020 BCSC 650 at para. 141, Justice Schultes commented in similar circumstances, including a delay of similar duration, at some point the respondent ought reasonably to have recognized that she needed to pursue the claim by way of a court application, or abandon it.
- [91] In *D.B.S. v. S.R.G.*, 2006 SCC 37, the Supreme Court of Canada said at para. 130 that if there has been an unreasonable period of delay after effective notice was given, it may be appropriate to make no award for the period of the unreasonable delay.
- [92] The claimant was aware of the respondent's intention to make a claim for spousal support because it was apparent from the pleadings the respondent filed in the Provincial Court in October 2010, and spousal support always been part of the pleadings in this case.
- [93] When asked about why it took so long for the case to get to trial, the respondent testified that she had no funds to retain a lawyer and had to rely on Legal Aid, and that she understood custody matters had to be finalized first. However, the parties have been to court on numerous occasions, particularly in Provincial Court, and her application for spousal support was extant throughout the entire period. It would have been a relatively straightforward matter for the respondent to ask a court for an order for spousal support at any time in the intervening years. I am not satisfied that there has been a reasonable explanation for what amounts to a ten year delay.
- [94] The respondent was certainly aware of the parties' difficult and challenging financial circumstances at the time of separation, as was the claimant. Any determination of an appropriate quantum of spousal support in the period following separation would necessarily have included some consideration of the parties' debt payments arising from the marriage.
- [95] Further, at the time Tairyn moved to live with the claimant full time in May 2015, the respondent would have been aware that she was obligated to pay child support to the claimant which would have offset, at least to some extent, any benefit she could have received from pursuing an order for spousal support.
- [96] Even if I accepted the respondent's position on the duration of her entitlement, which is until the end of 2017, it is now two and a half years since the last payment would have been made. At this point, an award of retroactive support would simply serve to redistribute the family property and, in particular, the only asset which is the proceeds of sale from the home for which the claimant has paid the mortgage for almost 10 years. Her claim is for retroactive support that far exceeds the claimant's interest in the Net Proceeds; as such, her claim, if granted, would see her receive all of the Net Proceeds and leave the claimant with

an additional and significant obligation. For his part, the claimant would be left to ostensibly start again financially and would be unable to buy a home for himself and his family, including Tairyn.

[97] I find that although the respondent would have been entitled to spousal support had an application been brought earlier, it would be unfair if she were permitted to advance the claim at this very late juncture.

[98] The claim for retroactive spousal support is dismissed.

Retroactive child support

[99] The claimant agreed to pay the amount of \$706 per month in child support commencing in May 2011, which was based on his income during the brief time he worked in Elkford, as opposed to his higher income at the Copper Mountain Mine. He also agreed that he did not provide copies of his income tax returns to the respondent on an annual basis. However, the claimant's child support obligation under the Child Support Guidelines would have been determined presumptively by way of offset due to the shared parenting arrangement, deducting the respondent's table amount from the claimant's table amount. The claimant would therefore not have been able to determine his obligation with certainty without the respondent's income tax information, and there is no evidence that either party requested income information from or provided income information to the other.

[100] Regardless, neither party asks the Court to revisit the amount of child support payable during the shared parenting regime. The issue of arrears of child support therefore only arises for the period after Tairyn went to live with the claimant full-time during May 2015.

[101] The respondent admits that she owes retroactive child support and that the claimant would have been entitled to child support starting in June 2015.

[102] In my view, however, the claimant is only entitled a retroactive order for child support from June 2019 onward. Although the claimant was theoretically entitled to child support as of June 2015, he did not raise the issue with the respondent until he filed an application to amend his pleadings on July 16, 2019. In *D.B.S.*, the Supreme Court of Canada concluded at para. 118 that having found that retroactive support is due, the date from which a retroactive order should have effect should be the date that notice of an intention to seek support was provided, not the date at which the entitlement theoretically arose.

[103] Although the court can use the date of when support should have been paid as the appropriate date, this is most often the case where one party, generally the payor, has engaged in blameworthy conduct. This is not such a case.

- [104] The trigger for the respondent's obligation to pay child support to the claimant was when the parenting arrangements changed and Tairyn went to live full-time with the claimant. Prior to then, child support was presumptively determined on a set off basis, and the respondent was the recipient given her lower income.
- [105] This is not a situation as was contemplated in D.B.S. where the payor withholds information or fails to disclose a material change in income. While the claimant may not have known the respondent's income with precision, he had a general idea. Perhaps, more importantly, he was aware that a claim for child support would likely be met with a cross-claim for spousal support. I conclude that it would not be fair for the respondent to pay child support prior to the date of effective notice.
- [106] With this in mind, I turn now to a calculation of the amount of child support owing.
- [107] The respondent owes to the claimant child support arrears calculated from the date of effective notice, being July 16, 2019. The respondent's wage from Iron Bull has been \$37,200 per annum since the spring of 2019. The arrears to the date of the trial are therefore calculated based on 11 months at \$350 per month (August 2019 to June 2020 inclusive), totalling \$3,850.

Other adjustments

- [108] There are two minor adjustments, and neither was the subject of much controversy.

Chattels

- [109] Although both parties gave evidence about certain chattels, including household furniture, artwork and old vehicles, there was no evidence before the Court with regard to the value of the various items discussed. The fact that the parties have been separated for almost ten years renders the purchase price for the various chattels even less relevant than it would normally be.
- [110] However, in his closing submissions, the claimant suggested that he would give the parties' artwork to the respondent, and that he would compensate her with an additional \$2,000 on account of household effects. This suggestion was acceptable to the respondent. I therefore order that the artwork be provided to the respondent within 14 days, and the \$2,000 will be taken into account in the adjustments made at the conclusion of these reasons.

Orthodontics

- [111] The only remaining adjustment to be taken into account is the cost of Tairyn's orthodontic work. The claimant's evidence is that he has paid \$8,590 on account of Tairyn's orthodontic work, but has received a reimbursement from Manulife through his employment in the amount of \$1,954. He has therefore paid a net amount of \$6,636. The respondent said during cross-examination that she is willing to pay "her half".

[112] However, her obligation is not to pay half but rather to pay her proportionate share based on the parties' incomes. Using their reported incomes for 2019, the respondent will reimburse the claimant twenty percent of the orthodontic costs not covered by insurance.

Summary of conclusions

[113] To summarize, I find as follows:

- a) The claimant is not entitled to any credit for mortgage payments he has made since separation, and the Net Proceeds are to be divided equally between the parties, subject to the adjustments set out below;
- b) The respondent has assumed responsibility for \$42,930 of family debt and the claimant \$24,507 of the family debt, which amounts are subject to adjustment between the parties;
- c) The claimant is entitled to \$6,000 of credit for the debt associated with the family travel trailer, representing approximately one half of the reduction in the principal amount of the debt as of the date of separation;
- d) The respondent's claim for retroactive spousal support is dismissed;
- e) The respondent owes retroactive child support to the claimant in the amount of \$3,850;
- f) The respondent will reimburse the claimant in the amount of \$1,327 on account of her share of the uninsured portion of Tairyn's orthodontic bills; and
- g) By agreement, the claimant will pay to the respondent the sum of \$2,000 on account of chattels in the family home, and he will return to the respondent the parties' artwork.

[114] Attached to these reasons is a copy of a spreadsheet that summarizes the financial components of the above.

[115] I consider that success was divided and therefore it may be appropriate that each party bear its own costs. However, if either party wishes to address the issue, they may contact Supreme Court Scheduling within 21 days of these reasons.

"Wilson J."

Appendix "A"

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