

CANADA / JUDGMENT

Nustad v. Nustad

2020 BCSC 534

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Supreme Court of British Columbia

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2020 BCSC 534 Nustad v. Nustad

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Nustad v. Nustad,

2020 BCSC 534

Date: 20200403

Docket: E17700

Registry: Quesnel

Between:

Wesley Travis Nustad

Claimant

And

Amber Dawn Nustad

Respondent

Before: The Honourable Madam Justice D. MacDonald

Reasons for Judgment

Counsel for the Claimant:

P.L. Schmit, Q.C.

Counsel for the Respondent:

D.E. Dent

Place and Dates of Trial:

Quesnel, B.C.

January 27-30, 2020

Place and Date of Judgment:

Quesnel, B.C.

April 3, 2020

Table of Contents

Overview... 3

Issues.. 3

Background Facts.. 4

Division of Assets.. 6

Legal Principles. 6

Claimant's Position.. 7

Respondent's Position.. 7

Analysis. 8

Family Home. 8

Excluded Property. 11

Other Property. 11

Spousal Support.. 14

Legal Principles. 14

General 14

Compensatory Entitlement 15

Non-Compensatory Entitlement 16

Duration of Support and Self-Sufficiency. 16

Claimant's Position.. 17

Respondent's Position.. 18

Analysis. 19

Incomes of the Parties. 19

Spousal Support Entitlement 22

Child Support.. 24

Analysis. 25

Divorce.. 25

Conclusion.. 25

Overview

- [1] Mr. Wesley Nustad and Ms. Amber Nustad are the claimant and respondent in this family law dispute. Both parties are 40 years of age. They began living together in March 1999 and were married on August 21, 1999. They separated on October 21, 2017.
- [2] The parties have three children, two of whom are children of the marriage. The parties agree that child support is necessary for these two children.
- [3] A number of issues were agreed to at a Judicial Case Conference. Both parties agree that the Consent Order signed by Justice Matthews on March 25, 2019 resolved the questions relating to parenting responsibilities and time. Those orders remain in effect.
- [4] The remaining issues are the identification and division of family property, as well as the amount of child and spousal support.

Issues

- [5] This case raises the following issues:
 - (a) What property is family property, family debt, and excluded property?
 - (b) Should I reappportionment the family property and debt or apply the general rule that each spouse is entitled to a one-half undivided interest in each family asset?
 - (c) How should I account for debt paid by Mr. Nustad post-separation, as well as expenses associated with the home and its maintenance until its sale or the purchase of Mr. Nustad's financial interest in the home?
 - (d) Can Ms. Nustad afford to purchase Mr. Nustad's financial interest in the home?
 - (e) What are the incomes of each party for the purposes of child and spousal support?
 - (f) What entitlement does Ms. Nustad have to spousal support?
 - (g) What should be the duration of spousal support?
 - (h) Should I order a review of spousal support after a period of time?
 - (i) Should retroactive child and spousal support be awarded?

Background Facts

- [6] The parties were very young when they started dating. They were both just out of high school. Mr. Nustad was attending college; Ms. Nustad was working in a horse stable. Ms. Nustad became pregnant within the year and the parties were married shortly thereafter. They were together for just over 18 years.
- [7] The parties have three children. Gabrielle is 20 and is no longer a child of the marriage. Adanna is 17 and Broderick (Brodie) is 9. Ms. Nustad was the primary caregiver for the children during the marriage. She worked outside of the home sporadically over the years but Mr. Nustad supported the family financially.
- [8] The parties have equally shared the children's care since they separated. They both continue to live in the family home.
- [9] Mr. Nustad is an employee with B.C. Hydro and has worked there since approximately 2001. He started as a meter reader but later undertook an apprenticeship to become a lineman. Ms. Nustad followed Mr. Nustad around the province as he established his career with B.C. Hydro. They lived in Squamish, Terrace, Prince George, Courtenay, and Abbotsford before finally settling in Williams Lake.
- [10] In 2013, Mr. Nustad helped develop a B.C. Hydro training program for linemen. Part of Mr. Nustad's work is as a trainer in this program in Surrey, B.C. He spends a considerable amount of time in Surrey and rents an apartment in the Lower Mainland to stay in when he is working at the Surrey Training Centre. He is paid \$130 per day when he is working in Surrey to cover his living-out expenses.
- [11] Mr. Nustad testified that the family lived beyond its means during the marriage. The parties had limited assets at the date of separation. In 2011 the family was forced to refinance the RBC mortgage on the home and took equity out to pay consumer debt. At the time of separation there was some credit card debt and outstanding balances on the mortgage and Homeline accounts. There was also a loan used to purchase the respondent's RRSP.
- [12] The family home has approximately \$180,334 in net equity. Mr. Nustad has an employment pension.
- [13] Ms. Nustad paid the bills and managed the family finances during the marriage. Ms. Nustad continued to manage the household finances out of the joint account where Mr. Nustad deposited his pay cheques until August 2018. In August 2018 Mr. Nustad paid off the overdraft and credit cards, closed the joint account and took over payment of all household expenses except for the internet service, which Ms. Nustad paid. Mr. Nustad was not given the internet password.

- [14] Mr. Nustad has paid for all the household expenses including mortgage payments, debt payments, taxes, insurance, household utilities, maintenance, and many of the children's expenses since August 2018. He also paid for 75% of the children's expenses presented to him by Ms. Nustad. Ms. Nustad incurred extended health expenses. The receipts were not submitted by Ms. Nustad to Mr. Nustad's extended health plan.
- [15] Adanna has a horse which she will sell when she goes to university.
- [16] Mr. Nustad paid 100% of the university expenses of their oldest daughter, Gabrielle, in her first year. This was approximately \$18,000. He intends to pay for Adanna's first year at university as well which will likely cost approximately \$20,000. He will do this out of his overtime earnings. He would like help from Ms. Nustad but assumes it will not be forthcoming.

Division of Assets

Legal Principles

- [17] Under the former Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], the court was required to consider property division before it considered spousal support. The Family Law Act, S.B.C. 2011, c. 25 [FLA], takes a different approach and links the division of family assets and the payment of spousal support. Section 95(3) enables the court to consider the extent to which the financial means and earning capacity of each spouse has been affected by the responsibilities during the relationship and the objectives of spousal support under s. 161 of the FLA. As explained by Justice Butler in *Parton v. Parton*, 2016 BCSC 1528, rev'd in part 2018 BCCA 273:
- [101] Section 95(3) of the FLA allows the court to consider, when deciding on a reapportionment claim, "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 have not been met." In other words, if the spousal support order which would be made based on the parties' circumstances and incomes at the time of separation would not fulfil the objectives of spousal support, that fact can be a relevant consideration in deciding whether it would be significantly unfair to divide family property evenly. This provision recognizes the close connection between the property division and spousal support orders made on dissolution of a marriage.
- [18] I will first address the division of property, but I will keep the objectives of spousal support (to which Ms. Nustad is entitled) in mind.
- [19] Each spouse is presumptively entitled to a one-half undivided interest in all family property as a tenant in common upon separation: FLA, s. 81. Family debts are also subject to equal division: FLA, s. 81. However, the equal division of property and debt may both be subject to an order for reapportionment: FLA, s. 95.

- [20] Family property is all real and personal property, other than excluded property, owned by one or both spouses at the date of separation: FLA, s. 84(1)(a). Section 85 sets out which property is excluded from family property. Generally, property brought into the relationship by a spouse, inheritances, gifts by third parties, court awards, and insurance proceeds are excluded property. However, the growth in value of excluded property during the marriage is considered family property: FLA, s. 84(2)(g).
- [21] Family debt is debt incurred during the period beginning when the spouses' relationship began and ending when the spouses separate, as well as debt incurred post-separation for maintaining family property: FLA, s. 86; *K.M.J. v. J.H.D.N.*, 2014 BCSC 1895.
- [22] All family property and family debt is to be valued according to its fair market value at the date of trial unless otherwise ordered or agreed to: FLA, s. 87.
- [23] The FRA permitted an unequal division of family property if an equal division would result in unfairness. The FLA applies a more stringent test: a court is only to reapportion family property if an equal division would be "significantly unfair": s. 95.
- [24] Part 6 of the FLA deals with pension division. Part 6 is intended to comprehensively address the division of pensions: FLA, s. 111(1).

Claimant's Position

- [25] Mr. Nustad is opposed to an unequal division of the family property and debts. He argues he needs his half of the equity in the home to buy a place to live for himself and the children. He has the children 50% of the time.
- [26] Mr. Nustad argues that if spousal support is ordered from August 2018 or some other date before trial, there should be an accounting of what each of the parties paid for the household expenses and debts from that date forward. Otherwise he is largely content to split the proceeds from the family home and commence child and spousal support on the date of the commencement of the trial.

Respondent's Position

- [27] Ms. Nustad disputes the equal division of family property and family debt. Ms. Nustad argues she is entitled to an uneven distribution of family property pursuant to s. 161 of the FLA. Ms. Nustad submits that s. 161 factors "dictate that there should be an uneven distribution of family property" in her favour.
- [28] Ms. Nustad argues that the former family home should be transferred to her. Pursuant to *Jaszczewska v. Kostanski*, 2016 BCCA 286 at para. 49 [*Jaszczewska*], Ms. Nustad submits the value of the family assets should be pooled and she should receive the family home, with Mr. Nustad receiving other assets to make up for it. She has arranged for a mortgage, although not through a traditional mortgage lender. As a result, the interest rate is high.

- [29] Ms. Nustad takes the position that she used her RRSP to meet expenses post-separation. As a result, the liquidated RRSP account should be treated as payment in lieu of spousal support and set off against arrears of spousal support. This would reduce the arrears to nil.

Analysis

- [30] There is relatively little dispute between the parties as to their assets and their values. The values of the property and debts set out in the Scott Schedule were not disputed by Ms. Nustad. The Scott Schedule, dated February 1, 2020, is set out in Mr. Nustad's submissions.
- [31] The question is how to divide the assets and debts.
- [32] Mr. Nustad takes the position that the family property and family debt should be divided equally. Ms. Nustad disputes the equal division of family property and family debt. Ms. Nustad seeks an unequal division of property pursuant to s. 95(1) of the FLA. She specifically wants the family home to be transferred to her as a way to equalize the income between the parties. She argues the parties' marriage was traditional one and she contributed to Mr. Nustad's career advancement. She was also the primary caregiver for the children during the marriage.

Family Home

- [33] I do not agree with Ms. Nustad that it would be "significantly unfair" to divide the family home, the parties' largest asset, equally. Section 81 of the FLA presumes an equal division of family property. As stated above, s. 95 is a higher bar than the former test under the FRA. The FLA has reduced the discretion of this Court to depart from the equal division of property: *Jaszczevska* at para. 36.
- [34] A key aspect of the test under s. 95 is that "reapportionment will require something objectively unjust, unreasonable or unfair in some important or substantial sense": *Jaszczevska* at para. 42. Reapportionment may be considered if a spousal support order does not fulfil the functions of spousal support as set out in s. 161 of the FLA. Here, spousal support will approximately equalize the parties' net disposable income.
- [35] The family home was appraised at \$337,300 in the 2019 assessment. In May 2019 a company appraised its market value at \$415,000. There is an outstanding mortgage and a line of credit secured against the mortgage. Together there was an outstanding balance of \$234,666 as of December 2019. The equity in the home at that time was \$180,334. Mr. Nustad has been making all the mortgage and line of credit payments since separation.
- [36] Ms. Nustad continues to have child support responsibilities to the two children of the marriage. She has qualified, conditionally, for an unconventional mortgage. Ms. Nustad offered no evidence regarding how her salary and spousal support payments would be sufficient to take on such a large mortgage, with an interest rate of 8.05%. In fact, her counsel stated:

[Ms. Nustad's] future career prospects leave little likelihood of an income which will be comparable to that of Mr. Nustad. Indeed, the document found at tab C3 of Exhibit 5 indicates that for Ms. Nustad to qualify for a mortgage which would enable her to pay out the mortgage on the family home, she would require "support payments" of \$3,000 per month.

- [37] Ms. Nustad does not currently have career prospects beyond employment in the \$30,000 per annum range. While Ms. Nustad is entitled to support payments, the payments will include child support for which only a portion should go to the mortgage.
- [38] I am not persuaded that Ms. Nustad can afford to purchase Mr. Nustad's share of the equity in the family home. The evidence was insufficient regarding Ms. Nustad's future prospects. Even if she could manage the mortgage payments, on the evidence before me Ms. Nustad does not have access to the money required to purchase Mr. Nustad's half of the equity in the home. The family debt exceeds the value of family property unless the family home is sold.
- [39] Ms. Nustad argued that "notwithstanding the long-term disadvantage that it might work upon her," she would be satisfied trading off her interest in Mr. Nustad's pension credits "in a judgment which saw the former matrimonial home going to her." Unfortunately, the value of Ms. Nustad's 50% interest in Mr. Nustad's pension has not been assessed. There is no evidence before me of the present value of a one half share of Mr. Nustad's pension for the period they were together. I therefore do not have the evidence before me to take the 50% interest in the pension into account when determining whether to reapportion family property.
- [40] In addition, it would be significantly unfair to Mr. Nustad to receive no equity from the family home. Spousal support can adequately address the inequality in income between the parties.
- [41] In these circumstances, the home must be sold so the parties can divide the equity equally.
- [42] The parties are to have joint conduct of the sale of the family home. It should be listed for sale at a price agreed to by the parties or, failing agreement, at the average of two appraisals, one obtained by each party. It shall be sold at a price agreed to by the parties.
- [43] Until the sale of the family home, both Mr. Nustad and Ms. Nustad shall pay half of all the expenses associated with maintaining the family home and half of all mortgage and line of credit payments attached to the home.
- [44] The parties have leave to apply for further directions concerning the listing and sale of the family home.
- [45] Upon completion of sale of the family home, the sale proceeds will be distributed as follows:
- a. real estate commissions, and applicable GST on such commission;
 - b. conveyance costs and normal adjustments of sale;

- c. amounts owing and costs to discharge the following debts:
- i. the outstanding balances on the Royal Bank of Canada conventional mortgage loan account # *5716 and secured line of credit Acct. #*8107; and
- ii. the outstanding balance on the B2B RRSP loan creditor: B2B Bank account #***3934.
- [46] The remaining proceeds will be divided equally between the parties.

Excluded Property

- [47] In terms of excluded property, a "spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property": FLA, s. 85(2). Mr. Nustad testified regarding excluded property. Ms. Nustad did not challenge Mr. Nustad's evidence regarding the assets he claimed were excluded property. I therefore accept the excluded property identified in the Scott Schedule as excluded property.

Other Property

- [48] In terms of the other property, I have taken into account that Mr. Nustad paid most household expenses since the separation, including the mortgage payments in the amount of \$45,813 at the date of trial and various credit card and debt payments. Exhibit 3, Tab 1 shows household expenses of \$111,569.55 since the date of separation. Ms. Nustad paid for business and horse expenses out of the joint accounts until they were closed by Mr. Nustad in August 2018. These were shown to amount to \$49,560.70. Mr. Nustad continued to deposit his paycheques and to pay for his expenses out of these accounts until they were closed.
- [49] The parties were spending largely as they had during the marriage from October 2017 until August 2018 when Mr. Nustad paid off certain debts and closed accounts and cancelled credit cards. He continued to pay the mortgage and other household expenses apart from the internet account after August 2018. When she no longer had access to the joint accounts, Ms. Nustad cashed in her RRSP, valued at approximately \$90,000, to help with ongoing expenses.
- [50] Ms. Nustad makes much less money than Mr. Nustad and no child nor spousal support has been paid to date. While they were both spending out of the joint accounts this was not fundamentally unfair. However, since August 2018, this put Ms. Nustad at a distinct disadvantage. This disadvantage arose as a result of her contribution to Mr. Nustad's career during the marriage.
- [51] Consequently, I find that Ms. Nustad does not have to pay to Mr. Nustad the following amounts:
- \$1487 owed to Mr. Nustad for RBC account #***8236;
 - Unspecified withdrawals from RRSP AGF account #***3214CS which in testimony Ms. Nustad admitted was approximately \$80,000;

- \$171.74 from RBC account #***3805;
- \$7004.12 withdrawal from RBC account #***0507;
- the credit card debts which were paid off by Mr. Nustad; and
- amounts relating to the RBC chequing overdraft account.

[52] The household chattels are to be divided as per the Scott Schedule. The parties are to keep their own vehicles; Ms. Nustad will keep the 2008 Dodge Ram and Mr. Nustad will keep the 2008 Kia Spectra and the 2015 Polaris 570. The parties have agreed to pay each other out as set out in the Scott Schedule.

[53] Mr. Nustad is to retain the RBC account #***9667. Ms. Nustad should pay back her half of the \$18,600 from the Line of Credit 8107 to Mr. Nustad.

[54] The non-excluded amount of \$23,000 in the RRSP at AGF, account #7933, is to be divided equally in a spousal rollover. Any remaining balance in the RRSP AGF account #***3214CS is to be divided equally in a spousal rollover.

[55] Mr. Nustad will transfer his shares in Equidae Enterprises Inc. to Ms. Nustad and Ms. Nustad will indemnify and save harmless Mr. Nustad from any claims relating to this company.

[56] Ms. Nustad is entitled to a 50% interest in Mr. Nustad's B.C. Hydro pension accumulated by him between the date he commenced employment with the B.C. Hydro and the date of the parties' separation, October 21, 2017. Until Ms. Nustad receives her half interest in Mr. Nustad's pension, Mr. Nustad is a trustee of her interest. Mr. Nustad's pension will be divided between the parties in accordance with Part 6 of the FLA. Each of the parties will pay one half of any administration fees payable to the administrator in order to divide the pension between them.

[57] Mr. Nustad will maintain his life insurance policy with B.C. Hydro with Ms. Nustad and the children as beneficiaries. He is also to retain the other life insurance policy for the children so long as any of the children are children of the marriage. The parties' Canada Pension Plan credits are to be equalized from March 1, 1999 to October 21, 2017.

[58] The parties will account to each other for any amounts owing to each other pursuant to the terms of this order. Each party will pay to the other party such amounts owing, to the extent possible, from their respective share of the proceeds of sale of the family home.

[59] In the event I have missed an asset or debt, the parties have leave to apply for further directions.

Spousal Support

Legal Principles

General

- [60] In determining entitlement, quantum and duration of spousal support I must consider the statutory provisions governing support and the relevant authorities. Spousal support orders may be made under the FLA (ss. 161 and 162) or the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [DA] (s. 15.2). The objectives and factors that must be considered for spousal support mirror each other: *Li v. Liu*, 2014 BCSC 1110 at para. 35.
- [61] This order for spousal support is made under the DA.
- [62] The Spousal Support Advisory Guidelines ("SSAG") are an appropriate resource to consider when determining the amount of support: *Lahdekorpi v. Lahdekorpi*, 2016 BCSC 2143 at para. 20 [*Lahdekorpi*], relying on *Redpath v. Redpath*, 2006 BCCA 338 at paras. 37-38.
- [63] The provisions relating to spousal support are found in s. 15.2 of the DA. Section 15.2(6) sets out the objectives of spousal support which are to:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [64] The Court in *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [*Bracklow*] at para. 15, described the three grounds for entitlement to spousal support: compensatory, contractual, and non-compensatory (needs-based). There is no contractual support in this case.
- [65] The mere fact of marriage does not automatically entitle a party to spousal support. As stated in *Moge v. Moge*, [1992] 3 S.C.R. 813, marriage is not a "general tool of redistribution."

Compensatory Entitlement

- [66] Compensatory spousal support addresses the economic advantages enjoyed by one partner as a result of the other partner's efforts. It addresses the contributions of a spouse to the marriage and their losses upon its breakdown.
- [67] The importance of the marital standard of living in lengthy marriages has been emphasized in many cases. The starting point for this analysis was discussed in *Moge* at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. Furthermore, great disparities in the standard of living that would be experienced by spouses in the absence of support are often a revealing indication of the economic disadvantages inherent in the role assumed by one party. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[Citations omitted.]

- [68] Put simply, in long-term marriages there is an increased presumption that the partners should not be economically disadvantaged as a result of the separation. Nor should a partner be unjustly deprived of the standard of living enjoyed during the marriage. While spousal support does not guarantee that either party will continue to experience the standard of living enjoyed during the marriage, the parties are often entitled to roughly equal standards of living post-separation. Justice Martinson helpfully explained this in *W. v. W.*, 2005 BCSC 1010:
- [11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.
- [12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims.

[Citations omitted.]

Non-Compensatory Entitlement

- [69] Non-compensatory support is needs-based. It recognizes the economic hardship and loss of the marital standard of living that arises as a result of the economic interdependency during the marriage. It occurs at the breakdown of the relationship.

- [70] Non-compensatory support is based on the economic disadvantages generated by the dissolution of the marriage, not contributions made during the marriage: DA, s. 15.2(6)(c). It is not based on one spouse forfeiting a career opportunity or playing a supportive role in the marriage: *Lee v. Lee*, 2014 BCCA 383 at paras. 51-61 [Lee]. It is based on the social obligations that arise when a partner is unable to support themselves following the breakdown of a marriage: Bracklow.

Duration of Support and Self-Sufficiency

- [71] A recipient of spousal support has an obligation to make reasonable efforts to become independent and self-sufficient. It is not an absolute duty: *Leskun v. Leskun*, 2006 SCC 25 at paras. 26-27 [Leskun]; DA, s. 15.2(6)(d); *Chutter v. Chutter*, 2008 BCCA 507 at para. 56. The frequently cited decision in *Tedham v. Tedham*, 2005 BCCA 502 [Tedham] explains this obligation:
- [33] [Section] 15.2(6)(d) of the [DA] does not require self-sufficiency, but simply seeks to promote self-sufficiency "in so far as practicable". In determining what is practicable, regard must be had to all of the circumstances, including the age and gender of the spouse, her/his skills and education, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self-sufficient, which may be quite a different matter.
- [72] The duration of spousal support is shaped by the basis of entitlement. In non-compensatory claims, support is more likely to be viewed as transitional with the expectation that the recipient attain self-sufficiency as soon as practicable: *Moge* at 383; *Tedham* at paras. 58-60.

Claimant's Position

- [73] Mr. Nustad submits his guideline income for spousal and child support is \$137,814 (his 2019 Line 150 income of \$140,112 less union dues of \$2,298). Mr. Nustad argues his higher income from 2013 to 2017 was attributable to B.C. Hydro's need in those years to fill retiree positions with new hires. Andrew Gosse, a B.C. Hydro employee, testified that B.C. Hydro hiring dropped significantly in 2017 and the need for training newly hired employees decreased. The demand for training has leveled off now, such that there is less overtime available to the Mr. Nustad than there was between 2013 and 2017.
- [74] Mr. Nustad testified that he expects his 2020 income to be similar to his 2018 and 2019 income, in the range of \$140,000.
- [75] Mr. Nustad argues he encouraged Ms. Nustad to work outside of the home during the marriage. However, she continued to pursue her horse-related hobbies instead.

- [76] Mr. Nustad submits that Ms. Nustad's income for spousal and child support purposes should be imputed at \$53,400 per year if she is permitted to acquire the family home. This would include income from serving, janitorial work, tips of \$13,000, horse boarding, and imputed income from the Equidae business.
- [77] Mr. Nustad submits his living-out allowance is not income for the purposes of determining child and spousal support. He claims the higher cost of renting an apartment versus staying in hotels and eating out permits him to maintain better mental health, which benefits the family. He relies on *Briggeman v. Briggeman*, 2000 BCSC 900.
- [78] Mr. Nustad argues Ms. Nustad has not fulfilled her obligations to provide full and frank disclosure of her income. He says an adverse inference should be drawn.
- [79] Mr. Nustad argues Ms. Nustad has made no attempt to retrain or prepare herself for self-sufficiency, nor has she made any attempt to obtain meaningful and remunerative employment. She continues to persist in occupying herself with her "horse hobby". He asks that I impute Ms. Nustad's income in the amount of \$31,267 if there is an equal division of family property.

Respondent's Position

- [80] Ms. Nustad was working in a stable when the parties met. Ms. Nustad emphasized she originally hoped to become a veterinarian. However, she got pregnant when she was a year out of high school and became the primary caregiver of the parties' three children. Her hopes for a career were dashed.
- [81] Ms. Nustad had a number of jobs during the marriage. In the early years she worked at an A&W, a deli, and an equestrian center. She also did some babysitting. During the marriage she sold products through home-based businesses but these businesses made little profit.
- [82] Ms. Nustad operated the School District #27 lunch program on a part-time basis from 2010 to 2012. She also continued to run her home-based businesses, the primary one being a company named Equidae. The parties incorporated Equidae in April 2013 and Ms. Nustad sells horse tack through the company. The company has not been profitable.
- [83] Ms. Nustad argues that during their marriage she worked only sporadically outside the home. She denies that Mr. Nustad encouraged her to pursue a career. The marriage breakdown has left her with few career prospects.
- [84] Ms. Nustad takes the position that Mr. Nustad makes more income than he admits and his living-out allowance should be calculated as income for support purposes. He is paid \$130 per day when he is working at the Surrey Training Facility to cover his living-out expenses. They relied on this as extra income when they were married.

- [85] Ms. Nustad testified that she is interested in anything horse-related. She expressed interest in a veterinarian technician course which is a two-year course on campus in Brookes, Alberta. She is also interested in a horse reproduction course which is a one-year course taken partly online. She offered no further information regarding these courses or her career prospects should she take either of them.
- [86] Ms. Nustad has applied to New Waves Spa and Blue Spoon Catering, both in Williams Lake.
- [87] Ms. Nustad takes the position that Mr. Nustad's income should be imputed at \$205,183 based on his income between 2013 and 2017, rather than based on his 2018 and 2019 income. In the alternative, she argues that this Court should impute income to Mr. Nustad in the amount of \$186,523.
- [88] Ms. Nustad argues her income is \$26,000 per year.

Analysis

Incomes of the Parties

- [89] Entitlement to spousal support must take into account "the condition, means, needs and other circumstances of each spouse". This includes factors such as the length of cohabitation, the functions that each spouse performed during the marriage and the ability of the payer to pay: DA, s.15.2(4). The incomes of the parties must be carefully examined since each party seeks to impute income to the other.
- [90] Mr. Nustad made \$181,454 in 2015; \$183,754 in 2016; \$205,158 in 2017; and \$140,780 in 2018. These amounts do not include his living-out allowance when he works outside of Williams Lake but do include overtime that he takes in wages as opposed to time off work.
- [91] The year 2019 can help explain Mr. Nustad's pay. In 2019 Mr. Nustad's annual pay was \$140,111.53 and his recorded overtime pay at the end of December was \$30,941.25. The \$30,941.25 was not recorded on Mr. Nustad's T4 earnings because his overtime bank can be used either for time off or paid as earnings. The overtime Mr. Nustad earned in 2019 and recorded on his T4 earnings was \$17,809.56. His non-taxable living-out allowance was \$15,470. His union dues were \$2,298.
- [92] Mr. Nustad testified that his non-taxable living-out allowance of \$15,470 in 2019 was more than the actual costs for his apartment in the Lower Mainland. He testified that his rent was \$275 per month until January 2020. However, he stated that going forward from February 2020 his rent is increasing to \$775 per month. Mr. Nustad testified that his rent was lower before because he did handy work around the place for the owner.

- [93] Mr. Nustad's income has decreased in the past two years. I reject the suggestion that he intentionally declined overtime work post-separation. I accept his evidence that this work has decreased since 2017. Mr. Andrew Gosse confirmed that the training program has slowed down as apprentice numbers have dropped. Mr. Nustad will therefore have less overtime in the future.
- [94] Although it is not anticipated that Mr. Nustad will have as much overtime as he did in the past, he will continue to earn some overtime as he has over the past two years. I find he will continue to earn salary and overtime of approximately \$140,000 per year.
- [95] Mr. Nustad had receipts for his living-out allowance which included purchases for alcoholic beverages, a mattress, bedding, kitchen supplies, a vacuum, sporting equipment, and so forth. These are expenses he would incur whether he is traveling or living at home. Therefore, a portion of his living-out allowance should be considered income. I add \$8,000 per year to Mr. Nustad's salary as a result of his living-out allowance.
- [96] As a result, I impute Mr. Nustad's income to be \$148,000. This imputation of income will apply in any year in which his line 150 income (minus union dues), together with \$8,000 from his living-out allowance, falls below this amount.
- [97] An analysis of respondent's post separation employment is more difficult. The most recent years are relevant.
- [98] The evidence established that Mr. Nustad encouraged Ms. Nustad to work in recent years. This resulted in Ms. Nustad working for Du More Promotional Ltd. earning approximately \$14,000 in 2016 and 2017, and \$25,867 in 2018.[1] She quit this job in 2019.
- [99] In 2019, Ms. Nustad began working at Billy Bob's Country Bar & Grill in Williams Lake. She is a server and she works as a janitor. Her pay statements for August and September 2019 established she is making approximately \$14,000 from this job. However, she did not record tips in her financial statements. She admitted in cross-examination that her tips are about \$50 per shift. She also admitted that she earns income from boarding horses.
- [100] Ms. Nustad has not provided any updated records since February 28, 2019. Ms. Nustad's income tax returns show she earns approximately \$26,000 per year. However, this does not account for her tips or her income from boarding horses. Since I have determined the family home must be sold, the boarding income is irrelevant.
- [101] In terms of wanting to become a veterinarian, Ms. Nustad did not take any steps during the marriage or since separation to upgrade her education, apart from a food safety certificate, an online veterinary technician course, and an equine nutrition course. There is not enough evidence before me to find that but for the marriage Ms. Nustad would have become a veterinarian.

- [102] Ms. Nustad sells products through her home-based businesses, with the main business being Equidae. Equidae shows a loss in all years up to the last disclosure for 2017. She admitted in cross-examination that this business supplies her and Adanna with horse tack.
- [103] Ms. Nustad has not registered in either course in which she expressed interest at trial. She did not provide evidence of the cost of these courses or her career prospects if she took these courses. Ms. Nustad is currently looking for other employment. In testimony she stated she was unsure what her ongoing income would be if she obtained either of the jobs for which she applied.
- [104] I impute Ms. Nustad's income to be \$30,000 to account for her T4 income and her tips. I decline to impute income from Equidae as the evidence demonstrated that the business is not profitable and will likely be dissolved. I also cannot add income for horse boarding since the property will be sold.
- [105] This imputation of income will apply in any year in which Ms. Nustad's line 150 income, together with any tips, falls below this amount.

Spousal Support Entitlement

- [106] There is no dispute that Ms. Nustad is entitled to spousal support. The parties were married for a relatively long time. They were financially interdependent during the marriage. Ms. Nustad contributed to Mr. Nustad's career by following him across the province and taking on the primary childcare responsibilities during the marriage. There were economic advantages conferred upon Mr. Nustad due to the roles the parties assumed during the marriage.
- [107] Ms. Nustad pursued minimal employment during the marriage in order to care for the children. While Mr. Nustad encouraged Ms. Nustad to work outside of the home in the later years of the marriage, given the functions she performed during the marriage, she has been placed at an economic disadvantage relative to Mr. Nustad. She is therefore entitled to compensatory support to equalize the parties' income: Moge at 861-863; Lahdekorpi at para. 21. Ms. Nustad is also entitled to non-compensatory support arising from the economic hardship she suffered as a result of the breakdown of the marriage and the parties' economic interdependency: Lee. This hardship is evident in the fact Ms. Nustad had to encroach upon her RRSPs to make ends meet after the separation.
- [108] Spousal support is ordered at the high level of the SSAG for two years. I have placed a limit of two years because Ms. Nustad is to strive for economic self-sufficiency within a reasonable period of time: DA, s. 15.2(6); Bracklow at para. 29. Ms. Nustad is relatively young and is likely capable of finding work that provides her with a reasonable standard of living. After the two years spousal support is ordered at the mid-range level, subject to the review outlined below. This will allow Ms. Nustad to maintain a standard of living commensurate with that enjoyed during the marriage and provide her with time to adjust to her new situation. Together with the imputation of income to Mr. Nustad, this will

adequately address the objectives of spousal support.

- [109] Mr. Nustad will pay Ms. Nustad spousal support in the amount of \$2,867 per month, commencing on February 1, 2020 and continuing on the first day of every month. It will be reduced after two years to the mid-level range unless varied by court order or agreement of the parties. No spousal support arrears are ordered based on the division of family debts.
- [110] Ms. Nustad is to commence paying her share of the mortgage and attached line of credit on February 1, 2020.
- [111] Each year the parties shall exchange a Financial Statement in Form F8 with appropriate attachments. Spousal support should be adjusted as necessary.
- [112] Section 15.2(3) of the DA allows the court to attach conditions to a spousal support order, including that the order will be reviewed at a specific time or after a specific event: Leskun at para. 36. Reviews are the exception and not the rule. However, in cases of genuine and material uncertainty, a review allows the parties to bring an application to adjust spousal support without having to establish a material change in circumstances: Leskun at para. 39.
- [113] Mr. Nustad requests a review after three years. Given the relatively young age of the parties and the general obligation to make efforts to become independent and self-sufficient as soon as practicable, I agree a review is warranted in this case. I therefore order a review, on either party's application, after May 1, 2026. The review should determine both parties' Guideline income and its impact on the quantum and duration of spousal support.

Child Support

- [114] I need not set out the legal principles or undertake a detailed analysis regarding child support because there are no significant issues regarding child support. Both parties agree that it should be paid for the two children who are still children of the marriage.
- [115] Child support orders may be made under either the FLA (s. 147) or the DA (s. 15.1). This order for child support is made under the DA.
- [116] The following facts are relevant. Adanna intends to attend university or college in Prince George in September 2020. There is no RESP for Adanna. The estimated cost of Adanna's first year is approximately \$20,000. Mr. Nustad testified that he intends to use approximately \$20,000 of the money from this overtime bank to pay for Adanna's education costs commencing in September 2020.
- [117] Ms. Nustad has not provided evidence of how she can contribute to the education of the children. She has not been helping the parties' oldest daughter. Mr. Nustad has helped her with her education.
- [118] There is an RESP in the amount of \$1,500 for Brodie. I assume the parties intend to continue contributing to this RESP.

Analysis

- [119] Mr. Nustad's Guideline income is \$148,000 for the purposes of child support; Ms. Nustad's Guideline income is \$30,000 for the purposes of child support. The parties will continue to support each of the two children of the marriage until they are no longer children of the marriage.
- [120] Mr. Nustad will pay Ms. Nustad child support in the amount of \$1,651 per month, commencing February 1, 2020 and continuing on the first day of every month. There is to be no retroactive child support before February 1, 2020 based on the division of family debts.
- [121] Each year the parties shall exchange a Financial Statement in Form F8 with appropriate attachments. Child support should be adjusted as necessary. Child support shall also be adjusted when a child ceases to be a child of the marriage.
- [122] The parties will retain the RESP in trust for Brodie. All decisions regarding the management and distribution of funds from the RESP will be made jointly by the parties. The parties will exchange copies of all documents, including statements of the account, as they receive them.

Divorce

- [123] I am satisfied that there has been a breakdown in the Nustads' marriage, they have been separated for at least one year, there is no possibility of reconciliation, and there has been no collusion.
- [124] Subject to s. 12 of the DA, Wesley Nustad and Amber Nustad, who were married at Houston, B.C. on August 21, 1999, are divorced from each other. The divorce is to take effect on the 31st day after the date of this order.

Conclusion

- [125] In summary, I make the following orders under the FLA:
- (a) The family home will be sold and the proceeds will be divided as ordered earlier in these reasons.
 - (b) Mr. Nustad's claim of excluded property as set out in the Scott Schedule is accepted.
 - (c) The remaining family property will be divided as ordered earlier in these reasons.
- [126] I make the following order under the DA:
- (a) Subject to s. 12 of the DA, Wesley Nustad and Amber Nustad, who were married at Houston, B.C. on August 21, 1999, are divorced from each other. The divorce is to take effect on the 31st day after the date of this order.

- (b) Mr. Nustad's imputed annual income is \$148,000.
- (c) Ms. Nustad's imputed annual income is \$30,000.
- (d) Commencing February 1, 2020, Mr. Nustad will pay Ms. Nustad spousal support in the amount of \$2,867 per month. This will be adjusted after two years to mid-range spousal support.
- (e) Commencing February 1, 2020, Mr. Nustad will pay Ms. Nustad child support in the amount of \$1,651 per month.
- (f) Each year the parties shall exchange a Financial Statement in Form F8 with appropriate attachments. Spousal and child support should be adjusted if the parties' income is greater than the imputed amount.
- (g) Child support shall be adjusted if a child ceases to be a child of the marriage.
- (h) A review of spousal support can occur after six years as set out earlier in these reasons.

[127] With respect to costs, I find success was divided and I would be inclined to order that each party bear their own costs. However, Mr. Nustad asked for leave to make submissions on costs. If the parties cannot agree on costs, either of them can make arrangements to further address the issue of costs, providing they advise the Court of their intention to do so within 45 days of these reasons.

"MacDonald J."

- [1] Ms. Nustad's actual income was higher but this was due to some RRSP withdrawals, not income earned.

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