

CANADA / JUDGMENT

M.A. v. B.S.A.

2024 BCSC 2058

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 2058 M.A. v. B.S.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.A. v. B.S.A.,

2024 BCSC 2058

Date: 20241113

Docket: E232375

Registry: Vancouver

Between:

M.A.

Claimant

And

B.S.A

Respondent

Corrected Judgment: The text of the judgment was corrected on the front page on November 26, 2024, and on the front page and throughout on December 5, 2024.

Before: The Honourable Mr. Justice Gibb-Carsley

Reasons for Judgment

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(Appearing March 15 and June 9, 2024)

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(Appearing October 7 and 9, 2024)

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(Appearing June 9, October 7 and 9, 2024)

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(October 7 and October 9, 2024)

Place and Dates Hearing:

Port Coquitlam, B.C.

March 15 and June 9, 2024

New Westminster, B.C.

October 7 and 9, 2024

Place and Date of Judgment:

Vancouver, B.C.

November 13, 2024

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I. Introduction

- [1] In these family law proceedings, the claimant, M.A., seeks a variety of interim orders from the Court in respect of the respondent, B.S.A. The application can be distilled to raising four significant issues. First, the claimant seeks sole occupancy of the family home. Second, the claimant seeks an order for interim child and spousal support to be paid by the respondent to the claimant. The third issue, which relates to the issue of support payments, requires the Court to assess the parties' incomes upon which to calculate support, as each party asks the Court to impute income to the other spouse. The fourth issue is the claimant's request for an interim distribution of funds to fund her litigation.
- [2] In respect of the issue of sole occupancy, the respondent contends that the parties should continue to reside in the home until the matter is determined at trial. He asserts that as the residence is sufficiently large and separated into detached suites, it is both better for the children and preferable financially for the parties. He further contends that the claimant has not met the test for being granted sole occupancy, namely, that shared use of the home is a practical impossibility.
- [3] The contention between the parties regarding the support amounts is twofold. First, the parties disagree as to the assessment of the other's income for the purposes of calculating support and argue that income should be imputed to the other party. Second, the respondent asserts that the amounts he currently pays to the claimant voluntarily for support combined with the amount he pays to maintain the family home, is in excess of the amounts he would be required to pay to the claimant for child and spousal support under legislation.
- [4] In respect of the issue of the claimant's application for an interim distribution from the family property to assist her in funding her family law litigation, the claimant asserts she requires the funds to level the playing field and continue her litigation. The respondent contends that the claimant has not established the grounds required to support her claim that she requires a distribution from the family assets and further, the source of the funds where she seeks the funding is a corporation owned jointly by the parties, creating potential negative tax consequences if money is distributed to the claimant.
- [5] Before commencing my reasons, I wish to note that at the commencement of the application before me the parties advised that as a result of a Judicial Case Conference held in early March 2024, they were able to agree to mutual conduct orders as well as resolve an issue relating to orders of restraint of family property. As such, I need not address the relief sought by the claimant in this notice of application regarding her seeking conduct orders or orders restraining family property.
- [6] I also note that after the first day of hearing before me, both parties retained new counsel for the continuation. While this has complicated the matter somewhat in that the counsel making the final arguments were not the counsel at the initial application, a transcript of the first proceeding was provided. I am satisfied that it was in the interests of justice to proceed

as a continued application before me as opposed to having the parties restart the application afresh before a new judge. My concern rested primarily on the fact that, given the parties are currently residing in the same property, it would be of some benefit for them to have this application dealt with in a more timely fashion than resetting the matter before a new judge at a date that is months in the future. The aim of the Court is to give the parties some clarity moving forward in respect of their living situations until the trial is heard, which is currently set to commence on July 14, 2025.

- [7] In these reasons for judgment, I will provide some brief background for context and then turn to my analysis and determination.

II. Background Facts

- [8] Both parties are 45 years old. They began their relationship in 2000 and married on June 25, 2003. There are three children of the marriage born in October 2013, June 2012 and December 2008 (the "Children"). Given I have anonymized names in this judgment for the sake of the Children, for clarity, the claimant is the Children's mother and the respondent their father. The parties share parenting time equally, although the claimant asserts that she is more involved in the Children's activities and taking them to various school and sporting events.
- [9] The parties own several properties owned both together and some held jointly in their names and in the name of L. Corp. L. Corp. is a corporation that the respondent controls but is owned jointly by the respondent and the claimant. I will describe L. Corp. in more detail below. I need not go into the property ownership in detail but, in general terms, the parties own a house in North Delta jointly (the "Family Home") and a rental property in Delta (the "Rental Property").
- [10] The Family Home is a large home of approximately 6,000 square feet. It has the main floor and upstairs, (the "Upstairs Suite") and a basement/ground floor suite (the "Basement Suite"). The Basement Suite is approximately 2,500 square feet, has a home theatre, two bedrooms, exercise room, laundry and kitchen. The main floor of the Upstairs Suite is also approximately 2,500 square feet with all available living amenities. There is an upper floor of the Upstairs Suite, in which the Children's bedrooms and a bathroom are located that is approximately an additional 1,000 square feet.
- [11] The claimant currently resides in the Basement Suite, the respondent resides in the Upstairs Suite, and the Children sleep each night in their bedrooms located on the upper floor of the Upstairs Suite. The Children move between the Basement Suite and the Upstairs Suite of the Family Home and spend time with the "on-duty" parent eating meals and spending time with that parent in the respective portion of the Family Home. However, the Children sleep in their bedrooms on the upper floor of the Upstairs Suite, even when having parenting time with the claimant. As I understand it, when the parties exercise their parenting time responsibilities, it essentially means that the on-duty parent is the person responsible

during that time for ensuring the Children are taken to their various activities and school and provided with meals and supervision.

- [12] The Rental Property is currently rented. It was unclear to me the details of the rental arrangement of rental income received by the parties from renting the Rental Property.
- [13] The parties also own three condominiums in Kelowna, British Columbia. One condominium is under construction and is to be completed in 2024/2025.
- [14] I also note that the parties own expensive automobiles with the claimant owning a Range Rover worth \$45,000 and the respondent owning a Corvette worth in excess of \$150,000. I reference these automobiles, because while each party claims to the court that they are suffering a form of financial hardship because of expenses exceeding income, they appear to both have extensive assets and are maintaining a luxurious lifestyle.
- [15] Starting in about March 2012, after their first child was born and the claimant was pregnant with their second, the claimant did not work outside the home. However, between November 2021 to June 2022, she began working five and a half hours per day, four to five days per week, as an education assistant ("EA") in a kindergarten classroom. In that position, she earned \$26 per hour. She did not work during the 2022/2023 school year. The claimant is currently working four hours per week as an EA with the Delta School District. I will provide more details of the claimant's income and income potential below in my analysis of the parties' income for the purpose of calculating support.
- [16] The respondent is a real estate broker at Avison Young. He has held this position since 2008. I will return to the respondent's income below, as the amount of income that the respondent has earned, and is expected to earn in the future, is a central issue in the application before me.
- [17] The parties separated in September 2022, at which time the claimant stayed in an Airbnb for a few weeks and then moved to her parent's home with the two youngest children. The claimant alleges that one of the reasons for the break down of the marriage is that the respondent suffers from substance use disorder, and alleges that he used both alcohol and drugs. The claimant also alleges that the respondent was physically and verbally abusive to her.
- [18] There is some dispute as to what specifically occurred after the parties initially separated, but at some time in or around March 2023, the claimant moved back into the Family Home. As set out above, she currently resides in the Basement Suite and the respondent resides in the Upstairs Suite.

- [19] There is no formal agreement for spousal or child support currently in place. However, the respondent currently pays for all of the expenses related to the Family Home and the Children, as well as many of the claimant's expenses. The respondent also pays \$5,000, per month on a without prejudice basis, to the claimant for her expenses and as child support and spousal support, but the amounts are not specifically particularized as child support or spousal support.
- [20] In the respondent's initial submissions, he argued he was paying, in addition to his \$5,000 monthly payment to the claimant, approximately \$17,000 per month to or on behalf of the claimant for housing expenses and maintaining the family assets. In subsequent submissions, the amount was revised to approximately \$10,000 for housing expenses related to the properties and his \$5,000 in support payments. I will revisit the amounts that the respondent asserts he pays to or on behalf of the claimant later in these reasons as, in my view, they impact the ultimate calculation of his support obligations.
- [21] I will now turn to my analysis and determination of the issues.

III. Analysis and Determination

- [22] I will first address the issue of whether the continued cohabitation of the parties is a practical impossibility, because that issue will impact the support issues.

A. Is the continued cohabitation of the parties a practical impossibility?

- [23] The legal test to determine whether a party should be granted exclusive occupancy of the family home is set out in s. 90 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Section 90(1) of the FLA defines the family residence as a property owned or leased by one spouse or both and is the ordinary place of residence of the spouses. It is not disputed by either party that the Family Home meets these requirements.
- [24] Subsection 90(2) of the FLA provides that a court may make an order granting a spouse, for a specified period of time, exclusive occupation of the family residence. The test for exclusive occupancy under the former Family Relations Act, R.S.B.C. 1996, c. 128, as set out in *Rinta v. Rinta*, 1980, 19 B.C.L.R. 287 (S.C.), outlines that shared use is a practical impossibility and that the applicant is the preferred occupant of the premises on the balance of convenience. The Court has reaffirmed that this test for exclusive occupancy continues to apply under the FLA: *Ferguson v. Ferguson*, 2014 BCSC 216 at para. 62. The test requires the party seeking exclusive occupation to show that:
- a) it is a practical impossibility for the spouses to have shared use of the property; and
 - b) on a balance of convenience, the applicant is the preferred occupant.
- [25] The onus is on the party seeking exclusive occupation to first establish that the shared use of the family residence is a practical impossibility. The practical impossibility test in an objective test, not a subjective one: *Dennis v. Regehr*, 1996 Canlll 2392 BCSC at paras. 44-45.

- [26] The legal threshold for practical impossibility is high. Incompatibility of the spouses is insufficient. Although spouses may be leading separate lives under the same roof in an unpleasant and acrimonious manner, shared use of the home may still not be considered a practical impossibility: *N.N.N. v. D.E.B.*, 2016 BCSC 1778 at para. 27, citing *Ingram v. Ingram*, 2011 BCSC 1318.
- [27] The jurisprudence is clear that there must be something more than the parties simply having differences, and "not wanting to live together. There must be something which makes the situation intolerable or unacceptable in an objective sense": *McMaster v. Knutson*, 2022 BCSC 2149 at para. 51, citing *Wilson v. Wilson*, 1995 CanLII 1445 (B.C.S.C.) at para. 50. As set out in *Cummings v. Chen*, 2023 BCSC 245 at para. 48, "[f]ear of possible inappropriate behaviour and uncomfortableness does not create a practical impossibility".
- [28] In determining whether the applicant is the preferred occupant, the court must look at the factors objectively. Factors to be considered include, "(a) any acquiescence or delay, (b) the conduct of the parties, (c) the economic position of the parties, (d) alternate living accommodation available to either of the parties and (e) other relevant circumstances such as health": *Glowacki v. Nesbeth*, 2021 BCSC 535 at para. 72, citing *Sun v. Cook*, 2007 BCSC 2045 at para. 16.
- [29] The balance of convenience requires that the court weigh the "disadvantages to the applicant if they are unsuccessful against the disadvantages to the respondent if they are successful": *Corness v. Sola*, 2024 BCSC 519 at para. 45 citing *Evans v. Mahtoy*, 2015 BCSC 2141 at para. 30.
- [30] The claimant asserts that she should be granted exclusive occupancy of the Family Home. This issue may have the greatest impact on the family members and the Children as, if ordered, it would relocate the respondent from the Family Home and would be the most disruptive to the status quo. Further, such an order would have the greatest economic impact on the parties as it would require the claimant to likely take over a majority of the operating expenses related to the Family Home (or be assessed a significant occupational rent) and require the respondent to find and fund new accommodations. In other words, each party would be required to maintain a household for themselves and the Children.
- [31] The claimant alleges that the respondent has perpetrated family violence against her. The respondent denies the allegations. In *Khomutskaya v. Sidorov*, 2020 BCSC 1024 at para. 14, Associate Judge Caldwell, as he then was, dismissed an application for exclusive occupancy of the family home. In that case, prior to the application, there was a physical altercation between the parties, which included allegations that the respondent kicked down the door of the room that the claimant had retreated to during a verbal argument, that the respondent physically attacked the claimant's adult son, and that the claimant's brother restrained the respondent and gave him bruises in the process, for which there was photographic evidence: *Khomutskaya* at paras. 7-11. Associate Judge Caldwell concluded that:

- [16] Continued cohabitation may well be uncomfortable for these parties, but I do not find it to be a practical impossibility as required by the first stage of the test, sufficient to order exclusive occupancy of the whole townhouse to one or other of the parties. The respondent will have exclusive occupancy of the bottom floor bedroom and adjacent garage. He will enter and leave by way of the separate entrance associated with that space. He will have access to the secondary (non-ensuite) bathroom as reasonably required. He will be responsible for maintaining his own foodstuffs in his space, but will have access to the kitchen cooking facilities three times per day for up to 30 minutes each for food preparation and clean-up. It is a condition of his use of the common bathroom and kitchen facilities that he clean up after his use of same such that he leaves those rooms as he found them. The claimant will have the exclusive use of the rest of the townhouse, save as provided above. Both parties are ordered to avoid contact with each other wherever possible within the confines of the above order. There will be liberty to apply by either party and I am prepared to remain seized of applications in that regard.
- [32] Despite what appear to be serious allegations of family violence, in Khomutskaya the Court did not find that exclusive occupancy was warranted and the parties should continue to cohabitate. In the case at bar, the claimant's allegations of family violence mainly relate to allegations that the respondent was verbally abusive to the claimant although there are some allegations of physical violence. In respect of the verbal abuse alleged by the claimant, I was shown text messages from both parties that demonstrate that both parties have at times used derogatory, inflammatory and abusive language in their communications with each other.
- [33] I do not want to minimize the allegations of family violence made by the claimant. Any allegations of family violence must be considered carefully. However, objectively, I do not find that there is sufficient evidence before me that the family violence allegations in the particular circumstances of this case rise to a level to make it a practical impossibility that the parties can remain living in the Family Home. In this regard, context is important. I distinguish this case from more typical circumstances in which parties may be forced to live together under the same roof while sharing amenities and living space in crowded situations which would undoubtedly add to an already stressful time during the breakdown of a marriage.
- [34] The parties are not sharing the Family Home in the manner other individuals might be sharing a house because of the significant size of the home and its design. The Family Home has separate access to the living areas. As set out above, the Basement Suite is 2,500 square feet, has a home theatre, a home gym, a pool table, a number of bathrooms and bedrooms, and a kitchen. I also understand it has a separate entrance and both units are self contained. The Upstairs Suite and Basement Suite are approximately equal in square footage and are essentially self contained living units. Indeed, it is of assistance to contrast the living circumstances of the parties in the case at bar to those described by the Court in Khomutskaya in which the Court found it not a practical impossibility for the parties to

continue to share a kitchen and bathroom.

- [35] In this regard, I find that the respondent's characterization of her living conditions as substandard in a "basement suite", fails to capture the true essence of her accommodation. While the parties are residing together in the Family Home, they are essentially residing in two separate residences located on the same parcel of property. Of course, given the Children move between the two suites and, as I understand it, so do the parties to some extent, there is likely more interactions between the parties than if they were living at separate residences completely. I accept sharing a home is less than ideal for parties going through a breakdown of marriage and there could be additional stress because the parties are living under the same roof. That said, the test is whether the continued sharing of the residence is objectively a "practical impossibility". I find it is not.
- [36] I have considered the factors set out at para. 16 of Sun and informing my decision is a consideration of the conduct of the parties who have essentially "made it work" sharing the Family Home for almost two years. Further, while the parties appear to have the means to live separately, the alternate living arrangements available to the parties now, do not seem to favour granting sole occupancy to the claimant because it would require selling other properties before trial or potentially both parties moving to a substandard accommodation also requiring the Children to reside at two different households.
- [37] I find the claimant has not met the threshold to obtain an order of exclusive occupancy on an interim basis. The parties appear to be making the current living arrangements work. The trial is set to occur in approximately eight months, in July 2025. At that point, I would expect that issues regarding the family assets as well as the living arrangements will be resolved. Further, given the parties apparent wealth and property ownership, it strikes me that even now, they could take steps before trial to sell an asset or have one of the parties move out of the Family Home and into one of the secondary properties they own. However, I will leave that up to the parties, because I have found that the claimant has not met the test for exclusive occupancy of the Family Home in this application. Simply put, I am not satisfied that the claimant has provided a sufficient basis that she has no other options in which to reside and that she should be granted sole occupancy of the Family Home. I dismiss that element of the application.
- [38] I will now turn to a discussion of the parties' income as it relates to support payments assessed under the Federal Child Support Guidelines, SOR/97-175 [Guidelines].

B. Support and the Parties' Income

- [39] The claimant seeks orders for interim child and spousal support. Given the income disparity between the parties, the respondent will be required to pay child support to the claimant while the parties co-parent the Children. In respect of spousal support, given the evidence before me of the circumstances of the parties' marriage in which the claimant primarily provided family care-giving duties while the respondent worked outside of the home, I have

little hesitation in concluding that the claimant will have entitlement to spousal support. The issue however, on this application, is what is an appropriate amount of interim support that the respondent should pay until the matter can be determined through an agreement or at trial. As each party disagrees on the amount the other party claims that they earn, this requires an assessment of the parties' incomes.

- [40] I will deal first with the respondent's income.
- [41] The claimant seeks an order for the determination of the respondent's Guideline income pursuant to s. 18 of the Guidelines, including pre-tax corporate income available to the respondent. Subsequently, she seeks an imputation of income to the respondent, pursuant to s. 19 of the Guidelines.
- [42] The respondent provided an affidavit of Vikas Kaushal, a CPA, who is the individual who has prepared the taxes for the respondent for the 2018 to 2024 taxation years. Mr. Kaushal was asked to prepare a five year average of the respondent's income from 2020 to 2024 based on the income earned by the respondent's Personal Real Estate Corporation (the "PREC"). I note that counsel did not articulate with precision the ownership of the PREC, but it appears from my review of the income tax returns that the PREC is, in fact, owned in thirds by the claimant, the respondent, and L. Corp. I presume this ownership relates only to non-voting shares of the PREC due to regulations governing real estate agents and PRECs.
- [43] The implications of the ownership of the PREC, specifically regarding that it is jointly owned by the claimant, the respondent, and L. Corp., was not explored by the parties in the application before me. The impact of the ownership of the PREC and L. Corp. with respect to how money should ultimately be distributed between the parties may be an issue for another day. For the purpose of this application, I accept that the respondent's earnings from his PREC for income purposes are as indicated in Mr. Kaushal's affidavit.
- [44] I had some concern that Mr. Kaushal's report was put before the Court as an expert report to provide opinion evidence of the respondent's income. Both counsel for the respondent and claimant accepted that Mr. Kaushal's affidavit did not amount to expert opinion evidence, and was instead presenting the reported income of the respondent as fact by simply applying arithmetic of yearly income. I accept that Mr. Kaushal's affidavit is properly before the Court and facilitates understanding of the respondent's reported income from the PREC for 2020 to 2024.
- [45] As set out in Mr. Kaushal's affidavit, the respondent's revenue from 2020 to 2024 from the PREC is as follows:
- a) 2020 - \$412,275;
 - b) 2021 - \$57,064;
 - c) 2022 - \$1,079,244;

- d) 2023 - \$921,739; and
- e) 2024 - \$306,480.

[46] From the revenue, the respondent's net income after corporate tax paid from the PREC is as follows:

- a) 2020 - \$226,332;
- b) 2021 - \$74,928;
- c) 2022 - \$846,073;
- d) 2023 - \$693,004; and
- e) 2024 - \$135,741.

[47] Mr. Kaushal calculated the average of the respondent's five years of net after tax income as \$365,244 and the average between 2020 and 2024 as \$181,037. As I understand it, the rationale for taking the income from the 2020 and 2024 years is that the respondent believes that those two years are more representative of the income he will make in the future from the PREC because his earning in 2021, 2022, and 2023 are related to the COVID-19 downturn and subsequent real estate boom. In other words, the respondent asserts that those three years are outliers, both positive and negative, and so are not representative of his income going forward.

[48] My review of the income tax documentation for the PREC indicates that it has a year end of January 31. While I was not provided with any argument about the timelines of Mr. Kaushal's calculations, I presume that his figures for the 2024 year only include the month of January for 2024, given the year end is January 31, 2024. If this is the case, then the earnings from February 1, 2024 to October 2024 are not included in Mr. Kaushal's accounting. If Mr. Kaushal has provided an abridged calculation of the PREC's income for the 2024 calendar year from January 1, 2024 to October 2024, it would still not account for a full year of income. In either situation, I am concerned that while Mr. Kaushal's affidavit purports to provide the PREC's income for 2024, it does not provide a complete financial picture of the respondent's most current income.

[49] In my view the remedy for what appears to be incomplete information provided for the PREC is to utilize a longer average of the income available to the respondent from the PREC. In this case, I prefer to use the five year average of the respondent's income calculated by Mr. Kaushal of \$365,244 for the purpose of assessing support under the Guidelines.

[50] I acknowledge that my assessment of the respondent's income may lack precision. I also acknowledge his claim that the average I have taken includes two "outlier" years in real estate due to the COVID-19 Pandemic. That said, the affidavit of Mr. Kaushal was put before the court by the respondent and I find it provides some measure of the respondent's income that can be used to establish his income for calculating support. Using the five year average

will in my view balance the variables in the respondent's income and is sufficient given this is an order to establish interim support until the parties' finances can be better assessed at trial.

- [51] I also note that in his affidavit, the respondent asserts that income he receives from the PREC is then carried down to L. Corp. He then pays himself dividends from L. Corp. which is ultimately his personal income. As I understand the submissions of the respondent's counsel and as supported by Mr. Kaushal's affidavit, "the net income after taxes [from the PREC] is the actual amount available to the Respondent each year which he will have to pay taxes on." This is somewhat inconsistent with the respondent's affidavit that his personal income is based on dividends he takes from L. Corp., but I accept that the primary source of income to the respondent is the PREC and that the after tax money earned by the PREC is the amount of money "available" to the respondent. Accordingly, I am satisfied for the purpose of this application that using the after tax money earned by the PREC is a fair - if rudimentary - assessment of the respondent's yearly income for the purposes of calculating support under the Guidelines.
- [52] For clarity, my assessment of the respondent's income, does not include income of L. Corp. On the evidence before me, I am unsure whether L. Corp. generates its own income, or is simply a holding company for money the respondent earns from the PREC and other real estate investments. As such, I am concerned that including income from L. Corp. may, in effect, be double counting income generated by the PREC. However, I recognize that in not including income available to the respondent (and perhaps to the claimant as she is a 50% shareholder in L. Corp.) may be understating income. I expect that this will be an issue to be resolved at trial when the finances of the parties are better ventilated.
- [53] In respect of the claimant's income, on her F8 Financial Statement she declares she currently earns none. The claimant attended a Medical Office Assistant Program at Douglas College in 1999 and 2000. In 2005, she attended BCIT for two marketing classes. She obtained a Property Management Licence in 2005. She obtained an EA certificate in 2021. She has worked as a property manager in 2009 after the birth of the parties' first child. The claimant stopped work with the birth of the parties' second child in 2012 and became a "stay-at-home-mom", although she worked part-time as a medical office assistant for about \$20 an hour in late 2017.
- [54] The claimant has worked as a casual EA for approximately 12-15 hours per week between March and June 2021. In November 2021 to June 2022, the claimant worked between 22 and 27.5 hours a week as an EA for \$26 an hour. The claimant asserts in her affidavit that she is unable to work significantly now because the Children require her attention, "needing something or wanting to be picked up."
- [55] I am satisfied that given the claimant's training and past work experience she is able to earn income. I find that the claimant, by claiming no income, is intentionally under-employed or at least significantly understating her income. I accept that the claimant could, and should

work at least part time in order to move toward economic self-sufficiency. To provide general context for earning potential, in British Columbia, minimum wage is set at \$17.40 per hour. If the claimant worked full-time (40 hours per week for 50 weeks), she would earn an annual income of approximately \$34,800. In making this observation, I note that the claimant's previous hourly income is significantly more than the minimum wage.

- [56] I accept that the claimant may not be in a position to work full time hours, but I also accept that with her training she is likely to earn more than minimum wage for part-time work. I acknowledge that the claimant appears to now do more of the activities for the Children than does the respondent meaning her ability to work full time hours may be reduced. However, in my view, given her past education, training and work experience, her skills would be desirable to an employer and she should be able to secure at least part-time employment.
- [57] Given these circumstances, I conclude that the claimant's income should be imputed at \$31,000 per year for the purposes of calculating support.
- [58] Based on the respondent having an imputed income of \$365,244 and the claimant having an imputed income of \$31,000 per year under the Guidelines, with shared parenting the respondent is obligated to pay the claimant \$5,492 in monthly child support. Subject to the caveats I will mention below, I will order that the respondent is to pay to the claimant child support for the Children in the amount of \$5,492 per month.
- [59] I now turn to spousal support based on the Guidelines income to which I have just referred. Applying the income figures to the Spousal Support Advisory Guidelines [SSAG] indicates that the respondent should pay the claimant spousal support each month in the range of \$3,071 at the low end, \$6,102 at the mid range, and \$6,975 at the high end.
- [60] In *Robles v. Kuhn*, 2009 BCSC 1163, Master Keighley set out a number of factors for the Court to consider on an application for interim support at para. 12 in the context of the Family Relations Act. These factors are equally applicable under the FLA, and include:
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 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 emphasize 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 when 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.*
- [61] Given that the application before me is for an interim order, and a more precise figure on more complete evidence will likely emerge at the trial, I conclude that an appropriate amount of spousal support the respondent must pay the claimant is at the mid-range of the spousal support set out under the SSAG. I set the amount of spousal support at \$6,100 per month.
- [62] The claimant does not seek retroactive support. In the Notice of Application the relief the claimant seeks is for support "commencing on the first day of the month following this order and on the first day of every month thereafter". The respondent, to his credit, has been paying a significant amount in housing expenses and support to the claimant since separation. I am concerned that going forward, the effect of the respondent paying for all of the housing expenses and the support I am now ordering him to pay would result in him overpaying his support obligations to the claimant. In effect, if there is no recognition of his contribution to the claimant's living expenses, it would result in him overpaying support, as child and spousal support are intended to fund the lower income earning spouse to maintain a household for the Children and maintain a standard of living independently -- something to which the respondent is already contributing.
- [63] Accordingly, I conclude that the respondent is entitled to deduct the claimant's share of the living expenses related to the Basement Suite which I set at \$2,000 per month based on the following assessment.
- [64] In his F8 Financial Statement, the respondent states that he pays monthly expenses for the Family Home related to mortgage, taxes insurance and water of \$3,220.60. In the F8, the respondent also states that he pays monthly utilities, including cell phones for the family of \$820.00 and household supplies of \$25.00. The total of these expenses is \$4,065.60. Given that the claimant occupies 42% of the Family Home (2,500/6000 square feet), I conclude that the claimant should be responsible to pay at least \$1,694 per month towards the maintenance of the family home. Given there was no value for repairs an maintenance set by the respondent on his F8, I will increase the claimant's share of the Family Home costs to

\$2,000 per month. While this amount may be less than market rent for a unit of similar size in the Lower Mainland, I find that given the nature of the relationship is not at arm's length the amount the claimant should be required to reimburse the respondent for living in the Basement Suite is appropriate. In summary, I conclude that the respondent may deduct the amount of \$2,000 from the monthly payments he is to make to the claimant as long as the claimant is residing in the Basement Suite or until other living arrangements are made.

- [65] For clarity, while I order that the respondent is to pay to the claimant monthly child support in the amount of \$5,492 and spousal support of \$6,100, he is entitled to reduce his payments by \$2,000 (to \$9,592 per month) to account for his payment of the claimant's living expenses. In my view, to order otherwise would be to have the respondent pay excessively for the claimant's living expenses.
- [66] Further, I am aware that the respondent is currently incurring the expense of maintaining the other family assets ultimately for the benefit of both parties. To be clear, the orders I am making now are without prejudice to either party making claims at the trial for reimbursement or credit for the expenses incurred at maintaining family property or for claims of retroactive adjustments to spousal or child support.

C. Interim Distribution of Family Property

- [67] The claimant seeks an interim order for the distribution of family property pursuant to s. 89 of the FLA to fund her litigation. Section 89 of the FLA provides as follows:

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.

- [68] The claimant contends that she has limited resources due to her inability to earn income and, as such, is unable to fund her litigation. She argues that the family assets are extensive in this matter, being in excess of \$6 million, but she is unable to access them without an order of the Court. I was provided with an affidavit of a paralegal at her lawyer's law firm which anticipates that the cost of the legal proceeding will be in the range of \$190,000-\$206,000.
- [69] It is the source of the funds that causes the greatest contention between the parties. The claimant seeks the interim distribution from L. Corp., the company owned by the parties but allegedly entirely controlled by the respondent. Specifically, the claimant seeks a distribution from L. Corp.'s cash holdings in the amount of \$206,000.

- [70] The respondent acknowledges that there are extensive family assets that ultimately will be divided between the parties, however, he asserts that the assets are not currently in a liquidated form. Important to his opposition is his assertion that a distribution from the assets of L. Corp. will trigger significant tax consequences for both him and the claimant. In other words, if funds are paid out of L. Corp. to the claimant, either as a draw or as dividends, the distribution will cause tax to be payable on the distribution. He argues that this is not in the parties' best interest.
- [71] As I understand the respondent's argument, he is not opposed to have other real estate properties sold and the money from the proceeds of those sales and equity used to fund litigation by the claimant as an interim distribution or simply to be distributed on an interim basis to the parties for their use and enjoyment while the litigation proceeds. As such, it is not the fact that the claimant seeks an interim distribution of funds, it is the source from which she seeks the funds that is most contentious. I pause to note that the respondent's suggestion to liquidate other assets does not appear unreasonable. I would encourage the parties to explore the possibility of liquidating assets in order to free up funds should they be required either for litigation pursuant to s. 89 or for other living expenses given they are both complaining of financial hardship. However, the application before me as framed by the claimant is whether funds held by L. Corp. should be distributed to fund her litigation.
- [72] The first aspect of the consideration under s. 89 of the FLA requires that I must be satisfied to make a prelitigation distribution to fund counsel that "it would not be harmful to the interests of a spouse". In my view, although there may be accounting and taxation issues that arise from a distribution from L. Corp. because it is a corporate entity, I find that such a distribution would not be harmful to the respondent.
- [73] Section 89 is a special provision crafted to "level the playing field" between parties and to allow a financially disadvantaged spouse access to funds to participate in family dispute resolution by sharing in financial resources despite the parties' ultimate respective entitlement not having been determined: *Bartch v. Bartch*, 2018 BCCA 271 at para. 75.
- [74] In *Bartch* our Court of Appeal confirmed the test under s. 89:
- [56] Section 89 establishes two conditions that must be met by an applicant seeking an interim distribution. The first is that the distribution will not be harmful to the distributing party. The second is that the applicant needs money to fund the family law proceedings or pursue the resolution of the family dispute. Even where those conditions are met, the issuance of an interim distribution remains a discretionary exercise, as s. 89 provides that the court "may" make such an order. Consequently, in exercising his or her discretion under s. 89, a judge must consider whether, in the particular circumstances of the case, it would be in the interests of justice to grant the order sought.
- [75] In *Etemadi v. Maali*, 2021 BCCA 298, at paras. 50-53, the Court summarized the principles applicable to s. 89 interim distribution orders:

- a) the chambers judge must first determine if the applicant is economically disadvantaged in advancing the family law proceeding and if so, an order that "levels the playing field" may be appropriate because it attempts to achieve balance between the parties;
 - b) the chambers judge must then embark on a preliminary assessment of whether the applicant can demonstrate that it would not be harmful to distribute property and whether it is necessary to do so for a purpose stated in s. 89;
 - c) in recognizing the extraordinary nature of the order, the chambers judge must carefully consider the amount of the interim distribution to ensure that it does not exceed what is necessary under s. 89; and
 - d) the chambers judge must always consider whether it is in the interests of justice to make the order.
- [76] The circumstances of this case appear to involve a family with significant assets but an uneven and unequal access to income and no current access to all of the liquidity of the assets. In other words, at least in the claimant's situation, she is asset rich but income poor. I accept that the claimant is disadvantaged economically as compared to the respondent who controls the flow of funds and that an order under s. 89 of the FLA would level the playing field for the litigation.
- [77] The respondent asserts that the claimant has failed to establish her need for funds for her litigation because she has failed to disclose her income tax returns for the 2023 taxation year and has provided in her F8 Financial Statement that she earns no income, despite saying she is employed on a part time basis. In essence, the respondent asserts that the claimant cannot fail to disclose her true financial circumstances and claim that she is at a financial disadvantage.
- [78] The claimant seeks access to funds from L. Corp., of which she is a 50% shareholder, but also appears to have little to no de facto control over the company assets. In my view, given the disparity in the income and income opportunities between the parties, the claimant is disadvantaged in proceeding with her litigation as compared to the respondent who clearly has sources of income from his real estate practice. The claimant has provided financial disclosure regarding her bank account balances which is roughly \$103,000. She has also provided affidavit evidence that she is unable to pay for legal fees for the litigation "without borrowing from her family."
- [79] I have also been provided information that there are currently significant cash holdings in L. Corp. My review of the L. Corp. corporate tax returns indicates, from its end of year balance sheet from January 31, 2023, that L. Corp. had cash holdings of \$96,288 and total retained earnings of \$5,750,746, and in the previous year, had cash holdings in excess of \$2.4 million and total retained earnings in excess of \$4.5 million.

- [80] I am satisfied that, although there may be tax consequences for the claimant (and potentially the respondent) in making a distribution from L. Corp. to the claimant as that income will presumably be taxed in her hands as either income or as a dividend, she should be entitled to draw an amount from L. Corp. Any advance will be accounted for in the division of the family assets between the parties in the future. No doubt this will add accounting complications due to the tax implications of removing funds from the corporation such that the net benefit and the cost to both parties will need to be carefully audited. Even given these complications, I find that such an order will not be ultimately harmful to the parties.
- [81] It is clear to me that the parties have significant equity and assets and as such it is a perverse result that the claimant is unable to access these funds in order to pay for her litigation. In my view this is the precise situation that the legislation set out in s. 89 of the FLA attempts to avoid. Especially so, given that I understand that the respondent exercises complete de facto control over L. Corp. and how money is distributed from the corporation.
- [82] The claimant seeks \$206,000 as an interim distribution to fund the litigation. I am not persuaded that she is entitled to the full estimated amount of her fees for two reasons. First, her financial disclosure indicates she has some funds to fund her litigation. Second, the estimated expense for litigating her family law provided by her lawyers, may not ultimately be incurred to the stated estimated total.
- [83] Based on the foregoing, I am satisfied that it is in the interests of justice that the claimant be paid a litigation advance from the cash held in L. Corp. in the amount of \$100,000 in order to "level the playing field" between the parties as they proceed with their litigation. I find that this amount does not exceed what is necessary to accomplish the purpose of s. 89 of the FLA. I order that the respondent draft or prepare any necessary documentation to ensure that this amount is released to the claimant.

IV. Summary of Order Made

- [84] In summary, I order as follows:
- a) On an interim basis the respondent is to pay to the claimant commencing on December 1, 2024, until varied by further order of the court or agreement of the parties, child support in the amount of \$5,492 per month based on a Guidelines income of \$31,000 for the claimant and \$365,244 for the respondent;
 - b) On an interim basis the respondent is to pay the claimant commencing on December 1, 2024, until varied by further order of the court or agreement of the parties, spousal support of \$6,100 per month support based on a Guidelines income of \$31,000 for the claimant and \$365,244 for the respondent this being at the mid range of spousal support under the SSAG;

- c) As long as the claimant continues to reside in the Family Home, the respondent is entitled to deduct \$2,000 per month related to the housing expenses he is paying, and will continue to pay, towards the claimant's living expenses at the Family Home. More specifically, he is entitled to deduct \$1,000 from his child support payments and \$1,000 from his spousal support payments; and
- d) Pursuant to s. 89 of the FLA, the claimant is granted an interim distribution of \$100,000 from the cash holdings of L. Corp. and the respondent will provide all necessary documentation to facilitate the transfer of those funds within 30 days of the date of this order. This distribution is without prejudice to the parties resolving property division issues in the future.

V. Costs

- [85] The general rule in respect of costs is that the party who is substantially successful is entitled to his or her costs: *Gold v. Gold* (1993), 106 D.L.R. (4th) 452, 1993 CanLII 1248 (B.C.C.A.) at para. 19. This general rule accords with Rule 16-1(7) of the Supreme Court Family Rules, B.C. Reg. 169/2009, that costs must be awarded to the successful party unless the court orders otherwise. There is however a discretion available to the court as to whether costs should be ordered. This discretion is exercised with a view to various factors, such as hardship, the purpose of the court's determination of the issues before the court, and the importance of not upsetting the balance achieved by the award.
- [86] In my view, there has been mixed success in this application. The respondent was successful in defending the claimant's application for exclusive occupancy. The claimant was partially successful in obtaining funding for her litigation, although not to the extent she sought. The claimant was successful in obtaining an order for child support and spousal support, but the respondent never disputed he would be required to pay support, instead he argued that he was generally paying a sufficient amount but in the form of payments to the claimant and funding her housing needs by paying the expenses for the Family Home. Indeed, the amount he was paying before approximated the amount I have now ordered although it was done so less formally and not particularized as child support or spousal support.
- [87] Having regard for the mixed success as well as being cognizant not to upset the balance of the support payments ordered, I order that the parties shall bear their own costs of the application.

VI. Conclusion

- [88] I wish to encourage the parties to attempt to cooperate in resolving their issues. It appears to me that while currently there is acrimony, the parties continue to share parenting time and want the best for their children. Hopefully the parties can accomplish the division of family assets, resolution of support issues and moving forward with the end of their marriage with the least amount of damage to the parties' relationship with each other and their children,

given they will continue to be connected to each other through their children, in some manner at least, for the rest of their lives.

[89] I thank counsel for their well-prepared and argued submissions during the various appearances in this matter.

"Gibb-Carsley J."

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