

CANADA / JUDGMENT

N.W. v. Y.W.

2023 BCSC 1843

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 1843 N.W. v. Y.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

N.W. v. Y.W.,

2023 BCSC 1843

Date: 20231024

Docket: E201791

Registry: Vancouver

Between:

N.W.

The Claimant

And

Y.W.

The Respondent

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for the Claimant:

C.L. Lee

Appearing in person:

Y. W.

Place and Dates of Trial:

Vancouver, B.C.

August 14-18, 2023

Dates of Written Submissions:

August 26 and September 18, 2023

Place and Date of Judgment:

Vancouver, B.C.

October 24, 2023

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Introduction

- [1] On January 18, 1999, the parties were married in China. In 2011, the parties immigrated to Canada. They lived in Montreal, then Winnipeg. In 2015, they moved to British Columbia.
- [2] On May 9, 2019, the parties separated. During the marriage, they had two sons.
- [3] Since the separation, the parties have continued to live together but separately in the family home; the respondent, Mr. W., lives in the upstairs portion of the house while the claimant, Ms. W., as well as the two sons and Ms. W.'s mother live downstairs. There is little communication between the parties.

- [4] The eldest son is now 23 years old and has graduated from university. The youngest son is 17 years old and began university in September. Although at the time of the separation both boys met the definition of "child of the marriage" as per the Divorce Act, R.S.B.C. 1985, c. 3 [DA], only the youngest son does so now. Given the age of the boys, parenting arrangements are not in issue.
- [5] Ms. W. seeks the family home, spousal support and child support for the youngest son for four years until he completes university.
- [6] Until trial, Mr. W. did not participate in the family proceedings other than to attend the Judicial Case Conference. Although Mr. W. failed to file a response to family claim, breached court orders and made no financial disclosure, Ms. W. took the position that he should be permitted to participate at trial so that the issues could be dealt with fairly and finally. Given Ms. W.'s position, I permitted Mr. W. to participate in the trial. He was hampered by the fact that he could not refer to any documents because he did not provide document notice as required by the Supreme Court Family Rules [the Rules]. I pause to note that in his written submissions filed on September 18, 2023, Mr. W. appended correspondence with the BC Family Maintenance Enforcement Program ("FMEP") and bank records. I have neither looked at nor considered those records.

Background

- [7] Ms. W. is 53 years old. She has a college degree in early childhood education. She runs a daycare from the family home.
- [8] Mr. W. is 59 years old. He will turn 60 in December. In 1998, Mr. W. completed his master's degree in civil engineering. He worked as an engineer for a big company in China until about 2001 when the parties decided to move to Canada for a change of lifestyle.
- [9] The parties moved to Montreal when their eldest son was almost 21 months old. Mr. W. testified that it was "very hard" to find a job in Canada, so he went back to university. During that time, Ms. W. took French lessons. Mr. W. says that when they moved, he sold one of the properties that he owned in China--The Han-zhong property. The parties utilized the funds from the sale of that property to pay for their living expenses, including rent, for the years in which they lived in Montreal.
- [10] In June 2004, Mr. W. graduated with his second master's degree. In March 2005, he was able to find a job in Winnipeg and the family relocated.
- [11] In November, 2005, the parties' youngest son was born. In April 2005, Ms. W.'s mother came from China to help Ms. W. with the children. She lived with the parties until March 2006. Ms. W. returned to China with her mother between March 2006 and August 2007, while Mr. W. remained in Winnipeg to work. He visited the family in China for a few weeks during that period. Between 2005 and 2012, Ms. W.'s mother travelled between China and the W.'s home spending long periods of time with them to help care for the children. In 2012, she moved in

with them permanently.

- [12] Ms. W. and her mother found the winters in Winnipeg to be too cold, so in about 2010 the parties sold their house and moved to the Vancouver area. Mr. W. got a job as a senior project manager with a global engineering firm. His starting salary was \$92,000 per annum. In 2010, the parties purchased the family home in Surrey. Ms. W. took early childhood development and business courses. In 2011, she started a daycare in the family home.
- [13] In December 2012, the family was involved in a car accident in Seattle. Ms. W. was seriously injured. She spent about a month in the hospital in Washington. Ms. W.'s mother and youngest son were also injured in the accident. According to Mr. W., it took months for Ms. W. to recover.
- [14] Mr. W. testified that while Ms. W. was recovering she made friends that introduced her to what he describes as "pyramid sales". Mr. W. says that Ms. W. began spending money from their joint bank account and the bank "started chasing them". That is when he opened a savings account in his name only that Ms. W. could not access. He had his salary deposited into that account and arranged for the family payments to be drawn from it. Much was made of this account at trial. Ms. W. alleges that Mr. W. hid funds from the family for his own personal use. I will return to this.
- [15] Both parties testified that money issues, particularly Mr. W.'s sole account, created issues in their relationship.
- [16] In 2016, when the parties were taking one of their sons to the Vancouver Sun Run, an incident occurred. The police were involved. As a result, Mr. W. was not permitted to go to the family home or have contact with Ms. W. except with her consent for one year. During that time, Mr. W. rented an apartment.
- [17] Money was becoming an increasingly serious problem. Mr. W.'s salary was not enough to cover their living expenses. Mr. W. testified that he had to draw funds from the parties' line of credit ("LOC") to cover family expenses. When Ms. W. found out that Mr. W. was taking money from the LOC, she did not want him in the house anymore. That is when Mr. W. moved upstairs where he remains today.
- [18] Mr. W. describes the family home as "not a happy place" and testified that he feels lonely and isolated. Money issues have become even worse. The interest rates on the LOC and mortgage (both are variable) have increased exponentially. Mr. W. could not afford to pay the family's living expenses and the interim child support ordered in April 2021. The support arrears started adding up. When the FMFP started garnishing his wages, Mr. W. could no longer pay the mortgage. Ms. W. and her mother have been paying it since.

[19] Throughout the trial, Mr. W. expressed his hope that he and Ms. W. could reconcile. In fact, he insisted several times that this trial was not about property, it was about the parties getting back together again. Ms. W. testified that reconciliation is not an option. Although he was told that many times throughout the week, I am uncertain as to whether Mr. W. truly understands that there is no prospect of reconciliation.

Issues

[20] The issues to be decided are:

- 1) the division of property and debt;
- 2) child support and special expenses;
- 3) spousal support; and
- 4) divorce.

[21] I will consider the issues in turn.

Division of Property and Debt

[22] Section 81 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] provides that, on the date of separation, each spouse is entitled to an undivided half interest in all family property as a tenant in common and is equally responsible for family debt, "regardless of their use or contribution".

[23] Family property is described in s. 84(1)(a) of the FLA as all real and personal property owned or beneficially owned by either spouse on the date of separation, unless the property is excluded. There is no issue of excluded property in this case.

[24] Family debt is defined at s. 86 of the FLA. It includes all financial obligations incurred by a spouse during the period of the relationship. Debt incurred after the date of separation is only defined as family debt if it is incurred for the purpose of maintaining family property.

[25] Under s. 87(b)(ii) of the FLA, the presumptive date for valuing family property and debt is the date of the trial. Departing from the presumptive date of valuation is effectively a reapportionment or unequal division of family property and debt, which can only be achieved through application of s. 95 of the FLA and a finding of significant unfairness: see *Namdarpour v. Vahman*, 2019 BCCA 153 at para. 59; *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76.

[26] The factors the court may consider in making an unequal division of family property and debt are in s. 95(2) of the FLA, and they include:

- (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;
- (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;
- [27] The debt in issue is the LOC which is attached to the family home. I will address it in my analysis of the properties.
- [28] There are several properties in issue--the family home in Surrey and three properties in China. I will refer to the properties as follows:
- 1) The Surrey property (or the family home);
 - 2) The properties in China:
 - i. The Chengdu property,
 - ii. The Nan-zheng property, and,
 - iii. The Han-zhong property.
- [29] Ownership of the properties in China is in dispute. While Mr. W. concedes that he owns the Chengdu property, he denies owning the Nan-zheng and Han-zhong properties.
- [30] Before I turn to considering the properties, I must address the position of Ms. W.. She contends in written submissions (and did so orally as well) that because Mr. W. has failed to make full disclosure, "it is appropriate for the court to conclude that the respondent has control and possession of family assets of which it had no knowledge and to proceed with the resolution of the property distribution issues on the basis of the inference that the value of the undisclosed assets was at least equal to the value of the disclosed assets." For this principle, Ms. W. relies on *Cunha v. da Cunha*, [1994] B.C.J. No. 2573, submitting that the facts are analogous to the present case.
- [31] In *Cunha*, the trial judge found that the husband "consistently obstructed the proper progress of the litigation and, contrary to the scheme of the Family Relations Act and to specific orders of the court, persistently failed to make full disclosure of assets". During the trial the husband accused the wife of "planning to sue him for every penny" and leaving him with only "his underwear in the street". The husband did not testify and was emotionally labile throughout the trial. The husband concealed assets. The judge noted that much of the evidence was only before him because of a "tireless struggle" by counsel for the wife to locate assets. The judge agreed with the wife that he had no confidence that they knew everything about the husband's assets that there is to know.
- [32] The court then went on to state the following:

- [10] It is not enough to respond to non-disclosure by an award of costs. Nor is it enough, in a case like this one, to deal only with what is known. Either of these approaches, or both together, may still reward the non-disclosing litigant for his conduct, depending whether his concealment has been successful.
- [11] I conclude that where there has been concealment of assets, it ordinarily should be held that the concealment is ongoing, that there are assets still undisclosed, and that the division of assets should be affected accordingly. I am not sure whether it is of consequence whether this is characterized as an assumption, a rebuttable presumption or an inference of fact. The result is the same. Such a holding may be avoided if the trial judge is satisfied by the conclusion of the trial that full disclosure has by then been made.
- .
- [13] Once non-disclosure at any stage has been established, the onus of satisfying the Court that afterwards there has been full disclosure should be on the non-disclosing party. If by the end of trial the Court is satisfied that full disclosure finally has been made, an award of costs only might be the appropriate penalty.
- [33] Cunha is distinguishable from the case before me in several significant ways. First, there is no evidence that Mr. W. "hid" assets. Ms. W. knew of all of Mr. W.'s assets. She knew of the properties in China. Second, while Mr. W. failed to make disclosure, I do not find that it was because he was hiding information. Rather, I am satisfied that he did so because he was emotionally unable to process the fact that the relationship was at an end and that assets would need to be divided. As mentioned above, throughout the trial, he expressed his belief that the parties would reconcile many times. While that hope may seem to be naive given the fact that the parties have lived separately in the family home for years and rarely communicate, I am satisfied having observed Mr. W. throughout the trial, including during his testimony, that it is sincere and genuine.
- [34] This is not a case like Cunha where the Court found that the husband was actively seeking to hide assets so that he did not have to share them. I find genuine Mr. W.'s stated desire that Ms. W. be able to stay in the family home and continue to run her daycare from it. Unfortunately, the parties were unable to come to a resolution that allows for that.
- [35] Additionally, Mr. W. is a salaried employee and always has been. His salary and benefits are not a mystery to Ms. W. Each year, Mr. W. gives her his tax information for their joint tax return.
- [36] I accept Mr. W.'s evidence that his income was inadequate to pay all the family expenses and as a result he had to draw on the LOC. I do not accept Ms. W.'s assertion that Mr. W. took funds for his own personal use. There is no realistic way that Mr. W.'s salary could cover the family's expenses. Plus, there is no evidence to suggest that he is living a high life. Quite the opposite. From the evidence and the manner in which he presented himself in court during the week of trial, I find that Mr. W. lives a modest life. He does not have a car to drive. The

car that he owns has been sitting in the parties' driveway dead for a couple of years. I accept that Mr. W.'s gross salary of \$124,000 did not and does not cover the parties' living expenses including mortgage and children's activities. The children were involved in costly activities--one played hockey and the other swam competitively. They both travelled for tournaments and competitions.

- [37] I find that the facts in Cunha are distinguishable from the case at bar. I am further satisfied that through the evidence at trial there has been full disclosure of assets. As such, as per para. 13 in Cunha as stated above, the appropriate penalty is an award of costs.
- [38] I find support for this conclusion in *Wu v. Sun*, 2011 BCCA 239 (later cited in *Singh v. Singh*, 2020 BCCA 21). Our Court of Appeal found the trial judge erred in valuing undisclosed assets at \$1.6 million. Donald J.A., for the Court, wrote:
- [41] I am not the first to observe that non-disclosure is the Achilles heel of family assets litigation. Strong measures are justified in discouraging it. However, one cannot make something out of nothing. The right note of caution was sounded by Madam Justice Baker in *Palanca v. Palanca*, 2005 BCSC 1014:
- [127] Counsel for Mrs. Palanca submitted that the court could draw an adverse inference against Mr. Palanca's estate in relation to the existence of family assets in the Philippines because Mr. Palanca failed to comply with court orders relating to accounting and disclosure. I accept that Mr. Palanca did not meet his obligations in this regard, but an adverse inference is not an adequate substitute for evidence about specific assets, the ownership of those assets, whether the assets were used for a family purpose, or otherwise met the definition of family assets, or the value of the family assets, sufficient to allow for the making of a compensation order that is more than a guess.
- [42] With respect, I think the judge erred in putting any value on the overseas investments when there was not any evidence about them. In my view, the \$1.6 million ascribed to this item must be taken out of the reckoning of family assets.
- [39] I take from *Wu* that there must be some evidentiary basis to support an allegation that Mr. W. owns assets that have not been disclosed, as well as an evidentiary basis on which to impute value to those undisclosed assets. As stated above, I am satisfied that all of Mr. W.'s assets are known.
- [40] I now turn to consider the properties in issue starting with the Surrey property. I will consider the properties in China together.

The Surrey Property (the family home)

- [41] The parties purchased the family home in 2010 for \$470,000.

- [42] There has not been an appraisal or market valuation. The only evidence regarding the current value of the property are the BC Assessments for 2020 and 2023, the latter of which values the house for 2023 tax purposes at \$1,490,000. Of course, tax assessments are not necessarily an accurate reflection of the market value of a property.
- [43] The property has a variable rate mortgage and LOC on it. The payments have increased considerably in the past approximately 17 months. In May 2023, the debt attached to the house was approximately \$437,000 - \$325,000 in mortgage and \$112,000 in LOC. Those numbers will obviously be higher today.
- [44] The equity in the family home is the only family property of significant value. There is no question that the current living arrangement wherein the parties live separately in the home must be resolved. Ms. W. would like to purchase Mr. W.'s share of the family home and keep living there.
- [45] While she claims to be able to assume the mortgage, Ms. W. takes the position that she should only assume the amount of the LOC that she withdrew-- \$15,000. That position is based on her argument that the funds that Mr. W. withdrew on the LOC were used by him personally, not for the family. For the reasons outlined above, I do not accept that argument. The LOC shall be split evenly between the parties.
- [46] Regarding the family home, pursuant to R. 15-8 of the Rules, the Court may order a sale of family property where it appears necessary or expedient that the property be sold. In the circumstances of this case, I find that a sale of the family home is necessary.
- [47] Section 97(2) of the FLA empowers the Court to require the sale of property and to make orders for the payment of the proceeds of sale to give effect to the division of property including making orders about who is to have conduct of sale, the manner of the sale, the sales price, obtaining evidence of the value, the conditions of sale, and what is to happen to the proceeds of sale.
- [48] In an effort to facilitate an expeditious sale of the family home, I make the following orders:
- a) The parties will have joint conduct of sale;
 - b) By November 30, 2023, the parties will retain a realtor or realtors. The parties must make best efforts to agree upon a realtor to jointly retain, however, if they are unable to agree, they each must retain their own realtor by November 30, 2023 for the purposes of co-listing the property;
 - c) The parties will list the family home for sale within 60 days of retaining a realtor, or realtors, as the case may be, and the family home will be continually listed for sale until sold (unless otherwise agreed upon between the parties);

- d) The parties will follow the recommendations of the realtor or realtors regarding the list price or will use the average of the recommended list prices and use their best efforts to complete any recommended repairs or staging for the purposes of selling the family home;
 - e) Until the family home is sold, the parties may continue living together but separately in it. They must cooperate and do all things necessary to permit prospective purchasers to view the home and to maintain the home in a clean and presentable condition;
 - f) If an offer is made on the family home that Mr. W. is willing to accept, Ms. W. will have the opportunity to beat the offer by \$500.00 within five business days; and
 - i. Should that occur, Ms. W. will pay the realtor any commission due to them pursuant to the terms of the listing contract; or
 - ii. If Ms. W. is unable to beat the offer, the family home will be sold to the third party and the parties will pay the realtor any commission from the sale proceeds.
- [49] If the family home is sold to a third party the parties shall share the proceeds equally after paying and discharging the mortgage and LOC in full as well as all other costs associated with the sale of the property.
- [50] If Ms. W. purchases the property, she shall pay to Mr. W. half of the purchase price less half of the mortgage and half of the LOC. She shall give Mr. W. a reasonable period to vacate the family home. If the parties are unable to agree on what is reasonable they may appear before me one morning at 9 a.m. for direction.

The Properties in China

- [51] Ms. W. asks the Court to find that because Mr. W. did not produce evidence to prove ownership or value of the properties in China, the only reasonable inference that can be drawn is that the value of the properties is greater than the value of the Surrey property. I do not accept that proposition. While there are cases where non-disclosure may lead to that inference, as I stated above, this is not, in my view, such a case.
- [52] I am satisfied on Mr. W.'s evidence that he did not intentionally withhold disclosure of information. Rather, he was emotionally unable to engage in the process. I accept his evidence that he is overwhelmed with all that is happening: the increased interest rates are driving up the cost of the mortgage and LOC exponentially; he is unable to keep up with payments on the mortgage, home and support; and FMEP is garnishing his wages. He testified that he has been trying to talk to Ms. W. about refinancing the house to deal with the rising interest costs, but according to Mr. W., she has not been cooperative. As Mr. W. testified, "everything comes to my cost".
- [53] Mr. W. is living on the top floor of the family home by himself. He does not have a kitchen or a bed. His youngest son does not talk to him. Nor does Ms. W. He feels isolated and lonely. He does not have a car. On top of all of that, he has these court proceedings. He clearly finds

the whole process extremely difficult to deal with. And, he can not afford counsel. The fact that Mr. W. is intelligent and well-educated has nothing to do with his emotional maturity or his ability to deal with the extreme stress that he is under. I also accept Mr. W.'s evidence that it is difficult to deal with the properties in China and to obtain information about them from Canada.

- [54] In her closing address, Ms. W.'s counsel stressed that Mr. W. did not produce any documents at trial to support his evidence. Mr. W. was not permitted to introduce evidence at trial because he did not give document notice. Nor was he permitted to call witnesses as he did not give notice.
- [55] In addition, the evidence before me regarding the value of the properties in China demonstrates that their value is nowhere near the value of the Surrey house. While I have no doubt that Ms. W. was frustrated by the fact that Mr. W. ignored court orders made this litigation more difficult, this court will not come to harsh, unrealistic conclusions to punish him.
- [56] I accept Mr. W.'s evidence that the Nan-zheng property belongs to his parents. I also accept his evidence that he sold the Han-zhong property when the parties moved to Canada.
- [57] Mr. W. owns the Chengdu property. It is a 66 square meter apartment. He bought it for the equivalent of approximately \$10,000 CDN in 1994 (before the parties married) when it was offered as a benefit by the company he was working for. According to Mr. W., it would have been worth three to five times that cost for non-employees. I conclude on the evidence that it is now worth approximately \$160,000 CDN.
- [58] Ms. W. is entitled to half of the increase in value of the property from the date of marriage to the date of trial. As there is no information about the value of the property at the time of marriage, I will use the purchase price plus an allowance for the employee benefit received by Mr. W. because of his work. Using the low end of the range provided by Mr. W., I find the value of the Chengdu property at the date of marriage to be \$30,000 CDN.
- [59] The Chengdu property remains the property of Mr. W. Mr. W. shall pay to Ms. W. \$65,000 CDN from his share of the proceeds of the sale of the family home, or if Ms. W. purchases the family home, \$65,000 shall be deducted from the amount she owes Mr. W. pursuant to paras. 49-50 above.

Child Support and Special Expenses

- [60] As stated above, the eldest son is no longer a "child of the marriage" as defined in the DA. The parties' youngest son, J.W., is eligible for child support. He is 17 years old and started university in September 2023. He is currently living in university residence for the school year (September 2023 to April 2024). He intends to live with Ms. W. during the four summer months. As his tuition and living expenses (board and food) are covered by a Registered Education Savings Plan, Ms. W. only seeks child support for the months that he will be living

with her.

- [61] I find that position to be reasonable.
- [62] I find support for this approach in the decision in *Thompson v. Thompson*, 2022 BCSC 1431, in which Justice MacNaughton awarded child support only for the portion of the year the child is home from university as follows:
- [62] As explained in *Neufeld* at para. 35, where an adult student is living away from home to attend a post-secondary institution, determining child support using the table amount, and adding special and extraordinary expenses as if the child were under the age of majority, is inappropriate. At para. 42, the court concluded that child support for an adult child attending a post-secondary institution should generally be determined under s. 3(2)(b).
- [88] Commencing September 1, 2022, and while Grace is at university and not living at home, Mr. Thompson's child support will be calculated on an income of \$73, 400 for one child. If Grace returns to live with Ms. Thompson in the summer months, his child support will be based on two children.
- [63] I pause to note the Federal Child Support Guidelines ("Guidelines"). Because their son is 17 years of age (he turns 18 years old in November 2023), child support should be paid pursuant to s. 3(1) of the Guidelines which reads:
- (1) Unless otherwise provided under these Guidelines, the amount of a child support order for children under the age of majority is
 - (a) the amount set out in the applicable table, according to the number of children under the age of majority to whom the order relates and the income of the spouse against whom the order is sought; and
 - (b) the amount, if any, determined under section 7.
- [64] After the child turns age 19 (for J.W. this will be November 2024), child support is determined pursuant to s. 3(2), as either the table amount, or if the court considers that amount to be inappropriate, a different amount pursuant to s. 3(2)(b):
- (2) Unless otherwise provided under these Guidelines, where a child to whom a child support order relates is the age of majority or over, the amount of the child support order is
 - (a) the amount determined by applying these Guidelines as if the child were under the age of majority; or
 - (b) if the court considers that approach to be inappropriate, the amount that it considers appropriate, having regard to the condition, means, needs and other circumstances of the child and the financial ability of each spouse to contribute to the support of the child.

- [65] Although the provision that governs child support for J.W. until he is 19 is s. 3(1) of the Guidelines as opposed to s.3(2) in Thompson, it does not, given the circumstances of this case and the position of Ms. W., change my conclusion that Mr. W. should only be responsible for child support for the period that J.W. is living with his mother in the summer break from university.
- [66] I base the amount of child support on Mr. W.'s guideline income being \$124,000 per annum.
- [67] Mr. W. shall pay to Ms. W. child support for J.W. in the amount of \$1,146.00 for the months of May, June, July and August only commencing May 1, 2024 and continuing on the first day of each of these months with the last child support payment being August 1, 2026, provided J.W. is living with Ms. W. during the summer break from university. Ms. W. shall immediately inform Mr. W. if J.W. is not residing with her during the summer months or if he stops attending university. If J.W. stops attending university once he turns 19 years old, Mr. W.'s child support obligation will end.
- [68] Ms. W. seeks an order for lump sum child support.
- [69] Justice Butler reviewed the applicable law regarding lump sum child support, in *Santelli v. Trinetti*, 2019 BCCA 319 as follows:
- [162] Section 11 of the Federal Child Support Guidelines allows for lump sum child support orders:

The court may require in a child support order that the amount payable under the order be paid in periodic payments, in a lump sum or in a lump sum and periodic payments.

- [163] While lump sum awards are provided for in the Federal Child Support Guidelines, they are relatively rare. In *Komori v. Malins* (1996), 1996 CanLII 470 (BC CA), 24 R.F.L. (4th) 1 (B.C.C.A.), which pre-dates the Guidelines, Justice Finch (as he then was), writing for the Court at paras. 71-72, noted that lump sum orders for child support are made only in special circumstances:
- [71] It would appear that as a general rule orders for lump sum child maintenance are not made. In *B.(J.) v. E.(J.)*, supra, Allan J. said:

Generally, lump sum awards are restricted to cases involving special circumstances. Those circumstances include animosity between the parties, the paying party's inability to make periodic payments, difficulties enforcing orders for support, and the risk that the available moneys will be otherwise squandered or dissipated.

- [72] Lump sum maintenance seems to be more commonly ordered where the children are within two or three years of being self-supporting, so that the award does not represent many months of payment.

- [164] The requirement for special circumstances continues under the Federal Child Support Guidelines. In *Zhang v. Sun*, 2016 BCSC 1418, Justice Fleming considered, but did not make, an award for lump sum child support. At para. 280, she summarized the circumstances that can support such an award:
- [280] *D.V. v. M.B.B.*, [1998] B.C.J. No. 2004, summarized the principles relevant to whether lump sum child support should be awarded, first set out in *Myatt v. Myatt* (1993), 1993 CanLII 1144 (BC SC), 45 R.F.L. (3d) 45 (B.C. S.C.) some of which are:
1. The same considerations that apply to orders for lump sum spousal maintenance apply to consideration of a lump sum child maintenance order (p. 51).
 2. Lump sum maintenance awards are exceptional, and should be made only when there is some special need or specific circumstances render it appropriate (the Canadian Family Law Guide, vol. 1 (Don Mills, Ont.: CCH Canada 1976) (p. 5117), which cited *Krause v. Krause* (1975), 1975 ALTASCAD 29 (CanLII), 23 R.F.L. 219 (Alta. C.A.) and *Carmichael v. Carmichael* (1976), 1976 CanLII 1122 (BC CA), 27 R.F.L. 325 (B.C. C.A.) [other cites omitted]).
3. The existence of animosity between the parties may favour a lump sum maintenance order to reduce future sources of conflict (*Reid v. Reid* (1974), 1974 CanLII 2214 (BC SC), 15 R.F.L. 125 (B.C. S.C.); *Hayre v. Hayre* (1973), 1973 CanLII 1977 (BC SC), 11 R.F.L. 188 (B.C. S.C.)).
- ...
7. The parent disobeyed a previous maintenance order and had not demonstrated "prudent financial management" (*McLean v. McLean* (January 4, 1991), Doc. Vancouver A892598, D076500 (B.C. S.C.)).
- [165] Recently, in *Devathasan v. Devathasan*, 2019 BCSC 661, Justice Gomery found special circumstances and ordered lump sum child support. The special circumstances included the payor father's past refusal to make support payments and the difficulty in enforcing a periodic order in Singapore.
- [166] I agree that lump sum child support orders should be reserved for cases with special circumstances. Relevant circumstances will include those set out in *Komori and Zhang*. In addition, a lump sum award should not be made where the payor does not have the ability to make the lump sum payment without undermining his or her future self-sufficiency: *Davis v. Crawford*, 2011 ONCA 294 at para. 63.
- [70] In the present case, while Mr. W. failed to pay child support, I accept that it was because he could not do so on top of the mortgage and expenses on the family home, as well as other family expenses. It was not because he did not see child support as his parental obligation. Once the parties have separated and the house is sold, Mr. W.'s financial situation should be improved. I am concerned that a lump sum award may impact Mr. W.'s future self-sufficiency. Therefore, I decline to order lump sum child support as sought by Ms. W.

- [71] Mr. W.'s arrears of child support as calculated by FMEP shall be deducted from his share of the proceeds of the family home.
- [72] Regarding section 7 expenses, Ms. W. seeks an order that Mr. W. share the cost of J.W.'s competitive swimming. As mentioned above, J.W. started university this year. There is no evidence before me that J.W. will or will not continue swimming competitively. I am reluctant to make an order that if he does, Mr. W. must pay a share as I am attempting to give the parties finality through the orders that I make. If J.W. does continue to pursue his swimming, I leave it to Ms. W. to come back before me to seek Mr. W.'s contribution.

Spousal Support

- [73] The obligation to pay spousal support is set out in s. 160 of the FLA.
- [74] Section 161 of the FLA requires the court to consider the following objectives in determining entitlement to spousal support:
- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
 - (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [75] Compensatory support, which relates to the first two objectives, is intended to provide redress for economic disadvantage arising from the marriage or the conferral of an economic advantage on the other spouse.
- [76] The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success: *Moge v. Moge*, [1992] 3 S.C.R. 813 at paras. 861-863, 1992 CanLII 25 (SCC); *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 39.
- [77] Non-compensatory support, which relates to the last two objectives, aims to narrow the gap between the needs and means of the spouses on marital breakdown. The concept of "need" was addressed by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 65 B.C.A.C. 226 at para. 10, 1995 CanLII 2274 (BC CA):

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[78] In *Chutter v. Chutter*, 2008 BCCA 507, our Court of Appeal discussed how to balance compensatory and non-compensatory bases for relief:

[49] Although the compensatory and non-compensatory grounds for spousal support are animated by different models of marriage, the case authorities hold that there is no single basis of support or objective under the Divorce Act that supersedes the other, and that many claims involve aspects of both compensatory and non-compensatory principles (*Bracklow*, at para. 27; *Moge*, at 852). A court is not called upon to decide on one basis for support to the exclusion of the other but rather to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (*Bracklow*, at para. 32). Moreover, the doctrine of equitable sharing is the overarching principle that must be borne in mind (*Moge*, at 864).

[79] Section 162 of the FLA sets out criteria for determining the amount and duration of spousal support:

[162] The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[80] Our Court of Appeal has stated that income disparity alone will not entitle a spouse to non-compensatory support: *Lee v. Lee*, 2014 BCCA 383.

[81] In summary, in determining spousal support:

1. The starting point is the objectives of spousal support in s. 15.2(6) of the DA;
2. All of the objectives must be considered and no single objective is paramount: *Moge*;
3. Self-sufficiency is only one objective, and is only a goal "in so far as practicable";
4. A disparity in income is not determinative; and
5. In determining what is practicable, the court should consider all circumstances, including the recipient spouse's age, gender, skills, education, opportunity for retraining, and the realistic prospect of the spouse finding a job that enables him or her to become self-sufficient: *Tedham v. Tedham*, 2005 BCCA 502.

- [82] The first question to be determined is whether in all the circumstances the claimant is entitled to spousal support.
- [83] Ms. W. argues that she is entitled to spousal support on both compensatory and non-compensatory grounds, until the respondent retires.
- [84] I am satisfied that Ms. W. is entitled to spousal support. This was a long marriage. Ms. W. was the children's primary caregiver. She was financially dependent on Mr. W.
- [85] Mr. W. testified that he plans to retire at age 65 at the latest. Ms. W. accepts his retirement as a reasonable termination point to his obligation to pay spousal support.
- [86] I order that Mr. W. pay to Ms. W. spousal support in the amount of \$2,170 (being the mid-range) per month commencing on the first day of December 2023, and continuing on the first day of each month until he retires. Mr. W. shall keep Ms. W. informed as to his plans for retirement.
- [87] I decline to order lump sum spousal support for the same reasons that I declined to make an order for lump sum child support above.
- [88] Mr. W.'s arrears of spousal support as calculated by FMEP shall be deducted from his share of the family home proceeds.

Divorce

- [89] Ms. W. seeks a divorce. Mr. W. opposes this as he is still hopeful that they can reconcile.
- [90] A court may grant a divorce on the ground that there has been a breakdown in the marriage. Pursuant to s. 8(2)(a) of the DA, breakdown of a marriage is established if the parties have lived separate and apart for at least one year. In addition to the above, pursuant to sections 10 and 11 of the DA, it is the duty of the court in a divorce proceeding to satisfy itself that there is no chance of reconciliation and that there has been no collusion. As addressed above, I am satisfied that there is, despite Mr. W.'s hope, no possibility of reconciliation. I am likewise satisfied that there has been no collusion.
- [91] Given that and the fact that all prerequisites have been satisfied, I grant a divorce on the basis that the parties have lived separate and apart for over a year. The divorce will be effective 31 days after the date of this order.

Conclusion

- [92] I make the following orders:
- 1) Each party is responsible for half of the line of credit attached to the family home.
 - 2) Regarding the family home:
 - a) The parties will have joint conduct of sale;

- b) By November 30, 2023, the parties will retain a realtor or realtors. The parties must make best efforts to agree upon a realtor to jointly retain, however, if they are unable to agree, they each must retain their own realtor by November 30, 2023 for the purposes of co-listing the property;
- c) The parties will list the family home for sale within 60 days of retaining a realtor, or realtors, as the case may be, and the family home will be continually listed for sale until sold (unless otherwise agreed upon between the parties);
- d) The parties will follow the recommendations of the realtor or the realtors regarding list price or will use the average of the recommended list prices and use their best efforts to complete any recommended repairs or staging for the purposes of selling the family home;
- e) Until the family home is sold, the parties may continue living together but separately in it. They must cooperate and do all things necessary to permit prospective purchasers to view the home and to maintain the home in a clean and presentable condition;
- f) If an offer is made on the family home that Mr. W. is willing to accept, Ms. W. will have the opportunity to beat the offer by \$500.00 within five business days; and
- i. Should that occur, Ms. W. will pay the realtor any commission due to them pursuant to the terms of the listing contract; or
- ii. If Ms. W. is unable to beat the offer, the family home will be sold to the third party and the parties will pay the realtor any commission from the sale proceeds.
- g) If the home is sold to a third party the parties shall share the proceeds equally after paying and discharging the mortgage and LOC in full as well as all other costs associated with the sale of the property.
- h) If Ms. W. purchases the property, she shall pay to Mr. W. half of the purchase price less half of the mortgage and half of the LOC. On payment of the funds, Ms. W. shall give Mr. W. a reasonable period to vacate the family home. If the parties are unable to agree on what is a reasonable period for Mr. W. to move out or the steps involved in completing the transfer of the family home they may appear before me one morning at 9 a.m. for direction.
- 3) The Chengdu property remains the property of Mr. W. Mr. W. shall pay to Ms. W. \$65,000 CDN from his share of the proceeds of the sale of the family home, or if Ms. W. purchases the family home, \$65,000 shall be deducted from the amount she owes Mr. W. pursuant to the order above.
- 4) Ms. W. shall retain all bank accounts and assets registered in her name solely and be responsible for any debt registered solely in her name;
- 5) Mr. W. shall retain all bank accounts and assets registered in his name solely and be responsible for any debt registered solely in his name;

- 6) For the purpose of support calculations, Mr. W.'s guideline income is \$124,000 and Ms. W.'s \$35,000.
- 7) Mr. W. shall pay to Ms. W. child support for J.W. in the amount of \$1,146.00 for the months of May, June, July and August, commencing May 1, 2024, and continuing on the first day of each of these months for the next three years, with the last child support payment being August 1, 2026 provided J.W. is living with Ms. W. during the summer break from university. Ms. W. shall immediately inform Mr. W. if J.W. is not residing with her during the summer months or if he stops attending university. If J.W. stops attending university once he is 19, Mr. W.'s child support obligation will end.
- 8) Ms. W.'s application for s. 7 expenses for J.W.'s competitive swimming is dismissed. Ms. W. has leave to apply to have this order revisited if J.W. continues swimming competitively.
- 9) Mr. W. shall pay to Ms. W. spousal support in the amount of \$2,170 (being the mid-range) per month commencing on the first day of December 2023, and continuing on the first day of each month until he retires. Mr. W. shall keep Ms. W. informed as to his plans for retirement.
- 10) The arrears of child and spousal support shall be deducted from Mr. W.'s share of the net proceeds of the sale of the family home.
- 11) The parties are divorced. The divorce shall take effect 31 days after the date of this order.
- 12) I shall remain seized of this matter for 12 months following the date of this order.

Costs

- [93] Regarding costs, as success was shared I would ordinarily order that each party bear their own costs. However as discussed above, Mr. W.'s failure to disclose financial information made this litigation much more difficult for Ms. W.. It cost her time, energy and lawyer's fees. Because of this, following Cunha, I find that Ms. W. is entitled to costs which shall be deducted from Mr. W.'s share of the proceeds from the sale of the family home. In further effort to give the parties finality I set costs at \$15,000 which shall be deducted from Mr. W.'s share of the proceeds of the family home.

"The Honourable Madam Justice Murray"

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