
CANADA / JUDGMENT

N.D.S. v. J.A.S.

2020 BCSC 1034

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 1034 N.D.S. v. J.A.S.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.D.S. v. J.A.S.,

2020 BCSC 1034

Date: 20200713

Docket: E54930

Registry: New Westminster

Between:

N.D.S.

Claimant

And

J.A.S.

Respondent

Before: The Honourable Mr. Justice Riley

Reasons for Judgment

Counsel for the Claimant:

S. Butler

Counsel for the Respondent:

D. Boyd

Place and Dates of Hearing:

New Westminster, B.C.

June 8-12, 2020

Place and Date of Ruling given to Parties with Reasons to Follow:

New Westminster, B.C.

June 24, 2020

Place and Date of Judgment:

New Westminster, B.C.

July 13, 2020

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Introduction

- [1] These are reasons for judgment in a divorce proceeding. The parties were in a relationship of more than 19 years, commencing when they were married in 1996, and ending with their separation in 2017. They have two children together, a son who is now 20 years old and a daughter who is 17, both of whom have been residing primarily with the claimant Ms. S since the separation. The parties agree that there should be a divorce order. The respondent Mr. S also asks for a joint guardianship and parenting order for the youngest child, who is still under the age of majority, and Ms. S does not oppose this. The issues in dispute between the parties are property division, child support, spousal support, and arrears of support.
- [2] On 24 June 2020, I gave judgment on this case with written reasons to follow. These are the reasons.

Overview of the Issues

- [3] With regard to property division, the principal asset is the former family home. It is currently listed for sale and the parties ask the court to make an order providing for division of the net proceeds, which are expected to be in the order of some \$800,000. Ms. S argues that equal division would be significantly unfair for a number of reasons, including the prolonged effect of Mr. S's alleged financial irresponsibility during the relationship, and the post-separation drop in income that occurred when Mr. S was fired from a well-paying job for misconduct. Mr. S argues that the factors relied upon by Ms. S are either legally irrelevant or otherwise do not rise to the level of significant unfairness so as to warrant departure from the statutory presumption of equal division of family property.
- [4] With regard to child and spousal support, there is disagreement between the parties as to Mr. S's Guideline income. It is common ground that Mr. S is presently working at a job that pays slightly less than \$35,000 per year. Mr. S says this should be his Guideline income. Ms. S argues that income should be imputed to Mr. S on the basis that his intentional misconduct led to his firing from a much better paying job, or alternatively on the basis that his annual income is likely to be greater than \$35,000, in view of anticipated wage increases and the availability of overtime.
- [5] With regard to child support, it is common ground that Mr. S is obliged to pay support for the youngest child, M.I.S., who continues to be a child of the marriage and resides with Ms. S. The parties disagree, however, about the status of the older child, M.J.S., who is over the age of majority and presently working close to full time hours, but who has stated intentions to return to college in the fall. For her part, Ms. S says the Court should make a contingent order under which Mr. S would be required to pay support for one child, with a contingent term requiring him to pay support for two children if M.J.S. returns to school full time. For his part, Mr. S does not quarrel with the notion that if M.J.S. did return to school, he would qualify as a child of the marriage, but Mr. S says that future event is too uncertain or open-ended to be built into a support order.

- [6] On the issue of spousal support, there is no dispute between the parties that Ms. S is entitled to support. Ms. S has had two bouts of breast cancer, has seriously compromised health, and is now on a fixed income consisting of a combination of long term disability benefits and pensions. However, Mr. S says that at his current income level, and in view of his child support obligations, he is not presently required to pay support under the Spousal Support Advisory Guidelines [SSAG]. He concedes that his obligation to pay spousal support could be revisited on a review, after the children have reached the age of majority. For her part, Ms. S says Mr. S's spousal support obligations should be determined based on imputed income as described above.
- [7] Finally, there is a disagreement between the parties as to arrears of support. Ms. S argues that the full amount of arrears owed by Mr. S should be deducted from his share of the net proceeds from the sale of the family home. Mr. S argues that the arrears were assessed based on the income he was earning from a well-paying job from which he was subsequently terminated, and that the arrears should be reduced or recalculated based on his actual income. Ms. S is opposed to this, arguing that it is Mr. S, not her and the children, who should bear the consequences of the misconduct that caused Mr. S to lose his job.

Facts

- [8] Ms. S was born in Richmond and grew up in the Lower Mainland of British Columbia. She is 49 years old. She has a high school diploma and a bachelor's degree from the University of British Columbia. Her work experience has been more or less exclusively in the field of child care and early education. Ms. S has had serious health challenges as a result of which she has been unable to work since 2011. Her current income consists of a combination of long-term disability and pension benefits.
- [9] Mr. S was born in Alabama, and moved to Washington state when he was seven years old. He is also 49 years old. He left high school while in his senior year, when his then-girlfriend had a baby. He was married for a brief period of time, but divorced after less than a year. He has one child from that relationship, a daughter, who is now 31 and lives in the Seattle area. As a young man, Mr. S worked at a variety of jobs, mostly in retail sales and shipping and receiving, before moving into the field of emergency services, security, and law enforcement. In 2015, Mr. S was diagnosed with a serious heart condition as a result of which he now has a pacemaker. Mr. S lost his job as a sheriff in 2019, and he now works as an operations manager at a brand name sports apparel store.
- [10] Mr. and Ms. S first met in 1993, when Mr. S was on a weekend visit to Canada. They started dating in a sort of long distance relationship. Mr. S was living in Seattle and Ms. S was living in Richmond. They would take turns visiting each other, or meet half way in Mount Vernon.
- [11] When the couple began to discuss marriage, Mr. S's finances and immigration status were major concerns for Ms. S.

- [12] With regard to Mr. S's immigration status, Ms. S said that if they got married, Mr. S would have to move to Canada. Mr. S accepted that term. However, Mr. S's application for permanent residency was delayed by the fact that he had criminal convictions in the US for passing bad cheques. In the end, Ms. S sponsored Mr. S's immigration application, and he was ultimately granted immigration status in Canada.
- [13] With regard to finances, the evidence of the parties was somewhat divergent, but I accept based on everything I have heard that Ms. S was aware of Mr. S's financial difficulties before the couple married. She may not have turned her attention to the details at the time, but Ms. S was aware that Mr. S had accumulated debts and had to declare bankruptcy in the US. Some time in 1996, Ms. S attended court in Washington state for Mr. S's bankruptcy proceeding. It is not necessary to descend further into the details, which are set out in bankruptcy documents tendered in evidence.
- [14] One thing that is very clear from all the evidence is that Mr. S has had, and continues to have, poor money management skills. This was a source of much strife between the parties throughout their relationship. I will come back to this point.
- [15] Mr. and Ms. S got married on 20 April 1996, after which they lived together in Vancouver. At the time, Ms. S was working at the YMCA in Vancouver, in pre-school and after school care. Mr. S did not yet have permanent resident status in Canada, and was still working in the United States as an emergency medical technician ("EMT") for an ambulance services company. He worked four days on, three days off. He stayed in the United States for his four-day work stint, and then returned to Canada for his days off.
- [16] The couple's son M.J.S. was born in 2000. Ms. S had been working at the YMCA and went on maternity leave. Mr. S continued to work as an EMT in the United States. By this time, the couple was living in rental accommodation in Tsawwassen.
- [17] The couple's daughter M.I.S. was born in 2002. Ms. S worked at the YMCA up until M.I.S. was born, and after taking maternity leave she switched jobs to work as an educational assistant ("EA") with the Richmond School Board. Mr. S was still working as an EMT in the United States, spending four days away from the home, and then returning to Canada for his three days off.
- [18] Right around the time that M.I.S. was born, the couple bought a house in Delta. Both parties were listed on the title to the property. The purchase price was just over \$300,000. They financed the purchase with a \$50,000 down payment, including \$6,500 from Ms. S's RRSP account, and a mortgage of some \$253,000.
- [19] With regard to employment, Ms. S continued to work as an EA in the Richmond school system, up until she was forced to stop working due to medical difficulties in 2011. I will return to that issue shortly.

- [20] Meanwhile, Mr. S went from being an EMT at an ambulance service, to being a security guard at a hospital, to a sheriff at the Whatcom County Sheriff's office. All of these jobs were in the United States, and Mr. S continued to commute to work from Canada. At one point, he worked three days on, one day off. Later, he worked 24 hours on, three days off. When he was working as a sheriff, he worked a five-day work week, leaving Canada early in the morning each work day and returning home late at night, after a full day that might include a trip to the gym, a regular shift, possibly overtime or a double shift, and other commitments.
- [21] There is a conflict in the evidence with respect to the role Mr. S played in child-rearing responsibilities. Certainly there is no dispute that because he worked across the border, Mr. S spent a lot of time away from home, working, commuting, and in other commitments. For example, in addition to his various work-related duties in the United States, there was a period of time when Mr. S was also a volunteer firefighter in Bellingham.
- [22] For her part, Ms. S's testimony was that Mr. S was more or less an absent parent throughout the duration of the relationship. Ms. S says Mr. S basically lived a double life, working and socializing, and even having relationships in the US, and then returning to Canada only to sleep. In his testimony, Mr. S denied this. He said that when he was not working or engaged in other professional commitments in the US, he was at home helping with the children. He described in some detail the shift arrangements and parenting schedule that was in place, in which he says the children were cared for by Ms. S, Ms. S's parents, and himself, at various points in an average work day. He was not challenged directly on his description of the parenting schedule.
- [23] Given what is in issue between the parties, it is not necessary for me to make detailed findings about this dispute in the evidence. It is enough to say two things.
- [24] First, Ms. S clearly believes that Mr. S has had a number of extramarital relationships causing him to spend more time away from home. The rules of hearsay prevented Ms. S from giving a full account of the basis for her beliefs. I heard evidence about certain specific allegations. Mr. S denies them. The bottom line is that I do not need to resolve the dispute in the evidence on this point. I probably could not do so fairly because much of the rationale for Ms. S's belief is clearly based on hearsay that is not admissible without testimony from other witnesses. Of course, there would have been no point in calling other witnesses on this issue because the question of whether or not Mr. S was unfaithful has no direct legal bearing on the issues in this case. At most, it is relevant to how much time Mr. S spent away from the home, as a result of which he was unavailable to assist Ms. S with child rearing and other household responsibilities during the relationship.
- [25] That leads me to the second point. It is very clear to me that, up until Mr. S switched jobs and began to work in Canada in 2012, all of Mr. S's work and professional commitments were in the United States. Thus Mr. S spent a great deal of time away from home, and as a result of this Ms. S, with the assistance of her parents, was left with the bulk of the child care

responsibilities most of the time. In saying this, I do not accept that Mr. S played no role in child rearing. I accept Mr. S's evidence, which was not really challenged in cross-examination, that he cared for the children when he was available to do so. He was simply not available very much, at least until he started working in Canada.

- [26] Moving forward in time, Ms. S was diagnosed with breast cancer in her left breast in 2011. It was invasive, and Ms. S had to have a radical mastectomy and removal of a number of lymph nodes, multiple rounds of chemotherapy, and prolonged radiation treatments. This was followed by reconstructive procedures, which had their own complications. These medical procedures began in 2011 and continued all the way through to 2014. Then in 2016, Ms. S was diagnosed with a different kind of breast cancer in her right breast, leading to another mastectomy, and several reconstructive surgeries. Ms. S has suffered significant health complications as a result of her cancer treatments and interventions. She was diagnosed with PTSD and has had a host of other problems including memory loss, anxiety, sleeplessness, chest pain, edema, and swelling of the left hand. Ms. S has been unable to work since 2011. Her income since then has been from long-term disability payments and pensions. I will return to the income issue later.
- [27] When Ms. S became ill in 2011, Mr. S was still working for the Whatcom County Sheriff's office. He had 8 or 9 years' seniority. He liked the job and was earning a good salary. Mr. S testified that after Ms. S became ill, she asked him to try to get a job with the BC Sheriff Service ("BCSS"), and he agreed. He testified that he thought it was the right thing to do given Ms. S's illness. Mr. S agreed in cross-examination that the move to BCSS also benefitted him because he no longer had to commute, but I accept his evidence that in doing so he had to leave a job that paid well and was professionally rewarding.
- [28] In any event, in 2012 Mr. S was able to get a job with BCSS. He started with three to four months of training at the Justice Institute of British Columbia ("JIBC"), and then worked at assigned courthouses, mostly in the Lower Mainland. No one presented any evidence as to Mr. S's beginning salary at the BCSS. There is evidence that by 2014, Mr. S's salary at BCSS was \$57,600. By 2018, Mr. S's employment income from BCSS had increased to \$71,100, and he was also working at a second job at a fishing goods store where he earned a further \$5,600 per year.
- [29] Mr. S testified that after he took the job at BCSS, he had to commute less and he consequently had more time to spend with the family. Ms. S maintained in her testimony that even after Mr. S started working in BC, he was still absent from the home a great deal of the time. As an example, Ms. S testified that Mr. S became a coach with M.J.S.'s football team, but ended up spending more time at "coach's meetings" and at the pub with the other coaches and parents than he did with M.J.S. Mr. S admitted in his testimony that he frequently went to coach's meetings where the participants would discuss coaching but would also socialize and drink beer. Mr. S also testified that as a result of his son's interest and success in lacrosse, he became increasingly involved in the management of the lacrosse team. All of this, in addition to a work schedule that required Mr. S to work throughout the

lower mainland and to travel to other parts of the province from time to time, meant that Mr. S was away from the family home quite a bit.

- [30] Mr. S also became ill, in late 2015, when he began to experience heart problems. He was off work for some time in 2016, before having surgery to implant a pacemaker. He was eventually able to return to work, initially on light duty only. He was assigned to do logistical support on the rollout of a new radio system. Later, some time in 2018, Mr. S was able to return to full duty status, after completing a number of physical examinations and tests. It appears to have been a long road back and Mr. S put in the effort to get there. There is considerable evidence that Mr. S has always been a hard worker.
- [31] Unfortunately for all concerned, although a hard worker, Mr. S also has a history of financial difficulty and poor decision making in regards to his finances. He had financial trouble as a young adult, leading to personal bankruptcy and charges associated with writing bad cheques. Mr. S testified that in his younger years he was a "dumb dumb" who made bad financial decisions. Nonetheless, there is objective evidence that these problems have persisted throughout Mr. S's adult life. Most significantly, at some time in 2018, Mr. S was suspended from his job with the BCSS for using a corporate gas card for personal purposes. There was an investigation and Mr. S was eventually terminated for cause. This has significantly impacted Mr. S's earning capacity, and the financial security of both Mr. S and his family. Ms. S's bank records also show a continuing pattern of cheques returned for insufficient funds. Finally, Mr. S testified that he was unable to service his credit card debt as a result of which the card was cancelled and the debt is now with a collection agency.
- [32] Meanwhile, the relationship between Mr. S and Ms. S had broken down. Ms. S was of the view that Mr. S was not supportive enough, did not spend enough time with the family, and was extremely financially irresponsible. Mr. S agreed that they were arguing constantly, to the point where they could not be in the same room.
- [33] Throughout the relationship, Ms. S tried to be proactive about the couple's finances, but whenever she tried to sit down with Mr. S and draw up a budget it led to a fight. When Mr. S worked in the US, he was paid through a US bank account, and contributed financially by giving Ms. S cash at various intervals. Ms. S says the payments were extremely irregular and did not necessarily marry up with how much she thought Mr. S's earnings were. Ms. S says she was kept in the dark about Mr. S's actual income, finances, and assets. However, I am satisfied that since at least the mid 2010s, the parties filed their tax returns together, such that Ms. S would have been in a position to know Mr. S's total annual salary.
- [34] In any event, Ms. S says the payments from Mr. S were erratic and insufficient, to the point where she had to go to her elderly parents to help cover expenses. There is some objective evidence of this, in the form of bank records showing deposits Ms. S identifies as coming from her father, used to pay the family's auto expenses.

- [35] Mr. S says he gave Ms. S money every two weeks on something approaching a regular schedule, and that later in the relationship he did this by e-transfer. He was asked to produce e-transfer documents and did so on the last day of the trial. He was not further examined on this point. On all of this evidence I conclude that for some appreciable period of time prior to separation, Mr. S did in fact make regular e-transfers of funds to Ms. S.
- [36] Ms. S testified about other aspects of Mr. S's poor money management skills that have caused family strife. One example was his history of driving the family vehicles without ever paying for the gas, and another example was drawing down the family's line of credit to its maximum limit of \$20,000 more or less immediately after Ms. S would make a payment to reduce the balance. Mr. S did not give any direct evidence in response to these two points. I accept Ms. S's assertion that one of the challenges she faced in the course of the relationship was Mr. S's financial irresponsibility.
- [37] Mr. S and Ms. S separated on 10 January 2017. Mr. S claims it was a trial separation but obviously Ms. S did not feel the same way. She served him with papers, first seeking a separation agreement, and later filing for divorce.
- [38] After separation, Ms. S remained in the family home in Delta, while Mr. S moved out. He lived with a friend for about one month, and then moved in with another friend to whom he began paying rent. Later, when the friend wanted to increase the rent, Mr. S decided it would be better to get his own place, so he rented a basement suite.
- [39] The children did not respond well to the separation.
- [40] M.I.S. initially seemed fine, but over time her relationship with Mr. S became strained. Mr. S testifies that he eventually worked out his relationship with M.I.S. and now they see each other with some regularity. M.I.S. stayed with Mr. S at his apartment for a short time in the summer of 2019, but decided to return to her home with Ms. S to complete her final year of high school. Both parties testified that M.I.S. has had emotional and behavioural problems. She has engaged in self-harm on multiple occasions. She has also been found with drugs, both marihuana and other more dangerous substances, by both parents on multiple occasions. Despite these challenges, M.I.S. expects to graduate from high school this year and plans to attend college in the fall, subject of course to concerns about the impact of COVID-19.
- [41] With regard to M.J.S., the separation appears to have made him very angry, primarily at his father. There was evidence about an incident when he became emotional and violent and ran out of the house in a state of distress. M.J.S., who has always been an excellent athlete, was able to secure an athletic scholarship for lacrosse at a university in the southern United States. He went there in the fall of 2019, but things did not work out for him, and he returned home within less than two months. He now lives with Ms. S in the family home in Delta. He has been working and apprenticing in a residential construction business, earning \$19 per hour, working close to full time hours. M.J.S. appears to be struggling emotionally and with alcohol abuse. Ms. S gave unchallenged evidence that he drinks alone in his room, and she

has found empty alcohol bottles stuffed under his bed. Ms. S thinks he may be drinking during the workday as well. M.J.S.'s hope is to return to school in the fall of 2020, at a local college, although it is not clear that he has taken the steps to put this in motion.

- [42] The post-separation financial situation of the parties can be described as follows.
- [43] Ms. S has been living in the former family residence with the children. Her income in 2018 was \$22,729, consisting of a combination of long term disability and pension benefits. She has assumed sole responsibility for the mortgage, taxes, and all of the other expenses associated with the family residence. Her non-discretionary housing expenses alone are some \$1,850 per month, excluding household maintenance and repairs.
- [44] Mr. S's income in 2017 was \$80,000. In 2018, it was \$76,793. When the couple first separated, Mr. S lived with a roommate and paid room and board of some \$700 per month. Later, he moved to a basement suite where he paid rent of somewhere between \$1,000 and \$1,400 per month. Despite his significant income in 2017 and 2018, Mr. S did not make regular child support or spousal payments, or contribute toward the maintenance of the former family home.
- [45] On 19 July 2018, Master Keighley made an interim order for support payments, based on stated incomes of \$80,000 for Mr. S and \$20,551 for Ms. S. The order was structured to account for M.J.S.'s planned attendance at university for the fall and winter months. It provided that from May to August of each year, Mr. S was to pay \$1,842 per month for child and spousal support, and from September to April, he was to pay \$1,572 per month.
- [46] Mr. S did not make payments as required, as a result of which (i) Mr. S accumulated significant arrears, discussed below, and (ii) Ms. S had to register with the Family Maintenance Enforcement Program ("FMEP") to have Mr. S's paycheques garnished at source. After FMEP became involved, Ms. S received support payments as required for a period of time. However, things changed after Mr. S lost his job at BCSS. Ms. S again stopped receiving regular support payments.
- [47] As noted, Mr. S lost his job with BCSS in March of 2019. He was terminated for misconduct when he was found to have used a government gas card for personal expenditures, on an ongoing basis over a period of months.
- [48] After losing his job with BCSS, Mr. S was able to secure a new job as an operations manager at a retail sports apparel store within a matter of weeks. He also had a chance at a bus driver's job with slightly better base pay, but chose the operations manager position because the sports apparel company has a very good benefits package, even better than his benefits at BCSS. In any event, Mr. S initially started working at the sports apparel business part time at \$12 per hour. Within a few months, he was working full time at \$14 per hour. Mr. S's total income for the 2019 tax year was \$40,054, which is not necessarily reflective of his future income because for the first three months of the 2019 calendar year he was still employed at BCSS, at a significantly higher pay rate than his pay rate at the sports apparel business for

the balance of the year.

- [49] Mr. S testified that he tried to negotiate a variation of his support payments based on his change in circumstances, but was unable to secure Ms. S's agreement. Eventually, he brought a court application, which was filed on 12 December 2019, and decided by Master Vos on 5 February 2020. In the resulting order, Mr. S's Guideline income was set at \$40,054, resulting in an obligation to pay support of \$377 per month in child support for M.I.S. There was no requirement to pay support for M.J.S. because he was no longer in school and in fact was working. This order was made on an interim, without prejudice basis, and was really intended to be a placeholder for the parties pending a final determination of both arrears and ongoing support obligations at this trial.
- [50] Subsequent to the 5 February 2020 order, Mr. S's paycheque has been garnished each month, although for a period of time the payments were not forwarded to FMEP due to some administrative error on the part of Mr. S's employer, the sports apparel business. I will account for this in my determination of outstanding arrears.
- [51] With regard to family property, the most significant property is the former family home in Delta. This property was purchased during the relationship, with family funds. Its current tax assessed value is \$991,500. It is presently listed for sale at a list price of \$1,070,000. In terms of associated debt, the parties have a mortgage with an outstanding balance of \$190,044, and a line of credit with an outstanding balance of \$24,933. This means the equity in the house is somewhere between \$855,023 and \$776,523.
- [52] The only other notable family property that I heard about during the trial is Mr. S's RRSP, and Ms. S's pension from her employment at the Richmond School Board. Both parties agree that this property, the RRSP and the pension, should be divided equally, but I will nonetheless set out the details in order to give a proper account of the financial situation of the two parties.
- [53] Mr. S's RRSP has a current value as of 26 May 2020 of \$41,474.
- [54] With regard to Ms. S's pension, the pension statement indicates that if Ms. S were to access the pension at the earliest available date, when she reaches age 55, she will receive \$563 per month. The earliest unreduced amount, accessible at age 60, would be a slightly higher monthly amount.
- [55] The last point about family property has to do with vehicles. The parties had two vehicles at the time of separation. Both have since been disposed of as trade-ins for newer vehicles. There was some dispute between the parties about which of the vehicles had the greater value as of the date of separation. Ms. S took the Dodge Journey, a 2010 vehicle that broke down shortly after separation, for which she received a trade in value of some \$4,000 to \$4,500 and bought a 2017 VW Tourag for \$24,000. None of that is disputed. Mr. S took the Dodge Caravan. There is a dispute about this vehicle and its value at the time of separation. Mr. S testified that it was an older Caravan, purchased in 2010 for some \$35,000. Ms. S

testified that it was actually a 2016 Caravan, purchased for \$33,800 and presumably still having considerable value when the parties separated in January of 2017. On this point, I accept the testimony of Ms. S, which is supported by loan documents with respect to the various vehicles owned by the parties during the relationship. Ms. S testified that Mr. S traded in the 2016 Caravan two to three weeks after separation and got a 2016 Jeep Cherokee. Mr. S agreed in his testimony that after separation he got a 2016 Cherokee at a list price of \$42,000 to \$43,000, for zero dollars down with a bank loan, on which he still owes some \$27,000.

- [56] As noted, the key issue as far as property is concerned is the anticipated \$800,000 in net proceeds from the sale of the former family home. Ms. S argues for unequal division of the proceeds for various reasons discussed in more detail in the legal analysis set out below. She testified that her plan is to look for a townhouse where she can live with the two children, now 17 and 20 years old. Ms. S believes the children will have to reside with her for some time given their ages, current circumstances, and the mental health and other challenges they are facing. Ms. S's hope is to purchase a townhouse in Delta or Tsawwassen at a cost of slightly in excess of \$600,000. She says she will be unable to qualify for a mortgage given her fixed income of some \$22,000 per year and her lack of financial resources.
- [57] Mr. S argues for equal division of the property. He currently lives with a new partner in rental accommodation. He claims to pay \$700 per month in rent, although his bank statements do not reflect any transactions, or even cash withdrawals, that would support that assertion. Mr. S admitted that this was a "discrepancy" in his evidence. There were also a number of other admitted overstatements on Mr. S's various form F8 financial statements. For some reason, his earlier F8s under-stated his income or stated income from only one source when there were clearly others. He also admittedly listed a number of one-time only expenses as recurring monthly expenses. I infer, based on all the evidence I have heard, that when Mr. S indicated on his financial statement that he pays \$700 per month in rent, this is notional rent which is not actually paid by him to his new partner. There is a dispute about what Mr. S's Guideline income should be, although it does not appear to be disputed that he is presently working full time at the sports apparel store, earning \$19 per hour. That equates to a salary of \$34,960 per year, plus benefits.

Analysis

(1) Divorce

- [58] Both parties agree they have been living separate and apart for more than a year, and there is no chance of reconciliation. A divorce order is granted.

(2) Orders with respect to Children

- [59] M.I.S. is 17 and both parties agree that she is a child of the marriage. The final order should state that the claimant Ms. S and the respondent Mr. S are joint guardians with respect to M.I.S. The order should also state that M.I.S. will reside primarily with Ms. S and have parenting time with Mr. S as arranged between the parties based on input from M.I.S.
- [60] M.J.S. is 20 years old. He is above the age of majority and not presently in school. It is not necessary to make an order of guardianship or parenting time with respect to M.J.S.
- (3) Division of Family Property and Debt
- [61] These parties have basically three assets that qualify as family property. They agree that the first two, being Mr. S's RRSP and Ms. S's pension, should be divided equally.
- [62] That leaves for consideration the family residence and associated family debt. Technically, the Family Law Act, S.B.C. 2011, c. 25 [FLA] requires the Court to consider family property and family debt separately, but on the facts of this case the parties are agreed that since all of the family debt is associated with the residence, and since the property is to be sold with the net proceeds divided between them, the family residence and associated debt should be dealt with together. The key question is how the net proceeds from the sale of the home are to be divided.
- [63] The property has an assessed value of \$991,500 and is presently listed for sale at \$1,070,000. After paying the mortgage and line of credit, it is expected that there will be somewhere between \$855,023 and \$776,523 in equity remaining. There will be slightly less available for division between the parties after payment of real estate commissions and closing costs.
- [64] I will first address Mr. S's argument that he should receive credit for amounts he has had to pay on rent between the date of separation and the date of trial, during which time Ms. S has had exclusive occupancy of the family residence.
- [65] Ms. S says this argument cannot be considered because it is a claim for occupational rent, a form of relief which Mr. S did plead. I do not agree with Ms. S's position that I cannot consider this argument. In the context of a family law proceeding, an argument about occupational rent need not be framed as a stand-alone claim when it can be factored into a party's position on property division. The general rule is that, "unequal contributions to preservation or maintenance of property during the relationship do not warrant unequal division of assets on separation": *Gutierrez v. Del Fierro*, 2020 BCSC 679 at para. 75. However, there appears to be an exception where adjustments are sought for post separation costs incurred to maintain the family residence. In this context, there is authority for the Court to take into account both expenses incurred by the occupying spouse to maintain the property post-separation, and expenses incurred by the non-occupying spouse to live elsewhere. All of this is relevant to whether an adjustment is necessary to ensure a "just and equitable" division of the property interest in the former family residence: *Storey v. Terry*, 2020 BCCA 30 at para. 28.

- [66] Although I agree that Mr. S is entitled to raise this argument, in the end I am not satisfied that he should receive any credit for amounts spent on rent following separation. There are several reasons for this.
- [67] First, after separation Ms. S assumed sole responsibility for all of the costs associated with maintaining the family residence, including the mortgage, insurance, property taxes and the like. Mr. S did not contribute anything. Ms. S is not seeking any adjustment on account of those carrying costs.
- [68] Second, for a period of some 18 months from the date of separation in January of 2017 up to the date of the first interim order in July of 2018, during which time Mr. S's annual income was some \$75,000 to \$80,000 per year, he does not appear to have made any regular child or spousal support payments to Ms. S. Ms. S's pleadings include a claim for retroactive support going back to the date of separation, but she did not pursue that claim at trial.
- [69] Third, the amount Mr. S paid for rent fluctuated over time. He lived rent free with a friend for a brief period of time, and then lived with another friend where he paid room and board of some \$700 per month. He then moved to a basement suite, paying some \$1,200 to \$1,400 per month, although the evidence is not clear exactly how much and for how long. At some point, Mr. S moved in with his new partner. His most recent financial statement indicates that he pays \$700 per month in rent, but his bank records since January 2020 do not reflect that he actually pays that amount. Mr. S admitted that there was a "discrepancy" in this regard. I find that the \$700 per month in rent recorded on Mr. S's financial statement was a notional amount, and that Mr. S was not in fact paying rent during the time that he has been living with his new partner.
- [70] For all of these reasons, it would not be just and equitable to make an adjustment to the net proceeds of sale from the family home on account of Mr. S's post-separation rent payments.
- [71] I turn then to question of how the net proceeds from the family home should be divided. Mr. S seeks equal division, arguing that there is no basis for departing from the statutory presumption of equal division in s. 81 of the FLA. Ms. S says equal division would be significantly unfair within the meaning of s. 95(1), and argues that she should receive 75% of the net proceeds (roughly \$600,000), and Mr. S should receive the remaining 25% (roughly \$200,000).
- [72] The significant unfairness test under s. 95 requires the party seeking unequal division to show that there is "something objectively unjust, unreasonable or unfair in some important or substantial sense" about equal division: *Delaurier v. Massicotte*, 2018 BCSC 1857 at para. 153, applying *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 41-42. The unfairness must be "compelling or meaningful" having regard to the factors in s. 95(2): *E.H.H. v. C.L.M.*, 2017 BCSC 1299 at para. 106, applying *Remmem v. Remmem*, 2014 BCSC 1552.
- [73] In this particular case, some of the factors in s. 95(2) are said to be relevant while others are not. The ones which are relevant are as follows.

- [74] First, s. 95(2)(c) deals with a spouse's contribution toward the career of the other. Ms. S suggested in her testimony, and her counsel echoed in closing submission, that Ms. S made a significant contribution toward the career of Mr. S. The evidence indicates that Ms. S assisted Mr. S in clearing up his financial difficulties, supported him while he obtained certification to work in the US as an EMT and later as a sheriff, encouraged Mr. S to apply for a job at BCSS, and encouraged and assisted him in some of his studies at JIBC. Nonetheless, I do not see anything exceptional or remarkable in Ms. S's contribution toward Mr. S's career, beyond that which one partner might commonly be expected to do to help the other in the course of their relationship. Ms. S's contribution to Mr. S's career does not, in my respectful view, reflect any substantial unfairness, whether taken alone or in combination with any of the other factors listed in s. 95(2). Indeed, Mr. S made a sacrifice in his own career to support Ms. S, by moving to a lower-paying job at BCSS after Ms. S became ill. Mr. S has always been a hard worker and it is fair to say that he was able to establish his career in emergency services, security, and law enforcement due in large measure to his own efforts and work ethic.
- [75] Moving on to s. 95(2)(d), debt incurred during the relationship, Ms. S gave some evidence that Mr. S drew down amounts on the line of credit for reasons that were selfish or that were not shared with her. I accept that Mr. S spent money and even drew funds from the line of credit without disclosing the details to Ms. S. This was clearly frustrating to Ms. S and I have no doubt that it was one of the factors contributing to the breakdown of the relationship. However, there is no evidence that Mr. S spent the money on things unrelated to the family. For example, there is no evidence that Mr. S bought expensive gifts for third parties or squirreled away money for his own personal benefit. Mr. S has US bank accounts, but he testified that the balances are nominal. He ultimately produced records to verify this, and he was not recalled or challenged on that assertion after the records were produced.
- [76] This brings me to s. 95(2)(i), any other factor that might contribute to significant unfairness. Under this heading, Ms. S relies on the best interests of the children. Counsel did not cite any authority for the proposition that the best interests of the children could be considered as an "other factor" in assessing significant unfairness under s. 95(2)(i). To the extent that this is a relevant consideration in this case, in my view it is best dealt with under s. 95(3) as one aspect of the means and capacity of Ms. S, and whether the objectives of spousal support will be adequately addressed by a support order. Under s. 95(3), the court may take any unmet objectives of spousal support into account in deciding whether equal division of family property would be significantly unfair. One of the statutory objectives of spousal support, as provided for in s. 161(b), apportioning between the spouses any financial consequences arising from the care of the child, beyond the duty to provide child support. In this way, financial consequences associated with caring for the children can be taken into account under s. 95(3).

- [77] This brings me directly to s. 95(3), under which the Court must consider the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship. If a spousal support order is contemplated, but the objectives in s. 161 of the FLA have not been met by that spousal support order, this may result in or contribute to a finding of significant unfairness so as to justify an unequal division of family property.
- [78] Ms. S says this is a case where a spousal support order may not be sufficient to meet the objectives in s. 161 of the FLA. Ms. S says Mr. S was terminated from his job due to his own misconduct, such that he is no longer able to provide the level of support to which Mr. S and the children would otherwise be entitled. Ms. S says if the court is not prepared to impute income to Mr. S on the basis that his conduct amounts to intentional underemployment for spousal support purposes, then the court should reapportion the interests in the family home to address the substantial unfairness of this situation.
- [79] Counsel for Mr. S says the text of s. 95(3) does not allow for this approach, because the section is limited to circumstances where the "financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses". In this case, counsel says Ms. S's limited earning capacity is a function of her serious illness and resulting long-term disability, not a product of the relationship or its breakdown.
- [80] However, I note that s. 95(3) is not limited to a consideration of a spouse's "earning capacity". Rather, the court is required to consider the extent to which the spouse's "financial means and earning capacity" have been affected by the relationship. In this case Ms. S's financial means have been drastically impacted by the circumstances of the relationship and its breakdown. More specifically, Mr. S's misconduct and subsequent loss of employment have had the effect of drastically reducing the amount of support to which Ms. S would otherwise have received.
- [81] I find the following passage from *Lahdekorpi v. Lahdekorpi*, 2016 BCSC 2143 at para. 32 helpful in explaining the relationship between property division and spousal support where s. 95(3) is in play:

The parties' financial circumstances and their respective positions demonstrate the interconnection underlying issues of property division and spousal support. In that regard, it is well settled that a court should make the appropriate division of property before considering spousal support. However, in light of the requirement of s. 95(3) of the FLA, if a spousal support order would not fulfill the objectives of the spousal support, "that fact can be a relevant consideration in deciding whether it would be significantly unfair to divide the property evenly. This recognizes the close connection between the property division and spousal support orders made on dissolution of a marriage": *Parton v. Parton*, 2016 BCSC 1528 at para. 101.

- [82] My full analysis of both entitlement to and quantum of spousal support is set out below under a separate heading. For present purposes I would summarize my spousal support conclusions as follows. First, I have concluded that Ms. S is entitled to spousal support based on both compensatory and non-compensatory or needs-based principles. Second, in terms of quantum of support, Mr. S would not be required to pay any amount of spousal support under the SSAG based on his current income and child support obligations. It should be apparent from this conclusion that I have not accepted Ms. S's position that income should be imputed to Ms. S on the basis that he is intentionally underemployed. Again, my reasons for this are set out below. As a result of all this, despite Ms. S's entitlement to spousal support, Mr. S's loss of a good paying job due to misconduct has placed him in a position where he is not able to pay spousal support.
- [83] This means the objectives of a spousal support order under s. 161 of the FLA will go unmet. All four statutory objectives in s. 161(a) to (d) are engaged in this case, namely: the recognition of any economic advantages or disadvantages to the spouses arising from the relationship and its breakdown per s. 161(a); the apportionment of financial consequences arising from the care of the children per s. 161(b); relieving any economic hardship of a spouse arising from the breakdown of the relationship per s. 161(c); and promoting the economic sufficiency of each spouse per s. 161(d). Mr. S's inability to pay spousal support at the level that he would otherwise have been able to do, but for his termination from a well-paying job, means that all four of these objectives will go unsatisfied.
- [84] The question is whether, in these circumstances, equal division of the family property would cause significant unfairness to Ms. S.
- [85] If Mr. S had not lost his job, he would have been able to pay Ms. S the level of support to which she was entitled on an ongoing basis for a number of years, or the court might have considered a lump sum award of support payable out of his portion of the net proceeds from the sale of the home. Counsel for Ms. S has provided calculations showing that, on a without child basis, Ms. S would have been entitled to support of \$1,664 per month at the mid-point for a duration of 15 years. Counsel submitted that using the without child SSAG formula and a 15 year duration affords a conservative estimate of the duration of time for which Mr. S might be expected to pay spousal support after the children cease to be children of the marriage. That approach certainly makes sense to me on the facts of this case, which involved a long term, traditional relationship where the duration of Mr. S's spousal support obligation would be substantial.
- [86] On these parameters, if Mr. S's spousal support obligation were converted to a lump sum award, he would have had to pay \$215,586 in spousal support. If Ms. S received a lump sum payment in that amount, together with \$400,000 flowing from an equal division of the net proceeds from the sale of the former family home, she would have been able to cover the entire purchase price of a \$600,000 townhouse. Alternatively, if Ms. S received periodic support of \$1,664 per month, together with \$400,000 flowing from an equal division of the net proceeds from the sale of the former family home, she would have been able to make a

substantial down payment on a \$600,000 townhouse, and would likely qualify for a mortgage to fund the balance of the purchase price. But because of Mr. S's loss of income earning potential through his own misconduct, Ms. S will not receive spousal support at this level - whether in the form of a lump sum or ongoing periodic payments - placing her in a compromised position, through no fault of her own.

- [87] As noted above, s. 161(b) provides that one of the objectives of spousal support is the apportionment of financial consequences arising from the care of the children. The children are presently 17 and 20 years old respectively. They reside with Ms. S, and when the family home is sold the family will have limited options as to where they can live. Ms. S lives on a fixed income and will not be able to afford to pay a significant amount for rent or for a mortgage. The older child M.J.S. does not presently qualify as a child of the marriage, and the younger child M.I.S. will graduate from high school this year and will only qualify as a child of the marriage beyond the age of 19 for the period of time that she is in post-secondary study.
- [88] Despite their age, there are strong indications that the children will continue to be dependent upon Ms. S, perhaps beyond the point that they cease to qualify as children of the marriage. Both children have emotional or psychological challenges. The younger child is engaged in self-harm behaviour and has experimented with hard drugs. The older child has anger issues and has serious problems with alcohol abuse. Both require counselling. Ms. S says it is in the best interests of the children that they have a stable place to reside, with her, in a townhouse in the community where they have grown up. In all these circumstances Ms. S says she is in a position where she requires a substantial share of the net proceeds from the sale of the family home, in the order of \$600,000, to be able to acquire a townhouse where she can live with the two children.
- [89] In response to this argument, Mr. S acknowledges his obligation to pay child support so long as M.J.S. and M.I.S. continue to be children of the marriage. Mr. S did not expressly make this point, but it seems to me that a logical extension of his position is that when M.J.S. and M.I.S. cease to qualify as children of the marriage, they will presumably be able to make a substantial contribution toward their own housing costs. If they continue to live with Ms. S, they could help her to pay for housing.
- [90] I have taken Mr. S's submission into account, but on balance I still consider the status of the children and their current need for housing to be relevant. Following the breakdown of the relationship, Ms. S's principal and most immediate concern is to find a place for herself and the children to reside. The children are mature, but not yet fully able to support themselves. One is just graduating from high school and will be going on to post-secondary education. The other is several years older and presently working full time, but is considering a return to school and is by no means settled or independent. Both children have emotional issues. At least one of them has a serious substance abuse problem. The financial impact of Ms. S's continued care for the children is a relevant factor in the s. 95(3) analysis.

[91] My conclusion is that Ms. S's financial means have been affected by the circumstances of the relationship within the meaning of s. 95(3). I further conclude that a spousal support order will not satisfy the objectives in s. 161. I find that Ms. S would be left in a position where she could not afford to fund either a mortgage or the full purchase price of a place to live with her children following the breakdown of the relationship, which she would otherwise have been able to afford were it not for the inadequacy of the spousal support she will receive. In these circumstances, equal division of the net proceeds from the sale of the family home would cause significant unfairness to Ms. S.

[92] I agree with Ms. S that the appropriate disposition in response to the significant unfairness of this situation is an order providing that Ms. S is to receive 75% and Mr. S is to receive 25% of the net proceeds from the sale of the family home. This order will place Ms. S in substantially the same position that she would have been in if Mr. S had not been terminated from his position with the BCSS.

(4) Support

(4)(a) Prospective Support Obligations

(4)(a.1) Guideline Incomes

[93] The first issue to be considered under this heading is the Guideline incomes of the parties. With respect to Ms. S's Guideline income, there is no dispute. The income of \$21,729.97 as set out in Ms. S's most recent financial statement is from fixed sources.

[94] The parties disagree concerning Mr. S's guideline income. Mr. S says it should be \$34,500. By my calculation, if Mr. S works 40 hours per week, and allowing for statutory holidays and vacation leave, his annual income based on his current wage rate of \$19 per hour would be \$34,960.

[95] Counsel for Ms. S does not accept this figure. She says Mr. S's income should be imputed under s. 19(1) of the Federal Child Support Guidelines, SOR-97/175 [Guidelines]. Counsel advances two separate arguments in this regard. First, counsel submits that Mr. S's income should be imputed at \$75,497, his annual income at BCSS prior to his termination. Alternatively, if the Court does not accept that submission, counsel says Mr. S's income should be imputed at \$60,000, to account for anticipated pay increases and the availability of overtime through his current employment as an operations manager at a sports apparel store.

[96] Dealing first with the impact of Mr. S's termination from the BCSS, counsel says Mr. S's loss of employment due to misconduct supports a finding of intentional underemployment within the meaning of s. 19(1)(a) of the Guidelines and the case law interpreting that provision. Counsel says the consequences of Mr. S's misconduct should not be visited upon Ms. S and the children, by reducing the amount of support he would otherwise have been required to pay.

- [97] Counsel for Ms. S cited two cases addressing the question of whether loss of employment due to misconduct can be said to constitute intentional underemployment under the Guidelines, namely *Rogers v. Rogers*, 2013 ONSC 1997 [Rogers] and *Moazzen-Ahmadi v. Ahmadi-Far*, 2019 BCSC 424 [Moazzen-Ahmadi].
- [98] I see a number of basic principles emerging from these cases. First, the burden is on the party seeking to impute income to show that there is a basis for doing so. Second, s. 19(1) of the Guidelines is open ended in the sense that it sets out a non-exhaustive list of circumstances where income may be imputed. Third, the decision as to whether to impute income is discretionary, although of course the court must exercise its discretion judicially having regard to the relevant legal principles and the circumstances of the case.
- [99] In *Rogers*, the payor spouse argued for reduction in the quantum of support payable under a separation agreement. The payor was repeatedly in trouble with the law for driving without a license or while suspended. After multiple criminal convictions, he was eventually sentenced to eight months in jail, as a result of which he was unavailable for work and he lost a well-paying job. He was also convicted of threatening or harassing his former partner. Because of his criminal convictions and inability to drive, the payor spouse's future employment prospects were severely limited. He eventually obtained a job paying about one third of what he was making before he went to jail. In these circumstances, the court refused his application to reduce the arrears of support he owed under the separation agreement, and imputed his income going forward on the same basis.
- [100] In doing so, the Court applied the three-part test for imputation of income based on underemployment in s. 19(1)(a) as set out in the leading case of *Drygala v. Pauli* (2002), 61 O.R. (3d) 711 (C.A.). Under that test, the Court must ask (i) whether the payor spouse is intentionally underemployed, (ii) if so, whether the underemployment is required by virtue of the reasonable educational or health needs of the payor, or the needs of a child, and (iii) if not, what income should be imputed to the payor spouse.
- [101] The focal point of the analysis in *Rogers* was on the first of these points, that is, whether the payor spouse was intentionally underemployed. On this point, in examining cases of alleged intentional underemployment, the Court identified a continuum or spectrum of conduct at para. 49 of the reasons:

Many cases have held that where a payor quits his or her employment, their previous level of income will continue to be imputed to them, irrespective of whether they have become unemployed or employed at a lower wage. At the other end of the continuum, the caselaw has generally held that where a payor loses employment through no fault of their own, the resulting change in income will generally constitute a material change in circumstances, justifying adjustment of the support order.

- [102] The court in *Rogers* concluded that the payor's loss of employment and reduction in income was a function of his own intentional conduct in repeatedly breaking the law, knowing that in doing so he could lose his job and undermine his income-earning

potential. The court took the view that for public policy reasons the consequences of the payor spouse's misconduct and resulting underemployment should not be visited upon the recipient spouse or the children of the relationship. The most relevant portions of the Court's analysis on this point reads as follows:

- [50] In some cases, it is difficult to determine if a payor is a victim of unfortunate financial circumstances, or whether he or she is the author of their misfortune.
- [51] But in the Applicant's case, there is no uncertainty as to cause and effect. He may not have quit his job. But he created and controlled the circumstances under which his job was terminated. He made conscious decisions to do things - illegal things - with the full knowledge that his reckless and anti-social behavior would make him unavailable (let alone, unacceptable) for employment. The net result is the same as if he'd handed in his resignation.
- [59] I find the Applicant is solely responsible for the financial difficulties he now submits as the basis for significantly reducing his support obligations. His unemployment (and eventual underemployment) did not arise through mix-up, honest mistake, bad luck, or even isolated error in judgment. The Applicant knowingly and intentionally made very bad decisions. He broke the law -- over and over again. His choices have resulted in unquestionably painful consequences. But why should the Respondent and her children share any portion of that pain? Why should a support recipient suffer from a payor's misconduct?
- [103] In the result, the court in Rogers dismissed the payor spouse's application to reduce his support obligation, both retroactively and prospectively, and imputed income at the level of his previous employment.
- [104] In Moazzen-Ahmadi, the Court was dealing with an application by the payor spouse to vary support payable under a final order, based on a reduction in income due to financial misconduct in the payor's business. The payor spouse was a pharmacist who, over an extended period of time, made illegal cash payments to clients as an incentive for them to fill their prescriptions at his pharmacy. When the government found out about this arrangement, his pharmacy contract was terminated. The College of Pharmacists also disciplined him. As a consequence, the payor spouse's income dropped significantly, and he applied to vary the final order to reduce his support obligations on a prospective basis.
- [105] Much of the discussion in Moazzen-Ahmadi has to do with the concept of material change in circumstances required to justify a variation of an existing order. However, Moazzen-Ahmadi also addressed, at least briefly, the question of whether the "payor's fault or folly", as Mr. Justice Blok put it, was a basis for refusing an application to vary support. Mr. Justice Blok determined at paras. 84-90 of Moazzen-Ahmadi that "fault or folly" is not in and of itself a basis on which to refuse a variation.

- [106] In his legal analysis, Blok J. cited two other cases dealing with the implications of employment-related misconduct by the payor spouse and its relevance to support obligations. The one that is most helpful for present purposes is *Baldini v. Baldini* (1999), 46 R.F.L. (4th) 407 (B.C.S.C.) [Baldini], a case dealing with imputation of income under s. 19(1)(a) of the Guidelines.
- [107] In *Baldini*, the payor spouse was fired from his job for doing personal work on company time and for taking company materials without permission. Madam Justice Martinson found that the payor spouse was intentionally underemployed, based upon a combination of three factors. First, there was his dismissal with cause. On this point, the Court noted the payor spouse had been warned repeatedly about employee misconduct of various sorts before he was ultimately terminated. The second factor was that the payor spouse failed to make reasonable efforts to find new employment. The third factor was that the payor spouse failed to make reasonable efforts to retrain. In all of these circumstances, Martinson J. imputed income in an amount equal to the payor spouse's prior employment. Her Ladyship went on to hold that it would not be appropriate to cancel the outstanding arrears that had accrued between the time of the payor spouse's dismissal and the time of the hearing.
- [108] Having reviewed the relevant case law, I am left with the impression that even where a payor spouse has lost a job due to misconduct, the Court must exercise its discretion in determining whether it is a situation which justifies imputation of income based on intentional underemployment under s. 19(1)(a) of the Guidelines. In deciding how to exercise that discretion, the conduct in issue may be viewed along a continuum as discussed in *Rogers* at para. 49.
- [109] When viewed along the continuum discussed in *Rogers*, I would characterize Mr. S's conduct as voluntary and intentional in the sense that he knew what he was doing and knew it was wrong. Mr. S admittedly used a corporate gas card for personal purposes for an extended period of time. It was more than just an error in judgment. However, Mr. S did not act with the specific intent to leave his job. In making this observation, I certainly accept that proof of bad faith is not required to justify imputation of income under s. 19(1)(a). It is nonetheless relevant that, while Mr. S's conduct was knowing and intentional, it was not done with the specific intent of quitting or giving up his employment. Nor is this a case of repeated or serial acts of misconduct punctuated by express warnings or sanctions that were ignored along the way, as was the case in both *Rogers* and *Baldini*. Further, after he was fired from BCSS, Mr. S promptly obtained a new job. I am satisfied that he obtained the highest paying job with the best remuneration package he was able to obtain in the circumstances.
- [110] This is an unusual case. Mr. S made a serious mistake. It was much more serious than a mere momentary error in judgment. He has done what he can to recover from it. He is acknowledged by all to be a hard worker. I would say he is not presently underemployed. While his reduction in income is a product of his own misconduct, I would not impute

income based upon his prior employment. I acknowledge that the consequences of Mr. S's loss of employment are significant to him and also to his former spouse and children who are dependent upon him for support. With respect to the effect on Ms. S and the children, there are other ways of remedying the impact of Mr. S's misconduct, namely by adjusting the division of family property based on significant unfairness under s. 95 of the FLA.

- [111] I turn to Ms. S's alternative argument, that Mr. S's Guideline income should be set at \$60,000 per year to account for potential increases in his pay rate and the availability of overtime work. I would not accede to this submission because in my respectful view it is speculative. It is true that Mr. S's income has increased over the time that he has been working as an operations manager at the sports apparel store, but that is because he transitioned from less than full time to full time employment, and also transitioned from being a new employee into being a regular member of the staff. The evidence indicates that Mr. S presently works full time hours at a job that pays \$19 per hour. On those parameters, his annual income is \$34,960.
- [112] If Mr. S's income were to change over time, that could be addressed by way of an application to vary support going forward. I will impose a term requiring the parties to exchange income information every year for the purposes of assessing support obligations. I appreciate that this places an onus on Ms. S to bring an application, but at this point there is no evidence that Mr. S's income will materially increase. Mr. S's Guideline income will therefore be set at \$34,960.

(4)(a.2) Child Support

- [113] The parties are in agreement that as things presently stand M.I.S. is a child of the marriage and M.J.S. is not. The parties disagree, however, as to the form the resulting order should take.
- [114] For her part, Ms. S says that on the evidence I have before me I can be satisfied that if M.J.S. goes back to college or university in the fall, he would be found to be unable to withdraw from the charge of his parents within the meaning of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA]. Ms. S therefore argues for a contingent order providing that (i) if M.J.S. is not enrolled in full time study in the fall, then Mr. S will be required to pay support based on one child, M.I.S., and (ii) if M.J.S. is enrolled in full time study in the fall, then Mr. S should be required to pay support based on two children, M.I.S. and M.J.S.
- [115] For his part, Mr. S says the situation is too open-ended, and that if M.J.S. ultimately goes back to school in the fall then Ms. S could bring an application to vary the support order. The downside to this approach is twofold. First, if M.J.S. does return to school, Ms. S would be required to bring a further application to the court, a mere two to three months down the road. Second, although this is a contingent possibility, the options are really only binary. One possibility is that M.J.S. will not return to school full time in the fall, in which case both parties agree he would not qualify as a child of the marriage. The other possibility is that M.J.S. will return to school full time in the fall, in which case both parties agree he would

qualify as a child of the marriage.

- [116] There are three legal principles governing my analysis of this issue. First, the burden of proof as to whether a child qualifies as a "child of the marriage" within the meaning of s. 2(1) of the DA is on the recipient spouse, although there is no minimum evidentiary requirement for discharging that burden: *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 at paras. 14-15 (B.C.C.A.); *Ratnam v. Priyanthan*, 2017 BCCA 343 at para. 24. Second, a child who is over the age of majority but unable to attain self-sufficiency while in pursuit of continuing education can qualify as a "child of the marriage" under the statutory definition and the case law interpreting it: *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C.) at p. 64-65, cited with approval in *Darlington* and *Ratnam*. Third, there is a wealth of case law reflecting that a child who is over the age of majority and no longer qualifies as a "child of the marriage" can "re-qualify" or "once again" become a child of the marriage due to a change in circumstances, for example upon return to post-secondary education: *T.D.M. v. J.D.M.*, 2020 ABQB 353 at para. 107, citing, among other cases, *Jonasson v. Jonasson*, 1998 CanLII 3619 (B.C.S.C.) at para. 5; see also *Leach v. Leach*, 2019 BCSC 1664 at para. 65.
- [117] I appreciate the point that the ultimate burden of showing that M.J.S. would in the future qualify as a child of the marriage is on Ms. S, and that the analysis generally involves a multi-factorial assessment of the child's circumstances. However, in this case Mr. S concedes that if M.J.S. returns to school full time in the fall, he would indeed qualify as a child of the marriage. In this context, there are two possibilities that could arise, neither of which is particularly complicated. Either M.J.S. will go back to school or he will not. Having heard four days of evidence and one full day of argument, I am in a position to make a contingent order to address the possibility that M.J.S. attends university on a full-time basis in the fall.
- [118] The resulting order will therefore include a term requiring Mr. S to pay child support in the amount of \$329 per month on the basis that there is one child of the marriage, M.I.S. It will also include a contingent term providing that if M.J.S. is enrolled in full time post-secondary study as of 1 September 2020, Mr. S will be required to pay child support in the amount of \$561 per month on the basis of two children of the marriage, M.I.S. and M.J.S., so long as both continue to qualify as children of the marriage within the meaning of the DA.

(4)(a.3) Spousal Support

- [119] Mr. S does not dispute that Ms. S is entitled to support on both a compensatory and a non-compensatory or needs-based analysis. That is an appropriate position to take on the facts of this case.
- [120] I consider the duration of the relationship, and the role that each parent played in the course of the relationship and in the rearing of the children. This includes the fact that Ms. S took maternity leave, and worked in an occupation that allowed Mr. S to continue to develop his career and earning potential over the course of the relationship. I also consider the present circumstances of Ms. S, who is on a fixed income and has assumed primary responsibility for the continued housing and support of the children following the

breakdown of the relationship. Taking all of this into account, I have no difficulty concluding that Ms. S is entitled to support on both a compensatory and a non-compensatory or needs-based footing.

- [121] When it comes to quantum of spousal support, Ms. S says I should determine entitlement based on the imputed incomes argued for above, namely, either (i) \$75,497 as reflective of Mr. S's prior income as an employee of the BCSS, or (ii) \$60,000 on account of the upside potential in Mr. S's current employment. I have already considered and rejected those submissions above. I am not prepared to impute income to Mr. S on a go-forward basis.
- [122] Applying the with-child formula provided for in the SSAG, Mr. S's income of \$34,960 does not require him to pay anything for spousal support. Counsel for Mr. S concedes that this could change in the future, for two reasons. First, once the children cease to become children of the marriage, spousal support would be determined on a without child basis. Second, it is possible that Mr. S's income could increase over time, giving rise to an obligation to pay spousal support.
- [123] Recall that I have already accepted the position of Ms. S that Mr. S's termination from BCSS, and the effect that this has had on the financial means available to Ms. S, has led to a situation in which equal division of the family property would be significantly unfair. In reaching that conclusion, I accepted that were it not for the reduction in Mr. S's income earning potential, Ms. S would have received spousal support with a present value of some \$215,000. Having reapportioned the division of property by making an order that Ms. S is to receive 75% and Mr. S is to receive 25% of the net proceeds from the sale of the family home, there is no scope for an award of spousal support going forward, even with a potential future increase in Mr. S's income.
- [124] My conclusion, in the unique circumstances of this case, is that there will be no order for prospective spousal support.

(4)(b) Arrears

- [125] The parties disagree about what should be done with respect to outstanding arrears of support that have accumulated under the interim orders. According to FMEP, Mr. S owes outstanding arrears of \$27,936.86, plus interest and penalties of \$1,487.17, for a total of \$29,424.03.
- [126] As to the proper approach for determination of unpaid support, counsel for Mr. S submits that because the prior orders were interim orders, at this point the court is required to make a final determination of unpaid support, as opposed to a reduction or cancellation of arrears. In other words, says counsel, the court is not concerned with cancellation of amounts previously determined to be payable under a final order, but rather with the proper calculation of actual amounts that should have been paid in the first place.

[127] I cannot agree with this submission. The amounts in issue are payable under prior court orders. The initial order of Master Keighley was made on 19 July 2018. It does not state whether it is made under the DA or the FLA. Both statutes are pled. However, the proper approach under both the federal and provincial legislation is to treat an application to reduce or recalculate amounts due under a prior order as an application to vary an existing order. There are many cases where courts have applied the legal principles governing cancellation of arrears to determine whether amounts due under an interim order should be reduced or cancelled at trial. See, for example, Baldini at para. 24. See also Herron v. Herron, 2016 BCSC 1508 [Herron] and the many cases cited therein at paras. 157-158. On this approach, Mr. S's proposal to recalculate amounts due under a prior order is properly construed as an application to reduce or cancel arrears, with some allowance for the interim nature of the orders and the context in which they were made as described below.

[128] The case law interpreting and applying both the provincial and the federal family law statutes recognizes that an application to reduce or cancel arrears imposes a substantial burden on the applicant. As explained by Martinson J. in Earle v. Earle, 1999 CanLII 6914 (B.C.S.C.) [Earle] at para. 23:

The courts are generally reluctant to reduce or to cancel arrears. Under the Family Relations Act arrears will not be reduced or cancelled unless it is grossly unfair not to do so. This principle is similar to the one applied to the Divorce Act, which requires a material and long lasting change.

(See also Fox v. Fox, 2011 BCSC 72 at para. 132. I will add that while these cases dealt with the now-repealed Family Relations Act, the legal principles are the same under what is now s. 174 of the FLA.)

[129] Amounts accumulated under an interim order are arrears. It is settled law that an application to cancel or reduce arrears, even under an interim order, engages the strict standard described in Earle. This is because an interim order is presumed to be correct, and is not to be departed from lightly: Dhaliwal v. Dhaliwal, 2017 BCSC 2083 at para. 33. Thus, courts have applied the "gross unfairness" test even where a party applies at trial to reduce cancel or reduce arrears accruing under an interim order: Herron at paras. 157-160.

[130] Nonetheless, when it comes to arrears owing under an interim order, some allowance may be made for the purpose and circumstances under which interim support orders are made. Interim support orders are intended to bridge the gap between the time when the court is first required to act and the time when the court can fully consider the issues and make a final decision on the merits: X.(R.L.) v. X.(J.F.), 2002 BCSC 1222 at paras. 60-61, cited in Herron at para. 160.

- [131] An interim order may carry "different considerations" depending on the circumstances in which it was made: Herron at para. 162. For example, an interim order setting support obligations based on employment income from a single source may be treated with greater deference or afforded greater weight than an interim order based upon imputed income where the payor's sources of income are less certain, as explained in *Tedham v. Tedham*, 2003 BCCA 600 at para. 63.
- [132] In the end, the Court must apply the "gross unfairness" test when considering an application to reduce or cancel arrears, even where the arrears have accrued under an interim order. The interim order is presumed to be correct. However, the court may have regard to the basis on which the order was made, and its interim nature, in deciding whether it would be "grossly unfair" not to cancel the arrears.
- [133] The analysis to be undertaken in deciding whether it would be "grossly unfair" not to cancel or reduce arrears was set out in the leading case of *Earle*. The questions that the Court should ask are: (i) whether there was a significant and long-lasting change in circumstance justifying reconsideration of the initial order, (ii) whether that the change was a real change in circumstance and not a product of the applicant's own choice, and (iii) whether every effort was made by the payor spouse to earn income. Also, in terms of ability to pay arrears, the question is not just whether the payor is presently unable to pay, but whether he or she will be unable to pay the outstanding amounts now or in the future. In the final analysis, the court will only reduce or cancel arrears where it would be "grossly unfair" not to do so.
- [134] The initial interim order of Master Keighley was made principally on the basis of the stated incomes of the parties. At the time, Mr. S was earning employment income from two different jobs, those being his full time job at BCSS and his part time job at an outdoor sporting goods store. Master Keighley set Mr. S's Guideline income at \$80,000. Ms. S was receiving income in the form of disability and pension benefits, being fixed sources of income, on the basis of which Master Keighley set her Guideline income at \$20,500. On these Guideline amounts, Mr. S was required to pay support of \$1,844 per month for two children, and \$1,572 per month for one child, at various points in time. The amount was later reduced by Master Vos's order of 5 February 2020, under which Mr. S was required to pay support of \$377 per month for one child. On these parameters, Mr. S's total support obligation would have been some \$36,075. Mr. S actually paid a total of \$7,338.15. The difference is \$27,936.86. That is how much Mr. S owes under the interim orders, plus interest and FMEP penalties.
- [135] The question is whether it would be grossly unfair to require Mr. S to pay this amount, given that his actual income was much lower due principally to the termination of his employment from the BCSS with cause in March of 2019. If the Court were to go back and recalculate the support based on the income Mr. S actually earned, the amount would be as follows:

Date Range

Number of Months

Number of Children

Guideline Income

Table Amount

Total

1 Jul 2018 to 1 Aug 2018

2

2

\$80,000

\$ 1,844

\$ 3,688.00

1 Sep 2018 to 1 Mar 2019

7

1

\$80,000

\$ 1,572

\$ 11,004.00

1 Apr 2019 to 1 Jun 2020

15

1

\$34,960

\$ 329

\$ 4,934.00

Total arrears

\$ 19,626.00

Less amount paid

\$ 7,338.55

Net unpaid amount

\$ 12,287.45

- [136] Mr. S testified that after his employment with BCSS was terminated, he tried through his lawyer to negotiate a reduction in the amount of support he was required to pay, but Ms. S was not prepared to consent to a variation, so he had to schedule an application. In the meantime, arrears accumulated and he did not pay them. In these circumstances, Mr. S says the court should reduce the arrears to reflect the actual amount of Mr. S's income.
- [137] Ms. S's counsel says I should not accept this argument. Counsel submits that even if Mr. S had brought an application to vary the amount of support immediately after he was terminated from his job at BCSS, the application would have been opposed on the basis that Mr. S's loss of employment was a product of his own misconduct, meaning that he was intentionally underemployed.
- [138] I accept that the reduction in Mr. S's income associated with the termination of his employment with BCSS was a significant and long lasting change in circumstance. As for whether the change was "real", and not a product of Mr. S's own choice, again I note that the misconduct itself was intentional but Mr. S's change in employment status was not. I also accept Block J's reasoning in Moazzen-Ahmadi that the payor's "fault or folly" is not a basis in and of itself for refusing a variation. It is, nonetheless, a factor which could hardly be said to weigh in the applicant's favour in terms of the court's exercise of discretion. I am satisfied that subsequent to his termination from BCSS, Mr. S made every effort to earn replacement income. With regard to ability to pay, Mr. S would not be able to pay down the arrears based on his current income. However, there will be funds available for payment of the arrears, namely Mr. S's share of the net proceeds from the sale of the family home.
- [139] In considering whether it would be grossly unfair not to reduce the arrears on account of Mr. S's reduction in income, I also take into account the evidence that Mr. S tried to resolve this issue by negotiation, but ultimately had to bring a court application which was filed on 12 December 2019 and decided on 5 February 2020. Finally, I take into account that at least part of the proposed reduction in arrears is not attributable to Mr. S's loss of employment income, but rather due to the fact that the oldest child, M.J.S., turned 19 in May of 2019, at which point he ceased to be a child of the marriage.
- [140] I conclude that the arrears should be reduced but not to the extent sought by Mr. S. In my view, the arrears should be reduced in four specific ways. First, I would reduce Mr. S's arrears by removing his obligation to pay spousal support, but not child support, from the point at which he was terminated from his job at BCSS. I do this based on my earlier determination that the impact of Mr. S's termination on the quantum of spousal support Ms. S would have received had he not lost his job has already been accounted for by an unequal division of family property. Second, I would reduce the arrears for the period from 1 May 2019 to 1 January 2020, to account for the fact that during this time, Mr. S's support obligations were being based on two dependent children, M.J.S. and M.I.S., when in fact there was only one dependent child, M.I.S. Third, I would reduce the arrears for the period

from 1 December 2019, which is the month when Mr. S filed his application to vary Master Keighley's initial support order, up to 1 February 2020, which is the effective date of Master Vos's variation order. Fourth, I would pro-rate the outstanding interest calculated by FMEP to account for these reductions.

[141] The resulting calculation of outstanding arrears is as follows:

Date Range

Number of Months

Number of Children

Guideline Income

Table Amount

Total

1 Jul 2018 to 1 Aug 2018

2

2

\$80,000

\$ 1,844

\$ 3,688.00

1 Sep 2018 to 1 Oct 2018

2

1

\$80,000

\$ 1,572

\$ 3,144.00

1 Nov 2018 to 1 Mar 2019

5

2

\$80,000

\$ 1,844

\$ 9,220.00

1 Apr 2019 to 1 May 2020

2

2

\$80,000

\$ 1,209

(child support only)

\$ 2,418.00

1 Jun 2019 to 1 Nov 2019

6

1

\$80,000

\$ 748

(child support only)

\$ 4,488.00

1 Dec 2019 to 1 Jun 2020

7

1

\$34,960

\$ 329

\$ 2,303.00

Total arrears

\$25,261.00

Less amount paid

\$ 7,338.55

Unpaid amount

\$17,922.45

Pro-rated interest (\$697.46) and default fee (\$400)

\$ 1,097.46

Net Arrears Owing

\$19,019.21

[142] I would therefore make an order under s. 17(1)(a) of the DA, reducing the outstanding arrears to \$19,019.21, inclusive of interest and default fees. This amount will be deducted from Mr. S's share of the net proceeds from the sale of the family home.

(5) Costs

[143] I make no decision on costs at this point. Within 14 days of receipt of these reasons, the claimant Ms. S may file a written submission of no more than four pages (plus any necessary attachments) setting out her position on costs. Within seven days of receipt of Ms. S's cost submissions, the respondent Mr. S may file a written submission of no more than four pages (plus necessary attachments) setting out his position on costs. Within seven days of receipt of Mr. S's costs submission, Ms. S may, if deemed necessary, file a reply submission of no more than two pages.

Summary

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

- (1) Divorce. The parties are divorced.
- (2) Orders with Respect to Children
 - (a) Pursuant to s. 39 of the FLA, the claimant Ms. S and the respondent Mr. S are joint guardians with respect to M.I.S.
 - (b) Pursuant to s. 42 of the FLA, M.I.S. will reside primarily with Ms. S and have parenting time with Mr. S as arranged between the parties based on input from M.I.S.
- (3) Property Division
 - (a) Mr. S's RSP is to be divided equally between the parties by way of a spousal rollover.
 - (b) Ms. S's Richmond School Board pension is to be divided equally between the parties under Part 6 of the FLA.
 - (c) The family home is to be sold, with the parties having joint conduct of sale, and the net proceeds divided as follows. Ms. S is to receive 75 percent of the net proceeds from the sale of the former family residence. Mr. S is to receive 25 percent of the net proceeds. Mr. S is to pay Ms. S the outstanding arrears of support discussed in point 4(b) out of his 25 percent share of the net proceeds.
- (4) Child and Spousal Support
 - (a) With respect to prospective support, pursuant to the DA:
 - (i) Ms. S's Guideline income is \$21,729.97.

(ii) Mr. S's Guideline income is \$34,960.00.

(iii) Subject to point (iv) below, commencing on 1 July 2020 and continuing on the first day of each month thereafter Mr. S is to pay Ms. S \$329 per month for the support of one child, M.I.S., [date of birth] so long as M.I.S. continues to be a child of the marriage within the meaning of the DA.

(iv) With respect to M.J.S. [date of birth], if by 1 September 2020, M.J.S. is registered as a full time student at a post-secondary educational institution, then commencing on 1 September 2020 and continuing on the first day of each month thereafter, Mr. S is to pay Ms. S \$561 per month for the support of two children, M.I.S. and M.J.S., so long as both children continue to qualify as children of the marriage within the meaning of the DA. For greater certainty, with respect to M.J.S., he will continue to be a child of the marriage so long as he continues to be a full time student at a post secondary educational institution.

(v) Mr. S will be responsible for 65% and Ms. S will be responsible for 35% of the special and extraordinary expenses for the children, which shall include (i) tuition costs, (ii) tutoring for M.I.S., and (iii) counselling for M.J.S. and M.I.S., to the extent that the same is not covered by any of the health benefits of either party.

(vi) The parties shall exchange filed tax returns by the 1st of June each year, and shall provide copies of their notices of assessment each year within 14 days of receipt of same.

(b) Mr. S's outstanding arrears of support are hereby reduced under s. 17(1)(a) of the DA to \$19,019.21, inclusive of interest and default fees. The amount of \$19,019.21 shall be deducted from Mr. S's share of the net proceeds from the former family home, and provided to Ms. S in satisfaction of all outstanding arrears. Any further arrears owing up to the date of this judgment are hereby cancelled.

(5) Costs. To be determined.

"Riley J."

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