

CANADA / JUDGMENT

Mancinelli v. Mancinelli

2021 BCSC 94

COURT

Supreme Court of British Columbia

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2020 BCSC 94 Mancinelli v. Mancinelli IN THE SUPREME COURT OF BRITISH COLUMBIA

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Westminster Between: Traci Dawn Mancinelli Claimant And Donald Glenn Mancinelli

Respondent Before: The Honourable Madam Justice Forth Reasons for Judgment Counsel for the

Claimant: C.J. Airhart Counsel for the Respondent: S.J. Bobb Place and Dates of Trial: New

Westminster, B.C. October 13-15, 19-21, and 23, 2020 Place and Date of Judgment: New

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Introduction

- [1] In this family law proceeding the parties dispute when they began living together in a marriage-like relationship. Once that date has been fixed, the two main issues relate to the determination and characterization of property under the Family Law Act, S.B.C. 2011, c. 25 [Act] and the claimant's claim for spousal support. Background Facts
- [2] The claimant was 58 years old and the respondent 62 years old at the time of trial. The claimant and respondent met in 2000 at the bar in the Golden Ears hotel. Before reviewing the evidence of the parties on the start date of their relationship I will provide a summary of both of their backgrounds.

- [3] The claimant has had a tragic life and has suffered physical and sexual abuse by several of her intimate partners. This abuse has affected her overall wellbeing and resiliency. She was born in April 1962. When she was young her mother took her to Toronto, while her father was in prison, and left her brother behind. While with her mother she was expected to assist with home chores and look after other children. She missed a great deal of school and failed grade 7. She claims she was sexually assaulted by her mother's husband, and physically and verbally assaulted by her mother.
- [4] When she was a teenager she left her mother's home and returned to live in Hamilton with her father. He was in a new relationship and was out of prison. She dropped out of secondary school without completing Grade 10. She was never diagnosed with having a learning disability but she sees numbers backwards, has difficulty writing and reading, and staying focused.
- [5] When she was approximately 17 years old an older man, around 29 years old, convinced her to move to Edmonton and offered to introduce her to modeling agencies. He was physically abusive and she left when she was 18. He tracked her down and stabbed her. She ended up in hospital needing surgery and 22 staples.
- [6] Scared to remain in Edmonton, she moved to Calgary where her mother now resided. She lived with her mother and worked as a waitress, as a model, and doing other work for various periods of time. She testified that she began drinking more heavily sometime in her mid-20s. She ended up living with a man who assaulted her in the shower, resulting in 37 stitches in her left buttocks.
- [7] When the claimant was in her 30s she met a man and followed him to North Vancouver. She went on welfare since she did not have a job. This man began to beat her. She left a couple of times but he tracked her down. She was violently assaulted by him and suffered a broken jaw. After the breakdown of that relationship she was able to secure a job working as a nanny for several years.
- [8] Two tragic events occurred in 1999: her mother died and her brother committed suicide.
- [9] She began working at the end of 1999 or early 2000 at the Golden Ears hotel as a waitress. She testified that she met the respondent at the Golden Ears hotel. When she met the respondent she had no assets and was renting a basement from a friend.
- [10] The respondent has lived his whole life in British Columbia. He was born in December 1957. He did not graduate from high school but completed Grade 10. In 1975 he obtained his trade certificate in sheet metal. He began working as a sheet metal work worker and carried on working predominantly for the same company.

- [11] In May of 1980 he began living in a common law relationship. There were three daughters from that relationship: Gina, April, and Jennifer. The only one to testify at trial was Jennifer Stokes (formerly Jennifer Mancinelli). The relationship ended in September 1990. At that time the three daughters were 10, 8, and 5 years old. The respondent testified that for the next few years he devoted his life to working and raising his daughters.
- [12] In 2000 the respondent was living on a property he owned on Victoria Drive (the "Victoria Drive Property"). On that property was an old house and a new house that the respondent was constructing. The old house had been rented out.
- [13] The parties agree that they met in 2000. The claimant says it was in July. The respondent was seated at the bar with a friend of the claimant. He came up to the claimant and whispered in her ear words to the effect of "you are going to meet a grey haired man and fall in love". She replied "oh go away". The respondent offered to buy her a drink and then drive her home. On the way they stopped at his new house and he showed her around. She recalls he drew her silhouette on a wall upstairs. She "believes" they then made love and he took her to her girlfriend's house where she was housesitting. When he left he gave her his number and told her to call if she needed anything. A couple of months later she called him.
- [14] The respondent testified that he first met the claimant in September 2000 on the Labour Day weekend. He took her to his new house and he imagines they had a drink or two together. He drew the silhouette on the drywall. They "fooled around" but did not have sex. He then drove her to her boyfriend's house. Two weeks to a month later she called him. They went out for pizza and beer. She then returned to her boyfriend's place. About two weeks after that she called asking if she could store some stuff at his house while she went to "live with another guy". They spent the night together and the next day she left.
- [15] Another two weeks to a month later, the claimant called asking if she could rent the old house on the Victoria Drive Property. It had been previously rented to another tenant. The claimant moved into the old house on the property as a renter around November 2000. While she was living in the old house the respondent testified that he continued to date a few different women. He testified that the claimant was seeing other people as well. He agreed that there were times they had sex on a picnic table in the unfinished attic. He would visit the old house but would always return to his bedroom to sleep since he wanted his daughter to see him at home.
- [16] The claimant's evidence differs. She says that he would spend every evening with her in the old house. She thought they were "exclusive".
- [17] The claimant testified that it was in 2000 or 2001 that the respondent asked if she would be "his girl" and that he would "take care of everything". The respondent bought all the groceries and paid for all the bills. He gave her a sapphire ring for their third anniversary. In 2001 at New Year's the respondent gave her an onyx ring.

- [18] The parties agree that the claimant was to pay rent. The claimant testified that she paid rent by performing services such as putting up drywall, mudding, and painting for the new house. Their agreement was for 30 hours of labour a month in exchange for rent. The respondent agrees that she performed these services in exchange for rent. Her evidence is that when the house was finished in 2001 she moved into the respondent's bedroom upstairs. The respondent testified that in 2002 the claimant left the old house and when she was gone he finished the new house. He then started using the old house for storage.
- [19] The respondent testified that the new house was not completed until 2003. He claims that in June or July of 2003 the claimant moved into his bedroom on the third floor of the new house. He agrees at that time she was his girlfriend. However, he denies that this was the beginning of an exclusive and long-term relationship since the claimant would take off partying for days at a time. He testified that she moved out in 2004 and rented an apartment. He cannot recall how long she was gone but she moved back in with him in August 2005.
- [20] In 2003 the claimant says she left for a couple of weeks and stayed at a friend's house but then returned. In 2004 she visited with Patricia Altwasser when she was staying in downtown Vancouver. She stayed for six days and the respondent knew where she was since he dropped her off. Ms. Altwasser testified that in 2004 she rented an apartment in Vancouver for a week. The claimant came and stayed with her for a few nights.
- [21] The claimant testified that she left again in 2005 when she moved to an apartment in Maple Ridge for a couple of months. She returned to live with the respondent.
- [22] In April 2006 the respondent proposed to the claimant. They were married on August 25, 2007, in Port Coquitlam. In 2015 the Victoria Drive Property was sold and the respondent purchased a property in Maple Ridge (the "Family Home"). The parties lived together in the Family Home until the claimant left in early June 2019. They have lived separate and apart since that time. There is no likelihood of a reconciliation.
- [23] Both parties seek a divorce and I will grant one.

Issues

- [24] The pleadings, evidence, and submissions raise the following issues:
- What was the duration of the marriage-like relationship?
 - How should family property be determined and divided?
 - Should there be an award of spousal support and if so, in what amount and for what period of time? Credibility and Reliability of the Evidence
- [25] Both parties raised issues with the credibility of the other. The parties' versions of the facts, particularly on the commencement of a marriage-like relationship, differ widely. Therefore, I must consider the reliability and credibility of their evidence. Applicable Legal Principles

- [26] Reliability and credibility are related but distinct concepts. Credibility is an assessment of the trustworthiness of a witness's testimony; reliability considers its accuracy. This involves a witness's ability to accurately observe, recall, and recount the events in issue. If a witness's evidence on a point is not credible, it follows it is unreliable: *United States v. Bennett*, 2014 BCCA 145 at para. 23, citing *Doherty J.A. in R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526A (C.A.). A reliable witness can make honest mistakes.
- [27] Factors to consider in assessing a witness's credibility include the firmness of their memory, the ability to resist the influence of interest to modify the recollection, whether the witness's evidence harmonizes with independent evidence that is accepted, whether the witness changes their testimony between direct and cross-examination, whether the witness's testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and, with caution, their demeanor: *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296.
- [28] The credibility of a witness must be assessed for its "harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357 (B.C.C.A.).
- [29] There is no requirement that a trier of fact believe or disbelieve a witness's testimony in its entirety. On the contrary, a trier may believe none, part, or all of a witness's evidence, and may attach different weight to different parts of a witness's evidence: *R. v. R. (D.)*, [1996] 2 S.C.R. 291 at para. 93. *The Claimant's Testimony*
- [30] The respondent argues that the claimant's evidence lacks credibility for the following reasons: · She was evasive and deceitful when responding to questions; · She had a poor recollection of events; · She started leading a second life in at least 2017 when she started talking to "Mo". She refused to disclose where she lived, and that she lived with him, in an attempt to keep her circumstances a secret; and · She gave evidence initially in her direct examination that an individual in the courtroom had heard a threat made by the respondent, but when directed to provide that individual's name she retracted her evidence and said that the individual was "deaf" and likely could not have heard the threat.
- [31] The respondent submits that the claimant's evidence should be treated with extreme caution and that his and his daughter's evidence should be accepted over the claimant's testimony.
- [32] I accept that there were instances in which the claimant struggled to recall dates and events. An example is her evidence of when she first met the respondent and when the relationship commenced. In her notice of family claim she alleges that they met in 1999. This was clearly not accurate. In her testimony she maintained that they met in July 2000.
- [33] She became confused over the dates she worked at various jobs. This is understandable since the claimant had many different jobs and she worked at some of them for only a short period of time.

- [34] I reject the respondent's submission that the claimant was evasive and deceitful in responding to questions. I found that she tried her best to answer the questions but struggled with recalling the timing and order of events.
- [35] There is one area where I find that the claimant was less than candid. She gave evidence on whether a witness in the courtroom overheard a threat that was allegedly made by the respondent to the claimant. She initially claimed that her "driver" overheard the threat. When directed by the Court to provide this witness's name she advised that he was "deaf" so it was unlikely he did hear the threat. I accept that the claimant was concerned about having this person dragged into the litigation when he did not want to be. However, this does not alter the fact that she initially claimed there was a witness who overheard this threat. I reject the claimant's evidence that any threat was made by the respondent in the courtroom during the interim support application in March 2020.
- [36] The claimant appeared to be less than forthright in her testimony concerning her relationship with "Mo" but she offered a plausible reason for the lack of detail. I accept the claimant's explanation that she did not want to disclose her address to the respondent. The claimant has had a number of abusive relationships in the past and has suffered serious physical assault at the hands of other men. In light of her background, it is understandable that she has concerns about disclosing where she lives.
- [37] Overall, I found that the claimant was credible, though have some reservations on the reliability of her evidence, particularly when relating to specific dates. The Respondent's Testimony
- [38] The claimant argues the respondent is unreliable because he admitted to lying a couple of times. She claims he has contrived evidence to suit his case.
- [39] The claimant argues that the respondent lied about getting involved with a woman named "Tammy McPhee" when the claimant moved out in 2005. She submits that the timeline would not make sense. The respondent stated that prior to April 2006, when he proposed, the claimant had not left the residence for one year. The respondent testified that Ms. McPhee rented the basement suite for two years before his wedding and he was involved with her during that time. The fact that the claimant had not left the respondent's house for a full year prior to April 2006 makes it unlikely that the respondent was involved with "Tammy McPhee" for the period of time that he alleges. The claimant submits these inconsistencies put his credibility at issue.
- [40] The respondent stated on his tax returns in 2004, 2005, and 2006 that he was in a common law relationship. He either lied or these were true statements. The respondent claims that he made these statements in order to take advantage of a tax loophole. This would be more than taking advantage of a tax loophole, it would constitute a false statement made to Revenue Canada. If he did lie this is a serious offence. The Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.) [ITA] imposes "duty on every person resident in Canada at any time in the year to report income accurately" and not doing so is a criminal offence: *R v. Millar*, 2017 BCSC 402

at para. 102. Section 239(1) of the ITA makes it an offence to make a false or deceptive statement on a return, certificate, statement, or answer filed as required under the ITA or a regulation.

- [41] I found that the respondent's evidence on the timing of events was more reliable than the claimant's. However, I am not prepared to accept all of his evidence where it conflicts with that of the claimant. His evidence needs to be given careful scrutiny. Overall, I accept that the respondent was a credible witness.
- [42] I will now consider each of the identified issues. Issue 1: The Duration of the Marriage-Like Relationship Applicable Legal Principles
- [43] The question of whether parties are living in a marriage-like relationship is largely fact-driven and depends on the individual circumstances of each case.
- [44] In cases decided under the predecessor to the Act, the Family Relations Act, R.S.B.C. 1996, c. 128, the following factors have supported a finding of a marriage-like relationship: the decision to have a child together; the purchase of a home together; the pooling of finances for family and other expenses; the financial assistance the parties provided to one another throughout their relationship; the length of the relationship; and the joint efforts to preserve the relationship by attending counselling: *Stace-Smith v. Lecompte*, 2011 BCCA 129 at para. 15.
- [45] In *Dey v. Blackett*, 2018 BCSC 244, citing *Austin v. Goerz*, 2007 BCCA 586, the Court held that the "determination of whether a relationship was marriage-like requires a 'holistic approach', in which all of the relevant factors are considered and weighed, but none of them are treated as being determinative of the question": at para. 192.
- [46] Parties can continue to "live together in a marriage-like relationship" even though they do not actually reside under the same roof: *Thompson v. Floyd*, 2001 BCCA 78 at para. 34.
- [47] In *Roach v. Dutra*, 2010 BCCA 264, the Court of Appeal upheld the trial judge's conclusion that the parties were spouses under the Act, even though they began living in separate residences, but with a view to preserving their relationship.
- [48] I note that in both *Thompson* and *Roach*, the couple had lived together prior to the separation and the issue was the nature of the relationship after they started living in separate residences.
- [49] A marriage-like relationship can be found in the absence of cohabitation where there is evidence that supports that a couple were in a loving and intimate relationship for many years. An example is found in *Connor Estate*, 2017 BCSC 978, where the Court found at paras. 48-51 that even though the parties in question did not live together (they were unable to do so because of illness), they were in a "marriage-like relationship" for the purposes of the Wills, Estates and Succession Act, S.B.C. 2009, c. 13. The evidence was that they had a "loving and intimate relationship" and they supported each other emotionally, "loved each

other, were faithful to each other, communicated with each other almost every day when they were not together, considered themselves to be (and presented themselves to be) "husband and wife" and were accepted by all who knew them as a couple": at para. 50.

- [50] A determination as to whether or not parties are "spouses" or in a "marriage-like relationship" is a question of mixed fact and law: Austin; see also Weber v. Leclerc, 2015 BCCA 492 at para. 22, leave to appeal ref'd [2016] S.C.C.A. No. 19.
- [51] There are a myriad of factors that can be taken into account, some of which include the questions listed in Molodowich v. Penttinen, (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), which the Court of Appeal noted in Weber at para. 25 "are helpful as indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship". That said, the Court of Appeal also emphasized that these factors should not be approached as a checklist, and that the circumstances should be addressed holistically. Position of the Parties Claimant's Position
- [52] The claimant submits that during the period from approximately November 2000 until she was engaged to marry the respondent, in April 2006 (the "disputed period"), they were in a marriage-like relationship. November 2000 was a couple of months after she met the respondent and after they started seeing each other. Her view is that she essentially moved in with him and although she stayed in a different house on the same property the parties were immediately accessible to each other. Alternatively, she claims 2001, when she moved into the new house and into the respondent's bedroom, was the commencement of an exclusive and marriage-like relationship.
- [53] The claimant says she moved out in early June 2019. Respondent's Position
- [54] The respondent submits that during the disputed period he continued to see other women. He characterizes their relationship when the claimant was living in the old house as one of renter and landlord. When the claimant moved into the new house, in June or July 2003, he agrees the relationship changed to one of a girlfriend and boyfriend. He maintains that even after the date he continued to see other women and that the claimant would take off for days at a time to "go partying". He says that she moved out for months in 2004 and 2005. He accepts that when he gave the claimant an engagement ring in April 2006 that was the beginning of an exclusive relationship.
- [55] The respondent agrees that the claimant stopped living at the Family Home in June 2019.

Analysis

- [56] A key question is whether the couple intended their relationship to be one of an indeterminate, lengthy duration, and whether the parties' evidence in this regard is consonant with the objective evidence of the parties' lifestyle and interactions: Weber at paras. 17 and 24. 2000 to June 2003

- [57] The claimant's contention that they were a "couple from the start" is not supported by the evidence. Prior to June 2003, I accept that the parties engaged in sexual activities and went on some dates but there was no exclusivity or long-term intention. The evidence of the respondent demonstrated there was no exclusivity, he continued to see other women during this period, and his evidence suggests that the claimant was not exclusive with him.
- [58] The relationship started not as a couple but as a landlord/tenant arrangement. The claimant's evidence is when she moved into the old house on the property she did so under a rental arrangement. She agrees she paid rent by performing services on the new house. This arrangement continued until she moved into the new house. The respondent confirmed that on months when the claimant could not pay rent she worked in lieu of the rent owed by painting and cleaning up the construction areas of the new house.
- [59] The claimant alleges that the respondent would sneak out of the new house every night, so his daughters would not see him, and come and spend the night with her. The respondent denies that he engaged in this type of activity although he conceded that there were some sexual encounters.
- [60] The claimant testified that the respondent supported her financially by purchasing groceries and paying bills from the time she moved into the old house. She agreed he did not provide her with any money. She claims that they shared meals together. The respondent agrees that quite often he would buy something to cook and the claimant would cook it for dinner. They did not have breakfast or lunch together. The evidence does not support that the claimant was looking after the domestic chores in the new house during the period she was living in the old house.
- [61] The claimant points to the gift of a sapphire ring. She claims it was given to her as a third anniversary gift. The respondent says he gave it to her as a Christmas gift when she still resided in the old house. This gift of a ring does not, in light of the other evidence, support that the parties had entered into a marriage-like relationship with the necessary intention of permanency. The claimant points to spending New Year's of 2000/2001 together at a hotel and attending a birthday party in April 2001. These events support that the couple were dating but does not elevate the relationship to a marriage-like one. I do not find that spending New Year's together or attending a family birthday party is enough to support the establishment of a more permanent relationship. If so, the argument would support that every boyfriend/girlfriend relationship would easily meet the definition of "marriage-like". There must be something more.
- [62] I am not convinced that the claimant has met the burden of proving that the marriage-like relationship commenced in September or November 2000 when she moved into the old house as a renter. The burden is on the claimant to prove this and she has failed to do so: *Ashton v. Hales*, 2017 BCSC 1928. When did the Claimant Move into the New House

- [63] There is a dispute in the evidence regarding when the claimant moved into the new house. The claimant says she moved into the new house in 2001. However, she agreed that when she first moved into the old home, in 2000, there was a significant amount of work left to do on the new house. She agrees that she rented the old house until the upstairs of the new house was completed. The evidence of the respondent was that the upstairs in the new house was completed in 2003 and not in 2001.
- [64] In addition, the respondent testified that he did not allow the claimant to move in with him until his youngest daughter, Jennifer Stokes, had graduated from high school. Ms. Stokes testified at trial that the top of the new house was completed in 2003. She testified that 2003 was when she graduated from high school and that she moved upstairs with her father. After that her father told her that the claimant would be moving in with them.
- [65] I accept the evidence of the respondent and his daughter on the date the claimant moved in. I find that the respondent's evidence is more reliable regarding the steps needed to finish the upstairs in the new house. I further find that there is a reasonable explanation for why he did not want the claimant to move in earlier. He wanted to wait until his youngest daughter finished high school in June. The claimant's evidence supports this, since she testified that she did not sleep in the respondent's bedroom prior to moving in. Any sexual relations they had before she moved in were in the unfinished attic or in her bedroom in the old house.
- [66] The respondent no longer charged the claimant rent after she moved into the new house. The absence of rent supports that, in his view, the nature of the relationship had changed. He began to pick her up from work on a consistent basis. He paid for all the bills and she participated in the domestic chores of cooking, cleaning, preparing his lunch, and being there for him while they lived together in the new house.
- [67] I find that the claimant moved into the new house and into the respondent's bedroom in June 2003. June 2003 to April 2006
- [68] Even after the claimant moved into the new house in June 2003, the respondent says that they were not in an exclusive relationship. He claims that there were a number of breaks in their relationship for weeks and months, including when the claimant moved out in 2005 to a rental apartment. He testified that in 2005 he began dating a tenant that lived downstairs. He describes his relationship with the claimant as being "on and off" and states that the relationship only became serious and committed shortly before he proposed to her on April 29, 2006.
- [69] I find that the claimant left the family home but it was for the most part on a limited basis. She left in 2004 to visit her friend Ms. Altwasser in Vancouver. I accept the claimant's evidence, supported by Ms. Altwasser, that the respondent drove her to the downtown apartment. The claimant visited with Ms. Altwasser for a few days and then returned to the Victoria Drive Property.

- [70] A second more significant separation occurred when the claimant rented an apartment in Maple Ridge in the summer of 2005. The claimant's recollection was that she rented the apartment for a couple of months. The respondent was unclear on how long the claimant was gone but testified that after she left he rented the basement suite in the new house to a female friend. He testified that while the claimant was gone he was dating this person. Ms. Stokes recalls that the claimant was not around for most of the summer of 2005. In cross-examination, Ms. Stokes testified that it was for a couple of months. The claimant then returned in late summer.
- [71] Further evidence that the respondent recognized he was in a common law relationship are the declarations he made on his 2004, 2005, and 2006 tax returns. Under marital status he indicated "common law." He would have made that declaration after the claimant had started living in his home in June 2003. In his 2000 to 2003 tax returns he describes his marital status as single. The respondent testified that he "cheated" when he indicated his marital status was common law and he did so to "take advantage of a tax loop". It is my view he provides this explanation in order to delay the start of the common law relationship.
- [72] I find that the invitation to move into the new house and share his bedroom, along with the financial support he provided in paying all the bills and purchasing all the groceries, and the domestic chores the claimant performed around the new house, indicates that the couple commenced living in a marriage-like relationship when the claimant moved in.
- [73] I accept there was one period of separation in the summer of 2005 for a few months when the claimant rented an apartment in Maple Ridge. This separation is not enough to reset the clock and indicate that the marriage-like relationship started again in August 2005 when she moved back in. The evidence does not support there was an intention to separate permanently.
- [74] Each marriage-like relationship is unique and time apart does not always indicate an intention to permanently terminate a relationship, particularly one of long duration. In *Ernst v. Carmichael*, 2019 BCSC 68, the parties were in a long distance relationship for over two years until 2009, when they moved in together. The evidence indicated they were physically separate and experiencing marital discord for five months in 2011. The Court held that the date they moved in together in 2009 was the start of their marriage-like relationship. During the period of separation, there was no evidence that either party formally communicated an intention to separate or sought to end the relationship, and when they reunited they continued the relationship more or less in the same form: paras. 12-17.
- [75] *Surrett v Butkiewicz*, 2018 BCSC 2194, involved an unusual and unfortunate set of circumstances. The parties to the litigation were the representatives of the estates of the two deceased, who had been in a marriage-like relationship. One party struck the other with a blunt object, causing her to die, then took his own life while on bail facing a murder charge. The parties had started their marriage-like relationship in 1987. The representative for the claimant submitted the relationship had continued until 2014, whereas the representative

for the respondent argued it had ceased being a marriage-like relationship in 2000, after which they were only roommates who continued living together until the claimant's death. There was evidence of a lengthy separation from 2000 to 2006 though the claimant never moved out, following which they reconciled though their relationship was increasingly dysfunctional. Justice Baird found that the period of separation did not terminate their relationship, noting that in a marriage-like relationship of a long duration there is a need for "compelling evidence of finality" such as a "direct statement" or "overt indication of an abandoned relationship" (referring to *Thompson v. Floyd*, 2001 BCCA 78 at paras. 31-32, 36).

- [76] In *J.J.G. v. K.M.A.*, 2009 BCSC 1056, the fact that one party in the relationship had taken occasional weekend trips and a vacation with friends, without her partner, did not indicate that the parties had ended their committed relationship, since a myriad of factors indicated that the parties were still in a marriage-like relationship. Justice Dardi noted at para. 71 "The essential inquiry is the existence of a marriage-like relationship; not the quality of that relationship."
- [77] I find the marriage-like relationship commenced in June 2003 and continued until the parties married on August 25, 2007.
- [78] The parties separated in June 2019 when the claimant left the Family Home. Issue 2: Property Division Applicable Legal Principles
- [79] The relevant provisions of the Act for the purpose of this analysis are contained in Part 5, headed "Property Division". Family Property
- [80] The key provisions are ss. 81, 84, and 85. Under s. 81 of the Act, each spouse is entitled to a presumptive one-half undivided interest in each family asset as a tenant in common upon separation.
- [81] Family property includes all real and personal property a spouse has a beneficial interest in at the date of separation, as well as property derived from family property: Act, s. 84(1). Generally, the value of the family property must be based on its fair market value as of the date of trial: Act, s. 87.
- [82] Pension division is dealt with under Part 6 of the Act. These sections are intended to be a comprehensive breakdown of how to divide pensions. Unequal Division
- [83] The relevant provisions of the Act with respect to the issues of reapportionment and compensation are ss. 95, 96, and 97.
- [84] Despite the presumption of equal division, the court may order an unequal division of family property if it would be significantly unfair to divide family property equally: Act, s. 95(1). Significant unfairness requires something "objectively unjust, unreasonable, or unfair in some important or substantial sense" having regard to the factors set out in s. 95(2) of the Act: *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 42.

- [85] A two-stage analysis is used to determine whether an unequal division of family property would be significantly unfair: *Polard v. Polard*, 2017 BCSC 1963 at para. 19. At the first stage, the court must determine the extent of family property in accordance with ss. 84-86 of the Act and undertake the notional exercise of dividing property equally. The second stage requires the court to determine whether the equal division would be significantly unfair, taking into account the factors in s. 95(2) of the Act.
- [86] The previous Family Relations Act permitted an unequal division of family property if an equal division would result in unfairness. The current Act raises that bar; a court is only to reapportion family property if an equal division would be "significantly unfair". Mr. Justice Brown touched on this difference in *L.G. v. R.G.*, 2013 BCSC 983, stating at para. 71: In my view, the term "significantly unfair" in s. 95(1) of the FLA essentially is a caution against a departure from the default of equal division in an attempt to achieve "perfect fairness". Only when an equal division brings consequences sufficiently weighty to render an equal division unjust or unreasonable should a judge order depart from the default equal division.
- [87] Significant unfairness is further discussed in *Remmem v. Remmem*, 2014 BCSC 1552, cited in *Jaszczewska*:
- [43] It is only at the very end of the exercise that equitable considerations come into play pursuant to s. 95. After determining the full extent of the family property, the court must go through the notional exercise of dividing that property equally. The court must consider if equal division would be "significantly unfair". If it would, then it is possible to order an unequal division.
- [44] The FLA provisions granting the court a discretion to order other than an equal division are very different from the provisions in the previous legislative scheme. Pursuant to s. 65(1) of the Family Relations Act, R.S.B.C. 1996, c. 128 (the "FRA"), courts had a discretion to divide family property in unequal shares if the court found that the division of property (pursuant to agreement or the provisions of the FRA) would be unfair having regard to the factors set out in that section. The first and obvious difference between the discretion given under the FRA and the discretion given in Part 5 of the FLA is that in order to exercise the discretion, it is no longer sufficient to find that a division of property is merely "unfair". There must be a finding that the division of property pursuant to the statutory scheme is "significantly" unfair. The Concise Oxford English Dictionary defines "significant" as "extensive or important enough to merit attention." Significantly is understood to mean more than a regular impact - something weighty, meaningful, or compelling. In other words, the legislature has raised the bar for a finding of unfairness to justify an unequal distribution. It is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2).

- [88] Further, where the court determines that it would be significantly unfair not to divide excluded assets, having regard to the factors set forth in s. 96(b), the court may make an order that excluded property be divided. In *Andermatt v. Tahmasebpour*, 2015 BCSC 1743, Justice Pearlman applied the same principles set out in *L.G. and Remmem* for s. 95 and found:
- [59] I conclude that the "significant unfairness" warranting the division of excluded property under s. 96 must be compelling or meaningful, on a consideration of the factors set out s. 96(b)(i) and (ii). Division will be justified where the court finds that the consequences of not dividing excluded property would be so weighty as to produce an unjust or unreasonable result.
- [89] Once the court has divided the family assets under Part 5 of the Act, it must go on to consider the mechanism by which the division of property is to be achieved, pursuant to s. 97.
- [90] Generally, property division is to be determined before considering spousal support: *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 86, *Wells v. Campbell*, 2015 BCSC 3 at para. 18; *A.M.D. v. K.R.J.*, 2015 BCSC 1539 at para. 47. Excluded Property
- [91] Property that is excluded from family property includes property acquired before the relationship between the spouses began, inheritances to a spouse, and property derived from excluded property: Act, s. 85(1)(a), (b), and (g). However, the amount by which the value of excluded property has increased since the relationship between the spouses is considered family property: Act, s. 84(2)(g).
- [92] A spouse who advances a claim that property is excluded property is responsible for demonstrating, on a balance of probabilities, the basis for and extent of the exclusion: Act, s. 85(2); *Shih v. Shih*, 2017 BCCA 37 at paras. 42-43. However, in balancing the evidence as a whole, a trial judge is permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties: *Shih* at para. 44. The Court emphasized in *Shih* that "precision" or "mathematical certainty" is not required, but in order to discharge his or her burden, the spouse seeking to prove property is excluded property must do so with "clear and cogent evidence": paras. 40 and 43.
- [93] To establish an exclusion a party must prove the value of the exclusion and, if property is derived from that exclusion, that the exclusion can be traced into property that existed at the date of separation: Act, s. 85(1)(g). Where a spouse seeks to have any increase in the value of the excluded property included in family property, however, they have the onus of establishing the value of the increase: *J.S.F. v. W.W.F.*, 2015 BCSC 2375 at para. 161; *Kumagai v. Campbell Estate*, 2016 BCSC 450 at para 70, rev'd on other grounds, 2018 BCCA 24. The approach involves first determining the fair market value of the property at the time the spouses' relationship began or the time the property was otherwise acquired, followed by a determination of the fair market value at the date of trial, and subtracting the former from the latter: *S.L.M.W. v. M.R.G.W.*, 2016 BCSC 272 at paras. 67-71. Positions of the Parties

- [94] I will first set out what the parties have agreed to.
- [95] The parties agree that the Family Home is a family asset and agree its value at the time of trial was \$1,185,000.
- [96] They agree that the Victoria Drive Property is an excluded asset and that its value should be assessed at the commencement of the marriage-like relationship.
- [97] The parties have agreed that the value of the Victoria Drive Property was \$290,000 in 2000 and \$590,000 in 2006.
- [98] The parties agree to the following financial assets and their value as of the date of separation: Account Value WSCU Savings Account (in respondent's name) \$81,078.82 WSCU Savings Account (in respondent's name) \$671.15 WSCU Fidelity Investment RRSP (in respondent's name) \$52,938.67 WSCU Golden Plan 24 (in respondent's name) \$43.10 Westminster RRSP Term Deposits #9 and 10 (in respondent's name) \$33,362.56 Westminster Savings RRSP #s 11 to 19 (in respondent's name) \$65,922.86 WSCU Tax Free High Interest Savings (in respondent's name) \$3,356.87 WSCU TFSA #18 (in respondent's name) \$60,000.00 WSCU Savings RRSP (in claimant's name) \$51,887.96 TOTAL (both parties) \$349,261.99
- [99] The parties agree that the following vehicles, in the possession of the respondent, are family property but disagree on the value: Description Claimant's Value Respondent's Value 1997 Ford Mustang \$7,900 \$4,000 1966 Ford Falcon \$10,000 \$3,000 2015 ride-on lawnmower \$1,000 \$300
- [100] The parties agree that the following pensions are family property: · Sheet Metal Pension (respondent) · Canada Pension Plan (respondent) · Canada Pension Plan (claimant)
- [101] The parties agree that the respondent received the following inheritances:
1. August 2013 -- \$19,151.16 ("inheritance #1")
 2. June 2014 -- \$55,948.51 ("inheritance #2")
 3. October 2015 -- \$80,412.28 ("inheritance #3) Claimant's Position
- [102] The claimant argues that the value that should be used for the Victoria Drive Property is \$290,000, being the value as of 2000, on the basis that is the date when the marriage-like relationship began. She claims that the value of the real property is \$895,000, calculated by subtracting the \$290,000 from the current value of the Family Home (being \$1,185,000).
- [103] The claimant claims that the following vehicles, all in the possession of the respondent, are family property. The respondent claims these are all excluded property. The parties further disagree on the values: Description Claimant's Value Respondent's Value 2011 Dodge Ram 1500 \$20,904 \$10,000 2002 Camaro \$26,000 \$11,000 2011 Ford Shelby \$48,000 \$40,000 2003 Yamaha Cruiser \$10,000 \$2,000 2015 Yamaha Dirt Bike \$5,000 \$3,000 2015 Yamaha ATV \$4,500 \$4,000

- [104] The claimant originally claimed the Ford Fairlane was family property but agreed during her closing submissions that it was purchased before the start of the relationship. She suggested that it had some pre-existing value that could be accounted for by compromising on the total value of all the vehicles. The claimant estimates that all the vehicles together are worth \$173,304 but was willing to compromise at a value of \$132,300 to account for some differences in valuation and the purchase of the Fairlane before the relationship. The respondent estimates the vehicles are collectively worth \$107,300 in his financial statement.
- [105] The claimant argues that the contents of the Family Home, including tools, are worth \$20,000, all of which remained in the respondent's possession.
- [106] The claimant says that while married to the respondent he gave some of the inheritance away and used some to purchase vehicles. She submits that she is willing to compromise on the collective value of the vehicles, at \$132,000, to account for the respondent using the inheritance to purchase some of those vehicles. She submits it is not possible to trace the inheritance to \$63,000 of the current financial accounts because the inheritance went into a bank account that was used for many different things, and it is hard to know what remains. The claimant agrees that they never had a joint bank account.
- [107] The claimant submits that the property should be divided on an equal basis and that none of the factors pursuant to s. 95 of the Act permitting an unequal division apply.
- Respondent's Position
- [108] The respondent disagrees with the claimant over the valuation of the real property and the vehicles, as well as the tracing of his inheritance funds. He submits the inheritances are excluded property under the Act.
- [109] The respondent's position is the value for the Victoria Drive Property should be \$590,000, the value as of 2006, and hence the value of the real property should be \$595,000.
- [110] He agrees that some of the vehicles are family property but disputes the values suggested by the claimant.
- [111] He argues that the 2002 Camaro is excluded property on the basis that he used inheritance #1 to purchase this vehicle for \$12,500. Since the funds used to purchase this vehicle were derived from excluded property, one of the inheritances, he submits the Camaro is excluded property.
- [112] He submits that the 2015 Yamaha dirt bike and the 2015 Yamaha Grizzly ATV were purchased for a total of \$16,300 and are excluded property on the basis that he used inheritance #3 to purchase them. Since these were purchased from excluded property, one of the inheritances, they both should be excluded property.
- [113] The respondent argues that both the 2011 Ford Shelby and the 2011 Dodge Ram were purchased from funds originating from the inheritances that he received. This results in them both being excluded property.

- [114] The respondent argues that he owned the majority of the tools and household items prior to the commencement of the relationship. Most of the tools he purchased or acquired long before the relationship started. He submits that both should be considered excluded property.
- [115] The respondent seeks an unequal division on the basis that when the claimant came into the relationship she had no assets and made little contribution to the family because of her struggles with alcoholism. The respondent significantly contributed to the accumulation of wealth with the improvements he did to the Victoria Drive Property, his work, and by accumulating a "long-term nest egg" for the parties for their retirement.
- [116] The respondent further argues that he is not able to trace all of the inheritances and some of the funds went into the Victoria Drive Property. As such, he argues that this is factor that can be considered in support of an unequal division of family property. The respondent suggests a 60/40 split in his favour.

Analysis

- [117] Since I found that the commencement of the marriage-like relationship was in June 2003, I am left with trying to determine the fair market value of the Victoria Drive Property as of that date. I have the appraised values in 2000 and 2006. In my view, a fair approach would be to take the increase in value from 2000 to 2006 of \$300,000 and assume that by June 2003 the value would have increased by \$150,000. I find that the value of the Victoria Drive Property as of June 2003 would be \$440,000, the 2000 appraised value of \$290,000 plus an additional \$150,000. I find that the value of the real property is \$745,000. This is calculated taking the current fair market value of the Family Home at \$1,185,000 and subtracting the 2003 value of the Victoria Drive Property of \$440,000.
- [118] I accept the evidence that the 2002 Camaro was purchased with inheritance #1 and it is excluded property. There was no evidence led by the claimant to support any increase in the value of this vehicle. The claimant sets out her view of the value at \$26,000 in her financial statement. She sets out that the value came from the "Kelly blue book". No documents evidencing this value were tendered into evidence and she provided no testimony to support this value. The respondent's daughter testified to researching the value of a 2002 Chevrolet Camaro in the Kelley Blue Book. She put in the kilometres of the vehicle at 93,000 and its condition as good. The pricing guide document was entered into evidence with an average value for a private sale of \$8,198. Since this vehicle was purchased for \$12,500 I am not convinced there was any increase in value. I accept this vehicle is excluded property and ownership is retained by the respondent.

- [119] The 1967 Ford Fairlane was purchased well before the commencement of any relationship with the claimant. The respondent testified that he purchased it in 1980 but could not recall how much he paid. The claimant conceded it was excluded property. There is no evidence of an increase in value. I accept this vehicle is excluded property and ownership is retained by the respondent.
- [120] The 1966 Ford Falcon was purchased in 2017. The claimant, in her financial statement, lists the value at \$10,000 based on "craigslist comparative value". The respondent, in his financial statement, lists the value at \$3,000 with no explanation on how he arrived at this value. No documents evidencing these values were tendered into evidence and the parties provided no testimony to support these values. I will take the mid-point in the values and assess a value at \$6,500.
- [121] The 2011 Dodge Ram truck was purchased in 2016. The evidence before me was not clear and cogent enough to show that inheritance funds were used to purchase this truck. It is family property. The claimant, in her financial statement, lists the value at \$20,904 based on the "Kelly blue book". No documents evidencing this value were tendered into evidence and she provided no testimony to support this value. The respondent, in his financial statement, lists the value at \$10,000. The source of the value is not listed. There were no documents tendered by either party to support a value. I will take the mid-point range in values and assess a value at \$15,000.
- [122] The 1997 Ford Mustang was purchased in 2006 for \$11,000-\$12,000. The claimant asserts a value in her financial statement of \$7,900 based on the "Kelly blue book". No documents evidencing this value were tendered into evidence and no testimony was given to support this value. The respondent's daughter testified that the Kelley Blue Book only had a value from 2000. She researched the value of this vehicle by looking on craigslist for a comparable vehicle. The craigslist ad was entered as evidence and supported a value of \$5,500. I accept the value of the 1997 Ford Mustang at that value.
- [123] The 2011 Ford Shelby was purchased in March 2015 for \$44,492.15. The claimant asserts a value in her financial statement of \$48,000 based on a "craigslist comparable value." No documents evidencing this value were tendered into evidence and she provided no testimony to support this value. The respondent's daughter testified to a Kelley Blue Book assessment she did by entering the kilometres at 15,000 and its condition as good. The pricing guide document was entered into evidence with an average private party value of \$41,637. I accept the value of the 2011 Shelby has a value of \$42,000.
- [124] The respondent purchased the 2003 Yamaha Cruiser in 2003. He took the position that he had purchased it prior to the parties' relationship commencing, based on the relationship commencing in 2006. I have found that the relationship commenced in June 2003. There was no evidence led on when in 2003 the motorcycle was purchased. The claimant in her financial statement placed a value of \$10,000 on the Yamaha Cruiser. There was no indication of where she obtained this value. The respondent's daughter testified there was

no Kelley Blue Book value for this motorcycle so she searched craigslist and found an ad selling a comparable motorcycle, although the one for sale had fewer kilometres. The sale price was \$2,900. A craigslist ad was tendered into evidence. Since the evidence of the purchase date would have been available to the respondent, and he failed to lead it, I find that this motorcycle is family property with a value of \$2,900.

- [125] The respondent produced bank statements to show the tracing of inheritance #3 into his bank accounts and then the payment for the 2015 Yamaha dirt bike and ATV. I accept that evidence and find that the dirt bike and ATV were purchased using excluded property. They were purchased for \$16,300 in 2015. There was no evidence led of any increase in value from the date of purchase to the date of separation. The claimant's financial statement sets the value of both at \$9,500. I find there was no increase in value. The respondent is entitled to keep the 2015 Yamaha dirt bike and ATV as excluded property.
- [126] The respondent purchased a ride-on lawnmower in the summer of 2018. The claimant in her financial statement claims the value at \$1,000 and the respondent in his at \$300. There were no documents tendered by either party to support a value. I will take the mid-point of the range in values and assess a value of \$650.
- [127] The respondent testified that he had a great deal of tools but the majority of them were acquired over forty years from different work sites. He testified that a value of \$10,000 could be placed on the tools. Neither party led evidence on the type of household furnishings that existed prior to the relationship, nor what was purchased during the relationship. I accept that the tools and some of the household contents are excluded property. Since there was no evidence led on the nature of the household contents, their value, or the value of the tools, I am not prepared to make any award.
- [128] Based on the evidence before me I accept that \$23,000 of the inheritance remained after various payouts were made for vehicles and to relatives of the respondent. This amount was injected into the registered funds held by the respondent.
- [129] I have attached as Schedule A a document setting out the various assets and values. If the respondent wishes to keep the vehicles, that are family property, he can pay to the claimant her half interest at the value I have found. If the respondent does not wish to keep these vehicles they will be sold and the parties will equally share in the sale price. If any of these vehicles are sold the equalization payment can be adjusted accordingly.
- [130] I conclude that the total family assets are valued at \$1,166,768.52. From that the \$23,000 in inheritance funds will be subtracted, making the total value \$1,143,768.52. On an equal sharing the parties are each entitled to \$571,884.26. There are two family assets in the claimant's name, both financial accounts, with a total value of \$52,559.11. The claimant owes the respondent 50% of those assets, a total of \$26,279.55. The remainder of the assets are in the respondent's name. Those assets add up to \$1,091,209.40. Of the family assets the respondent owes to the claimant 50% of the assets in his name, being \$545,604.70. After deducting the \$26,279.55 that the claimant owes the respondent, the amount the

respondent owes the claimant is \$519,325.15 as an equalization payment.

- [131] I will next address the respondent's submission that there should be an unequal division of the assets in his favour with a 60/40 split.
- [132] There is a strong presumption in favour of an equal distribution.
- [133] Having considered all of the evidence, my view is that it would not be significantly unfair to order an equal division. The arguments put forth by the respondent were not persuasive to vary the distribution. The respondent did not identify any specific factors in s. 95(2) of the Act in support of his position. I have already accounted to his credit the excluded property he brought into the relationship as well as the vehicles he purchased with his inheritance, and the remaining inheritance injection into his bank accounts.
- [134] I am not convinced that an equal division would create a situation that is, using the Court of Appeal's words in *Jaszczywska*, "objectively unjust, unreasonable or unfair in some important or substantial sense."
- [135] The respondent has contributed to a pension with Sheet Metal Workers (Local 280) Health Benefit and Pension Plans since he commenced working. He has contributed to the pension for 42 years. I have found that the parties were in a 16-year relationship. I will leave it for the parties to determine the precise percentage of the pension the claimant is entitled to receive.
- [136] The parties should split their CPP in accordance with the Canada Pension Plan, R.S.C. 1985, c. C-8. Spousal Support Applicable Legal Principles
- [137] The factors and objectives of a spousal support order are set out in ss. 15.2(4) and 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.). They read as follows: 15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[138] The objectives of spousal support under the Divorce Act are analogous to the objectives of spousal support set out in s. 161 of the Act: *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 136.

[139] In determining the ongoing application for spousal support, the law recognizes three models of spousal support as described in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 15, namely: compensatory, contractual, and non-compensatory (needs-based). In this case, only non-compensatory comes into play.

[140] Non-compensatory support is "grounded in the 'social obligation model' of marriage, in which marriage is seen as an interdependent union": *Chutter v. Chutter*, 2008 BCCA 507 at para. 54, leave to appeal ref'd, [2009] 1 S.C.R. vi. Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, not the state: *Chutter* at para. 54. "Need" alone may be sufficient to ground a claim for spousal support: *Bracklow* at para. 43.

[141] According to the Court in *Chutter*, "need" is something more than basic necessities:

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10: "Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[142] The principles of imputation of income were canvassed by the Court of Appeal in *Willms v. Willms*, 2020 BCCA 51 at para. 51 in which they quoted extensively from their decision in *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-38:

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income

will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.

- [38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, 2006 SCC 25, [2006] 1 S.C.R. 920 at para. 29). Position of the Parties Claimant's Position
- [143] The claimant submits that the respondent intentionally retired to avoid spousal support and he should return to work full-time. What he was earning in 2018 as a sheet metal worker should be imputed to him in the amount of \$102,193.00 along with his pension income of \$24,302 for a total of \$126,495.00. He should continue to work full-time until age 65. At that time a review should be conducted to determine if any further spousal support should be paid.
- [144] The claimant claims that she is unable to earn much income. At most, she may be able to work part-time at a minimum wage job. She has few skills, little training, and no recent experience in the marketplace. She suggests the amount of income to be imputed to her should be \$15,000. Respondent's Position
- [145] The respondent submits that he has retired and he currently is not able to work because of the medical conditions he suffers from. He argues that the claimant can work and has not reasonably pursued any employment since she was planning to leave the respondent in 2017. He argues there is nothing impeding her from working an entry level position on a full-time basis. This would provide her with an income of approximately \$28,000 which is more than the respondent's pension income.
- [146] The respondent argues that no award of spousal support should be made. He further submits that he has overpaid spousal support since March 2020 and should be reimbursed for this.

Analysis

- [147] The parties agree that the claimant has no claim for compensatory support. The issue is whether there is any entitlement to a needs-based support. The respondent concedes that if he was working full-time and not retired the claimant would have a claim for spousal support on a non-compensatory basis. He takes the position that since he is retired and cannot work due to his medical conditions the claimant is not entitled to any support.
- [148] The evidence supports that the respondent did retire and has ongoing health issues. In 2013, when he was 55 years old, he suffered a heart attack. He has had to take medication daily. He decided he would retire at age 60. He testified that he retired from his job in January 2018 and began to receive a pension in February 2018. In addition to applying for his pension, he sold the Victoria Drive Property and purchased the Family Home as a retirement property. He also purchased some RRSPs in contemplation of his retirement.
- [149] The respondent returned to work in 2018. He did so with the hopes of preserving his extended health coverage since he knew he needed knee surgery and for benefits for the claimant since she needed to seek substance use treatment. The claimant testified that the respondent purchased the Family Home as a retirement home.
- [150] The respondent worked as a sheet metal worker. It is a physically demanding job. It requires physical strength to carry and use various tools and unload steel. It requires dexterity to walk and balance on rebar and climb ladders.
- [151] The respondent has a number of health challenges. When he was a teenager he was in a motorcycle accident and destroyed his cartilage in his left knee. By the summer of 2019 he was having trouble walking to his vehicle at the end of a working day. He was also diagnosed with arthritis. It is throughout his body but particularly bad in his toes. It got to the point that his work boots did not fit. He stopped working in October 2019. At that time he had surgery on his right toe due to arthritis. He is scheduled for knee replacement surgery on his left knee in November 2020.
- [152] The respondent also has plantar fasciitis in the soles of both of his feet. He has tested positive for cancer of the mouth. The arthritis is also in his hands and he testified that he can no longer swing a hammer due to the arthritis in his right hand.
- [153] The claimant suggests that after his knee surgery the respondent could return to work. He should then pay spousal support until age 65 when a further review should be conducted.
- [154] Assuming that the knee surgery proceeded in November 2020 the respondent testified that there was a one-year recovery period. This would bring us to November 2021 when the respondent would be 63 years old. The claimant's suggestion is that at that time he should return to work full-time for two more years so he can afford to pay her spousal support.

- [155] I accept that returning to a physically demanding job such as sheet metal work would be challenging with an artificial knee and not advisable. I further accept that with the respondent's other medical challenges it is not reasonable to expect that he return to work. He has worked in excess of 42 years and I am not convinced that he should be required to return to work at age 63. He is entitled to retire in accordance with the plans he made in 2013 after his heart attack. His decision to retire was reasonable considering his years of service, the physically demanding nature of his job, and his ongoing deteriorating medical conditions.
- [156] I reject the submission of the claimant that the respondent deliberately stopped working to avoid paying spousal support. The evidence does not support that finding. Retroactive Spousal Support
- [157] The claimant left the family home in early June 2019. She did not have a job and has not obtained any employment since that date.
- [158] The claimant tendered evidence that after she left, she suffered from some anxiety and depression. She was prescribed medications for anxiety and stress.
- [159] I am satisfied that a reasonable period of time for the claimant to re-establish herself and seek employment is to the end of 2019. During this seven-month period of time she was entitled to receive spousal support.
- [160] In 2019 the respondent's line 150 income was \$90,307.86.
- [161] According to DivorceMate calculations, the mid-range of spousal support at that level of income would be \$2,107 per month.
- [162] I find that the claimant is entitled to \$14,750 in retroactive spousal support for the period from June to December 2019. In my view, this is fair and reasonable in light of my decision on the interim and future spousal support.
- [163] The claimant's entitlement to spousal support ended at the end of December 2019. As of January 2020 the claimant should have obtained employment. I accept that she has the ability to earn the same amount as the respondent earns from his pension, being approximately \$24,000. This would require the claimant to work less than full-time hours and earn only minimum wage. I take judicial notice that the minimum wage is being increased in June 2021 to \$15.20 an hour: see B.C. Reg. 12/2018, s. 1, amending the minimum wage set out in s. 15 of the Employment Standards Regulation, B.C. Reg. 396/95, from 2018 to 2021. In addition, the claimant will be receiving her share of the respondent's pension in the future.
- [164] On March 11, 2020, an order was made for interim spousal support payable by the respondent to the claimant in the amount of \$2,500.00 per month. The respondent has paid this amount commencing in March 2020. All interim spousal support payments paid by the respondent to the claimant shall be returned to the respondent. The retroactive spousal

support owed to the claimant of \$14,750 should first be deducted. The respondent is entitled to deduct the remaining amount paid from the claimant's share of the family property. Other Issues

[165] The parties agreed to equally share the costs of obtaining the appraisals from Bakerview Appraisals Ltd. The respondent paid the entire cost of the appraisals and seeks reimbursement of \$2,257.50 for the claimant's share. The claimant did not dispute this amount. Summary of orders made

[166] The following orders are made:

1. Subject to s. 12 of the Divorce Act (Canada), R.S.C. 1985, c.3 (2nd Supp.) the claimant, Traci Dawn Mancinelli, and the Respondent, Donald Glenn Mancinelli, who were married at Port Coquitlam on August 25, 2007, are divorced from each other. The divorce is to take effect on the 31st day after the date of this order.
2. The parties commenced a marriage-like relationship in June 2003 and separated in June 2019.
3. The following is "excluded property" and is retained by the respondent as his separate property:
 - a. Victoria Drive Property valued at \$440,000;
 - b. 1967 Ford Fairlane;
 - c. 2002 Camaro;
 - d. 2015 Yamaha Dirt Bike;
 - e. 2015 Yamaha Grizzly ATV;
 - f. Tools; and
 - g. Inheritance valued at \$23,000.
4. The remaining family property shall be divided equally.
5. The respondent shall be given the opportunity to retain the Maple Ridge property and buy out the interest of the claimant.
6. Each party is entitled to keep the family property currently in his or her possession.
7. The claimant is entitled to retroactive spousal support in the amount of \$14,750 for the period from June to December 2019.
8. The respondent is entitled to a retroactive adjustment of all interim spousal support paid by the respondent to the claimant since March 2020 to be paid out of the claimant's share of the family property.
9. The claimant's claim for spousal support is dismissed.

10. The claimant is entitled to a share of the respondent's pension administered by the Sheet Metal Workers (Local 280) Health Benefit and Pensions Plans based on a 16-year relationship.
11. The parties' unadjusted Canada Pension Plan credits shall be divided in accordance with the Canada Pension Plan, R.S.C. 1985, c. C-8.
12. The claimant shall pay to the respondent the sum of \$2,257.50 for her share of the cost of the appraisals conducted by Bakerview Appraisals Ltd.
13. The parties are at liberty to apply to court with respect to the division of family property and any adjustments to bring effect to this court's order.

[167] Based on the results and division of success here, I am inclined to order that each party be responsible for his or her own costs. However, there may be circumstances that I am not aware of. If necessary, the parties are permitted to make submissions, in writing, on the issue of costs. Written submissions are to be exchanged between the parties and filed with the Court within 60 days of the release of these reasons. "Forth J." Schedule A (referenced at para. 129)

Description	Owner	Value	Claimant	Respondent	Real Property	Family Home
R	\$745,000	\$372,500	\$372,500	Bank Accounts/RRSPs	Various bank accounts	R \$81,078.82
\$40,539.41	\$40,539.41	WSCU Savings Account	C \$671.15	\$335.58	\$335.58	Various RRSPs and a TFSA
R \$162,641.91	\$81,320.96	\$81,320.96	WSCU RRSP	C \$51,887.96	\$25,943.98	\$25,943.98
WSCU Fidelity Investment Account	R \$52,938.67	\$26,469.34	\$26,469.34	Vehicles	2011 Dodge Ram	R \$15,000
\$7,500	\$7,500	1997 Ford Mustang	R \$5,500	\$2,750	\$2,750	2011 Ford Shelby
R \$42,000	\$21,000	\$21,000	2003 Yamaha Cruiser	R \$2,900	\$1,450	\$1,450
1966 Ford Falcon	R \$6,500	\$3,250	\$3,250	2015 lawnmower	R \$650	\$325
\$325	2002 Camaro	R Excluded	1967 Ford Fairlane	R Excluded	2015 Yamaha Dirt Bike	R Excluded
2015 Yamaha Grizzly	ATV	R Excluded	Tools/household contents	R Excluded	Total Equal division	\$1,166,768.52
\$583,384.26	\$583,384.26	Inheritance Funds (subtracted)				
-	\$23,000.00	Total less Inheritance Funds	\$1,143,768.52	571,884.26	571,884.26	

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