

CANADA / JUDGMENT

Leggett v. Leggett

2020 BCSC 1540

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1540 Leggett v. Leggett

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Leggett v. Leggett,

2020 BCSC 1540

Date: 20201020

Docket: E200092

Registry: Victoria

Between:

Crystal Dawn Leggett

Claimant

And

Kyle Matthew Leggett

Respondent

Before: The Honourable Mr. A. Justice Ross

Reasons for Judgment

Counsel for the Claimant:

J. Duncan

Counsel for the Respondent:

N. Reid

Place and Date of Trial/Hearing:

Victoria, B.C.

September 22 and 24, 2020

Place and Date of Judgment:

Victoria, B.C.

October 20, 2020

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- [1] In this family law dispute, the parties brought cross-applications seeking various forms of relief. To their credit, they were able to agree on many terms. These reasons discuss the items that did not see agreement.
- [2] The claimant, Ms. Leggett, seeks interim spousal, child, and s. 7 support retroactive to November 2019.
- [3] The respondent, Mr. Leggett, seeks an interim distribution of capital in the amount of \$250,000 to fund his legal expenses in relation to this proceeding.
- [4] On the claimant's application for support, the areas of dispute relate to the calculation of the respondent's income, and the advisability and affordability of the children's school tuition and horse-riding activities.

Background Facts

- [5] The parties are both in their early 40's. They began cohabiting and were married in 2000. There are two children of the marriage, born 2005 and 2008. The couple separated in July 2019, and began living separate and apart in September 2019.

- [6] By training, the claimant is a nurse. However, she has not worked in that profession for several years. She says that she would require further training and education in order to return to that work. Prior to separation, the claimant was involved in a property development business with the respondent. I discuss that endeavour below. Since separation, the claimant has not earned any employment or business income.
- [7] The respondent, as described in more detail below, owns a business, Java Designs Inc. ("Java Designs"), which designs residential buildings. In addition, as noted, the respondent has been involved in property development with the claimant.
- [8] The earnings of the couple are described in more detail below.
- [9] The lifestyle of the parties is a significant issue in this application, especially as it pertains to the expenses for the children's activities.
- [10] In addition to the family home, the parties owned a vacation home on Lake Cowichan. They also owned several expensive "toys" including jet skis and a tent trailer. Prior to separation, Mr. Leggett drove a Tesla Model X.
- [11] The children have both been in private school throughout their education. They attended a Montessori school until 2018. The annual tuition for that school was in the range of \$20,000. At the date of separation, the older daughter was enrolled at St. Margaret's School ("SMS"), and the younger daughter was scheduled to start at SMS for the year commencing September 2019.
- [12] The enrolment of the two girls at SMS was a decision made jointly by the parties. However, there is a dispute regarding the basis of the respondent's agreement to have the girls switch to SMS. The respondent claims that he only agreed to the girls attending SMS on the understanding that his mother-in-law would pay the tuition. I deal with this issue below.
- [13] The parents had some concern regarding the children's progress in school prior to attending SMS. Both children have received counselling, independent education plans, and extra academic supports. In the affidavit material, the claimant emphasises those concerns. The respondent minimizes them.
- [14] There is also dispute over their academic success since beginning at SMS. The claimant says that SMS has accommodated the girls' extra learning needs and demonstrated a commitment to adapting the academic environment to ensure the children achieve success. She says that the girls have both thrived at SMS. The respondent says that the girls' academic achievements or improvements have not been significant.
- [15] The switch from the Montessori school to SMS incurred an increase in annual tuition of \$14,000 (from approximately \$20,000 to \$33,740). While at Montessori, the couple had always paid for their daughters' entire tuition. The claimant says that it was the expectation that the parties would continue to pay for their daughters' tuition when they switched to SMS. However, in the school year beginning September 2019, the children's maternal

grandmother offered to, and did, pay for one year of private school tuition. The respondent says that he only agreed to SMS on the basis that his mother-in-law would continue to pay the SMS tuition.

- [16] The second, and larger financial issue, relates to the children's extracurricular activities. Commencing in 2018, the younger daughter started participating in equestrian activities. The older daughter joined soon after.
- [17] After the girls demonstrated their commitment to riding, the couple started looking into purchasing ponies for them. Instead, their maternal grandmother agreed to purchase a pony for each of them as a gift. It was agreed, prior to separation, that the couple would pay the ongoing expenses related to the ponies, including stable and lesson costs.
- [18] The regular monthly riding expenses prior to separation were approximately \$4,200. In addition, several thousand dollars were paid annually for horse shows. The girls have not attended horse shows since separation, in part, because of the funding dispute and, in part, because of the Covid pandemic.
- [19] In his response to this application, the respondent says that he had no idea the costs associated with owning two ponies and having two daughters involved in equestrian activities. I discuss his position in further detail below.
- [20] Since separation, the respondent has refused to contribute to the children's equestrian expenses. He says the expenses exceed his ability to pay based on his current income.
- [21] The income of the couple, during the course of their marriage, was primarily earned through the respondent's work in the design business. The couple derived income from the following companies (collectively, the "Companies"):
- a) Java Designs creates residential building plans and was the primary source from which the parties drew their personal incomes. Since separation, the respondent has continued to operate Java Designs. The claimant is a shareholder in Java Designs.
 - b) Java Properties Inc. ("Java Properties") owns the commercial premises out of which Java Designs operates. It also operated as a holding company in relation to other development properties acquired during the marriage.
 - c) Ziemi Developments Inc. ("Ziemi") was incorporated to develop residential properties for the parties to either resell or hold as investments. Both parties participated in this development business.
- [22] In addition to the income generated by the Companies, the parties also generated income from personally owned rental properties. Those properties have either been sold or are in the process of being sold.

- [23] Until a point in time after separation, the parties jointly drew approximately \$14,000 (net) per month from the Companies. They also drew additional sums to meet their financial needs as they arose. There is some dispute over the amount of personal expenses that were run through the Companies.
- [24] The claimant says that the parties were accustomed to having the Companies pay for a significant amount of personal expenses. The parties' finances were co-mingled in a joint bank account until October 2019.
- [25] In support of her application, the claimant alleges that the respondent continues to use corporate funds to pay personal expenses. She also alleges that he conducted "cash transactions" within Java Designs that were not noted in any accounting. I address those allegations below.
- [26] Since November 2019, the claimant has received a total of \$114,500 from the respondent. \$50,000 of these funds were clearly noted to be capital payments, rather than support. Another \$23,000 was received with a notation suggesting that they were capital payments, although this was not entirely clear. The claimant assumes that the balance (\$41,500) was intended as either interim child or interim spousal support, however, as mentioned, the attribution of these payments was not clear.
- [27] The parties' combined incomes shown on their respective personal income tax returns in the years prior to separation disclosed the following income:
- 2016: \$293,182
- 2017: \$172,329
- 2018: \$294,343
- 2019: \$421,000
- [28] The respondent notes, and the claimant concedes, that the earnings in 2019 were inflated due to the capital gains on the sale of the rental properties owned by the couple.
- [29] The claimant seeks an order imputing an income of either \$250,000 or \$300,000 to the respondent and corresponding support amounts based on the imputed income according to the Federal Child Support Guidelines, SOR/97-175.
- [30] The respondent states that his design business has been affected by the Covid pandemic, and consequently he is limiting his income from Java Designs this year to \$177,087. In submissions, his counsel indicated that his income will be no more than \$200,000 in 2020. As discussed below, his income projection is subject to certain caveats. Further, the respondent has gone into a new property development business with his (now) fiancé. He says that there is no income from that business because it is in the start-up phase. Thus, it will have no income until the first properties are sold.

[31] I note two further facts that I find relevant to this application:

- a) In October 2019, as the respondent moved out of the family home, he traded in his Tesla Model X and purchased a Range Rover for approximately \$91,000. In order to facilitate this purchase, he drew \$20,000 out of Java Designs. He now pays approximately \$2,200 per month in vehicle loan payments.
- b) In April 2020, the respondent took a business loan of \$40,000 from the federal government that was offered as a result of the Covid pandemic. Those loans were designed to assist businesses in getting through the difficult time caused by the economic shutdown. Mr. Leggett use the \$40,000 to purchase an engagement ring for his then girlfriend, now fiancé.

[32] As discussed below, I consider these two facts relevant to the respondent's argument that, while together, the couple, and the family, were living "beyond their means".

[33] I consider and assess these facts below.

Law

[34] The parties both point to the decision in *Robles v. Kuhn*, 2009 BCSC 1163, as the starting point for the proper considerations in this application relating to interim support. Master Keighley wrote:

[12] On interim support applications, the application of these provisions must be qualified by certain established considerations:

1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
4. The courts should not unduly emphasise any one of the statutory considerations above others;
5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);

7. Interim support should only be ordered where it can be said a prima facie case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);
 8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: *L.G.B.*
- [35] While the respondent agrees with the tenets set out in *Robles*, he submits that the court must also consider his "actual income": *Wallace v. Wallace*, 2000 BCCA 81. In *Wallace*, Chief Justice McEachern, as he then was, wrote at para. 19:
- [19] In *Bell v. Bell* (1999), B.C.C.A. 497, this Court said that, wherever possible, salaries should be fixed for guideline purposes on the basis of amounts actually earned. In my view, the projected annual salary of \$225,000 as of the date of trial is not supported by the evidence. At the forthcoming review, the husband's actual salary and other circumstances will be determined. In my view, it will be better to leave the question of child maintenance to be fixed at that review. With respect to child maintenance, there is no convenient way to roll back the clock and I would not make any adjustment for past months. From February, 2000, and thereafter until the review is actually completed, I would reduce the basis for guideline maintenance payable by the husband to \$150,000 with a direction that the final amount when determined, will be payable from the month of February, 2000.
- [36] The respondent also submits that, while the prior earnings of the couple are to be considered, the proper analysis for interim support relates to the respondent's current year earnings: see *Fuzi v. Fuzi*, 1999 CanLII 4073 at paras. 11-12 (B.C.S.C.):
- [11] Section 16 [of the Guidelines] is silent with respect to the period for which the determination of annual income is to be made. It must be inferred that calendar year income is intended as that is the taxation year for individuals. It is unclear whether annual income is historic income for closed taxation years, estimated annual income for the current year, or an estimate of likely future annual income. It is also unclear whether, if current annual income is to be determined, it is income for the year in which the application was filed, or the year in which the application is heard, should a calendar year end intervene.
- [12] I conclude, reluctantly and not without considerable doubt, that the determination under s. 16 is intended to require a determination of income for the calendar year in which made the application is heard.
- [37] The respondent also relies on the reasoning in *Bell v. Bell*, 1999 BCCA 497:

- [7] Mr. Bell's income has been a matter of some considerable fluctuation. The trial judge concluded that there was no need for spousal maintenance and indeed none was sought. For the purposes of child maintenance the husband's income was based upon an average of his previous three years, which resulted in a figure of \$48,758, even though his income for the year was estimated at \$21,880.
- [12] Turning to the question of the maintenance for the children, it is my view that the learned trial judge erred in fixing Mr. Bell's income at a figure far in excess of what he was earning. The guidelines that apply in this case require a fair fixing of income for this purpose. I think that the amount that the husband actually earns is a far better indicator of what figure should be used for this purpose than is achieved by averaging, particularly in an economy where employment is sometimes scarce and where there can be wide fluctuations.
- [38] In light of these cases, the respondent says that any support obligations should take into consideration his anticipation of decreased income in 2020.
- [39] I take from these decisions that I am to perform a contextual analysis, with the primary goal of setting interim support by balancing the respondent's ability to pay with the needs of the claimant and the children.
- [40] This balancing act is made more difficult in this case by the following factors:
- a) The parties have commissioned a joint report that will determine the respondent's actual income, but that report will not be available for some months.
 - b) The respondent is the owner of a business which has fluctuating profits. Those profits may or may not be affected by the current Covid pandemic.
 - c) Since separation, the respondent has started a new property development business with his, now, fiancé. In that type of business, there is a lag time before income is achieved. The new business requires investment in and development of properties. When those properties sell, the respondent may achieve substantial profit.
 - d) Finally, as noted above, the respondent submits that the lifestyle pursued by the family prior to separation was not sustainable. He says that the couple was accessing funds by going into debt in order to sustain their lifestyle.
- [41] I discuss below the needs of the family and the ability of the respondent to pay.

The Respondent's Income

- [42] As noted above, prior to separation, the parties split the income derived from their businesses and rental properties. Upon separation, the development company, Ziemi, ceased operation, and they decided to sell all of the rental properties.

- [43] As a result of those decisions, the claimant acknowledges that a significant percentage of the joint income declared by the couple in 2019 will not be repeating. Despite that reduction, the claimant asserts that the respondent's income for guideline purposes should be set in the range of \$250,000 to \$300,000.
- [44] The respondent states in his affidavit material that, because of the potential downturn in the economy due to the Covid pandemic, in order to ensure the ongoing financial health of the company, he will limit his income from Java Designs to \$177,087 in this fiscal year. He further says that, based on the economic downturn in June and July 2020, he is not sure whether he can sustain his current salary. He also says that he will not have any income from his new property development business, because it just commenced operating.
- [45] As noted above, the claimant alleges that the respondent did certain "cash" work at Java Designs. In response, the respondent says that there were very few such jobs and that they have ceased. While this admission raises the prospect that the respondent may have additional income, the affidavits of his staff make it clear that there is no opportunity to hide any significant income within the structure of the company. Each designer in the company bills their time to specific projects and is responsible for invoicing their work. For the purpose of this application, I decline to attribute any income to these alleged cash transactions.
- [46] Mr. Leggett acknowledges that, for the year ending May 31, 2020, the combined management salaries (paid to the parties) within Java Designs were \$194,928. Further, there was pre-tax profit within the company of \$33,490. However, he notes that, due to Canada Revenue Agency's requirements, \$35,507 worth of work in progress ("WIP") was declared as income but had not yet been billed. Hence, he says, the WIP offsets the pre-tax profit.
- [47] While I accept that unbilled WIP is neither profit, nor cash, it does represent an asset within the company. It is work that has been performed and will be billed. Hence, I include it for the purpose of assessing guideline income.
- [48] I also note that, the respondent is pursuing a new property development venture with his fiancé. His affidavit material indicates that the company "only has debt", and that he and his partner have agreed that they "won't be taking any money out of this company as [they] need to build it up, so [they] don't have to keep borrowing private money at a high rate." I am unable to make any finding regarding the timing of income that may eventually derive from this enterprise. However, when that income comes to fruition, this court will need to determine whether the respondent is fairly dividing it as between reinvestment and income available for consideration in respect of spousal and child support. For the purpose of this application, I ascribe no income to that venture.
- [49] The respondent's affidavit referred to the income for Java Designs being reduced for the months of June and July 2020 due to the Covid pandemic. That reduction is the basis of his projection that his income will be reduced overall in 2020.

- [50] I am unable to make any prognostications for the economy in general. However, it is evident that the economic shutdown in this province was most severe during the months of April through to July. Economic activity has increased since the summer. Hence, I put little stock in Mr. Leggett's concern that he will not be able to sustain an income of \$177,087. Subject to a further shutdown of the economy due to the pandemic, there is no reason to think that his overall income from Java Designs will be diminished. Hence, it is probable that his earnings from Java Designs this year will be commensurate with, or exceed, his earnings from the year ending May 31, 2019.
- [51] As noted, the management income available to the respondent in the last fiscal year was \$194,928. I add to that amount the pre-tax earnings of Java Designs of approximately \$33,000. As noted, the company began this fiscal year with \$35,000 in unbilled WIP that will be converted into income this year.
- [52] On that basis, I ascribe an income to Mr. Leggett for guideline purposes at the rounded up sum of \$230,000.

Needs of the Family/ Section 7 Expenses

- [53] It has been agreed between the parties that the claimant will continue to reside in the former family home. She will also take over the mortgage payments on that residence.
- [54] As noted, the family owned a vacation property on Lake Cowichan. That property has been sold (at a profit), and the mortgage paid off. Thus, Mr. Leggett's overall expenses have been reduced, although the family does not get the benefit of that vacation property. To that extent, the parties have tacitly recognized that they could not afford that property following separation.
- [55] The family owned other chattels that have also been sold, or are in the process of being sold. The accounting for those items will occur on another day.
- [56] As discussed, the claimant seeks an order for special or extraordinary expenses relating to the children.
- [57] The relevant portions of s. 7 of the Federal Child Support Guidelines, SOR/97-175, provide:

Special or extraordinary expenses

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;

(f) extraordinary expenses for extracurricular activities.

[58] The two special expenses sought by the claimant are the following:

- a) the tuition for attending SMS (\$33,740); and
- b) the costs associated with horse-riding.

[59] For the reasons set out below, taking into account the necessity of the expenses, spending patterns prior to separation, and the ability of the respondent to pay, I allow the full tuition fees of SMS and a portion of the horse-riding expenses as extraordinary expenses to be paid by the respondent.

[60] As noted above, on this application, Mr. Leggett takes the position that the lifestyle undertaken by the family was in excess of what they could afford. He says that they were sustaining that lifestyle by going into debt. If I were to accept Mr. Leggett's primary submission, the girls would attend public school and cease their horse-riding activities. His alternate position is that these expenses should be trimmed back.

[61] I have the following problems with Mr. Leggett's description of the family's pre-separation lifestyle exceeding their financial means:

- a) Following the sale of the couple's rental properties and other assets, the respondent's lawyer currently holds approximately \$1,000,000 in trust for division between the parties in this litigation. That amount does not include the equity in the family home. Hence, the couple had managed to accumulate significant assets in their 20 years together.
- b) Soon after separation, Mr. Leggett traded in his main mode of transportation, a Tesla Model X, and purchased a Range Rover for approximately \$91,000. He took a \$20,000 advance from Java Designs for the down payment on that vehicle. He now pays approximately \$2,200 per month on the vehicle loan.
- c) In April 2020, Mr. Leggett took a \$40,000 "Covid loan" from the federal government and purchased an engagement ring for his then girlfriend, now fiancé.

[62] I infer from these facts that, although the family had significant expenses before separation, they were still able to accumulate significant assets. Further, to the extent the respondent submits that their lifestyle was unsupportable before separation, Mr. Leggett does not appear to have arrived at that epiphany until the claimant commenced this application for spousal and child support.

[63] Put another way, following separation, Mr. Leggett purchased items that required him to incur approximately \$130,000 worth of debt. Those items will not, in any way, improve or maintain the lifestyle of his children. Now, in the face of those debts and facing this application, he argues that the family's lifestyle was not sustainable before separation. He further argues that he cannot afford to, and should not have to, fund the activities that the children pursued prior to separation.

- [64] I do not accept the respondent's submission on that front.
- [65] In addition, the respondent argues that some amount of income should be ascribed to the claimant. He notes that she was involved in the property development business (with him) prior to separation. He suggests that she may be planning to start a similar business with her mother. The claimant denies any such plans.
- [66] For the purpose of interim support, I do not ascribe any income to the claimant. As noted in Robles, the need to achieve economic self-sufficiency is of less significance at this stage. In this case, the act of separation coincided with the termination of the claimant's ability to be involved in the couple's property development business. While this court will eventually determine the claimant's economic self-sufficiency, that will not occur at this point.
- [67] I now turn to discuss the specific expenses, taking into account their necessity in relation to the children's best interests, their reasonableness in relation to Mr. Leggett's ability to pay, and the family's spending pattern prior to separation.
- [68] As noted, the two girls have attended private schools since kindergarten. They moved from a Montessori school to SMS just before separation. That move increased the tuition by approximately \$14,000 per year.
- [69] I do not accept the respondent's submission that he only agreed to the girls attending SMS on the understanding that his mother-in-law would pay the tuition. As noted, prior to separation, the couple was doing well financially. Their daughters had always attended private school. Attendance at SMS was a reasonable expense for a couple in their situation to consider and adopt.
- [70] With respect to the tuition for the girls' school, I consider that, once the couple committed, this became a bedrock expense that is required to allow the children to continue living at the same standard they enjoyed prior to separation. It is clear to me that Mr. Leggett's income affords the ability to pay the tuition at SMS. The evidence is clear that both girls enjoy the school and have benefited from attending it. I do not accept Mr. Leggett's suggestion that they have not achieved significant improvement. I note that, at least for the 2019-2020 school year, it is reasonable to infer that their academic pursuits may have been distracted by their parents' separation and the resulting upheaval in their lives. Clearly, a further upheaval by requiring them to switch schools is not in their best interests.
- [71] On that basis, I allow the SMS tuition as a s. 7 expense.
- [72] The ponies, on the other hand, are a more difficult issue. I am informed that the yearly cost to maintain the ponies and provide riding lessons is approximately \$60,000. That is a substantial sum, and I do not believe that Mr. Leggett has the means to fund the entirety of it while paying other forms of support.

- [73] In his affidavits, Mr. Leggett says that he had no idea of the financial commitment he was getting into when he agreed to the girls starting horse-riding. He further argues that the claimant should decrease the current (post-separation) expenses. He submits that the claimant should:
- a) reduce the number of riding lessons the girls take per week;
 - b) compel the girls to work at the stables to off-set the cost of housing their ponies; or
 - c) agree to sell one of the ponies.
- [74] I give no credit to the respondent's statement that he had no idea what financial commitments he was getting into when he agreed to allow the girls to pursue horse-riding as an activity. It would be evident to the most casual observer that buying ponies for your daughters (or receiving them as gifts) is not equivalent to signing them up for soccer or Little League. There is no doubt that horse-riding is an expensive activity. It is a pursuit that should, and would, be discussed in depth before it was undertaken. Again, Mr. Leggett does not appear to have come to that financial realization until after separation.
- [75] Although unstated in the claimant's submissions, there is a tacit recognition that the girls' full yearly riding expenses will exceed the respondent's ability to pay. The claimant put forward scenarios that would see the respondent contribute either \$12,000 or \$25,000 per year toward the riding expenses. The subtext of the application appeared to be that the claimant would either reduce the overall expense to accord with the amount awarded, or alternatively, the claimant's mother would pay some portion of it.
- [76] Taking into consideration the respondent's probable income for the current year and the combination of expenses from both private school and the cost of horse-riding, in my opinion, it is reasonable to order Mr. Leggett to contribute \$20,400 per year (\$1,700 per month) to the children's horse-riding related expenses.

Summary of Orders on Support Application

- [77] Based on the findings above, I order that, commencing August 1, 2020:
- a) Mr. Leggett's income for interim support purposes is determined to be \$230,000;
 - b) section 7 expenses will be paid by Mr. Leggett, including the entirety of the SMS tuition and \$20,400 annually for the equestrian pursuits;
 - c) child support will be paid based on the income set out above; and
 - d) spousal support is ordered at the mid-point of the Spousal Support Advisory Guidelines.
- [78] The claimant seeks an order making these payments retroactive to November 2019. I decline to make that order. I listed above (at para. 26) the payments that have been made to the claimant since November 2019. The nature of those payments, and the accounting for them, will be determined at trial.

- [79] I make the order for support payments effective August 1, 2020. I choose that date on the basis that the claimant's application was filed on July 30, 2020. I note that an advance tuition payment was made by the claimant in July. The respondent is responsible to reimburse the claimant for that amount in addition to other tuition payments.
- [80] These support payments will continue until further order of this court or agreement of the parties. The parties have commissioned a report relating to the respondent's available income. Should that report vary significantly from the findings in these reasons, either party is at liberty to apply to vary this order.

Application for Capital Distribution

- [81] The respondent seeks a capital distribution of \$250,000 in order to fund this litigation. His position, which I accept, is that this litigation will be of the "high-conflict" variety. He points to a long list of letters written by his counsel that were required for him to see his daughters.
- [82] As noted above, his counsel currently holds approximately \$1,000,000 in trust from the sale of various family assets. He submits that a distribution could be made that does not negatively affect the claimant.
- [83] In his affidavit material, the respondent states that he has incurred legal fees of \$58,000 to August 21, 2020, and he anticipates that he will require a further \$230,000 to pursue this litigation.
- [84] As authority for this distribution, the respondent relies on s. 89 of the Family Law Act, S.B.C. 2011, c. 25, which provides:

Orders for interim distribution of property

89 If satisfied that it would not be harmful to the interests of a spouse and is necessary for a purpose listed below, the Supreme Court may make an order for an interim distribution of family property that is at issue under this Part to provide money to fund

- (a) family dispute resolution,
- (b) all or part of a proceeding under this Act, or
- (c) the obtaining of information or evidence in support of family dispute resolution or an application to a court.

- [85] The respondent also points to several cases where a distribution has been ordered.
- [86] In *Devathasan v. Devathasan*, 2017 BCSC 1010, Justice Fitzpatrick allowed a distribution of \$400,000 to the claimant on the basis that the parties were involved in high-conflict litigation that was unlikely to resolve before trial. There was a finding that the payment would not negatively affect the respondent.

- [87] In response, the claimant points to the reasoning in *Devathasan* wherein Fitzpatrick J. cited the decision of Justice Ballance in *I.F. v. R.J.R.*, 2015 BCSC 793:
- [156] In *I.R.*, Ballance J. stated:
- [192] The blunt purpose of s. 89 is to assist economically disadvantaged spouses to access justice in matrimonial disputes; it is meant to help level the litigation playing field that is so often skewed when one spouse controls all or the majority of the wealth and assets. Application of s. 89 calls for a purposive interpretation, where the need of the applicant spouse to receive an interim distribution and the potential entailing harm to the other spouse are evaluated contextually with an eye on the larger objectives endorsed by the FLA.
- [88] The claimant notes that, in this case, she is the disadvantaged spouse. She does not have any control over the income producing entity (Java Designs). She has been shut out of the couple's property development business. Hence, the respondent cannot rely on s. 89 to "level the playing field" because it is already tilted in his direction.
- [89] The respondent further relies on *M.A.L. v. N.A.L.*, 2014 BCSC 203, where Justice Melnick reasoned:
- [15] The respondent's alternate application is for an interim distribution to her of family assets in the amount of \$200,000 so that she may fund her litigation expenses. On the evidence before me on this application, I am satisfied that is a reasonable request, both in terms of amount and its necessity for her to deal with the difficult issues of asset division and parenting issues on an equal basis with the claimant. Given the equity in the matrimonial home, the length of the marriage, and the assets to which the claimant has access, it is, even at this early stage, sufficiently clear for me to say that it would not be harmful to the claimant's interests for such an interim distribution to take place by March 31, 2014. Whether the source of these funds is from the equity in the home or other assets over which the claimant has control is up to the claimant. If obtained from the equity in the home, the parties will co-operate in securing the funds. The claimant shall be responsible for all costs, including interest, if any loan needs be taken out to secure the interim distribution subject to determination at trial of who should bear the responsibility for these costs.
- [90] However, in the *M.A.L.* decision, the applicant was, again, the non-earning spouse who required and requested the distribution.
- [91] The respondent further relies on the decision of Justice Milman in *J.W.L.P. v A.J.P.*, 2017 BCSC 1898. However, here too, the party applying for the distribution did not have control of the income producing entities.
- [92] In addition to arguing the point about "levelling the playing field", the claimant submits that the courts have taken a broad interpretation of the phrase "harmful to the interests of a spouse" in s. 89. Any risk of potential harm should be considered, including the prospect that, following the resolution of the litigation, the respondent may have insufficient funds to pay any eventual judgment. The claimant notes, somewhat cheekily, that the respondent

decided to borrow funds to purchase a vehicle and an engagement ring, but seeks to withdraw capital in order to pay the future bills of his lawyers.

- [93] I note that the claimant does consent to a distribution of capital necessary to pay the invoices of the jointly retained business valuator, Mr. Ounstead. She also consents to a distribution sufficient to pay the 2019 income tax owing by each party.
- [94] The claimant submits that the respondent's application for a \$250,000 capital distribution should be adjourned until after the receipt of Mr. Ounstead's report.
- [95] I accept the claimant's submission on that issue. I adjourn generally the respondent's application for a distribution of funds. With that being my decision, it would not be prudent for me to express my views on the strength of the respondent's position.

Summary

- [96] At para. 77 above, I summarized my orders regarding the claimant's application for support.
- [97] The respondent's application for a capital distribution is adjourned except that I allow a distribution to pay the invoices of the jointly retained business valuator.
- [98] The claimant has been successful in this application. I award costs to her in any event of the cause.

"A. Ross J."

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