

CANADA / JUDGMENT

P.W. v. G.Z.

2022 BCSC 1323

COURT

Supreme Court of British Columbia

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2022 BCSC 1323 P.W. v. G.Z.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

P.W. v. G.Z.,

2022 BCSC 1323

Date: 20220804

Docket: E193422

Registry: Victoria

Between:

P.W.

Claimant

And

G.Z.

Respondent

Before: The Honourable Madam Justice Murray

Reasons for Judgment

Counsel for Claimant:

R. Neary

M. Browne

Counsel for Respondent:

K. Melbye

J. Holm

Place and Date of Trial:

Victoria, B.C.

October 12-15, 18-21, 2021

November 23, 2021

December 16, 2021

and January 24-28, 2022

Place and Date of Judgment:

Vancouver, B.C.

August 4, 2022

Table of Contents

INTRODUCTION.. 3

BACKGROUND.. 3

ISSUES.. 6

CREDIBILITY.. 6

ISSUE 1: PARENTING ARRANGEMENTS OF N.Z. 9

ISSUE 2: CHILD SUPPORT AND SPECIAL EXPENSES.. 12

Adverse inference. 14

Imputed Income. 17

G.Z. 17

P.W. 21

Child Support and s. 7 expenses. 22

Child support 22

Section 7 Expenses. 23

ISSUE 3: SPOUSAL SUPPORT.. 25

ISSUE 4: DIVISION OF FAMILY PROPERTY.. 27

Mercedes G wagon.. 28

Motorcycles. 28

Timeshare. 28

The San Juan house. 28

Richmond condominium.. 29

Edgecliffe. 29

CONCLUSION.. 30

INTRODUCTION

- [1] The issues in this high conflict family trial involve the parenting arrangements for the parties' child, division of property, and support, both child and spousal.
- [2] The claimant wife, P.W., seeks a divorce, the majority of parenting time, an unequal division of assets, and orders for child and spousal support based on G.Z. having an imputed income of \$150,000. The respondent husband, G.Z., seeks to have parenting time divided equally. He agrees that he is responsible for paying child support but argues that his income is much less than that that the claimant seeks to have imputed to him. He takes the position that because of his modest income he should not be required to pay spousal support.
- [3] While the parties agree that family property should be divided, they do not agree on a method of determining a fair division or what assets constitute family property.
- [4] By way of counterclaim, G.Z. seeks unequal division of family property, including the house on San Juan Avenue in which P.W. is currently living (the "San Juan house") and excluding a condominium in Richmond which is in his name only (the "Richmond condominium"). Although in his counterclaim G.Z. seeks spousal support, he did not give or call evidence or make submissions in pursuit of that claim at trial.

BACKGROUND

- [5] The parties lived in a common-law relationship from about June 2009 until approximately April 2019. The parties disagree as to when they separated. P.W. says it was April 15, 2019; G.Z. says it was May 10, 2019. Whether they separated in April or May 2019 is of no moment to the issues in this trial. The parties have one son together, N.Z., born May 1, 2011. N.Z. has lived with his mother since the separation and has seen little of his father.
- [6] P.W. has an older daughter, M.M., from a previous relationship. G.Z. has a daughter and two sons from other relationships. His daughter, A.Z. is currently attending UBC and is living on her own in Vancouver. His sons, aged 9 and 15, live with their mother, G.Z.'s wife, Y.S. and G.Z. in Victoria. It is clear from the evidence that G.Z. commenced and continued his relationship with Y.S. prior to his separation from P.W. In fact, G.Z. and Y.S. had their youngest son before he separated from P.W. Throughout these reasons for judgment I will refer to Y.S. as G.Z.'s wife as, although they are now legally divorced, that is how he refers to

her. According to the evidence Y.S. lived primarily in China during the parties' relationship but her and G.Z.'s sons G.Z. came to Canada to live with P.W. and G.Z. At some point Y.S. also moved to Richmond and then Victoria.

- [7] G.Z. was the sole financial provider during the parties' relationship. P.W. was the primary caregiver for N.Z. as well as G.Z.'s three children from other relationships. The parties' financial arrangement was that G.Z. would deposit money into the parties' joint bank account from which P.W. would pay the mortgages, bills and expenses and manage the family home.
- [8] Throughout the parties' relationship G.Z. travelled back and forth to China for business. G.Z.'s primary place of business and sources of income were located in Mainland China. He stayed in China for weeks to months at a time, while P.W. mostly remained in Canada.
- [9] While together, the parties enjoyed a lavish lifestyle. They lived in a home in Victoria which was assessed in 2020 at over \$3.9 million (the "Edgecliffe property" or "Edgecliffe"), drove expensive cars including a Mercedes G wagon which G.Z. bought with \$170,000 cash in 2013, and sent N.Z. to a private school. G.Z. pledged a donation of \$350,000 to N.Z.'s private school in return for name rights to a newly constructed building. G.Z. belonged to a private golf course.
- [10] The family home, which was purchased by the parties in June of 2015, had a mortgage balance of approximately \$1.6 million as of November 2019. The mortgage payments were up-to-date at the time of separation, as were all of the parties' other payments. That changed almost immediately following the separation. After the bank commenced foreclosure proceedings, Edgecliffe was sold on July 31, 2020. Proceeds of the sale are being held in trust by P.W.'s counsel, Mr. Neary.
- [11] In addition to Edgecliffe, in May 2011 G.Z. purchased a condominium in Richmond, assessed at over \$1.2 million in 2020. While G.Z. is solely on title as owner, he claims that it belongs to his mother and his wife. P.W. claims the condominium is family property subject to equal division. That condominium is also currently the subject of foreclosure proceedings due to default of mortgage payments.
- [12] G.Z. claims impecuniosity. He says that his businesses in China are no longer viable. He says that he has had trouble finding work in Canada as his English is poor and maintains that the only work he could find in Canada is as a food delivery driver. He has been delivering food since November 2020 earning approximately \$45,000 a year. He claims that as his only source of income.
- [13] Likewise, P.W. claims that she is destitute. She is not employed, nor has she made any effort since separation to find a job. P.W. lives with her daughter M.M. in a house she says is owned by M.M.

- [14] On March 16, 2021, on a without prejudice basis, I imputed to G.Z. an income of \$150,000 and ordered that he pay to P.W. interim child support of \$1,356 per month and interim spousal support of \$2,887 per month for a total of \$4,243 per month, retroactive to September 1, 2019, until further court order or by agreement of the parties. The arrears and the monthly support payments going forward have been paid to P.W. out of the proceeds of sale of Edgecliffe being held in trust by her counsel.
- [15] Two interim distributions have been made from the proceeds of Edgecliffe. On March 16, 2021 I ordered that \$137,000 be released to P.W. and on January 21, 2022 I released, by consent, \$50,000 to G.Z. Both orders were made pursuant to s. 89 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] to fund the parties' family law proceedings. As of July 1, 2022, approximately \$244,460 remained in trust.

ISSUES

[16] The issues to be decided are:

1. Parenting arrangements for N.Z.;
2. Child support and special expenses;
3. Spousal support; and
4. Division of family property and debt.

[17] I will consider each issue in turn. Before I do, I must touch on the credibility of the witnesses.

CREDIBILITY

[18] The credibility of the witnesses and the reliability of their evidence is a key issue.

[19] The distinction between reliable evidence and credible evidence was discussed by Doherty J.A. in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 (C.A.) at page 526:

Testimonial evidence can raise veracity and accuracy concerns. The former relates to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[20] In *Bradshaw v. Stenner*, 2010 BCSC 1398, at para. 186, Dillon, J. set out a non-exhaustive list of factors the court may consider when assessing credibility:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 1919 CanLII 11 (SCC), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Faryna v. Chorny*, 1951 CanLII 252 (BC CA), [1952] 2 D.L.R. 354 (B.C.C.A.) [Farnya]; *R. v. S.(R.D.)*, 1997 CanLII 324 (SCC), [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [21] Besides the parties, few witnesses testified at trial. P.W. called her daughter, M.M. and G.Z. called his daughter A.Z. and N. who, along with her husband, was G.Z.'s business partner in a hotel in China and in 2017 lent G.Z. money. She testified that much of the money has never been repaid. The N.s have commenced a court action against G.Z. to recover these funds.
- [22] I have no difficulty accepting the evidence of N. as credible and reliable. Although N. is clearly upset with G.Z., her evidence makes sense and is corroborated by documentary evidence.
- [23] Similarly, I have no trouble finding A.Z. to be credible and reliable. I found A.Z. to be poised, intelligent, well spoken and forthright. She told painful stories of her life with her father and P.W. including how she felt ignored and isolated by them. Although she was called as a witness by her father she was not biased; in fact, her evidence is clear that her relationship with G.Z. is strained and distant. Her evidence is corroborated by documentary evidence.
- [24] To the contrary, I have difficulty with the evidence of the parties and M.M.
- [25] In her testimony M.M. showed a clear bias toward her mother. Her manner of testifying changed dramatically in cross examination. To her mother's counsel M.M. was responsive, pleasant and forthcoming. With G.Z.'s counsel, in cross examination, her demeanour was the opposite - curt and impatient. M.M. has little positive to say about G.Z. and views herself, and not G.Z., as N.Z.'s other parent. Because of her obvious hostility toward G.Z. I must treat M.M.'s evidence with care.
- [26] I have a great deal of difficulty with both P.W. and G.Z.'s evidence especially as it concerns their finances. There is a lack of corroboration, particularly in the form of documentary evidence and their lifestyles belie their professed impecuniosity.
- [27] Further it is clear that P.W. holds great hostility toward G.Z. As with M.M. for that reason her evidence must be treated with care.

- [28] I must touch on G.Z.'s language barrier and how it impacted, if at all, his ability to testify and my assessment of his credibility. G.Z.'s first language is Cantonese. G.Z. can only understand basic English. He was assisted throughout his trial by an interpreter arranged by his counsel. For the first segment of the trial, G.Z. had a Mandarin interpreter assisting him, as apparently it is difficult to find a Cantonese interpreter. Both G.Z. and the interpreter confirmed that they were able to understand each other. I was satisfied that that was the case during the plaintiff's case. However, on a couple of occasions during G.Z.'s evidence the interpreter brought to my attention that she and G.Z. had had a miscommunication and clarified with G.Z. the question asked and his answer. After each instance G.Z. and the interpreter insisted that they were communicating well and that they were aware when they were having a misunderstanding. On that basis both counsel and I were confident that G.Z. was understanding the proceedings and that his evidence was accurate. We continued.
- [29] On October 20, 2021, the third day of G.Z.'s testimony, it became apparent to both counsel and I that there were more issues in the translation and that we could not continue with the interpreter. We halted proceedings and adjourned the trial. I ordered transcripts of the proceedings. We recommenced the trial on January 24, 2022 with a new interpreter, again in Mandarin, who was able to communicate with G.Z. with no difficulty. G.Z. had had the opportunity of reviewing all of the transcripts with the interpreter. When he recommenced his testimony, he clarified a portion of his evidence previously given and confirmed that the rest was accurate. At the end of the day, having had the chance to review the transcripts of his evidence with his new interpreter, I am satisfied that G.Z. was able to testify fairly and accurately.
- [30] I give that background for a couple of reasons. First to explain the reason the trial proceeded in segments over several months. This will be more relevant when I address parenting time. Secondly because it relates to credibility. It is always more difficult to assess evidence when it comes through an interpreter for the obvious reason that the court is not hearing the words through the witness but through a neutral third party. The interpreter may deliver the words with a different emphasis or inflection than the witness did. In this case, there was also some misunderstanding along the way. I take these factors into consideration when assessing G.Z.'s credibility.
- [31] I will return to the parties' credibility and the reliability of their evidence as I consider the issues.

ISSUE 1: PARENTING ARRANGEMENTS OF N.Z.

- [32] When considering the issue of parenting time, the sole consideration of this court is the best interests of the child.
- [33] Section 37 of the FLA provides that in determining what is in the best interests of a child the court must consider, amongst other things:
- a) the child's health and emotional well-being;

- b) the child's views, where appropriate;
- c) the history of the child's care;
- d) the child's need for stability having regard to their age and stage of development; and
- e) the ability of each parent to exercise his or her responsibilities as a parent.

- [34] The FLA also provides in s. 37(3) that an order is not in the best interests of a child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.
- [35] The Supreme Court of Canada has recently stated that the "maximum contact principle" is better conceptualized as the "parenting time factor". This means that the best interests of the child remain the sole determinant of parenting arrangements, and that a fulsome and child-centric analysis is required to determine how much parenting time with each parent will fulfill this goal: *Barendregt v. Grebliunas*, 2022 SCC 22 at 131-135.
- [36] G.Z. seeks to have increased parenting time with N.Z. Before the separation G.Z. says that he had a close relationship with N.Z. They shared many interests, golf in particular. N.Z. is an avid golfer as is his father. From the time the parties separated to May 2020, G.Z. saw N.Z. only a few times at N.Z.'s school. After May 2020 P.W. refused to let G.Z. see N.Z. at all. On September 10, 2021, Punnett, J. ordered that G.Z. have weekly 30-minute Zoom meetings with N.Z. These meetings were supervised by M.M. who testified that N.Z. always becomes upset after spending time with his father, and that in her view G.Z. is not a good father. For the reasons outlined above, I attach limited weight to M.M.'s statements.
- [37] One of the benefits of the trial progressing in a staged manner was that partway through, on December 16, 2021, I had the opportunity to meet with N.Z. N.Z. impressed me as a bright, thoughtful 10-year old. Having spent virtually no time with his father since his parents separated in April 2019, N.Z. understandably expressed some unease at spending long periods of time with his father. N.Z. told me that he would like to spend time with his father and his step-brothers, particularly J.Z. with whom he is close in age, starting with short visits and then gradually increasing the time as he feels more comfortable. After I met with N.Z. I summarized what he told me for the benefit of the parties who then consented to an order granting parenting time to G.Z. once per week for three (later increased to four) hours at a time. This continued through the remainder of the trial. The parties agree that it has been going well.
- [38] P.W. seeks an order that she be allocated all parenting responsibilities, that her house be N.Z.'s primary residence, and that parenting time continue at four hours per week for at least the next six months, and then proceeding according to further court order.
- [39] G.Z. seeks to have a parenting schedule set to alleviate the necessity of returning to court. He suggests a schedule that starts with one night per week, and then gradually increases over 5 months, until N.Z. is able to spend alternating weeks with each parent.

- [40] While the views of the child are not determinative, I am satisfied that N.Z.'s views should be considered. N.Z. turned 11 at the beginning of May. He is mature for his age and as I stated above, thoughtful. He was able to clearly articulate his feelings surrounding the reintegration of his father into his life. What he said made sense.
- [41] After considering all of the evidence I find that the visitation has to grow slowly and steadily. N.Z. has to be able to rebuild trust with his father, which was eroded during the course of their separation. As will be clear from these comments, I do not find the schedule proposed by G.Z. to be in the best interests of N.Z.; it is too much too fast. But neither do I find the order sought by P.W. to be in N.Z.'s best interests; it is too little too slow. P.W.'s proposal of an order for six months from the date of this judgment is effectively a year of weekly visits of three to four hours. Plus, it requires a further court order to give effect to the plan to increase G.Z.'s parenting time.
- [42] I am satisfied that it is in N.Z.'s best interests to have a relationship with his father with regular visitation and that the visitation should increase gradually. I made these views clear during trial. Ideally the parties will be able to work that out together. If not, I will remain seized of the parenting issue for 12 months from the date of this decision to accommodate reviews.
- [43] Accordingly, I order that G.Z. have weekly parenting time with N.Z. each Saturday for up to six hours at a time with pickup and drop off at Majestic Park. This order will remain in force until further court order or by agreement of the parties. If there are any problems with the Saturday parenting time the parties shall communicate via email. Changes to the time and date may be made by consent.
- [44] I stress that this order is being made with the expectation that G.Z.'s parenting time will increase gradually and that the parties will be able to work that out themselves. In the event the parties are unable to agree on parenting time they may schedule a remote appearance with me through Supreme Court scheduling for a morning at 9 a.m.

ISSUE 2: CHILD SUPPORT AND SPECIAL EXPENSES

[45] Three fundamental principles apply to all child support applications:

- a) parents have a joint and ongoing legal obligation to support their children;
- b) the children, not the custodial parent, have the right to support; and
- c) support payments are based on earning capacity and not only on what a parent actually earns; as a result a parent has a legal obligation to earn as much as he or she is reasonably capable of earning.

(M.A.G. v. P.L.M., 2014 BCSC 126, at para. 52)

- [46] As stated above, P.W. seeks an order for child support for N.Z. based on G.Z. having an \$150,000 annual income imputed to him. P.W. further seeks an order for lump sum child support as she maintains that G.Z. will never voluntarily pay support as evidenced by his failure to do so following the parties' separation. G.Z. argues that the income that P.W. seeks to have imputed to him is unrealistically high and says that his income should be based on the \$45,000 he makes as a delivery driver: his sole source of income.
- [47] Section 19 of the Child Support Guidelines allows the court to impute income in a number of situations including where the spouse is intentionally under-employed.
- [48] The test for imputing income is set out by our Court of Appeal in *Marquez v. Zapiola*, 2013 BCCA 433:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.
- [Emphasis added.]
- [49] Circumstances to be considered include:
- a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
 - b) it appears that income has been diverted which would affect the level of child support to be determined under the Guidelines;
 - c) the spouse has failed to provide income information when under a legal obligation to do so; and
 - d) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax: s. 19(1).

- [50] The task of determining G.Z.'s income is a difficult one. For reasons outlined above, I am not persuaded that G.Z.'s testimony was entirely truthful or accurate. It was filled with contradictions. Little if any was backed up by documentary evidence. G.Z. failed to provide full financial disclosure. For example, G.Z. failed to provide a T4 or other proof he did, in fact work as a delivery driver, or what his salary might be. He also failed to call necessary witnesses despite them being available. These witnesses include G.Z.'s mother, his wife and L., who is letting G.Z. and his family live rent-free in their homes.
- [51] P.W. submits that the court should draw an adverse inference from G.Z.'s failure to provide documentary evidence or call witnesses that could have corroborated G.Z.'s evidence.
- [52] I will consider the distinct issues of imputing income and adverse inference in turn. It will also be necessary to impute income to P.W. for the purposes of calculating s. 7 expenses.

Adverse inference

- [53] Our Court of Appeal summarized the adverse inference principle in *Singh v. Reddy*, 2019 BCCA 79:
- [8] The principle is described by authors S.N. Lederman, A.W. Bryant and M.K. Fuerst in *The Law of Evidence in Canada* (2018, 5th ed.) as follows:

§6.471 In civil cases, an unfavorable inference can be drawn when, in the absence of an explanation, a party litigant does not testify, or fails to provide affidavit evidence on an application, or fails to call a witness who would have knowledge of the facts and would be assumed to be willing to assist that party. In the same vein, an adverse inference may be drawn against a party who does not call a material witness over whom he or she has exclusive control and does not explain it away. The inference should only be drawn in circumstances where the evidence of the person who was not called would have been superior to other similar evidence. The failure to call a material witness amounts to an implied admission that the evidence of the absent witness would be contrary to the party's case, or at least would not support it. [Emphasis added.]

In *Thomasson v. Moeller* 2016 BCCA 14, this court summarized the principle in similar terms:

An adverse inference may be drawn against a party, if without sufficient explanation, that party fails to call a witness who might be expected to provide important supporting evidence if their case was sound: *Jones v. Trudel*, 2000 BCCA 298 at para. 32. The inference is not to be drawn if the witness is equally available to both parties and unless a prima facie case is established: *Cranewood Financial v. Norisawa*, 2001 BCSC 1126 at para. 127; *Lambert v. Quinn* (1994) 110 D.L.R. (4th) 284 (Ont. C.A.) at 287. [At para. 35; emphasis added.]

(See also *Rohl v. British Columbia (Superintendent of Motor Vehicles)* 2018 BCCA 316 at paras. 1-5.)

[9] As noted in Rohl, it is now generally accepted that the court is not required as a matter of law to draw an adverse inference where a party fails to call a witness. Thus in *Witnesses* (looseleaf), A.W. Mewett and P.J. Sankoff write:

A considerable number of cases now reinforce the view that there is no such thing as a "mandatory adverse inference" to be drawn where a party fails to call a witness. Rather, the question of whether to make such an inference seems to depend upon the specific circumstances, in particular whether:

- There is a legitimate explanation for the failure to call the witness;
- The witness is within the "exclusive control" of the party, and is not "equally available to both parties"; and
- The witness has material evidence to provide; and
- The witness is the only person or the best person who can provide the evidence.

Essentially, the decision to draw an adverse inference is discretionary and premised on the likelihood that the witness would have given harmful testimony to the party who failed to call him or her. In a case before a jury, where there are circumstances that support the drawing of such an inference, the trial judge should charge the jury that it is "appropriate for a jury to infer, although [jurors] are not obliged to do so, that the failure to call material evidence which was particularly and uniquely available to [a party] was an indication that such evidence would not have been favourable to [that party]. [At 2-23 to 2-24; emphasis added.]

[54] In this case G.Z. failed to call the witnesses who are best positioned to offer supporting evidence. Regarding his mother, Mrs. Z., G.Z. was at all material times (and perhaps still is) involved in business with his mother in China. According to G.Z. his mother gave the family money throughout their relationship. He says now that his mother is no longer in a financial position to do so. He claims that she is the true owner (along with his wife, Y.S.) of the Richmond condominium that is in G.Z.'s name and which he seeks to exclude from family property. Neither G.Z. nor his counsel provided an explanation of why Mrs. Z. was not called as a witness, aside from the fact that she lived in China. The fact that Mrs. Z. was living in China means that she was not equally available to both parties. Only G.Z. and his counsel could reasonably have been expected to secure her testimony at trial. However, Mrs. Z. could have testified remotely. In light of all the circumstances, I find the only reasonable inference to be drawn from this fact is that her testimony would not have supported G.Z.

[55] Concerning Y.S., G.Z. claims that she is his wife and business partner. According to G.Z. she co-owns the Richmond condominium with his mother and that she paid for everything following the parties' separation. Y.S. was in the courtroom for two days of proceedings and I am told was at the courthouse throughout the trial. Y.S. clearly has material evidence to give regarding G.Z.'s financial situation and the Richmond condominium. Because of Y.S.'s relationship with G.Z., I am satisfied that she was not equally available to P.W. No explanation was proffered as to why she was not called. As with Mrs. Z., the only reasonable

inference to be drawn is that Y.S.'s evidence would have been contrary to G.Z.'s case.

[56] Finally, with respect to L., G.Z. claims that L. has let him, Y.S. and their sons live rent-free in first a waterfront house and then a large house on the understanding that when G.Z. has money he will repay them. Again, no explanation was provided as to why L. could not have testified. Although this evidence would have been helpful if it supported G.Z. I am not convinced that it would have been superior to other similar evidence, for example from Y.S. Nor am I convinced that L. was not available to P.W. While I decline to draw an adverse inference from G.Z.'s failure to call L., the lack of corroborating evidence will certainly be considered when assessing G.Z.'s evidence.

Imputed Income

G.Z.

[57] P.W. argues that an income of \$150,000 should be imputed to G.Z. G.Z. counters that income should not be imputed to him. He maintains that he is a salaried employee. His income should be the amount he makes from working as a food delivery person, which is \$45,000. As above, the burden of proof is on P.W. to prove that income should be imputed to G.Z.

[58] G.Z. submits that it is not enough to say that income should be imputed because there are inconsistencies in the evidence and witnesses that should have been called. G.Z. stresses that P.W. was in charge of the parties' finances, managing the home and running their business, so she was in a position to provide proof of his finances as well. He adds that there are issues with P.W.'s credibility.

[59] According to G.Z., many things contributed to his financial downfall. All of his income came from a bar and massage parlour he owned in China. The COVID-19 pandemic and the overall bad business climate in China were disastrous for these businesses: income decreased dramatically; debt amassed. He eventually had to close his businesses. G.Z. says that he was forced to look for work in Canada. The only work he could find with his limited English was as a food delivery person; a job he still holds.

[60] I find the following facts to be significant:

1. Prior to the separation in April or May 2019, G.Z. was able to pay all of the parties' living expenses, including mortgage payments of approximately \$12,000 per month on the family home and the Richmond condominium;
2. The last payment toward the mortgage on Edgecliffe was made on May 30, 2019, the month after G.Z.'s sons with Y.S. moved out of that house. The mortgage then fell into default, resulting in foreclosure proceedings being instituted by CIBC;
3. In 2019 all but one mortgage payment was made on the Richmond condominium. G.Z. says that Y.S. made the payments, but as noted above he failed to call Y.S. to corroborate that claim;

4. Of the \$350,000 G.Z. pledged to N.Z.'s private school in exchange for a building being named after him, he paid only \$144,645; \$39,645 of that was donated through a gift in kind, a car; G.Z.'s name was eventually removed from the building because he failed to fulfil his pledge;
5. N. testified that on March 14, 2016, G.Z. borrowed 3M RMB (approximately \$540,000 CDN) from herself and her husband. N. explained that they lent G.Z. the money because they had done business with him in the past, they knew that he owned a profitable bar in China, and that his family was considered wealthy; in addition, they were planning to send their son to Canada and G.Z. told them he would repay the loan in Canadian funds. G.Z. repaid half of the debt by July 12, 2019 and has paid nothing since. N. and her husband have filed a civil suit against G.Z. for the remaining funds;
6. P.W. testified that in 2018 G.Z. started talking about having financial problems and he told her that it was harder to make money. Despite his assurances that she did not have to worry, money was not coming in as it had and they started making payments late; by late 2018 she was worried about not being able to pay bills on time and in January 2019 G.Z. asked P.W. to start paying private school tuition and their WorldMark timeshare with his credit card in China. This is corroborated by texts between the parties;
7. G.Z.'s life insurance policies have lapsed due to non-payment of premiums;
8. Over roughly three-and-a-half months from the separation date to July 15, 2019, G.Z. indirectly deposited about \$100,000 into the parties' joint account for P.W. to use to pay mortgages and living expenses;
9. G.Z. testified that he is unable to get a job in Canada as his English is too poor;
10. G.Z. says that when his businesses in China started suffering he got the money to pay the parties' expenses through private loans and financial support from his mother;
11. G.Z. claims that his mother is no longer able to financially assist him but he failed to call her as a witness to corroborate that;
12. G.Z. testified that "friends" were letting him and his family live rent free in their houses and lending him money on the understanding that he will pay them back when he can. He failed to explain why they would lend him money or allow him to live rent-free or how he would be able to pay them back; nor, as discussed above, did he call these people as witnesses to corroborate his claims.

[61] I further find significant the following email correspondence between G.Z. and P.W. that preceded the separation, which was filed as an exhibit at trial:

1. On December 18, 2018:

G.Z.: "Another ten years of hard work. At least an annual income of 2.5 million (approximately \$500,000 CDN). For now it seems like five years has been taken care of. Hopefully RMB does not go into depreciation. There are always problems."

2. On January 8, 2019:

P.W.: "Hubby you make so much money and yet it is still not enough. Apparently there is a problem with the spending/consumption structure. It has to change"

G.Z.: "Must keep monthly expenses under \$50,000. For hubby (me) to make 300,000 RMB (approximately \$59,000 CDN) a month is doable."

- [62] As can be seen from the above, the evidence is conflicting and vague. As a result, the task of determining G.Z.'s income is difficult if not impossible. For the reasons outlined above, I am not persuaded that G.Z.'s testimony was entirely truthful or accurate. It was filled with contradictions. Little if any was backed up by documentary evidence. G.Z. failed to provide full financial disclosure. And as discussed above, he failed to call witnesses that would have been able to give material corroboratory evidence despite them being available.
- [63] P.W. argues that prior to separation G.Z. was able to maintain a significant debt load. Months prior to separation G.Z. indicated to P.W. in an email that he was capable of making enough money to pay up to \$50,000 per month in expenses. As soon as his sons with Y.S. moved out of Edgecliffe, he stopped paying the bills, claiming that he was unable to do so. He has let insurance policies lapse and mortgages go unpaid leading to foreclosure of his properties. P.W. asks me to find that this is part of a ploy by G.Z. to escape paying support.
- [64] Despite my suspicions that G.Z.'s financial situation may not be what he portrays to this court, I am unable to reach the conclusion that G.Z.'s purported financial difficulties are entirely illusory and an attempt to frustrate his financial obligations to P.W. and his child. P.W.'s own evidence shows clearly that there were financial problems well before the parties separated. While G.Z. kept trying to reassure P.W. that all was fine, it was clear to her that it was not.
- [65] From the evidence I conclude that in about 2018, G.Z. started having financial issues. He had to borrow money to pay bills. The parties had no savings - money came in and went directly to pay bills.
- [66] I accept that G.Z. is working as a food delivery driver. Both N. and G.Z.'s daughter A.Z. corroborate that. However, I have trouble accepting that he and his family have been living rent free for years; that Y.S. paid for everything post-separation including the mortgage on the Richmond condominium; that a friend is letting him drive their new car and that another friend paid his initiation fee for his membership at a private golf club. I note that G.Z. is able to pay his monthly golf club dues of \$330 and fund golf lessons, games and tournaments for one of his sons with Y.S. To the contrary, if G.Z. is the recipient of such beneficence from friends and family, then his income as a delivery driver belies his true financial state, and his available means to pay support are greater than someone with the same income who incurs ordinary living expenses.

- [67] After much consideration, I am satisfied that an income should be imputed to G.Z. for two reasons: first, he has not disclosed all of his financial information and second, I find that he is intentionally underemployed. G.Z. is an intelligent man, who until about four or five years ago was consistently been capable of generating income to sustain a high level of living. While G.Z. is at present having trouble financially, given his abilities, I do not accept that this is a long-term situation. Having considered all of the evidence, I find \$90,000 to be a reasonable income to impute to G.Z.
- [68] One final note, while normally I would set an annual review to revisit the parties' financial states I have no confidence that G.Z. will ever accurately disclose his income. I also find that it is in the parties' best interests to bring finality to their financial separation. An annual review would undoubtedly be a costly and futile exercise. I will return to this.

P.W.

- [69] P.W. has not worked since separation. She agrees that an income should be imputed to her and submits that \$36,000 is fair and reasonable. G.Z. says that she should have an imputed income of \$50,000.
- [70] P.W. is bright, capable, enterprising and hard working. When she met G.Z. she was working full-time and was a single mother. She studied at university in the Maritimes. She has considerable experience working with programs for international students and as an interpreter. She was involved in business with G.Z.
- [71] When she wanted to return to work after maternity leave, P.W. says that G.Z. told her to stay home and look after the children as he made lots of money. At first she continued to work a couple of days a week, but when the parties moved to B.C. in about 2013 P.W. stopped working outside the home. She was the mother to M.M., N.Z., A.Z. and eventually looked after both of G.Z.'s sons with Y.S. While A.Z. did not live with the parties full-time, P.W. was often the sole caregiver for the other four children. G.Z. travelled back and forth to China spending months at a time there. When he was home in Victoria, he spent most of his time golfing. P.W. was responsible for taking care of all of the children, taking the three boys to their many after-school activities and taking care of the family home.
- [72] P.W. testified that she likes working and that she plans to get a job. I am satisfied that P.W., with her working background, skills and proficiency in English is highly employable. I find that \$50,000 is a reasonable and fair income to impute to her.

Child Support and s. 7 expenses

Child support

- [73] G.Z. acknowledges his obligation to pay child support for N.Z. He is also obliged to share N.Z.'s s. 7 expenses.

[74] P.W. seeks lump sum child support arguing that it is clear that G.Z. will not voluntarily pay monthly child support.

[75] Section 170 of the FLA provides the court with the discretion to make a lump sum child support order. In *Zhang v. Sun*, 2016 BCSC 1418 at paras. 279-284 Fleming J. summarized the principles relevant to determining whether a lump sum child support payment should be made, including:

1. The same considerations that apply to orders for lump sum spousal maintenance apply to consideration of a lump sum child maintenance order;
2. Lump sum maintenance awards are exceptional, and should be made only when there is some special need or specific circumstances render it appropriate;
3. The existence of animosity between the parties may favour a lump sum maintenance order to reduce future sources of conflict;
4. Whether the parent disobeyed a previous maintenance order and had not demonstrated prudent financial management;
5. The payor's past avoidance of support payments.

[76] The risk of a lump sum order is that the payor's ability to pay may change, leading to a need for variation. Given my comments regarding the futility of a review, G.Z.'s failure to provide adequate financial disclosure, G.Z.'s pattern of failing to pay creditors, and the likely difficulty P.W. will have collecting support, I find that a lump sum child support order is the appropriate award, despite the risk that future variation could be required.

[77] I order that counsel are to calculate the amount of the award to be put in an order for lump-sum child support, being the present value of the child support payments of \$860 per month commencing August 1, 2022 and continuing until N.Z.'s 19th birthday. The lump sum is to be paid from G.Z.'s share of the proceeds of the division of property.

[78] This award does not include N.Z.'s s. 7 expenses.

Section 7 Expenses

[79] Section 7 of the Guidelines, which governs special and extraordinary expenses, provides that the best interests of the child and the reasonableness of the expense in relation to the financial state of the parties are relevant to the determination of what constitutes a special expense. It reads as follows:

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the employment, illness, disability or education or training for employment of the spouse who has the majority of parenting time;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

[80] I have no difficulty finding that G.Z. should share in N.Z.'s medical, dental, extracurricular activities and child care expenses. I take a different view regarding N.Z.'s private school tuition. Despite P.W.'s plea of impecuniosity, she has maintained N.Z.'s enrollment at the private school. Tuition is significant. P.W. has taken in homestay students in return for a decrease in tuition. M.M. helps at the school for further reduction. It is clear on the evidence that the parties are unable at this time to afford private school. In fact, G.Z. removed his two sons with Y.S. from the private school. If P.W. wishes to keep sending N.Z. to private school that is her choice, but the tuition or any other cost associated with it will not fall under the umbrella of s. 7 expenses, meaning G.Z. is not obliged to pay a share.

[81] The parties are to split the s. 7 expenses commensurate with their imputed incomes: G.Z. 2/3, P.W. 1/3. This will include N.Z.'s medical and dental expenses, child care expenses, and expenses relating to N.Z.'s extracurricular activities.

ISSUE 3: SPOUSAL SUPPORT

[82] The obligation to pay spousal support is set out in s. 160 of the FLA.

[83] Section 161 of the FLA requires the court to consider the following objectives in determining entitlement to spousal support:

[161]

- (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.

[84] The same essential objectives are set out in s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 [Divorce Act].

[85] 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.

[86] 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), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

[10] [] "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.

[87] 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.

[88] 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.

[89] In summary, in determining spousal support:

1. The starting point is the objectives of spousal support in s. 15.2(6) of the Divorce Act;
2. All of the objectives must be considered and no single objective is paramount: *Moge v. Moge*, [1992] 3 S.C.R. 813;
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.
- [90] P.W. seeks spousal support on a compensatory basis as she raised N.Z. and during the parties' relationship raised G.Z.'s children with other women.
- [91] G.Z. argues that he has overpaid support through the interim support order and he should not be responsible for supporting P.W. any further.
- [92] Pursuant to my order of March 16, 2021 G.Z. has been paying spousal support retroactive to September 1 2019, based on him having an income of \$150,000, \$60,000 higher than the income that I have imputed to him. The support payments are coming from the proceeds of the house that are being held in trust. That equals approximately five years of support at the level I would have ordered after trial.
- [93] Considering the objectives of spousal support and in light of all of the evidence including my finding that G.Z.'s income is substantially lower than was imputed to him for the interim spousal support order, and P.W.'s ability to be self-sufficient, I find that G.Z. has paid sufficient spousal support. P.W.'s claim for spousal support is dismissed.

ISSUE 4: DIVISION OF FAMILY PROPERTY

[94] In issue are:

1. The Mercedes G Wagon,
2. Two motorcycles,
3. The WorldMark timeshare,
4. The San Juan house,
5. The Richmond condominium, and
6. The proceeds for the Edgecliffe house.

[95] I will consider the assets separately.

Mercedes G wagon

[96] G.Z. took possession of the Mercedes shortly after the parties separated. The parties agree that it is family property and that the vehicle will be retained by G.Z. The parties agree that the value of the G wagon is \$85,000.

Motorcycles

[97] The parties agree that the motorcycles are family property valued at a combined total of \$20,000 and that they will be retained by G.Z.

Timeshare

[98] The evidence regarding the timeshare is vague. I am unclear if the monthly dues have been paid or if it is still in good standing. Neither party has indicated a desire to take ownership of it. In doing so that party would be solely responsible for the monthly fees. Nor was there evidence about its salability. I find that the timeshare is a family asset, having been purchased by the parties during their relationship. I further find, having heard no evidence otherwise, that it should be split evenly between the parties. Given the paucity of information I am unable to make an order regarding how the timeshare should be divided. It makes sense that it would be sold and split evenly but I leave it to counsel to resolve the division.

The San Juan house

- [99] G.Z. claims a beneficial interest in the San Juan house, arguing that P.W. has an interest in it. P.W. denies having any interest in the San Juan house despite being named on the title.
- [100] Both M.M. and P.W. testified that M.M. is the sole owner of the San Juan house. They provided unchallenged and uncontradicted documentation to support that contention.
- [101] I am satisfied that M.M. made the down payment with funds from the sale of property she owned in China and that P.W. is listed on title only because the bank required her to guarantee M.M.'s mortgage. I find that M.M. makes all the payments. While P.W. may help M.M. run the house and rent out rooms, and assist with the occasional bill payment, I am satisfied that she does not have an ownership interest. Accordingly, I find that San Juan is not family property and that G.Z. has no claim to it.

Richmond condominium

- [102] As stated above, G.Z. claims that the Richmond condominium is not family property and that he holds it in trust for Y.S. and his mother. Again, he failed to provide any documentation proving that Y.S. or his mother contributed to the Richmond condominium nor did he call Y.S. or his mother as witnesses.
- [103] The Richmond condominium was purchased during the parties' relationship. The unchallenged evidence is that the parties and N.Z. often stayed in the Richmond condominium. One of the parties' mortgages was taken out on both the Edgecliffe and the Richmond condominium and was paid from proceeds of the sale of Edgecliffe.
- [104] Having regard to all of the evidence, I am satisfied that the Richmond condominium is family property. At the time of trial the Richmond condominium was subject to foreclosure proceedings. I am uncertain as to its current status. Upon sale, the proceeds from the sale of the Richmond condominium will be split evenly between the parties.

Edgecliffe

- [105] There is no dispute that the proceeds from the sale of Edgecliffe are family property. The home was purchased by the parties during their relationship using family property, was registered in both of their names and was the family home. As stated above Edgecliffe was sold and the proceeds are being held in trust by Mr. Neary.
- [106] As stated above, as per my March 16, 2021 order, monthly interim child and spousal support of \$4,243 per month dating back to September 1, 2019 have been already been paid from the proceeds. In addition, two interim distributions have been made from the proceeds of the house: \$137,000 to P.W. and \$50,000 to G.Z. These funds were released to the parties pursuant to s. 89 FLA to fund their family law proceedings. As of July 1, 2022, approximately \$244,460 remained in trust.
- [107] G.Z. argues that he is entitled to an unequal division of the proceeds because his mother has significantly contributed to the family's resources during the course of their relationship. I reject this argument. G.Z. has produced no evidence or documentation to substantiate this claim. Nor did he call his mother as a witness.
- [108] The proceeds from the sale of the Edgecliffe shall be divided as follows:
1. \$18,000 to P.W., to equalize the distribution of property (the combined value of the G.Z.'s share of the assets being motorcycles, the Mercedes, and his advance from the proceeds of sale of Edgecliffe which totals \$155,000 less the \$137,000 advance P.W. received from Edgecliffe);
 2. The remaining proceeds shall be divided evenly between the parties;
 3. The lump sum child support to be determined by counsel shall be paid to P.W. from G.Z.'s portion of the proceeds of sale;
 4. Mr. Neary shall not release any funds from the sale of Edgecliffe to G.Z. until P.W. has received the entirety of the lump-sum child support owed.

CONCLUSION

[109] I make the following orders:

1. By consent, the parties are joint guardians of N.Z.;
2. N.Z. shall reside primarily with P.W. G.Z. shall have weekly parenting time with N.Z. each Saturday for up to 6 hours at a time with pickup and drop off at Majestic Park. This order will remain in force until further court order or by agreement of the parties. If there are any problems with the Saturday parenting time the parties shall communicate via email. Changes to the time and date may be made by consent. This order is being made with the expectation that G.Z.'s parenting time will increase gradually and that the parties will be able to work it out themselves. In the event the parties are unable to agree on parenting time they

shall schedule a remote appearance with me through Supreme Court scheduling for a morning at 9 a.m. I remain seized of parenting issues for 12 months following the date of this order;

3. For the purposes of calculating child support and s. 7 expenses, G.Z. has a guideline income of \$90,000 and P.W. \$50,000;
4. G.Z. shall pay to P.W. for the ongoing support of the child N.Z. a lump sum to be calculated by counsel, at \$860 per month commencing September 1, 2022 and continuing until N.Z.'s 19th birthday. The lump sum amount shall be paid from the G.Z.'s share of the proceeds of Edgecliffe;
5. Commencing September 1, 2022, the parties shall share N.Z.'s s. 7 expenses with G.Z. paying 2/3 and P.W. 1/3. Tuition and expenses for private school are not considered special expenses;
6. G.Z.'s obligation to pay spousal support to P.W. is terminated as of August 31, 2022;
7. G.Z.'s application for spousal support is dismissed;
8. By consent, G.Z. shall have sole ownership of the Mercedes G wagon, valued at \$85,000;
9. By consent, G.Z. shall have sole ownership of the two motorcycles valued at \$20,000 in total;
10. The timeshare is family property to be divided as determined by the parties;
11. The San Juan house is not family property;
12. The proceeds from the sale of the Edgecliffe shall be divided as follows:
 - i. \$9,000 shall be released to P.W. to equalize the division of property;
 - ii. The remaining proceeds shall be divided evenly between the parties;
 - iii. The lump sum child support to be determined by counsel will be paid from G.Z.'s share of the remaining proceeds of Edgecliffe. Mr. Neary shall not release any funds from the sale of Edgecliffe to G.Z. until P.W. has received the entirety of the lump-sum child support owed.
13. The Richmond condominium is family property;
14. The proceeds from the sale of the Richmond condominium shall be divided evenly between the parties;
15. The parties shall remain solely responsible for any debts and liabilities currently in their sole name;
16. Any remaining relief sought in the Notice of Family Claim and Counterclaim filed in these proceedings is dismissed as if heard on the merits.

[110] As success was shared, the parties shall bear their own costs.

"Murray, J."

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