

CANADA / JUDGMENT

M.B.F. v. A.R.F.

2021 BCSC 1262

COURT

Supreme Court of British Columbia

DECIDED

29 June 2021

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2021 BCSC 1262 M.B.F. v. A.R.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.B.F. v. A.R.F.,

2021 BCSC 1262

Date: 20210629

Docket: E25204

Registry: Fort St. John

Between:

M.B.F.

Claimant

And

A.R.F. also known as A.R.T.

Respondent

Before: Master Bilawich

Reasons for Judgment

Counsel for Claimant, by teleconference:

N.R. Bauder

Counsel for Respondent, by teleconference:

R. Mostar

Z. Suche

Place and Date of Hearing:

Fort St. John, B.C.

April 14, 2021

Place and Date of Judgment:

Fort St. John, B.C.

June 29, 2021

- [1] The respondent applies for interim without prejudice child and spousal support and asks that the claimant's Guideline income be imputed as \$400,000 per year. Alternatively, she asks that their family residence be listed for sale, that she have sole conduct of its sale, and seeks directions regarding distribution of net sale proceeds. She asks that a portion of the proceeds be used to fund expert valuations and lump sum child and spousal support, with the balance held in trust pending agreement of the parties or further order.
- [2] The claimant opposes all of the relief sought.

Background

- [3] The parties began dating in 2012. At the time, the respondent worked as a tax accountant with an accounting firm in Langley. She was pursuing a Certified General Accountant ("CGA") designation and had reached the PACE level, which was the final certification level before achieving CGA accreditation.
- [4] The claimant was and is director and shareholder of a private B.C. company, [name redacted] ("ResourceCo"). He had established the company in 2006. It carries on business in the oil and gas industry in the Peace Region of northern B.C. It provides mulching and a variety of construction services. Among other things, it owns and operates heavy equipment, namely mulchers, which the claimant says require considerable maintenance, skilled operators and involve substantial operating expenses. His business required him to travel frequently to northern B.C. to source work for ResourceCo or help in its operations. His frequent and prolonged absences were unfortunately a source of considerable discontent in the early stages of the parties' relationship.
- [5] The claimant is a status member of the Salteaux First Nation and is entitled to claim certain tax exemptions pursuant to s. 87 of the Indian Act (Canada). ResourceCo's registered office is situated on reserve land which allows the claimant to claim an exemption from paying income tax on funds he receives through the company.

- [6] In October 2012, the respondent became pregnant and the parties started cohabiting, albeit with frequent periods of physical separation when the claimant was working in northern B.C. In November 2012, they were engaged.
- [7] In April 2013, the respondent was involved in a motor vehicle accident which caused a lower back injury. Her claim was eventually settled in 2017. During this period ResourceCo's business was slow, as a result of which the claimant took a job with a gas plant in Fort McMurray, AB for a time. The claimant says it was necessary for him to seek work outside of the lower mainland to generate sufficient income to meet his family and business expenses.
- [8] On [month / day redacted], 2013, their son, C.L.F. (the "Child"), was born. The parties have divergent views regarding the period following the Child's birth. The respondent says she was left to raise their son largely on her own, while the claimant says he quit his job to help care for the Child and was frustrated in those efforts because the respondent did not trust him to safely care for their son, except with her supervision. The claimant also says his mother provided frequent assistance to both the respondent and the Child.
- [9] In October 2013, the parties purchased a lower mainland franchise location for a yoga business. The business was operated through a private B.C. numbered company, [name redacted] B.C. Ltd.)("NumCo"), which was registered solely in the claimant's name so they could take advantage of a business loan for start up costs which was available to indigenous entrepreneurs.
- [10] The yoga studio opened in January 2014. The respondent says their original plan was for the claimant to take over management of the business when her maternity ended and she had to return to work at the accounting firm. The claimant disputes this and says the franchise was the respondent's idea and passion, and he merely provided support to help her achieve it. The claimant was not interested in managing the yoga business and focused his time and effort on ResourceCo 's business. The respondent managed the yoga business largely on her own.
- [11] The respondent's maternity leave was due to end in June 2014. She was already hard-pressed because she was the parent primarily responsible for their Child's care, she was managing the yoga business and also trying to keep up her studies for her CGA designation. She was not able to return to work at the accounting firm and was laid off when her maternity leave ended.
- [12] The parties separated temporarily in late 2014. The claimant says it was because the claimant physically assaulted her. The claimant denies this and sets out a different version of events. He moved out of their home. While they were separated, the respondent found work as a finance manager with a car dealership in Surrey. The parties reconciled a week later. The respondent says she was fired from the car dealership due to the frequent telephone calls she was receiving from the claimant while at work. The claimant denies this.
- [13] On October 17, 2014, the parties married.

- [14] The claimant says he tried working at the yoga studio for a period of time after they married, but was simply not earning enough income to meet the family's expenses. He returned work in northern B.C. where his financial prospects were substantially better.
- [15] The parties separated a second time in March and April of 2015 for about six weeks. During that period, the respondent secured part-time work with an H&R Block. The parties reconciled shortly thereafter and the respondent left that position so they could work on their relationship. They went on a family vacation to Florida and the Bahamas and the respondent purchased a \$20,000 time share on her credit card.
- [16] In September 2015, the respondent, having completed all of her course work, wrote her final accounting exams, PA1 and PA2. She failed one of those exams, she says because she did not have time to prepare on top of all of her family and work responsibilities. Had she wished to continue pursuing her letters, the next step at that point would have required her to transfer to a CPA legacy program. This involved two additional years of course work, which was simply not feasible given her other responsibilities. She decided to stop pursuing her letters.
- [17] The claimant takes issue with some aspects of the respondent's account, noting that his mother was helping to care for the Child approximately 3-4 days per week and would regularly keep him overnight. The claimant says he also focused on the Child when he was not away working.
- [18] The parties continued to have a tumultuous relationship through 2016.
- [19] In about 2017, the claimant persuaded the respondent to relocate to northern B.C. They sold the yoga business, which by that time the respondent says had started generating some profit.
- [20] In about February 2018, the parties started the process of purchasing a home in Grande Prairie, AB. That ran into difficulty when the bank requested copies of ResourceCo's financial statements. The company had not filed tax returns for the preceding four years. The respondent got to work bringing its bookkeeping, GST returns and corporate tax returns up to date. They eventually opted to back out of the purchase of the Grande Prairie property.
- [21] The respondent says she was not compensated or not adequately compensated for work she performed for ResourceCo. The claimant says the respondent had full access to ResourceCo's financial records and if she had wanted money, she had his permission to prepare a cheque and he would have signed it. He says she caused ResourceCo to pay her the amount she desired. The claimant says that he had actually asked the respondent to provide bookkeeping and accounting services to ResourceCo earlier, but she had declined to do so until after he complied with her demand that his father be excluded from ResourceCo's business.
- [22] The respondent continued fulfilling ResourceCo's accounting needs thereafter. She says that, as a result, she is very familiar with its finances and the amount of income the claimant is able to generate from it. She also started operating an accounting business through NumCo.

This is the company through which they previously held the yoga business. The respondent says her income from this was modest. The claimant alleges the respondent had tax clients for whom she was working up to 5-6 days per week at times but she never had income which reflected this. He alleges she has concealed her actual income.

- [23] In about April 2018, the parties moved into the basement in the home of one of the claimant's cousins in Fort St. John, B.C. The respondent says the claimant secured work in Moberly Lake, B.C. and ended up staying there instead, leaving her and the Child with his cousin's family in Fort St. John.
- [24] In about April 2018, the parties found and eventually purchased a 158 acre rural property at [address redacted], Fort St. John Rural (the "Family Residence"). The parties asked a lender how much income they required to qualify for mortgage financing to purchase the property and were told about \$200,000 - \$225,000 per year. The claimant says the respondent made his ResourceCo income match the lender's suggestion. He is not sure how she managed to do this, but says on paper his income roughly doubled from the previous year.
- [25] The claimant alleges the respondent was intentionally keeping her own income artificially low and making his artificially high to create the conditions for her to make excessive support demands in the event of separation. I frankly suspect the better explanation is that ResourceCo-based income in the claimant's hands was tax exempt while income flowing to the respondent would be subject to normal taxes. It made practical sense to channel as much family income as practicable through the claimant. Both parties agree they needed proof of sufficient income to qualify for the financing needed to buy the home they wanted at the time.
- [26] Around this time, ResourceCo began to enjoy better financial results due to some significant projects it had acquired. Both parties accuse the other of excessive spending. The respondent alleges that the claimant was in the habit of carrying substantial sums of cash in his truck. The family went on a number of vacations.
- [27] In January 2020, the parties again separated. The respondent alleges the claimant physically assaulted her, including strangling her. She alleges he was in the midst of a depressive episode at the time. The claimant describes a much milder version of events but admits that at one point in the course of an animated argument he grabbed the respondent by the neck and raised a fist as if to hit her, but with no intention of doing so. He says his actions were very brief and that he regretted them. He left the family home following the incident. He suggests that any marks on the respondent were not caused by him and alleges she made them herself. He alleges that she had previously self-harmed and had threatened suicide if he left her.

- [28] Efforts to reconcile were ongoing. The claimant moved back into the family home in March 2020 after the Covid-19 pandemic struck. They were living under the same roof but they were not back together. The respondent says that attempts to reconcile continued until about September 8, 2020, when they separated for the final time.
- [29] On October 8, 2020, the respondent moved out of the family home and relocated to Sechelt, B.C. with the Child. They stayed temporarily with the respondent's father. The parties disagree on whether the respondent notified the claimant she was intending to move and where. The claimant says she took the Child without his consent and initially refused to tell him where they were. He ended up not seeing the Child until November 20, 2020 in Sechelt. The respondent suggests the respondent was or ought to have been aware where she was relocating to.
- [30] The respondent enrolled the Child in a local elementary school and has been working at developing new clientele for her bookkeeping and accounting business.
- [31] As of December 4, 2020, the respondent and the Child moved into an apartment in Sechelt. It costs \$1,975 per month for rent, parking and storage.
- [32] The respondent says that post separation she was paying living expenses for herself and the Child in part from her own separate funds. This includes proceeds in NumCo's bank account. Prior to separation she had accumulated a balance of about \$29,000 in NumCo's account. Post separation she had drawn out about \$24,000 to cover moving costs, rent and living expenses. When there was a balance of about \$5,700 remaining, she says the claimant unilaterally suspended her access to the account, withdrew the remaining balance and later purported to pay it to her as part of a \$6,000 voluntary "without prejudice" support payment he agreed to make to her. Terminating the respondent's access to this account also interfered with her ability to operate her business. The account was linked to the respondent's accountant e-file profile with CRA. As a result, the respondent had to acquire a new company and apply for a new e-file number with CRA, which took roughly 30 days to process.
- [33] The claimant says he terminated her access to the account because he noticed a series of substantial withdrawals without his consent and was receiving inquiries from CRA and PST regarding missed filings. He is the sole shareholder and director of NumCo and the tax personnel he spoke to were not interested in being re-directed to the respondent. It is his position that the funds in this account were a family asset and not the respondent's separate property.
- [34] The claimant says that since separation the respondent has received the following:
- a) Transfers from NumCo's RBC account - \$29,774.48;
 - b) Without prejudice interim child support payments:
 - i. October 2020 \$1,356

- ii. November 2020 \$1,356
 - iii. December 2020 \$1,356
 - iv. January 2021 \$1,061
 - v. February 2021 \$1,061
 - vi. March 2021 \$1,061
 - vii. Total \$7,251
- c) Without prejudice interim spousal support payments:
- i. January 2021 \$1,424 (\$2,024 - \$600 vehicle payment)
 - ii. February 2021 \$2,024
 - iii. March 2021 \$2,024
 - iv. Total \$5,472

[35] The claimant says the respondent had the benefit of a credit card on which he made two payments, including \$5,000 on September 8, 2020 and \$6,138.93 on September 23, 2020, for a total of \$11,138.93. It is not clear what specific expenses the relevant balances on the card included.

[36] He suggests the respondent benefitted from him paying the mortgage and property taxes for the Family Residence and making payments on the respondent's truck since separation. He says the respondent's share of these payments is \$8,013.97.

[37] In reply to the respondent's request that he fund an expert valuation for ResourceCo and a guideline income report for himself, the claimant says he does not have sufficient funds to do so. He has paid \$10,000 towards the cost of a section 211 report to be prepared by Dr. Elterman and expects that report will cost a further \$4,000 - \$5,000 by the time it is completed.

[38] The claimant opposes a sale of the Family Residence because it is a home for himself and the Child and is also needed for ResourceCo's operations.

Principles Relating to Interim Spousal Support Applications

[39] In *Robles v. Kuhn*, 2009 BCSC 1163 at para 12, Master Keighley summarized the considerations as follows.

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. 1082; *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 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.*

[40] In *I.F. v. R.J.R.*, 2015 BCSC 793 at paras 122-126, Madam Justice Ballance discussed the purposes for an interim order:

122 The main purpose of an interim order for spousal support is to bridge the period between when the action is commenced and the trial at which time the court will be in a position to make a decision on the merits: *D.R.M. v. R.B.M.*, 2006 BCSC 1921; *Goriuk v Turton*, 2011 BCSC 652.

123 Because interim orders are summary in nature and temporary, they provide a rough justice at best: *Newson v. Newson*, 65 B.C.L.R. (3rd) 22 (C.A.) at para. 11. The "rough justice" approach underlying the temporary order implicitly recognizes that the evidence before the chambers judge on the interim application is often insufficient to permit an in-depth analysis of the wide array of factors relevant to entitlement and quantum of support: *R.C.G. v. C.L.G.*, 2010 BCSC 1596, para. 11; *Johnson v Johnson*, [1993] B.C.J. No. 2140 at 16.

124 The legal test governing interim support is not necessarily the same as the test applicable in reaching the final order: *Goriuk*. This is because the full picture of many of the considerations under the applicable legislation will not be known until a fulsome inquiry on the merits is embarked upon a trial.

125 Relying on Newson, Goriuk confirmed that where the marriage is admitted and need is proved interim support should be ordered without adjudicating the issues, unless the action is frivolous or vexatious.

126 While the other relevant factors that inform the issue of spousal support are to be considered to the extent possible, the respective needs and means of the parties are ordinarily the central factors, if not the most prominent, on an interim application. The corollary is that considerations such as compensatory factors and the need to achieve self-sufficiency often hold less significance: *R.C.J. v. C.L.G.*, 2010 BCSC 1596 at para. 11; *Goriuk* at para. 33.

[41] A party seeking to impute income to the other spouse bears the burden to establish an evidentiary basis for same: see *MacCarthy v. MacCarthy*, 2015 BCCA 496 at para 35. There is also authority for the proposition that disputes relating to imputation of income are best left to trial, where parties have fully canvassed their respective earning capacities and an evidentiary basis for such a funding can be properly established. See *Kouznetsova v. Kouznetsov*, 2014 BCCA 160 at para 45.

Determining Incomes / Imputing Income

[42] The respondent asks that the claimant's income be imputed at \$400,000 per year, pursuant to ss. 22 and 23 of the Federal Child Support Guidelines (the "Guidelines") and Rule 5-1(28)(f) and (g). This would lead to child support payments of \$3,306 per month and spousal support of \$10,445 per month.

[43] She relies on *Hausman v. Klukas*, 2009 BCCA 32, where the court concluded that the onus is on the payor to establish that pre-tax corporate income is not available to the payor in determining income for support purposes.

[44] The claimant relies on *Kowalewich v. Kowalewich*, 2001 BCCA 450, in which the court concluded that the corporate income method was the fairest way of determining what money was available to a payor when dealing with a wholly-owned corporation. The claimant argues that s. 18 of the Guidelines allows but does not require inclusion of all pre-tax income of a corporation. The court should consider evidence of legitimate business needs to determine the appropriate amount of pre-tax income to be included in Guideline income. Funds needed to maintain the value of the business as a going concern should not be included in determining annual income. He points to paragraphs 58-59 in *Kowalewich*:

58 It seems to me regard should also be had to the nature of the company's business and any evidence of legitimate calls on its corporate income for the purposes of that business. Justice Drake cautioned about not killing the goose who lays the golden eggs. Monies needed to maintain the value of the business as a viable going concern will not be available for support purposes. In my view they should not be included in determining annual income. In *Hollenbach v. Hollenbach*, 2000 BCCA 620, [2000] B.C.J. No. 2316, the trial judge recognized the need for a reserve for depreciation as an appropriate factor to be considered in a real estate business. Justice Dorgan recognized Mr. Kowalewich's business expansion plan as a valid business purpose

in a retail business.

59 I do not recite these factors to suggest this Court should tinker with a trial judge's exercise of discretion, nor that a trial judge should second guess business decisions. I do say that a trial judge must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income for Guideline purposes.

[45] He argues that ResourceCo's pre-tax income for the most recent year end was \$447,891.20. The company uses the Family Residence in its operations and business. There is overlap between some personal and business expenses. The majority of business expenses include:

- a) Auto expenses (fuel for employee vehicles, vehicle maintenance) - \$32,210.74;
- b) Fuel for equipment - \$43,941.09;
- c) Insurance - \$15,052.75;
- d) Payroll - \$55,380.23;
- e) Subcontractors - \$30,707.48;
- f) Repairs and maintenance - \$71,451.16;
- g) Supplies and small tools - \$31,095.77
- h) Wages - \$17,823.77

Total - \$297,572.79

[46] He argues that ResourceCo's pre-tax income is not available to him to pay child support. The foregoing are "hard" business expenses which do not have a personal element to them. He further argues that the company required retained earnings to ensure that there are funds available to meet unforeseen business expenses and capital purchases to allow it to continue as a going concern. Given the size and nature of the large equipment involves, unexpected expenses can end up being significant.

[47] While I appreciate the logic behind the claimant's latter point, the financial records available to me on this application do not bear out that there has been a pattern of keeping retained income as a reserve for ResourceCo in recent years. The balance sheets suggest significant fluctuations in both retained earnings and shareholder loan balances:

Year End

Retained Earnings

Shareholder Loan

July 31, 2017

-\$81,848

\$253,410

July 31, 2018

-\$21,895

\$187,688

July 31, 2019

-\$21,893

\$253,795

July 31, 2020

\$135,945

-\$17,672

[48] The respondent says that for the period August 2018 to July 2019, the claimant withdrew shareholder loans of \$191,584.35 from ResourceCo. As accountant / bookkeeper, she issued to him a T4 in the sum of \$200,000, which was in accordance with generally accepted accounting principles. ResourceCo also had a further \$151,000 in retained earnings. She notes that because of the claimant's tax exempt status, it is actually advantageous for him to withdraw money from ResourceCo, as this reduces its corporate income tax payable. These two figures add up to \$351,000 in income that is available to the claimant. With the income tax exemption, his effective Guideline should also be grossed up to take this into account. She suggests that \$400,000 per annum is a reasonable level at which to fix his imputed Guideline income.

[49] For 2020, she argues that between January 1, 2020 and October 28, 2020 there were \$181,700 in transfers from ResourceCo's bank account to the claimant's personal bank account, and that he will not have to pay tax on this. She also suggest that this does not account for personal benefits the claimant receives from the company.

[50] The respondent belatedly raised a troubling allegation of fraud in a late-delivered Affidavit #3 sworn April 8, 2021. Claimant's counsel objected to this being considered on this application because he had just received this new evidence and had not yet received instructions regarding a response. The allegation is serious and the claimant should have a reasonable opportunity to respond to it. It also does not appear to directly impact the issues on this application. For the purpose of the present application, I do not consider it is necessary or appropriate to consider the allegation and I have not factored it into my decision.

- [51] The claimant says that an imputed income to him is patently unreasonable and argues there is no evidence to support such a figure. The claimant also questions the allegation that he received \$200,000 from ResourceCo during August 2018 to July 2019 and says this was not representative of his earlier pattern of income from the company. He does not understand how she got his income figure this high.
- [52] He says that ResourceCo's business is seasonal. Since the Covid-19 pandemic began, work has been slow due to changes in circumstances with contractors the company does business with. For example, he says that in the three preceding winters the company had large mulching contracts which involved up to 7 machines working, which generated large revenues while ResourceCo was partnered with another company. He says they no longer work together. Another example is ResourceCo formerly did work in partnership with [name redacted]. That work ended on September 23, 2020 due to lack of demand in their projects. He also says that the fact he has to drive about 1300 km each direction to exercise parenting time with the Child in Sechelt every second weekend has also had an impact on his ability to generate income.
- [53] The claimant argues that ResourceCo's net income from its most recent year end (\$113,890.83) is the most accurate measure of his income at the present time. He recently started voluntarily making "without prejudice" interim child and spousal support payments to the respondent based on this level of income.
- [54] During submissions, I pointed out that his suggested figure does not include any tax gross up. At my request, following the hearing, both counsel forwarded a new calculation which included auto-gross up on income of \$113,890 per year. This resulted in a Guideline income for the claimant that came out to \$166,636.
- [55] The respondent disputes whether and how much of a cash reserve ResourceCo requires to remain a going concern. The respondent has made allegations that the claimant is causing ResourceCo to pay numerous personal expenses. There are issues regarding the claimant's shareholder loan balance and alleged changes to ResourceCo's business.
- [56] In view of the many disputed issues relating to ResourceCo, the claimant's income and personal benefits from it and whether and how much of a reserve is appropriate for the business, in my view it is appropriate that a Guideline income opinion be prepared before a fully considered decision is made concerning the claimant's appropriate level of guideline income for interim child and spousal support purposes. The respondent has been in contact with Gary Mynett of Blair MacKay Mynett Valuations Inc. for that purpose and also regarding a business valuation for ResourceCo generally, but says she cannot afford the requested retainer.

- [57] The claimant has not taken issue with the respondent's choice of joint expert. Rather, he says he cannot afford to pay the cost of these reports in addition to the section 211 report, and he argues the respondent actually has sufficient individual funds available for her to do so; she simply does not want to spend them on expert reports.
- [58] With respect to the respondent, the claimant asks that the court impute income to her in the sum of \$40,622 per annum. He says she has education and work experience as a bookkeeper and accountant, has her own practice and is again self-employed in that capacity in the Sechelt area. He says her skills and background make her highly employable. The Child is also attending school, which frees up time for her to work. The claimant conducted research on a Government of Canada Job Bank website and his wage analysis suggested the median income for an accountant in the lower mainland is \$28.21 per hour.
- [59] The respondent's position is that, for the moment at least, her efforts to establish a new accounting business in Sechelt are at a fledgling stage and it will take time for her to develop a new client base. For present purposes she suggests \$30,000 is a reasonable figure.
- [60] Pending receipt of a Guideline income report, I set the claimant's Guideline income for the purpose of calculating interim without prejudice support at \$166,636.
- [61] I also agree that \$30,000 is a reasonable level at which to fix the respondent's Guideline income for the same purposes.
- [62] Gary Mynett of Blair MacKay Mynett Valuations Inc. is appointed as joint expert to prepare a Guideline income report for the claimant and a corporate valuation of ResourceCo. In the first instance, I order that the claimant and respondent to bear the costs associated with Mr. Mynett's report in rough proportion to their preliminary incomes, namely claimant 85% and respondent 15%.
- [63] When the reports are available, the parties are at liberty to apply to adjust interim spousal support without having to show a change in circumstances.

Child Support

- [64] The respondent seeks an order that the claimant pay her ongoing interim without prejudice child support for the Child commencing November 2020 and continuing on the 1st day of each and every subsequent month thereafter until further order of the court or written agreement of the parties, and that he pay her 95% of special and extraordinary expenses. This is pursuant to sections 147, 149, 170 and 216 of the Family Law Act ("FLA"), section 15.1(1) and (2) of the Divorce Act ("DA") and ss. 3 and 17-18 of the Guidelines.
- [65] Several months before this application was filed, the parties made an informal agreement that the claimant would start making interim without prejudice child support payments of \$1,061 per month, which was based on the claimant's assertion that his Guideline income is \$113,890 per annum.

- [66] In view of my decision to order that expert reports be prepared, at this time I will only make an interim without prejudice order based on ResourceCo's net income figure but with a tax gross up - namely \$166,636. This results in a base child support figure of \$1,486 per month.
- [67] The respondent also asked for an order that the claimant pay a proportionate share of the Child's special and extraordinary expenses, however, on this application she did not specifically identify any such expenses.
- [68] I order that this amount of child support be paid on an interim without prejudice basis starting on November 1, 2020 and continuing on the first day of each and every subsequent month until further order or written agreement of the parties. The claimant is entitled to credit for the amounts he has already paid specifically as interim without prejudice child support for the relevant months.

Spousal Support

- [69] The respondent requests an order that claimant pay her ongoing without prejudice spousal support, commencing September 2020 and continuing on the 1st day of each and every subsequent month thereafter until further order of the court or written agreement of the parties. This is pursuant to sections 160, 162 and 170 of the FLA and section 15.2 of the DA and the Spousal Support Advisory Guidelines ("SSAG").
- [70] Several months before this application was filed, the parties reached an informal agreement that the claimant would start making without prejudice interim spousal support payments to the respondent of \$2,024 per month, based on the claimant's original assertion that his appropriate Guideline income is \$113,890. As mentioned, I have concluded that pending receipt of the expert opinion, the claimant's grossed up income figure will be set at \$166,636.
- [71] The level of spousal support under the SSAG based on the Guideline incomes I have indicated above are Low - \$2,016, Mid - \$2,399 and High - \$2,769.
- [72] I order that the claimant pay to the respondent interim without prejudice spousal support of \$2,399 per month, commencing January 1, 2021 and continuing on the first day of each and every subsequent month until further order or written agreement of the parties.
- [73] The claimant is entitled to credit for the amounts he has previously paid to the respondent specifically for interim without prejudice spousal support for the relevant months.

Sale of Family Residence

- [74] As alternative relief, in the event the claimant was not ordered to pay the respondent support based on the claimant being imputed as having a Guideline income of \$400,000, the respondent applied for orders that:

- a) The Family Residence shall be immediately listed for sale, with the respondent to have sole conduct of the sale on numerous conditions (not reproduced here), pursuant to Rule 15-8 and section 97(2)(d) of the FLA.
- b) An order that net proceeds of the sale of the Family Residence be distributed to pay:
 - i. Real estate commission, legal fees and disbursements and applicable GST relating to the sale of the property;
 - ii. The TD Mortgage and all other encumbrances secured against title;
 - iii. \$7,500 to Blair Mackay Mynett Valuations Inc. for the purposes of completing a corporate valuation of ResourceCo and an income determination in relation to the claimant's available income for the purposes of spousal and child support;
 - iv. \$50,000 to be paid immediately to the respondent to fund her living expenses and those of the child; and
 - v. The remaining funds to be held in trust until further agreement between the parties or order of the court.

[75] Rule 15-8 of the SCFR provides that the court can order property sold where it is necessary or expedient:

Rule 15-8 -- Sales by the Court

Court may order sale

- (1) If in a family law case it appears necessary or expedient that property be sold, the court may order the sale and may order a person in possession of the property or in receipt of the rents, profits or income from it to join in the sale and transfer of the property and deliver up the possession or receipt to the purchaser or person designated by the court.

[76] Section 97(2)(d):

Giving effect to property division

97 (1) For the purposes of giving effect to a division of property or family debt under this Part or Part 6 [Pension Division], the Supreme Court may

- (a) determine any matter respecting the ownership, right of possession, or division of the property or family debt, and
 - (b) despite sections 94 (2) [orders respecting property division] and 215 (2) [changing, suspending or terminating orders generally], and subject to subsection (3) of this section, make any order that is necessary, reasonable or ancillary to give effect to the division.
- (2) Without limiting subsection (1), the Supreme Court may make an order to do one or more of the following:

- (d) require partition or sale of property and payment to be made out of the proceeds of sale to one spouse or both in specified proportions or amounts;

[77] As a Master, while I do have authority to order the interim sale of property, I do not jurisdiction to make a final order regarding division of family property. I can order an interim distribution of property for the limited purpose of providing an economically disadvantaged spouse money to fund the litigation or family dispute resolution, pursuant to s. 89 of the FLA. See in this regard Master Muir's comments in *Maryoush v. Ibrahim*, 2020 BCSC 599 at paragraphs 90-91.

[78] In *Kapoor v. Makkar*, 2020 BCCA 132 at paragraph 46, the court summarizes the factors considered in an application for interim sale of a family asset:

46 Furthermore, in so far as the Interim Sale Order is concerned, R. 15-8 of the Supreme Court Family Rules provides that the court may order the sale of a family residence where it appears necessary and expedient to do so. In *Reilly v. Reilly*, [1992] B.C.J. No. 2561 (B.C.C.A.), this court confirmed the court's authority to order the sale of a former matrimonial home on an interlocutory application where it is necessary or expedient, meaning it is advantageous to both parties. More recently, in *A.B. v. C.D.*, 2015 BCSC 2134 at paras. 63-64, the court reviewed the jurisprudence and summarized the core factors on an application under R.15-8:

[63] The courts have discretion to order the interim sale of a family asset where it is necessary and expedient. The courts have considered a number of factors in doing so. These include:

* Whether the sale is necessary. This is an important factor. If the sale is not necessary, any sale should be advantageous to both parties. Another factor is whether the sale will promote early settlement (as per *Reilly v. Reilly*, [1992] B.C.J. No. 2561 (C.A.)), and/or whether the sale will defeat a spouse's claim for reapportionment (*Head v. Head*, [1994] B.C.J. No. 1503 (S.C. Master); *R.(L.M.) v. R.(J.F.)*, 2009 BCSC 1332 (Master));

* In addition, a question may arise as to whether the sale of the family home is inevitable, or whether a spouse might be able to retain it on a division of assets (*Pierce v. Pierce* (1994), 2 B.C.L.R. (3d) 31 (B.C. S.C.); *Lede v. Lede*, [1994] B.C.J. No. 1655 (S.C. Master); *Wilson v. Wilson*, 2009 BCSC 1834 (Master), *aff'd* 2009 BCSC 1600); and

* Another important consideration may arise as to whether a sale would effectively eliminate accommodation for a spouse and children or whether alternative accommodation is available (*Leask v. Leask*, [1994] B.C.J. No. 1821 (S.C. Master); *Matheson v. Matheson*, [1995] B.C.J. No. 441 (S.C. Master).

[64] Finally, any doubt should be resolved in favour of the status quo (*Bodo v. Bodo* (1990), 25 R.F.L. (3d) 295 (B.C.S.C.)).

[79] The respondent relies on *G.J.U. v. J.L.U.*, 2017 BCSC 1352, at para 57, where Master Bouck set out factors considered on an application to sell property:

57 Factors to consider in the exercise of the court's discretion under this Rule include whether the sale will promote early settlement, whether the sale will defeat a spouse's claim for reapportionment, whether the sale is inevitable or whether a spouse might be able to retain the property on a division of assets. An interim sale will be considered expedient if it is advantageous to both parties: *N.N.N. v. D.E.B.* 2016 BCSC 1778 at para. 21.

[80] The claimant argues this application should be governed by section 89 of the FLA. Section 89 is as follows:

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.

[81] In *I.F. v. R.J.R.*, supra, at paras 192-193, Madam Justice Ballance described this section as follows:

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.

193 In my opinion, the plain meaning of the phrase "harmful to the interests of the spouse" in s. 89 contemplates actual or potential economic harm, and is likely broad in its scope. Determination of the presence of harm requires the court to reasonably anticipate and then assess the consequences that may flow from the interim order being sought. That approach, in turn, invites a highly individualized component to the inquiry. For example, would the distribution being sought in the particular case require a sale of property or of the encumbering of assets; what income tax ramifications might be triggered and what other transactional costs would arise? The concept of harm under s. 89 would also encompass economic implications such as whether the distribution would adversely impact the other spouse's lifestyle or effectively undermine or prejudice his or her argument for reapportionment.

[82] Section 89 establishes two conditions that must be satisfied 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 pay for family dispute resolution, to

pay for all or part of a proceeding or to obtain relevant information or evidence in support of the dispute resolution process. Even where those conditions are met, the issuance of an interim distribution remains discretionary. When exercising that discretion, the court must consider whether it would be in the interests of justice to grant the order sought. See *Lit v. Lit*, 2019 BCCA 158 and *Bartch v. Bartch*, 2018 BCCA 271.

[83] The respondent says the sale is necessary and expedient because:

- a) The claimant has represented on his financial statement that he does not earn sufficient income to meet his expenses, including expenses associated with the Family Residence;
- b) The respondent and the Child do not reside in the Family Residence;
- c) Access to funds from the sale proceeds would allow the parties to move forward with resolving this dispute in a timely fashion by financing the necessary expert fees; and
- d) The respondent and the Child are receiving insufficient financial support at present and require access to funds.

[84] The respondent says that according to the claimant's own account, his company has not earned income since September 2020. By the respondent's calculation, the claimant's monthly expenses in relation to the Family Residence are as follows:

Mortgage \$4,650

Property Taxes \$250

Property Insurance \$270

Water, sewer, garbage \$250

Total: \$5,420

[85] The claimant says that ResourceCo uses the Family Residence in various aspects of its operations. As such, if not already doing so, it should be making a substantial contribution to the relevant expenses. The claimant's evidence is that ResourceCo pays some expenses such as hydro.

[86] The claimant argues that a sale of the Family Residence is not necessary to fund expert reports because the respondent has access to a large sum of liquid financial assets solely available to her and funds received for her sole benefit since separation. He has covered the cost of one report already (the s. 211 FLA report of Dr. Elterman) and says the respondent should bear the up-front cost of the other given his financial means at this time. The respondent has an account which has proceeds from the settlement of her personal injury claim. She says this is her separate property. She also has a modest RRSP and TFSA accounts.

- [87] The claimant says the Family Residence is also essential for ResourceCo's operations. Work carried out on the property includes mechanical, steam cleaning, welding, maintenance of machinery and work gear. He and ResourceCo employees work there. All ResourceCo accounting work is carried out at the property. He says he does not want to sell because he wants to spend his parenting time with the Child there and he wants the Child's residence to be returned there.
- [88] He argues as well that the respondent's financial situation and standard of living are at a status quo level relative to when the parties separated, notwithstanding her protestations of dire financial need.
- [89] The respondent counters that the claimant operated ResourceCo for many years without having the Family Residence and can do so again. She suggests that Moberly Lake, B.C. is substantially closer to the areas in which ResourceCo normally operates and would make more sense overall.
- [90] While I suspect that ordering that the Family Residence be sold might well help promote a swifter resolution of the property issues in dispute, I simply I do not have sufficient evidence to convince me that making such an order would not harm the claimant's financial interests. The evidence indicates that prior to separation the parties had intentionally arranged their affairs so that a substantial portion of ResourceCo's operations were carried out at the property. ResourceCo was a critical component to the family's finances prior to separation and its continued success remains a key concern for both parties' post-separation. I do not have specific evidence on what the financial implications of making an order which would force the claimant to relocate ResourceCo's operations to a new location would be or what impact that might have on the claimant's ability to earn income.
- [91] The claimant has also indicated that he wishes to try to retain the Family Residence. I cannot say at this point that the claimant would be unable to purchase the respondent's interest as part of the ultimate resolution of family property issues in this proceeding.
- [92] I note as well that the only litigation or dispute resolution related expenses that the respondent requested be paid from the sale proceeds is the initial retainer for Mr. Mynett in the sum of \$7,500. The other requested payout is characterized as lump sum support, which cannot be ordered under section 89 of the FLA.
- [93] Given my overall doubts regarding whether an order to sell the Family Residence is necessary or expedient at this time, I am obliged to resolve this issue in favour of maintaining the status quo. I dismiss this aspect of the respondent's application.

Summary

- [94] Gary Mynett of Blair MacKay Mynett Valuations Inc. is appointed as joint expert to prepare a Guideline income opinion for the claimant and a corporate valuation of ResourceCo. In the first instance, the claimant and the respondent will bear the costs associated with Mr. Mynett's report in the following proportions, namely claimant 85% and respondent 15%.
- [95] Pending delivery of the Guideline income opinion:
- a) The claimant's preliminary Guideline income will be set at \$166,636.
 - b) The respondent's Guideline income is set at \$30,000.
- [96] The claimant is ordered to pay the respondent interim without prejudice support for the Child in the sum of \$1,486 per month, commencing November 1, 2020 and continuing on the first day of each and every subsequent month until further order or written agreement of the parties.
- [97] The claimant is entitled to credit for the amounts he has already paid specifically as interim without prejudice child support for the relevant months, namely:
- i. October 2020 \$1,356
 - ii. November 2020 \$1,356
 - iii. December 2020 \$1,356
 - iv. January 2021 \$1,061
 - v. February 2021 \$1,061
 - vi. March 2021 \$1,061
 - vii. Total \$7,251
- [98] The claimant is ordered to pay the respondent interim without prejudice spousal support in the sum of \$2,399 per month, commencing January 1, 2021 and continuing on the first day of each and every subsequent month until further order or written agreement of the parties.
- [99] The claimant is entitled to credit for the amounts he has previously paid to the respondent specifically for interim without prejudice spousal support for the relevant months, namely:
- i. January 2021 \$1,424
 - ii. February 2021 \$2,024
 - iii. March 2021 \$2,024
 - iv. Total \$5,472

- [100] If the claimant continued making without prejudice child and spousal support payments in April, May and June 2021 pending a decision on this application, he is entitled to credit for those payments as well.
- [101] When Mr. Mynett's reports are available, either party is at liberty to apply to adjust interim child and spousal support without having to show a change in circumstances.
- [102] The respondent's application that the Family Residence be listed for sale and that she have sole conduct of sale is dismissed.
- [103] The costs of this application are in the cause.

"Master Bilawich"

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