
CANADA / JUDGMENT

Marino v. Marino

2008 BCSC 1402

COURT

Supreme Court of British Columbia

DECIDED

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2008 BCSC 1402 Marino v. Marino

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Marino v. Marino,

2008 BCSC 1402

Date: 20081023

Docket: E071082

Registry: Vancouver

Between:

Natalina Marino

Plaintiff

And

Enzo Don Angelo Marino

Defendant

Before: The Honourable Mr. Justice Nathan Smith

Reasons for Judgment

Counsel for the Plaintiff

Lisa Slater

Counsel for the Defendant

John C. Fiddes

Date and Place of Trial:

Vancouver, B.C.

July 7-11, 17-18 and Aug. 8, 2008

- [1] The parties in this divorce action separated in 2006 after a 21-year marriage. They have three children, now aged 16, 14 and 10. The major issues are custody, guardianship and access, child and spousal support, and division of family assets.
- [2] The parties were married in Ontario in 1986 and lived there until 2000, when the defendant husband's employer transferred him to Vancouver. At the time, the defendant was director of real estate and construction for a major office supplies retailer. He subsequently became the company's vice-president for real estate for Western Canada and the U.S. Pacific Northwest. His work involved extensive travel, although he says that, after the move to Vancouver, more of his business trips allowed him to leave home in the morning and return the same day.
- [3] The plaintiff wife has a bachelor's degree in psychology and during the early years of the marriage worked in human resources for a supermarket chain. She left that job shortly before the birth of the couple's first child and has been out of the paid labour force since then.
- [4] In early 2006, the defendant went on medical leave from his job, the result of a severe depression. The parties agree that he had a "breakdown" at the time, although there are issues about his current condition. A subsequent attempt to return to work was not successful and the plaintiff's employment was terminated in January, 2008. The long-term disability benefits that he was receiving were terminated as of February, 2008. The defendant has retained counsel to deal with his former employer and the matter remains unresolved.

Divorce

- [5] The parties agree and the evidence clearly establishes that there has been a breakdown of the marriage within the meaning of the Divorce Act, R.S. 1985, (2nd Supp.) c. 3 and there will be a divorce order.

Custody, Guardianship and Access

- [6] Following an incident in March, 2007, when the defendant attempted to move back into the matrimonial home against the wishes of the plaintiff, the plaintiff obtained a restraining order. That order prevented the defendant from seeing the children until it was varied by consent in May, 2007. Since then, there has been a gradual increase in access, accompanied by frequent disputes about dates and times. Under the arrangement now in place, the defendant generally has the couple's son (the youngest child) in his care for periods totalling about 10 days a month, with the two older daughters present for about six of those days. The children are with their father overnight during those periods. There are additional occasions

when the defendant sees one or more of the children at some point during the day.

- [7] The plaintiff and defendant both say they agree to joint custody and joint guardianship, but differ over what that will actually mean. The plaintiff says the children should remain primarily resident with her, with the defendant having specified access with the youngest child. She says there should be no access orders for the two girls because they are old enough to decide for themselves. As for guardianship, she seeks a joint guardianship order in the "Joyce model," which would give her decision-making power in the event of a disagreement.
- [8] The defendant agrees that the oldest daughter, now 16, will make her own decisions about how much time she wishes to spend with each parent, but wants an order giving him equal time with the other two children. He wants custody and guardianship to be equal in all respects and opposes a guardianship order that would give the plaintiff final decision-making power.
- [9] In determining custody issues, my primary concern must be the best interests of the children, recognizing that they should have as much contact with each parent as is consistent with their best interests. Past conduct of the parents is not a consideration unless that conduct is relevant to their ability to act as a parent. The relevant sections of the Divorce Act are:
- 16.(1) A court of competent jurisdiction may, on application by either or both spouses or by any other person, make an order respecting the custody of or the access to, or the custody of and access to, any or all children of the marriage.
- (8) In making an order under this section, the court shall take into consideration only the best interests of the child of the marriage as determined by reference to the condition, means, needs and other circumstances of the child.
- (9) In making an order under this section, the court shall not take into consideration the past conduct of any person unless the conduct is relevant to the ability of that person to act as a parent of a child.
- (10) In making an order under this section, the court shall give effect to the principle that a child of the marriage should have as much contact with each spouse as is consistent with the best interests of the child and, for that purpose, shall take into consideration the willingness of the person for whom custody is sought to facilitate such contact.
- [10] The determination of the child's best interest is specific to the facts of each case and is not guided by any presumption in favour of or against any specific arrangement. As Rice J. said in *J.S. v. G.J.S.*, 2005 BCSC 1373, 20 R.F.L. (6th) 405 at para. 42:

Because each child is entitled to individual justice, the courts must undertake the best interests analysis free of any legal or factual presumptions, including any presumption either in favour or against joint custody orders (*Robinson v. Filyk* (1996), 28 B.C.L.R. (3d) 21, 84 B.C.A.C. 290 (C.A.) at paras. 22 and 27) "Each case turns on its own unique circumstances and the only issue is the best interests of the child in the particular circumstances of the case" (*Gordon v. Goertz*, [1996] 2 S.C.R. 27 at 59-60 19 R.F.L. (4th) 177).

- [11] It follows that there should also be no presumption based on which party was the primary caregiver during the marriage. In this case, that was clearly the plaintiff, but that was, in effect, an agreed upon division of labour and should not in itself prevent the defendant from developing a different relationship with his children in the context of the new situation that exists.
- [12] The plaintiff relies on a number of incidents of conduct by the defendant that she says are relevant to his ability to act as a parent. These reasons for judgment are a public document and I do not consider it necessary to describe these incidents in any detail. It is sufficient to say that the defendant has not always been able to appropriately control his anger at the plaintiff when in the presence of the children. However, most of these incidents occurred in the last few months that the parties were together or since separation. I repeat here what I said in *Falvai v. Falvai*, 2008 BCSC 79 at para. 28:
- [28] The period following the break-up of a marriage is typically a stressful, highly emotional time, which does not tend to reveal the best qualities of either spouse. Conduct of the parties in such situations is a highly unreliable guide to their general parenting abilities and no purpose would be served by making factual findings about all these allegations.
- [13] In this case, the stresses and conflicts prior to and following separation were complicated by the mental health issues the defendant was dealing with. In my view, that makes his conduct during that period an even less reliable indication of his general or long-term parenting ability. More recently, he has had the added stress of his employment being terminated.
- [14] I also note that the plaintiff, while opposed to the equal parenting arrangement suggested by the defendant, still agrees to joint custody and proposes an order in which the youngest child would stay with the defendant from Wednesday evening to Sunday evening every second week, as well as one night in the alternate week. That position is not consistent with her having any serious concerns about the children's well-being while in the defendant's care.
- [15] In *Jordan v. Jordan*, 2001 BCSC 1058, Joyce J. discussed factors to be considered by a court in relation to a joint custody order at paras. 20 and 21:
- [20] I am satisfied that the ability of the parents to communicate and cooperate remains an important factor when considering the best interests of a child. That is apparent from the decision in *Robinson v. Filyk* itself as well as from the decision in *Ness v. Ness* (1999), 43 R.F.L. (4th) 363 (B.C.C.A.). It is not the only factor to be considered, however.

- [21] In my view, some other factors that are relevant to this enquiry include: (i) the ability of each parent to make proper decisions for the child; (ii) the extent to which the child will reside with each parent; (iii) the geographic distance between the parents' homes; (iv) the extent to which the parties' "parenting styles" may differ and, consequently, the extent to which their different parenting styles may provide the opportunity for disagreement; (v) the harm that may be caused to the child if the parents' disagreement on issues creates an atmosphere of conflict; and (vi) the nature of the disagreements in the past, particularly whether they relate to "access issues" that are likely to be resolved by the court order or whether they concern matters of child rearing that are likely to continue to arise. These are not necessarily all of the factors that have a bearing on what sort of custody order is in the best interests of the particular child but they are, I think, some of the important ones.
- [16] In this case, there has clearly been an inability to communicate and co-operate. However, a large part of this conflict has related, broadly speaking, to "access issues," or what might in this case be more accurately called a power struggle. I do not suggest that is the sole cause of disagreement or that all disagreement will vanish with a Court order, but an order clearly spelling out the arrangements will avoid many occasions for conflict.
- [17] Another source of conflict appears to have been the reluctance of the defendant to accept that the marriage is over, a reality that he now appears to have come to terms with.
- [18] It is also clear that these parties have very different parenting styles and different ideas about what is or is not in the best interests of the children. These parenting differences were a source of disagreement while the parties were together and those conflicts have escalated since separation.
- [19] The defendant believes the plaintiff has allowed and encouraged the children to become involved in too many sports and artistic activities, at the expense of their school work and "family time." The plaintiff says the defendant has a rigid, controlling approach that fails to recognize the social development and other needs of the children.
- [20] For example, after the parties separated, the defendant refused to contribute to the cost of the oldest child going to Cuba with her school choir, saying it wasn't in his budget. At trial, he said he refused because he was presented with a *fait accompli* and a request for money without being asked for his opinion. He says he does not want to agree to individual expenditures without an overall "parenting plan" or budget. The defendant has also resisted expenditures for tutoring, saying he and the plaintiff should be able to help the children learn and that additional assistance might not be necessary if the children were able to devote more time to school.
- [21] The plaintiff says this case is comparable to *Glase v. Glase* 2008 BCSC 387 where Warren J. said at para. 410:

- [410] There is no doubt that the period since the separation has been an extremely difficult and trying time for the parties and their children. The relationship between the parents was at times highly acrimonious. For reasons that are not entirely clear, I conclude that the defendant was extremely angry with the plaintiff and that this drove him to acts that were extremely detrimental to the children. In the presence of the children, he has spoken harshly to their mother and called her foul and abusive names. As well, he has allowed his anger to interfere with the best interests of the children, including their access to counselling and learning aids. In my view of the evidence, his recalcitrance has been driven only by his determination to maintain a presence in the lives of the children and his anger at the plaintiff, rather than a selfless attempt to do what is best for the children.
- [22] There are similarities between the conduct described in Glase and the conduct of the defendant in this case. Certainly, the defendant's anger at the plaintiff has contributed to the communication difficulties. However, I do not find that the defendant has put his own interest ahead of those of the children to the extent that was found in Glase.
- [23] The defendant certainly is concerned about his role as father and wants the children to see him exercising parental responsibility. He also has a somewhat rigid and unrealistically "business-like" view of how a family should operate, as shown by his insistence on a comprehensive "parenting plan" against which all expenditures that arise can be compared. But I find much of the conflict in this case is the result of a very real and genuine disagreement about what is or is not in the best interests of children. I cannot say that either party's position is so unreasonable that the Court should impose its own view of these matters.
- [24] These parties are both intelligent people who love their children and have a great deal to offer them. I find that it is in the best interest of the children that both parents continue to be part of their lives to the greatest extent possible. Although they have different parenting styles, the children are old enough to recognize and adjust to those differences. They are also of an age where they can begin to have some direct input into decisions affecting them, such as decisions about extra-curricular activities. That does not mean the child will always get what he or she wants, but either parent will ignore the children's wishes at his or her peril. The age of the children distinguishes this case from Jordan , where Joyce J. was dealing with a very young child.
- [25] While a shared or co-operative parenting arrangement will be difficult for the plaintiff and defendant at first, I am not satisfied that they are incapable of establishing the necessary level of communication and co-operation, particularly when they realize they have no choice in the matter. I am satisfied that the children will benefit from equal contact with both parents.
- [26] I find that this is a case where a joint custody arrangement can work and would be in the best interests of the children, provided there are clear rules about when the children will be in the care of each parent. I accordingly award joint custody, with the two younger children

living alternate weeks with each parent. During summer vacations each parent will have the children for two consecutive weeks at a time. The children will spend half of each Christmas vacation with each parent. Other holidays will be divided on an alternate year basis.

Regardless of where the children are living at the time, they will spend Mother's Day with the plaintiff and Father's Day with the defendant, and each party is entitled to spend time with the children on his or her birthday. If the parties require a more specific order, they may speak to the matter.

- [27] I include the 14 year old daughter in the order, although I recognize that she will soon reach the point where she will make her own decisions.
- [28] The plaintiff seeks a joint guardianship order on the "Joyce Model", which would require both parties to discuss and attempt to reach agreement on any significant decisions concerning the children, including decisions related to their health, education, religious instruction and general welfare. However, in the event that agreement cannot be reached, the proposed order would permit the plaintiff to make the decision, with the defendant having the right to seek review and directions from the Court under s. 32 of the Family Relations Act, R.S.B.C. 1996, c. 128.
- [29] The defendant opposes a guardianship order in that form because he says it would effectively permit the plaintiff to do what she wants and would be contrary to the regime of fully equal parenting that he seeks. In my view, the history of disagreement on such matters makes it necessary that someone be able to act in the event of disagreements that cannot be resolved. The alternative is a risk of deadlock that would not be in the children's interests. If, as the defendant fears, the plaintiff fails to discuss these matters in good faith and does not make a reasonable effort to reach agreement, he will have the remedy provided by s. 32. The order for joint guardianship will therefore go in the form proposed by the plaintiff.

Family Assets

- [30] The parties' assets consist primarily of securities and other investments held by the defendant, and to a lesser extent, the plaintiff, in investment accounts, and the defendant's interest in four companies, including family companies based in Ontario. The parties do not own a matrimonial home, although they previously owned two houses in Ontario.
- [31] There is no dispute that most of the assets are indeed family assets and division of them is relatively straightforward. Plaintiff's counsel has prepared a Scott Schedule setting out the assets and a proposed division. It is not necessary to review these assets in detail and I will only address those matters that are in dispute.
- [32] One issue relates to the defendant's corporate interests. There are two companies in which the defendant is the sole shareholder and two others in which he is a shareholder along with other members of his family. Plaintiff's counsel proposes that the defendant retain those shares and that the plaintiff receive a compensatory payment.

- [33] The financial statements of those companies show a number of debts owing between them or to the defendant. The financial statements are not audited and are prepared by the accountant solely on the basis of information supplied by others. Plaintiff's counsel has valued the family companies based on the retained earnings shown on the financial statements, adjusted for amounts owing to the defendant. I find that valuation to be entirely reasonable on the evidence.
- [34] One of those companies, Quattro Hair Designs Ltd., has a value, according the plaintiff's Scott Schedule, of \$374,391. As recently as June 20, 2008, the defendant swore a Form 89 financial statement to the effect that he owned 50 per cent of the shares of that company. He also gave similar evidence on examination for discovery. However, at trial he produced the share register showing his holdings at only 25 per cent. The other shareholders are his father and a company apparently owned by his brother.
- [35] Similarly, the defendant previously gave evidence that he owned nine per cent of the shares of Sal Marino investments, but said at trial that he was mistaken and he only owned three per cent of the shares.
- [36] It is not unusual for parties who have given certain evidence on discovery to later realize that they were mistaken. Parties may not have fully turned their minds to all issues that are raised on discovery, and incomplete or mistaken evidence in such circumstances is not necessarily a reason for the court to make adverse credibility findings.
- [37] However, full disclosure of financial information is considered so important in matrimonial cases that the Rules of Court set out specific procedures to be followed. The parties must file Form 89 financial statements and must revise those statements when changes occur. Mistakes can, of course, be made in those documents, but Rule 60D (23) provides that where a statement has been delivered more than 90 days before trial, an updated statement must be delivered no later than 30 and no sooner than 60 days before trial. As Martinson J. said in *Freeman v. Freeman*, 2008 BCSC 857, the purpose of that rule is to allow parties to prepare for trial based on the most current information. A related purpose must also be the opportunity it gives parties to correct any errors that may have been made on previous statements. In *Freeman*, Martinson J. said at paras. 28-30:
- [28] This Court has concluded that each party to a matrimonial proceeding, whether with respect to the division of assets or the payment of maintenance, has a duty, separate and apart from the requirements of Rule 60D, to make full financial disclosure to the other party and to the court. That duty is of particular significance where one of the parties has relevant information unknown to the other: *Wang v. Yang*, 2003 BCSC 1451; *Turpin v. Turpin*, [1991] B.C.J. No. 35 (QL).

- [29] The disclosure requirements are in keeping with the object of the Rules, which is to secure the just, speedy and inexpensive determination of every proceeding on its merits; Rule 1(5). Early disclosure allows the parties to stabilize their financial situation by putting reasonable interim arrangements in place. It allows parties to move towards an early resolution, either by way of settlement, or a timely trial. Information needs to be kept current so that the parties can continue to work on settlement, prepare for trial, or both.
- [30] Non-disclosure has a negative impact on both the settlement process and the trial preparation process. When a party to a family law action has to spend time, energy and money to obtain the disclosure to which they are entitled, that will usually escalate the dispute rather than create a climate where the focus is settlement. Non-disclosure also adversely affects the trial itself. Time that should be used to focus on the merits of the case ends up being used to resolve disputes over disclosure.
- [38] In this case, we are dealing with companies in which all shareholders are family members. There is no evidence before me as to the basis on which shares were originally allocated or the basis on which they may be transferred between family members from time to time. It would not have been a difficult matter for the defendant to inquire and determine his correct shareholdings at the outset of this proceeding. Even allowing for the possibility of innocent error on the initial disclosure, the defendant has given no reasonable explanation for persisting in that erroneous evidence until trial.
- [39] In the circumstances of this case, it would be unfair to permit the defendant to resile from his earlier evidence and I attribute to him the interests declared on his financial statements. There is, in my view, no evidence to support any conclusion other than that the defendant's interest in those companies is a family asset.
- [40] The plaintiff says that based on the values set out in the Scott Schedule, which are the values as of or shortly before the date of trial, equal division of the above assets would be accomplished by an equalization payment from the defendant to the plaintiff of \$362,445. After such a payment, each party would be left with assets with a total value of approximately \$860,000.
- [41] While I find the general approach to be the valid and proper one, I am not prepared to make an order for an equalization payment or the specific amount sought by the plaintiff. That is because many of the assets consist of securities whose value may change from day to day. I take judicial notice of certain recent events affecting the general economy that may have substantially reduced the value of all such assets in the period between the date of trial and the date of these reasons.
- [42] The interest which s. 56 of the Family Relations Act gives to each spouse is an undivided one half interest in the assets, not an undivided one half interest in the value of the assets at any particular date. See *Blackett v. Blackett*, [1989] BCJ No. 1889.

- [43] In *N.M.M. v. N.S.M.*, 2004 BCSC 346, 26 B.C.L.R. (4th) 80 at para. 76: Joyce J. distilled a number of principles from the decided cases on valuation. One of those is:
4. While generally the appropriate date for valuing family assets will be the trial date it appears there is discretion to fix another date, not earlier than the triggering event, if that is necessary in order to achieve fairness.
- [44] The entitlement to a share of the assets arises on one of the triggering events set out in s. 56 of the Family Relations Act. The record does not disclose any previous declaration made under s. 57 that there is no reasonable prospect of reconciliation, nor is there any evidence of a separation agreement. It therefore appears that the triggering event in this case will be the divorce order contained in this judgment, which means the valuation date must be the date of judgment, rather than the date of trial.
- [45] Even if there had been a triggering event prior to trial, I would hold the date of judgment to be a more appropriate valuation date. In order to make the equalization payment which the plaintiff seeks, the defendant will have to liquidate or borrow against some of his holdings and those transactions will be governed by the current value.
- [46] I therefore order that family assets be divided in the manner proposed in the plaintiff's Scott Schedule, after asset values in that schedule have been restated based on their value as at the date of these reasons. The defendant will pay to the plaintiff an equalization payment calculated according to the Scott Schedule on the basis of the re-stated values.

Reapportionment

- [47] The plaintiff seeks to retain one investment account, valued in the Scott Schedule at \$115,000. The effect of this would be to transfer the defendant's one half interest in that asset to her. Such re-apportionment can be ordered to compensate a spouse for financial loss arising from the marriage and its breakdown, and to address the need of each spouse to become economically self-sufficient. See *Lodge v. Lodge*, (B.C.C.A.), 79 B.C.L.R. (2d) 360 (C.A.). The plaintiff has been out of the workforce for 16 years and is clearly entitled to some re-apportionment in her favour. I do not take the defendant to be disputing the plaintiff's proposal as set out in the Scott Schedule.
- [48] The defendant seeks re-apportionment based on the need to repay an alleged loan from his parents. In 1989, the parties bought a house in Markham, Ontario, referred to as the "Wooten Way" property, for \$312,500, of which \$100,000 came from the defendant's parents. The defendant says that was a loan on which interest was payable and that the total amount now owing to his parents is almost \$350,000.
- [49] The original advance of \$100,000 was the subject of an agreement dated November 19, 1989 and signed by both parties along with the defendant's mother and father. The copies of the agreement available at trial were poor photocopies, portions of which were illegible.

[50] The agreement states that the money is being provided "lovingly and willingly so long as the kids remain in wedlock." There is a provision for monthly payments of \$1,000, but no evidence of those payments being made, except perhaps for a brief initial period.

[51] The agreement states that, should the parties separate, each will repay half of the "floating balance" -- a term that is not clearly defined. The agreement further provides that, on sale of the property, the parents would be repaid the "floating balance" plus 10 per cent. The property was in fact sold in 2005, before the parties separated, but no repayment occurred at that time or since. The only provision that I can find for interest is triggered by a demand for repayment and there is no evidence of any such demand.

[52] An interesting provision of the agreement states:

If, at any time in the future, the intent of this agreement, in all or in part, is in question the intent will be that which is agreed by upon by 75 per cent of the persons involved.

In other words, in the event of a marriage breakdown--the most likely occasion for a dispute to arise--the defendant and his parents would be able to impose their interpretation on the plaintiff. The plaintiff says she signed the agreement because her husband asked her to and she had no legal advice.

[53] The leading authority on characterizing advances made by parents to their children is *Wiens v. Wiens* (1991), 31 R.F.L. (3d) 265, (B.C.S.C.) where Harvey J. said at paras 24-25:

It is clear from the case law that, where the parents of a married child advance money to facilitate the purchase or the improvement of the matrimonial home, and the spouses later do not agree as to the nature of that advancement, the court must presume that the money advanced is a gift to the child which, on a presumption of advancement, becomes a gift to the wife. In the absence of clear evidence, like a promissory note specifying the amount or any other secured document showing to the court that the advancement is a loan, the court must assume that the money advanced is a gift. See *Sleightholme v. Sleightholme* (unreported) (26 March 1982), Doc. Vancouver A803106, MacDonald L.J.S.C. (B.C.S.C.); *Leach v. Leach* (unreported) (19 May 1982), Doc. Victoria 202/81, Stewart J. (B.C.S.C.); *Hadley v. Hadley* (unreported) (18 January 1988), Vancouver A862747, Catliff L.J.S.C. (B.C.S.C.); *Yip v. Yip* (unreported) (20 April 1988), Vancouver A871481 Errico L.J.S.C. (B.C.S.C.).

Upon consideration of the evidence and the authorities, I am of the view that, without documentation confirming not only the loan but the manner in which repayment is to be made, such advances must be construed as absolute gifts. In my view, in the particular circumstances of this matter, the advances were probably made for the purchase and renovation of the family home, and as such were made as gifts to the petitioner and respondent.

[54] In *Locke v. Locke*, 2000 BCSC 1300, A.F. Wilson J. reviewed a number of cases and listed factors the courts have considered in such cases at para. 20:

1. whether there were any contemporaneous documents evidencing a loan;

2. whether the manner for repayment is specified;
3. whether there is security held for the loan;
4. whether there are advances to one child and not others, or advances of unequal amounts to various children;
5. whether there has been any demand for payment before the separation of the parties;
6. whether there has been any partial repayment; and
7. whether there was any expectation, or likelihood, of repayment.

[55] In this case, there is a contemporaneous document, but the repayment terms are not entirely clear and were not complied with during the marriage. There was no registered mortgage or other security and no demand for payment before separation, although one of the events--sale of the property--that was supposed to trigger repayment had occurred.

[56] When asked at trial if there had been a demand, the defendant's response was "not yet." The repayment obligation in the event of separation is not a joint obligation but is stated in the agreement as an obligation of each of the plaintiff and defendant to pay half the amount owing. Therefore, the defendant's parents can chose to demand repayment only from the plaintiff while ignoring or forgiving the portion allegedly owed by their son.

[57] The defendant has failed to demonstrate that the \$100,000 was a loan and I find that it was a gift from the defendant's parents to both spouses. However, I make that finding in a proceeding to which the defendant's parents are not parties. They will still be in a position to demand repayment from the plaintiff and to bring action against her, based on the agreement.

[58] In dividing family assets, the Court may also divide a contingent liability that cannot be valued at the time of trial. See *Stein v. Stein*, 2008 SCC 35, 79 B.C.L.R. (4th) 1. I therefore order that the defendant indemnify the plaintiff for any and all amounts she may be required to pay to his parents under the November, 1989 agreement.

Imputing Income

[59] The defendant's employment was terminated early in 2008. For most of the preceding two years, he had been on medical leave and receiving disability payments, which were also terminated early in 2008. The defendant says he continues to see a psychiatrist and is still unable to work, but recently enrolled in a real estate licensing course. He says he eventually hopes to establish a business assisting landlords and tenants with the negotiation of commercial leases--a field in which he has experience from his former employment. The defendant at one point held an Ontario real estate license, but has made no inquiries to determine if that or his job experience can be applied as credit toward any of the anticipated course work.

- [60] The plaintiff acknowledges that the defendant was suffering from a severe depression when he stopped working in 2006, but argues that he is now capable of working and urges the court to attribute annual income of \$195,000 for purposes of child and spousal support.
- [61] Section 19(1) of the Federal Child Support Guidelines, (SOR/97-175) permits the court to impute income that it considers appropriate to a spouse in a number of circumstances, including where the spouse is "intentionally under-employed or unemployed." Parents have a joint, ongoing obligation to support their children and for that purpose each parent must earn what he or she is capable of earning. In *Sedlmair v. Sedlmair* (1999) 3 R.F.L. (5th) 294 (B.C.S.C.), Madam Justice Martinson said at para. 12:

Parents have a joint and ongoing legal obligation to support their children. Imputing income is the way in which the court gives effect to the legal requirement that a parent must earn what the parent is capable of earning. The concept of imputing income is consistent with the first objective of the Guidelines: to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both parents after separation: *Hanson v. Hanson* (October 15, 1999), Doc. New Westminster E006672 (B.C.S.C. [In Chambers]).

- [62] A parent who asserts a continued inability or reduced ability to earn income because of an ongoing medical condition has the burden of proving that on the balance of probabilities. In most cases, that will require opinion evidence from a properly qualified medical expert. The procedure for introducing such evidence, including the right of the opposite party to demand the attendance of the expert for cross-examination, is set out in Rule 40A of the Supreme Court Rules. No such evidence has been presented in this case. I therefore can not and do not accept the defendant's bald assertion that he is incapable of earning income.
- [63] However, that does not mean he has any real prospect of earning income at the previous level. In his former job, the defendant sometimes earned more than \$300,000 a year. However, much of that income came in the form of performance bonuses. His base salary was \$156,000. The defendant cannot return to that job and I accept that it will be difficult, at least in the short term, for him to find employment at the same base salary, much less employment that offers the same bonus opportunities.
- [64] On the other hand, the defendant has impressive experience in business and in particular in the field of the acquisition, construction and leasing of retail properties. In that work, he has had to use management and negotiation skills that will also be applicable in other businesses. The defendant may have some initial difficulties in finding a new position and, given his previous health problems, he is understandably reluctant about moving immediately into a position involving excessive pressure or stress. However, I do not accept that he is unable to earn any employment income while he pursues his longer term goal of establishing a new real estate business. The defendant also has an ongoing claim against his former employer for additional compensation, including payment in lieu of proper notice. Taking into account all of these matters, I impute annual employment income to the defendant of \$100,000.

- [65] Both parties have assets from which they will derive income. In dealing with the division of those assets, I have said that many of them must be valued as of the date of judgment because their value may have changed significantly from the date of trial. In the circumstances, it would be pure speculation to impute any specific income to either party from those sources. However, there are some individual assets for which it is possible to estimate income for the current year.
- [66] The defendant's personal holding company had a net income in 2007 of \$18,700. The defendant retains full ownership of that company, although he may have to liquidate other assets in order to make the equalization payment I have ordered in respect of it. It is, in my view, reasonable to attribute similar income on an ongoing basis.
- [67] At the time of trial, the defendant held a six-month, \$100,000 bond, set to mature in September with repayment of the purchase price plus \$8,500. The plaintiff's Scott Schedule, which I have generally accepted as the basis for division of assets, leaves that asset with the defendant, and the plaintiff says I should attribute income of \$17,000 on an annual basis from that source. There is no evidence that the defendant will be able to re-invest those funds at the same rate of return, but the \$8,500 that was due in September can clearly be considered as part of his income for the current year.
- [68] The plaintiff has retained two mortgage investments, including one that was the subject of a re-apportionment of assets in her favour. The total income from those two sources is approximately \$22,000. She also holds an investment in a limited real estate partnership that produces annual income of \$11,250. The division of assets requires the plaintiff to hold half of her interest in trust for the defendant, meaning that each will receive \$5,625.
- [69] Therefore, to the extent that income can be estimated from investment sources, each party is likely to receive investment income of approximately \$27,000 and I impute that amount to each party.
- [70] The defendant's total income for guideline purposes, including imputed employment income, is therefore \$127,000 while the plaintiff's total income is \$27,000. I have not imputed any employment income to the plaintiff because of the length of time she has been out of the work force. While she is certainly capable of finding employment in the future, that will likely require some retraining, or at least updating of job skills, before any income can be earned.

Child Support

- [71] Earlier in these reasons, I held that the two younger children are to spend equal time with each parent, while the eldest child will make her own decisions. This is therefore a situation, (at least in regard to the two younger children), where s. 9 of the Federal Child Support Guidelines applies and that section reads:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [72] In *Contino v. Leonelli-Contino*, 2005 SCC 63, [2005] 3 S.C.R. 217, the Supreme Court Canada made clear that in such cases of equal or nearly-equal shared custody, there is no presumption in favour of awarding the Guideline amount, nor is there any presumption in favour of reducing child support obligations. One of the realities the Court recognized in *Contino* is that the party with the lower income has certain fixed costs that are not reduced by the fact a child spends half of his or her time with the other parent (at para. 54):
- [54] not every dollar spent by a parent in exercising access over the 40 per cent threshold results in a dollar saved by the recipient parent.
- [73] In considering the proper amount of support to be awarded under s. 9, the court should consider financial statements and/or child expense budgets. In this case, both parties have prepared Form 89 financial statements that include estimations of monthly expenses, but I find them to be of limited value. While some expenses are absolutely fixed, others are always to some extent adjustable based on the income available.
- [74] Both parties in this case had to prepare expense statements without yet knowing what income the court would impute. The defendant is still in the process of adjusting his spending patterns to the fact that, whatever happens, he will not likely replace all of the income that he was able to earn in his best years with his former employer. The plaintiff, meanwhile, has produced an expense statement that largely ignores the need for such an adjustment.
- [75] Doing the best I can with the evidence before me, I note, first of all, that the shared custody regime does not apply to the eldest child. The defendant must pay the regular Guidelines amount in respect of her. On the basis an imputed total income of \$127,000, that would be \$1,122 a month. If the defendant was paying the full Guidelines amount for three children, he would have to pay \$2,309 a month.
- [76] The two younger children will be in the care of the plaintiff half of the time and she will have certain child-related expenses that will not be reduced by the amount of time the children spend with their father. In all of the circumstances, I find that the proper amount payable to the plaintiff in respect of those two children should roughly equal 75 per cent of the difference between the one child and three child Guidelines amounts.

- [77] The defendant will therefore pay basic child support of \$2,000 a month. That order is retroactive to March, 2008, when the defendant stopped paying child support.
- [78] The plaintiff also seeks contribution to special and extraordinary expenses pursuant to the s. 7 of the Guidelines. Based upon the respective incomes that I have imputed, the defendant's contribution would be 80 per cent of any such expenses.
- [79] The children have always attended Catholic private schools, and both parties have always considered that important. I agree the defendant should continue to contribute to those expenses, which total \$9,000 a year. Two of the children have also required tutoring, at a cost of \$1,400 a year. The defendant disputes the need for that tutoring, but I accept that the plaintiff, because of the extent she was involved with the children's education during the marriage, probably has a better sense of their needs. I therefore allow that continuing expense, as well as a \$900 one-time expense for driver education for the eldest daughter.
- [80] The plaintiff claims orthodontic expenses, but there is no medical evidence proving the necessity of those expenses.
- [81] The plaintiff also claims annual expenses totalling almost \$16,000 a year, plus some one-time expenses, for a variety of sports and artistic activities the children are involved in. The middle child, in particular, is said to be a very talented dancer and the plaintiff wants her to have high level instruction. The oldest child plays soccer at a high level, but is also heavily involved in musical activities, while the youngest does dance and martial arts.
- [82] I have no doubt that all of these activities are of benefit to the children, but I do not believe the past level of spending on them can be maintained at the current income levels. In the circumstances, I allow special or extraordinary expense for extracurricular activities of \$5,000 a year, of which the defendant will pay 80 per cent. It will be up to the parties to decide on priorities.

Spousal Support

- [83] The principles governing spousal support are set out in s. 15.2 of the Divorce Act. Sections 15.2(4) and (6) provide 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 break-down of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[84] The principles governing the application of those sections were discussed by the Supreme Court of Canada in *Moge v. Moge*, [1992] 2 S.C.R 813 and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420. Entitlement to spousal support may be based on compensatory, contractual or non-compensatory (need) considerations. The compensatory considerations relate to the economic advantages and disadvantages arising from the marriage and its breakdown. Those considerations are particularly relevant in cases such as this, where the wife left the work force to take responsibility for child care and has remained out of the work force for many years. In *Moge*, the Court said at 861-862:

These sacrifices often impair the ability of the partner who makes them (usually the wife) to maximize her earning potential because she may tend to forego educational and career advancement opportunities. These same sacrifices may also enhance the earning potential of the other spouse (usually the husband) who, because his wife is tending to such matters, is free to pursue economic goals while the union survives, such division of labour, at least from an economic perspective, may be unobjectionable if such an arrangement reflects the wishes of the parties. However, once the marriage dissolves, the kinds of non-monetary contributions made by the wife may result in significant market disabilities.

[85] As set out earlier, the plaintiff had a university degree and formerly worked in the human resources field. She was earning approximately \$45,000 per year when she left the work force in 1992 at the time she and the defendant had their first child. She has been out of the work force ever since. She will likely require retraining or at least updating of her job skills in order to find employment, and is unlikely to ever attain the level of income she would be at today if she had remained in the work force these last 16 years. The facts are similar to *Tedham v. Tedham*, 2005 BCCA 502, 261 D.L.R. (4th) 332 where the Court of Appeal said at para. 52:

- [52] In this case, a 16-year marriage in which Ms. Tedham stayed home to take care of the home and the children called for a support order which, after taking into account Ms. Tedham's ability to contribute to her own support, provided a standard of living reasonably commensurate with that enjoyed during the marriage and which compensated Ms. Tedham, to the extent possible, for the losses she had suffered by remaining out of the paid workforce for so many years.
- [86] I have already recognized the economic costs of the marriage to some extent through a reapportionment of some of the family assets. However, as the Court of Appeal made clear in Tedham re-apportionment alone may not meet the goals of the governing statutes (at para. 64).
- [64] The fact that there has been a reapportionment does not mean that there should not be an award of spousal support. That decision will turn on the extent to which the reapportionment has adequately compensated for the economic dislocation caused to a spouse flowing from the marriage or its breakdown, and any continuing need the spouse may have for support arising from other factors and objectives set forth in s. 15.2.
- [87] In considering the amount of spousal support that would be appropriate in this case, I have considered the effect of re-apportionment, the income the plaintiff will earn from her assets, and the income I have imputed to the defendant. I have attempted to apply those factors to the appropriate calculation under the Spousal Support Guidelines.
- [88] By my calculations, with the defendant earning \$127,000 per year, the plaintiff earning \$27,000, and the defendant paying the child support I have ordered, the Guidelines suggest a range of support from approximately \$800 to approximately \$1,700 per month. The fact that the plaintiff has some income and has received a re-apportionment of family assets suggests spousal support should be in the middle of the Guidelines range. See: *Wu v. Dipopolo* 2008 BCSC 112, 78 B.C.L.R. (4th) 165 at para. 209.
- [89] I conclude that the appropriate level of spousal support for the defendant to pay will be \$1,300 a month, effective as of the date of these reasons.
- [90] The amount of spousal support, along with the child support, will be reviewable when the defendant's claims against his former employer and disability insurer are resolved or adjudicated upon. The spousal support order will also be reviewable if and when the plaintiff obtains full time or significant part time employment. Of course, both support orders are subject to variation on either party showing a change in circumstances.

Summary

[91] In summary, I make the following orders:

- a) The parties are divorced, effective on the 31st day after the date of this judgment;

- b) The parties will have joint custody of the three children of the marriage and joint guardianship on the "Joyce model."
- c) The two younger children will spend alternate weeks with each parent during the school year and alternate two week periods with each parent during the summer. The children will spend half of each Christmas vacation with each parent and other holidays will be divided on an alternate year basis.
- d) Family assets will be divided as set out in the plaintiff's Scott Schedule, except that the valuation of investment accounts will be based on values as of the date of judgment rather than the values as of the date of trial.
- e) The defendant will pay child support of \$2,000 per month, retroactive to March, 2008.
- f) The defendant will pay 80 per cent of special and extraordinary expenses, being educational expenses of \$10,400 per year, a one-time \$900 cost of driver education, and \$5,000 per year for extra-curricular activities.
- g) The defendant will pay spousal support of \$1,300 a month.
- h) The orders for spousal support and child support will be reviewable when the defendant's claims against his former employer and disability insurer are resolved. The order for spousal support will also be reviewable if the plaintiff obtains employment.

Costs

[92] The plaintiff has been largely successful on issues relating to family assets, child support, and spousal support. However, the defendant has been largely successful on issues related to custody, guardianship, and access, which occupied a large portion of the trial time. In the circumstances, each party will bear his or her own costs.

Nathan H. Smith J.

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