

CANADA / JUDGMENT

N.S. v. C.S.

2020 BCSC 48

COURT

Supreme Court of British Columbia

DECIDED

22 January 2020

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2020 BCSC 48 N.S. v. C.S. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: N.S. v. C.S., 2020 BCSC 48 Date: 20200122 Docket: E114867 Registry: Kelowna Between: N.S. Claimant And C.S. Respondent Before: The Honourable Mr. Justice Milman Reasons for Judgment Counsel for the Claimant: J. Van Allen The Respondent on her own behalf: C.S. Place and Date of Trial/Hearing: Kelowna, B.C. December 9 - 13, 2019 Place and Date of Judgment: Kelowna, B.C. January 22, 2020

I. Introduction

- [1] This action arises from the breakdown of a 14-year marriage.
- [2] The parties are in their mid-40's. They are originally from Switzerland, where they were married in May 2003. They have three sons, J.N.S., J.R.S., and J.L.S., now aged 16, 12 and 10, respectively. They also had a fourth child, a daughter, who was born in 2009 but died only days later. In the aftermath of that tragedy, they moved to Kelowna intending to build their dream house and start a new life in this country. Unfortunately, their plans did not turn out as they had hoped. They separated in early 2017.
- [3] Since then, the parties have been unable to agree on a number of parenting and financial issues.
- [4] With respect to the parenting issues, the claimant, N.S., is currently estranged from all three of his sons and has no contact with them, despite interim orders of this Court granting him regular parenting time. He attributes this state of affairs to their mother's alienating and obstructive behaviour. To remedy the situation, he seeks a final order that will ensure that he can resume a modest parenting schedule and rebuild his severed relationships, particularly with the two younger ones. The respondent, C.S., attributes the poor state of N.S.'s relationships with the boys entirely to his previous mistreatment of them. She does not oppose a final order making provision for reasonable parenting time, as long as the boys are not forced to be in contact with their father against their will.
- [5] The financial issues fall into three broad categories.

- [6] First, the parties disagree about how to divide the family assets and debts. By far the most significant of the assets is the parties' remaining equity interest in the former family home, now being sold in foreclosure, where C.S. still resides with her own mother and the three boys. Both parties seek an unequal division in their favour, on various grounds.
- [7] Second, C.S. seeks an order requiring N.S. to pay child support and his share of the boys' special and extraordinary expenses, including private school tuition fees and the cost of participating in extracurricular tennis. N.S. acknowledges his obligation to pay child support but refuses to contribute to certain of the expenses claimed, on the basis that he was not consulted before they were incurred and they are, in any event, unreasonable and beyond the parties' means, in his view.
- [8] Finally, C.S. advances a claim for spousal support, a claim that N.S. opposes primarily on the basis that C.S. has refused, in breach of the Supreme Court Family Rules and previous court orders, to disclose her true income or the records evidencing it. II. The Facts A. The Swiss Years
- [9] The parties first met in the 1990's when they were teenagers. Their relationship became more serious in 2000, when C.S. invited N.S. to move into her three-bedroom condominium in Leutwil, Switzerland. They were married on May 7, 2003.
- [10] At the time, N.S. had been planning to pursue a career as a chef. In 1993, he was accredited to work in that field. In 2003, he obtained a diploma in hotel management. He was unable to continue on that career path, he says, because during that same year C.S. became pregnant with their first child, which left him in the position of having to obtain a better paying job to support his new family. He opted instead for a position in sales. N.S. was not entirely without means, however. In 1997, following his parents' divorce, he and his other siblings each received a gift of one million CHF (Swiss francs, which are comparable in value to American dollars at today's exchange rates).
- [11] C.S. had career aspirations of her own. After completing trade school, she went to work for a municipality. Later, she was retained to provide IT services for an airline but had to leave that position when she became pregnant with their first child. She developed an interest in Reiki, a Japanese therapeutic practice.
- [12] Following their marriage, the parties decided to sell C.S.'s condominium and build their own house elsewhere. To that end, they purchased an empty lot in Leutwil on which they built a new house at a cost of approximately 600,000 CHF. Title to the new property was taken jointly. At least part of the proceeds of the sale of C.S.'s condominium appears to have been put towards the acquisition and construction of the new home.

- [13] The construction project was financed in part with a loan of 200,000 CHF from N.S.'s father, as evidenced by a written loan agreement dated April 1, 2004. In 2008, the loan was forgiven and a further 50,000 CHF advanced as a gift. According to N.S., most of the 1.25 million CHF that he received from his parents was used to acquire and build the new house. The rest was lost in the stock market.
- [14] 2008 was a turning point in the parties' lives. In May of that year, their only daughter was born but succumbed to illness just five days later. Needless to say, the parties were devastated by the loss.
- [15] Thereafter, they appear to have sought solace and spiritual guidance from a group of African shamans, to whom they had been introduced through a neighbour. They soon fell under the influence of the shamans. They travelled to Mali to consult with them. At the request of the shamans, they purchased two vehicles - a pickup truck and an SUV - for use at a local hospital in Mali. After their arrival in Kelowna, the parties flew the shamans to visit them there. They later attempted to sell African jewelry to raise money for the shamans, but without success.
- [16] For some time, the parties had been considering a move to Canada. They visited Toronto, Calgary and Kelowna. After consulting with the shamans, they decided to begin their new life in Kelowna. In the summer of 2009, they sold their newly-built house in Leutwil for 1.295 million CHF and prepared for the move.
- [17] After paying the 800,000 CHF mortgage and other transaction costs and debts, they were left with approximately 445,000 CHF. That sum was spent on their next major project - the construction of what was to be a much grander home in Kelowna. B. Married Life in Kelowna
- [18] The parties arrived in Kelowna in July 2009. They had already purchased a bare-land strata lot at 1143 Parkbluff Lane (the "Parkbluff Property") as the future site of their new home. Construction began there on June 24, 2010 and the parties were able to move in just under a year later, on May 19, 2011.
- [19] In addition to the net proceeds from the sale of their former home in Leutwil, the parties received a further gift of 500,000 CHF from N.S.'s father to help fund the construction project. Although N.S. now contends that this money was advanced as a gift to him alone, I find C.S.'s version of events, to the effect that the gift was meant for the entire family, to be more plausible. That is because the gift was intended to be used for the construction of what was expected to be a family home.
- [20] The home that was eventually built on the site is 5,400 square feet in size and has five bedrooms. It contains a separate in-law suite with two bedrooms and a bathroom. The suite was intended to be occupied by C.S.'s parents, who opted to join the parties in their move to Kelowna. To that end, they contributed 100,000 CHF to the cost of construction. According to N.S., whose evidence I do accept on this point, they also agreed to pay the property tax in

lieu of rent while they remained in occupation of the suite. As it turned out, C.S.'s father died in 2011 but her mother has occupied the suite since then. She paid the property tax between 2011 and 2016 but ceased making payments thereafter. The property tax has been unpaid since 2017.

- [21] According to N.S., the parties spent a total of approximately \$2 million on the Parkbluff Property. C.S. contends that the total cost of the project was much less than that. She relies on a "Construction Summary Worksheet" that appears to have been completed on their behalf as part of an application for a GST rebate, showing the total construction cost to have been only \$1,003,480.08. I accept N.S.'s evidence that the total cost was as he described it. The Worksheet appears to reflect only the work performed by the general contractor. It does not account for the land acquisition cost, or that of other contractors whom the parties engaged separately.
- [22] The parties incurred other construction costs because they chose certain non-conforming features for the house (in particular, thermal windows, paint and a pool enclosure) without seeking the requisite approvals from the strata corporation. That oversight led the strata corporation to impose a \$200 fine every two weeks from May 2011 until N.S. arranged for certain remedial work to be done in 2018, yielding a total charge against the Parkbluff Property, still unpaid, of \$66,952.34.
- [23] In addition to these construction-related expenses, the parties opted to send the children to private schools.
- [24] It eventually became apparent that the parties had over-extended themselves financially. They funded the construction project and other expenses with a home equity line of credit ("HELOC"), secured by a mortgage on the Parkbluff Property. By the time the construction project was completed, the HELOC debt had risen to approximately \$900,000. The balance now stands at \$1,011,860.
- [25] The parties were never able to earn anywhere near enough money to service these debts.
- [26] In early 2010, N.S. found employment with Canterbury Coffee as a sales manager. He was given responsibility for a large territory covering much of the interior region of British Columbia, a position that called for frequent and extensive travel. He recalls having to drive approximately 60,000 km per year and having to be away from home for approximately 16-18 hours per week. His frequent and lengthy absences took their toll on his relationships with C.S. and the children.
- [27] In 2013, N.S.'s employer offered him a more senior managerial position in Calgary. After consultation with the shamans, he accepted the offer. Initially, he rented a room in Calgary for himself but his plan was to have the rest of the family join him there. To that end, the parties put the Parkbluff Property on the market. Before it sold, however, C.S. decided that she did not want to uproot the family and the plan to relocate was abandoned. In 2014, after spending a year there, N.S. left the position in Calgary and returned to his former position in

Kelowna.

- [28] N.S.'s earnings as a sales manager were insufficient to meet the family's growing financial obligations. In an effort to supplement his income after his return to Kelowna in 2014, he took on a second job as a server at a Swiss Chalet restaurant, working three or four evening shifts per week. In August 2019, however, he quit his job at Swiss Chalet because, he says, he was experiencing disabling back pain that prevented him from carrying out his duties as required.
- [29] In 2015, C.S. began working as a life coach, with a specialty in employment counseling and later in addiction treatment counseling. She received referrals from an agency that services insurers. Her expenses, including travel to Vancouver to meet clients, were covered by the agency. She offered her services through a corporation, formerly a shelf-company that N.S. had incorporated, that she took over and renamed "Best Balanced Life Coaching Inc."
- [30] By 2016, the parties' joint account was overdrawn and N.S. decided to open a separate account in his own name in order, he said, to ensure that his business expenses could be paid. C. The Separation and its Aftermath
- [31] By early 2017, the parties' relationship had deteriorated to the breaking point. They separated on January 17, 2017, although N.S. continued to live at the Parkbluff Property until February 25, 2017, when he moved into separate rental accommodation. He commenced this action on March 30, 2017.
- [32] N.S., with assistance from his father, continued to pay for the children's private school tuition until the summer of 2018, at which point he told C.S. that his father would no longer fund that expense and the children would have to go to public school. C.S. refused to withdraw the children. Instead, without consulting N.S., she re-enrolled them for the following year and managed to negotiate a steep discount in their tuition.
- [33] Following the parties' separation, N.S. also stopped paying the premiums on his life insurance policies, which consequently lapsed.
- [34] N.S.'s relationship with the children worsened following the separation. Over the next few months, he was able to see them only sporadically, and then for no longer than two hours at a time.
- [35] On April 27, 2017, N.S. had arranged to take the boys fishing during his parenting time. After they had been gone for about an hour and a half, the boys said they were hungry and so he took them for lunch at the food court of a local shopping mall. While they were having lunch, C.S. called N.S. on his cell phone to find out where they were. He did not answer because, he says, he did not hear the phone ring. C.S. then called J.N.S., who took the call and told C.S. where they were. N.S. told J.N.S. to inform C.S. that he would bring the boys home shortly. C.S. nevertheless arrived at the food court to take the boys home herself, which led to an argument in front of the boys. Following that incident, N.S. had no contact with the boys until the parties agreed on new parenting terms at the judicial case

conference ("JCC") on November 23, 2017.

- [36] At the JCC, the parties agreed to an order that, among other things, made provision for N.S. to have interim parenting time from 1:00 p.m. to 4:00 p.m. on alternate Sundays. Additional parenting time was to be available if both parties agreed. Despite that order, N.S. frequently missed parenting time through the spring and summer of 2018, often due to tennis tournaments and other trips that C.S. arranged without consulting him.
- [37] In March 2018, N.S. applied to the Court for further relief, including to increase his parenting time and to compel the boys to attend with a counselor who would prepare "Hear the Child" reports. He also sought an order to have the Parkbluff Property sold.
- [38] By order made May 8, 2018, most of the relief sought was granted, except for the requested increase in parenting time. The hearing of that aspect of the application was adjourned pending the preparation of the Hear the Child reports.
- [39] The Parkbluff Property was placed on the market at an asking price of \$2,495,000, but did not sell. The bank has since commenced foreclosure proceedings and obtained an order for sale. As of the date of trial, the Parkbluff Property was on the market at an asking price of \$1,599,000 but had not yet been sold.
- [40] On May 14 and 23, 2018, J.R.S. and J.L.S. were interviewed as ordered. The resulting reports dated May 30, 2018 relay comments that, to some extent, confirm C.S.'s testimony as to their reluctance to spend more time with N.S., and the reason for it.
- [41] In March 2019, N.S. renewed his application to increase his parenting time. The matter was initially made returnable on March 14, 2019. On that date, C.S. sent her mother to court to seek an adjournment on the basis that C.S. had clients scheduled for counseling with her in Vernon. C.S.'s mother brought J.N.S. with her to court to seek the adjournment. In the result, the matter did not proceed but C.S. was ordered to pay costs of \$250 for the wasted appearance. The cost award remains unpaid.
- [42] The application was ultimately heard on March 29, 2019. The resulting order stipulated, among other things, that N.S. was to receive parenting time with J.R.S. and J.L.S. on alternate Sundays from 9:00 a.m. to 5:00 p.m. In addition, N.S. was to have "unrestricted telephone communication with the Children on Tuesday and Thursday nights from 7:00 pm through until 7:30 pm.", and C.S. was to "facilitate these telephone discussions." Each party was to provide advance notice of any travel plans and "at least 48 hours - notice of any of the Children's sports activities, musical activities or performances, appointments, or other recreational pursuits." The children were ordered to attend counseling at N.S.'s expense, with the cost of the sessions paid on a "without prejudice" basis.

- [43] As contemplated by the March 29, 2019 order, J.R.S. and J.L.S. attended counseling. According to N.S., the counseling did not improve matters, however. He continued to have difficulties receiving the parenting time called for by the last court order. His Tuesday and Thursday telephone calls often went unanswered.
- [44] On Sunday, July 7, 2019, N.S. went to the Parkbluff Property to pick up the boys for his parenting time but no one answered the door, although he heard voices in the house. After being told that the next parenting day would not take place because they were going to a tennis tournament, N.S. emailed C.S. seeking assurance that on Sunday July 21, 2019, his next scheduled parenting day, he would have his parenting time with the boys as ordered. C.S. replied later that same day with an email advising him that she and the boys would be in following cities on the following dates for tennis tournaments: Spokane, WA July 12-14 Yakima, WA July 16-18 Walla Walla, WA July 19-21 Missoula, MT July 26-28
- [45] C.S. sought to exercise his parenting time on July 21, 2019, despite these travel plans, by researching where in Walla Walla the tennis tournament was likely to be. He found the location himself and drove there expecting to have time with the boys. When he got there, however, C.S. and the boys ignored him.
- [46] N.S. tried once again to have his parenting time on Sunday, August 18, 2019. When he arrived at the Parkbluff Property on that date, he found three handwritten notes on the door stating as follows: To [N.S.] Do not ring the bell - all 6 boys are sleeping From [J.R.S.] I don't want to see you any more I will come again once you stop whith [sic] the court. Im [sic] scared because [J.R.S.] isn't coming From [J.L.S.]
- [47] N.S. went around to the back and saw J.N.S. sitting inside the house on a bar stool. J.N.S. greeted his father by raising his middle finger at him. Once again, N.S. left without having received any parenting time.
- [48] He tried again in September. On that occasion, he arrived at the house, rang the doorbell and once again heard voices inside. After another ring, C.S.'s mother emerged with J.R.S. who was carrying a plastic baseball bat and a tennis racket. They insulted him with profanities and told him to leave. The cell phone that he had recently purchased for J.R.S. was tossed out onto the driveway and broken.
- [49] Since then, N.S. has not received any parenting time and the boys have been blocking his calls. III. The Parenting Issues
- [50] Disputes between parents about how to allocate parenting time and parenting responsibilities are to be resolved pursuant to s. 37 of the Family Law Act, S.B.C. 2011, c. 25 (the "FLA"), which states as follows: Best interests of child 37 (1) In making an agreement or order under this Part respecting guardianship, parenting arrangements or contact with a child, the parties and the court must consider the best interests of the child only.

- (2) To determine what is in the best interests of a child, all of the child's needs and circumstances must be considered, including the following:
- (a) the child's health and emotional well-being;
 - (b) the child's views, unless it would be inappropriate to consider them;
 - (c) the nature and strength of the relationships between the child and significant persons in the child's life;
 - (d) the history of the child's care;
 - (e) the child's need for stability, given the child's age and stage of development;
 - (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
 - (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
 - (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
 - (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
 - (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.
- (3) An agreement or order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- (4) In making an order under this Part, a court may consider a person's conduct only if it substantially affects a factor set out in subsection (2), and only to the extent that it affects that factor.
- [51] Although N.S. does not seek a formal finding of alienation, he attributes the deterioration of his relationships with the boys primarily to C.S.'s conduct. The leading case in British Columbia on parental alienation is *Williamson v. Williamson*, 2016 BCCA 87. In that case, Stromberg-Stein J.A., writing for the Court, described the approach that this Court should take when faced with such an allegation, as follows at paras. 40-45:
- [40] In *D.S.W. v. D.A.W.*, 2012 BCSC 1522, Mr. Justice Barrow thoroughly discussed some of the concepts relating to parental alienation. At para. 64, Barrow J. stated that at the core of parental alienation is: the notion that the child's decision to refuse to have a relationship with the targeted parent is without justification or without convincing reason. If there is a reason given by the child for taking the extreme step of refusing to have a relationship with

a parent, it will often be out of all proportion to the decision taken. The reasons for such decisions need to be assessed with the particular personality and experience of the child involved. What may seem a thin or unconvincing rationale for one child may have a much more convincing force in the context of the personality and experience of another child.

- [41] Barrow J. also observed that parental alienation must be distinguished from estrangement: D.S.W. at para. 28. Courts have said that the difference between estrangement and alienation lies in the cause; estrangement occurs when the child understandably refuses contact with a parent because of that parent's behaviour, and there is a logical and rational reason for the child's rejection of the parent. In the case of alienation, it is said there is little or no objectively reasonable cause for the child's rejection of the parent: N.R.G. v. G.R.G., 2015 BCSC 1062 at paras. 277-278
- [42] If a court finds a parent 'guilty' of alienation, that finding does not pre-determine one particular remedy: L.G. at para. 220. Determining an appropriate response once a finding of alienation is made is an extremely important process since it can have an impact on both the short and long term well-being of the children involved: N.R.G. at para. 287.
- [43] In N.R.G. at para. 288, Mr. Justice Kent described what could be some of the legal responses to alienation, which are illustrative of the type of inquiry one would expect in the face of allegations of alienation: · Detailed case management and parental conduct orders with cost consequences for non-compliance; · Judicial exhortation urging compliance and emphasizing the emotional harm caused to the children (generally only effective in less severe cases of alienation); · Court-ordered therapeutic intervention where appropriate, while recognizing "force-marching" a child to reunification may in some cases be unrealistic and harmful; · Ordering supervised access/parenting time to allay any child anxiety and possibly pave the way for further strategies to achieve positive relationships; · Suspension of child or spousal support as a sanction to enforce more engagement with the other parent; · Transferring custody from the alienating parent to the rejected parent where expert testimony establishes the long-term benefits will outweigh any short-term emotional trauma to the child; · Terminating access by/parenting time of the alienated parent when the alienation is so entrenched that the "cure is worse than the illness", recognizing that children do sometimes resume a relationship with a rejected non-custodial parent after a long period without contact, albeit perhaps only in later years.
- [44] Further, courts have considered that the age of the child appears to be relevant in determining the appropriate response to alienation. Once the child becomes a teenager, it appears that remedial options become increasingly limited: L.G. at para. 215.
- [45] The only consideration in determining what particular remedy is appropriate in an individual case is the best interests of the child in accordance with the factors outlined in s. 37(2) of the FLA. It is important to consider the child's best interest in both the short term and long term: A.A. v. S.N.A., 2007 BCCA 363 at para. 27.

[52] To remedy the unfortunate situation that has arisen in this case, N.S. proposes a final order that increases his parenting time with J.R.S. and J.L.S. In particular, he seeks to have additional parenting time with them as follows:

- a) Tuesday afternoons, from the time they finish school until 7:30 pm;
- b) alternate Sundays from 9 am to 5 pm;
- c) the first two days of spring break;
- d) every other weekend over the summer holidays; and
- e) December 25 in alternate years.

[53] To ensure that his parenting time occurs as ordered, he seeks ancillary orders as follows:

- a) C.S. to be at home at pickup times to ensure that the children are available to be picked up for N.S.'s parenting time as ordered;
- b) the parties are to consult one another before scheduling extracurricular activities and not schedule activities during the other parent's parenting time without prior agreement;
- c) neither party to relocate the children outside Kelowna;
- d) 21 days notice to be given of any foreign travel (with itineraries including specific locations and contact numbers), with consent of the other parent not to be unreasonably withheld;
- e) C.S. to advise N.S. of the mobile phone numbers of J.R.S. and J.L.S. and unblock N.S. from whatsapp and snapchat phone applications; and
- f) a party who is later found not to be in compliance with the final order is to be liable for special costs on any enforcement application made necessary as a result.

[54] In response, C.S. acknowledges that N.S. has not been receiving parenting time as ordered. She attributes that fact to what she says is the justifiable reluctance of the boys to see their father. She alleges that they are afraid of him and his temper. According to her, the boys refused to see N.S. after learning, through the counseling sessions they attended, that they too have rights in the process.

[55] On several occasions prior to the separation, C.S. says, N.S. forced the boys, most often J.R.S., into cold showers as a means of disciplining them. N.S. acknowledges having done this to J.R.S. on one occasion only, but says he now deeply regrets it.

[56] C.S. accepts that it would be beneficial in principle for the boys to have a relationship with their father, but she seeks an order that leaves ultimate control over his parenting time with the children. C.S. does not oppose an order that would prevent either party from relocating the children more than 50 km outside Kelowna. She also does not oppose an order that would require advanced notice of foreign travel, but suggests that two days' notice should suffice.

- [57] Having considered the evidence adduced and the submissions of the parties in light of the factors set out in s. 37 of the FLA, I have concluded that it is in the best interests of J.R.S. and J.L.S. that they return to a regular parenting schedule with N.S. I also agree with N.S. that C.S. must assume responsibility for ensuring that the boys are available for N.S.'s scheduled parenting time. That means that C.S. must be physically present on each occasion when N.S.'s parenting time is supposed to commence. In addition, she must encourage the boys to rebuild and then maintain their relationships with him.
- [58] Although C.S. attributes the boys' reluctance to spend time with N.S. to his previous mistreatment of them, it is apparent that she too has played a significant role in bringing about the current state of affairs. Rather than facilitate his parenting time with the boys as previously ordered, she has instead actively obstructed it, such as by taking them on road trips during his scheduled parenting time without properly notifying him or allowing him to make alternative arrangements. Some of the boys' animosity toward N.S. appears to be attributable to this litigation, as evidenced by the note from J.R.S. that greeted N.S. at the door when he sought to exercise his parenting time on August 18, 2019.
- [59] On the other hand, there also appears to be at least some "objectively reasonable cause" for the boys' apprehension in this regard. Because of that fact, I accept that they ought to have some input into the type of contact they are required to have with N.S., at least during the initial period while he attempts to regain their trust. I am therefore not prepared to order any increase in N.S.'s parenting time at this stage. I am ordering, instead, a gradual restoration of his existing parenting time, beginning with what may, at the election of the boys, be only telephone contact for the first six months.
- [60] After those six months, N.S. is to resume having regular parenting time with the boys in person on Sundays and by telephone on Tuesday and Thursday evenings, as previously ordered.
- [61] I am also making the parenting arrangement reviewable after six months. If, after those six months, the boys continue to be reluctant to spend time with their father in person, then C.S. may seek a further order to reflect that fact. Alternatively, N.S. should be free to seek an increase in his parenting time at that stage.
- [62] Finally, I agree with N.S. that any further failure by C.S. to comply with her obligations in this regard should attract a proportionate financial penalty, such as special costs on the resulting application. Rather than make that order now, as N.S. urges, I prefer to leave the remedial options open so that a remedy can be crafted to suit the specific situation that may arise.
- IV. The Financial Issues A. Division of Assets and Debts
- [63] The term "family property" is defined in s. 84 of the FLA to mean property that either spouse owns at the time of their separation or was acquired after their separation but derived from such property.

- [64] The following are the family assets as of the separation date, and their present values as I find them to be: Asset Value N.S. C.S. The Parkbluff Property \$1,599,000 (estimated) \$799,500 \$799,500 2015 Lincoln Navigator unknown 0 unknown 2016 Nissan Sentra \$9,000 \$9,000 0 Canadian bank accounts \$875 \$875 0 Swiss Bank Account (subsequently used to pay children's tuition) \$7,998 0 0
- [65] The family debts subject to division are defined in s. 86 of the FLA to include all financial obligations incurred by either spouse during the relationship, or after the relationship if incurred for the purpose of maintaining family property.
- [66] The following are the family debts as of the separation date, as I find them to be: Debt Amount Owning N.S. C.S. HELOC (\$1,011,860) (\$505,930) (\$505,930) Strata Judgment (\$66,952) (\$33,476) (\$33,476) Property Tax and Arrears (\$41,408) (\$20,704) (\$20,704) Credit Card Debt (paid by N.S.) (\$37,022) (\$37,022) 0 Sentra Financing (paid by N.S.) (\$13,883) (\$13,883) Navigator Financing (paid by C.S.) Unknown 0 unknown Remedial work paid by N.S. to address strata non-conformities (\$13,868) (\$13,868) 0
- [67] Pursuant to s. 81 of the FLA, spouses are generally entitled on separation to a half interest in family property, and equally responsible for family debt, regardless of their respective use and contribution. In this case, that means that each party is presumptively entitled to be paid from the proceeds of sale of the Parkbluff Property half of the difference between the present market value of the family assets less the family debts.
- [68] Despite s. 81, the Court may order an unequal division of family property or family debt pursuant to s. 95, which states as follows: Unequal division by order 95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to
- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;

- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also 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 between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [69] Both parties seek an unequal division in their favour pursuant to that provision.
- [70] N.S. asserts that an equal division would be significantly unfair for two reasons.
- [71] First, he argues that he could seek to have the funds that his father gifted to him during the marriage treated as excluded property under s. 85(1)(b.1) of the FLA. He has elected not to do so, he says, because this would leave no proceeds available for distribution to C.S. Instead, he urges the Court to reapportion the remaining equity interest in his favour to account for this factor, relying on *Jaszczewska v. Kostanski*, 2016 BCCA 286 and *E.H.H. v. C.L.M.*, 2017 BCSC 1299, in which it was held that unequal contributions by one spouse may justify a reapportionment. Furthermore, he argues that he contributed his entire income to maintaining the Parkbluff Property, whereas C.S. has been secretive about her income, a factor that, he argues, also justifies a reapportionment in his favour, citing *Nanara v. Nanara*, 2017 BCSC 1447.
- [72] On that basis, N.S. seeks an order allocating the proceeds of sale of the Parkbluff Property 75/25% in his favour.
- [73] Second, N.S. seeks a further adjustment to account for family debts that he paid off himself or that C.S., through her unreasonable behaviour, caused to grow unnecessarily.
- [74] C.S. advances her claim for reapportionment on the following grounds:
- a) greater contributions by her;

- b) the need for the parties to keep the promise made to her mother that she can continue to live in the family home;
- c) N.S. can afford to bear the family debts more than she can;
- d) she contributed to N.S.'s career and gave up her own career to look after the children;
- e) N.S. caused a diminution in value of the Parkbluff Property by refusing to pay the mortgage after separation;
- f) N.S. has not paid his fair share of special and extraordinary expenses;
- g) C.S. will have the responsibility of providing a home for the children after the Parkbluff Property is sold;
- h) C.S. has paid the costs of maintaining the Parkbluff Property since separation alone; and
- i) N.S. has not disclosed all of his assets, particularly those in Switzerland.

[75] In general, I am not persuaded that an equal division of the family assets and debts would be significantly unfair in this case. I have found that N.S.'s father intended his gifts for the family, not N.S. alone. I also find that C.S. made contributions of her own, for example through the proceeds of sale of her condominium in Leutwil. C.S. also contributed to the parties' lifestyle through her care of the children. In summary, none of the grounds advanced by the parties, alone or in combination, rises to the level of justifying an unequal division of the family assets and debts, in my view.

[76] There are two exceptions, however.

[77] First, I agree with N.S. that the strata judgment beyond \$50,000 (which is the amount at which the matter would have settled had C.S. accepted the strata corporation's settlement offer, as she should have, rather than forcing it to obtain a judgment against the parties in the full amount of \$66,952.34) should be borne exclusively by C.S. To that end, I am ordering, pursuant to ss. 95(2)(g)(i) of the FLA, that C.S. should bear the entire \$16,952.34, out of her share of the net proceeds of sale of the Parkbluff Property.

[78] Second, the parties will each retain their own vehicles (N.S., the Sentra and C.S., the Navigator), together with the associated debt and will indemnify each other for any liability under any lease or financing agreement associated with the vehicle that they retain.

[79] Finally, I am not prepared to allocate the cost of the "Hear the Child" report as between the parties at this stage. I consider that item to be more appropriately addressed by separate order, as part of the award of costs for the litigation itself. B. The Parties' Incomes

- i. N.S.'s Income

- [80] Between 2014 and August 2019, N.S. was working as a sales representative for Canterbury Coffee and as a server at Swiss Chalet. His declared income in the last three years has been as follows: 2017: \$90,044 (line 150) + \$12,000 (tips, grossed-up) - \$18,000 (vehicle allowance) = \$89,203 2018: \$89,601 (line 150) + \$9,000 (tips, grossed-up) - \$18,000 (vehicle allowance) - \$2,334 (other expenses) = \$81,889 2019: \$85,059 (anticipated line 150) - \$18,000 (vehicle allowance) = \$67,059
- [81] Although C.S. pleads that N.S.'s actual income is between \$155,000 and 180,000 per year, there was no evidence suggesting that he has ever earned an income in that range. I am therefore satisfied that N.S.'s income has been as he has declared it.
- [82] N.S. testified that he recently had to quit his job at Swiss Chalet due to a back injury, but he adduced no medical evidence to support the suggestion that the injury is permanently disabling. Rather than assume that N.S.'s income earning capacity has been permanently diminished due to the recent back injury, I prefer to fix his future income closer to the previous three-year average, or \$79,383.67. Although I accept that he cannot reasonably be expected to continue working evenings as a server at Swiss Chalet, the additional time that has now been freed up, together with the conclusion of this litigation, should allow him to regain some of the ground lost in recent years with respect to his main source of income at Canterbury Coffee.
- [83] On that basis, I am fixing his income for 2020 and future years at \$75,000. ii. C.S.'s Income
- [84] Determining C.S.'s Guidelines income is more problematic, due chiefly to her failure to produce complete records evidencing her earnings.
- [85] C.S. testified that she has been earning an income as a life coach, through her incorporated business known as Best Balanced Life Coaching Inc. ("BBLC"). She said that her workflow from the referring agency was relatively consistent between November 2017 and February 2019, when she was reimbursed for regular trips to Vancouver. Since then, she says, the number of referrals directed to her has diminished.
- [86] In her most recent Financial Statement, sworn June 14, 2019, C.S. declared a Guidelines income for child support purposes of \$15,000, which she described as "self employment income." Attached to that statement is a 2018 Assessment showing annual partnership income in that year of negative seven dollars. Also attached is her 2017 tax return, declaring line 150 income of \$9,111.77, taxable dividends of \$1,431, taxable capital gains of \$7,328 and gross business income of \$29,864. Her 2016 return shows line 150 income of \$1,080.
- [87] There are very few financial records of BBLC in evidence. An income statement for the calendar year 2015 shows that, in that year, it earned gross income of \$3,955.43 against expenses of \$17,480.45. A statement of professional activities for BBLC for 2017 shows that it earned gross income in that year of \$31,357.43.

- [88] When asked in cross-examination about these and other entries, C.S. professed to be unable to explain her income, where it came from or how it was accounted for. The records on file were prepared, she said, by her accountants and she could not afford to pay an accountant to update the financial records or respond to N.S.'s requests for better financial information in this litigation, information she was required to deliver by previous orders of this Court.
- [89] In addition to her income from BBLC, C.S. appears to have received income in 2018 from a mutual fund known as the "Solar Income Fund." C.S. also acknowledges that she had several homestay students living with her and the boys in the Parkbluff Property at various times over the last few years. She testified that she had homestay students throughout the 2017/8 academic year, during part of the 2018/9 academic year and since Sept 2019. In cross-examination, C.S. refused to accept that she received any income from that source. Rather, she considers whatever payment she received from the schools for the students to be a "reimbursement." I agree with N.S. that she has received non-taxable income from that source - income that she should have declared in this litigation.
- [90] I therefore agree with N.S. that it is appropriate to impute additional income to C.S., beyond what she has declared on her Financial Statement.
- [91] N.S. argues that C.S.' income in 2017 should be calculated as the sum of the following amounts: Homestay Student Income: \$9,250 Taxable Capital Gains: \$7,328 Expenses improperly deducted \$29,864
- [92] Recognizing that 2017 appears to have been a busier year for BBLC and that any capital gains earned in that year may not recur, N.S. seeks to have an income of \$50,000 imputed to C.S. from 2018 forward.
- [93] In addition to the figures showing BBLC's gross income to have been approximately \$30,000, N.S. testifies that, during the marriage, C.S. worked 4-5 days per week, from 9 am to 2 pm. At \$30/hour (the rate C.S. said she was paid), her annual income through BBLC was likely to have been approximately \$30,000 annually. I agree that the alleged business expenses were not properly explained and ought to be imputed as income.
- [94] Having regard to the various sources of income in evidence and after grossing up the untaxed sources, I have concluded that C.S.'s income should be fixed at \$37,000. C. Child Support
- [95] Based on his income as I have found it to be, N.S. is required to pay child support from and after January 1, 2020 at the table amount of \$1,522.
- [96] I also accept N.S.'s submission that the amount he owes for retroactive child support is \$13,466, calculated as follows:
- | Period | N.S. Income | Table Amount | Total Owing | Amount Paid | Net Amount Owing |
|------------------------------------|-------------|--------------|-------------|-------------|------------------|
| 2017 March to November (9 months) | \$89,203 | \$1,795 | \$16,155 | \$7,722 | \$8,433 |
| 2017 December (1 month) | \$89,203 | \$1,795 | \$1,795 | \$1,200 | \$595 |
| 2018 (12 months) | \$83,350 | \$1,655 | \$19,860 | \$14,400 | \$5,460 |
| 2019 January to July (7 months) | \$67,059 | \$1,364 | \$9,548 | \$8,400 | \$1,148 |
| 2019 August to December (5 months) | \$67,059 | \$1,364 | \$6,820 | \$8,990 | (\$2,170) |
| Total | | | \$54,178 | | |

\$40,712 \$13,466 D. Special and Extraordinary Expenses

- [97] In her most recent financial statement, C.S. claims to be paying \$2,166.42 in expenses for the children every month. Most of that amount, \$1,900, is described as "activities and sports." No details were provided. C.S. has produced no receipts to substantiate this aspect of her claim. She did testify that since September 2019 she has been paying \$75 per month in private school tuition for the three boys.
- [98] I agree with N.S. that the s. 7 expenses to be shared should, in general, be limited to health, dental and orthodontic expenses exceeding insurance coverage and only those extracurricular activities that have been agreed upon in advance. The only exception is the \$75 monthly tuition, which, in my view, should be treated as a special expense and shared as such between the parties. E. Spousal Support
- [99] In her counterclaim filed June 17, 2019, C.S. seeks spousal support, both prospectively and retroactively from March 1, 2017. N.S. opposes any award of spousal support on the basis that C.S. has not established her entitlement, and has failed to disclose her true income or produce the records evidencing it.
- [100] C.S. did not seek spousal support on an interim basis prior to trial. In any event, none has been paid to date.
- [101] Regardless of whether C.S. has established her entitlement to spousal support or should be disqualified from claiming it, there is no spousal support payable pursuant to the Spousal Support Advisory Guidelines, given the relative size of the parties' net disposable incomes after N.S. pays child support.
- [102] I would not award spousal support retroactively in light of C.S.'s unexplained delay in advancing that aspect of her claim and her failure to comply with her discovery obligations: *Street v. Street*, 2017 BCSC 981.
- [103] C.S. did not advance a claim for spousal support in this case until she filed her counterclaim on June 17, 2019, nearly two and a half years after the parties separated and this action was commenced.
- [104] In addition, I am satisfied that C.S. has withheld important information and records relevant to her income, despite previous orders of the Court directing her to be more forthcoming. She was frequently evasive during her examination for discovery and even refused to complete it. She testified falsely on discovery that she did not know what her consulting hourly rate was, but when the same question was put to her at trial and she was directed to answer it despite her obvious reluctance, she was able to do so. I have found that her true earnings exceed the \$15,000 she swore to on her financial statement. She was unable to answer any questions about her income as previously reported, because, she said, the forms were prepared by her accountants. She testified that she was unable to meet her discovery obligations because she could not afford further consultations with her accountants, even though she was able to travel on expensive vacations with her mother

and the children overseas.

[105] I am therefore making no award for spousal support. V. Summary and Conclusion

[106] My orders with respect to parenting are as follows:

- a) the parties are to continue as joint guardians of the children;
- b) in the event of a death of a guardian, the surviving guardian will be the only guardian of the children;
- c) each guardian will have the obligation to advise the other guardian of any matters of a significant nature affecting the children;
- d) each guardian will have the obligation to discuss with the other guardian any significant decisions that have to be made concerning the children, including significant decisions about the health (except emergency decisions), education, religious instruction and general welfare;
- e) the guardians will have the obligation to discuss significant decisions with each other and the obligation to try to reach an agreement on those decisions;
- f) each guardian will have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals and third party caregivers;
- g) the children will reside primarily with C.S., subject to N.S.'s parenting time as set out below or otherwise as agreed by the parties;
- h) N.S. is to have parenting time with J.R.S. and J.L.S. on alternate Sundays from 9 am to 5 pm;
- i) that parenting time may, for the first six months following this order, be exercised either in person or by means of a telephone call, at the election of the children;
- j) C.S. is to advise N.S. by 4 pm on the Friday before each Sunday when his parenting time is scheduled, whether the children wish to have their parenting time with N.S. in person or by telephone;
- k) C.S. must encourage the children to have their parenting time with N.S. in person and, if one or both of them agree to do so, must be present and answer the door at pick-up time to facilitate this, but if one or both of the children elect to have parenting time by telephone only, C.S. must, upon notifying N.S. of that fact, provide a telephone number and a time on the following Sunday for N.S. to call and must ensure that the child or children who have elected to have their parenting time in that manner are available for the telephone call at that number and time;

- l) the parenting schedule is to be reviewable after six months, at which time, in the absence of any further order, N.S. will have parenting time in-person with J.R.S. and J.L.S. on alternate Sundays from 9 am to 5 pm and by telephone on Tuesday and Thursday evenings between 7:00 and 7:30 pm;
- m) the parties shall consult one another on scheduling extracurricular activities for J.R.S. and J.L.S. and shall not schedule activities or make appointments for them during the other parties' parenting time unless agreed in advance by the parties in writing;
- n) neither party shall relocate the children more than 50 km outside the city of Kelowna without further agreement between the parties or court order;
- o) either party is at liberty to travel with the children in Canada during their parenting time;
- p) if a party wishes to travel with the children outside of Canada, they must provide the other party with a trip itinerary by no later than 21 days before the trip is to commence, including the locations where the children will be and contact numbers; and
- q) C.S. will encourage the children to maintain unrestricted social media contact with N.S. through "snapchat", "whatsapp" or such other application as he and the children may choose to use for their communications.

[107] In addition to the parenting orders set out above, I am making the following financial orders and declarations:

- a) subject to any future costs award in this action, the net proceeds of the Parkbluff Property are to be divided equally, except that N.S. is to be paid an extra \$20,267.68 from C.S.'s half share of the net proceeds, calculated as the sum of the following amounts:
 - i. \$16,952.34/2 or \$8,476.18, being reimbursement for N.S.'s half share of the strata judgment overpayment; ii. half of the family debts paid by N.S. alone after separation ($\$37,022 + \$13,868$)/2 = \$25,445; and iii. the \$250 costs award for the appearance on March 14, 2019; iv. less ($\$875/2 = \$437.50$), being C.S.'s half share of the funds left in the bank account retained by N.S.; and
 - v. less (\$13,466) payable to C.S. for retroactive child support.
- b) the parties will each retain their own vehicles (N.S., the Sentra and C.S., the Navigator), together with the associated debt and will indemnify each other for any liability under any lease or financing agreement associated with the vehicle that they retain;
- c) N.S.'s Guideline income is \$75,000;
- d) C.S.'s Guideline income is \$37,000;
- e) N.S. is to pay child support from and after January 1, 2020 in the amount of \$1,522 per month;

- f) Section 7 expenses are to be shared proportionately to the parties' incomes (N.S., 67%; C.S. 33%);
 - g) Section 7 expense will be as follows:
 - i. health care, dental and orthodontic expenses not covered by insurance; ii. \$75 per month during the school year for tuition; iii. other expenses agreed to by the parties in writing in advance;
 - h) N.S. is to maintain the children on his health and dental plans for as long as these are available from his employer;
 - i) the amount of child support payable by N.S. is to be reviewable after June 1, 2021; and
 - j) all other corollary relief is dismissed.
- [108] The parties have leave to speak to costs if they are unable to agree on the appropriate order in light of my decision. "Milman J."
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Prepared on 26 October 2026 · Esheria