

CANADA / JUDGMENT

Pidwerbeski v. Garcia

2020 BCSC 2022

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Supreme Court of British Columbia

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2020 BCSC 2022 Pidwerbeski v. Garcia

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pidwerbeski v. Garcia,

2020 BCSC 2022

Date: 20201218

Docket: E181938

Registry: Vancouver

Between:

Kevin James Pidwerbeski

Claimant

And

Donald Aaron Garcia

Respondent

Before: The Honourable Madam Justice E. McDonald

Reasons for Judgment

Counsel for the Claimant:

D. Dahl

Counsel for the Respondent:

R. Aldana

Place and Date of Trial:

Vancouver, B.C.

February 24-28, 2020,

July 27-28, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 18, 2020

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OVERVIEW

- [1] The parties to this family law litigation first met in 1996. At that time, the claimant, Mr. Pidwerbeski, was approximately 38 years old and the respondent, Mr. Garcia, was approximately 19 years old.
- [2] The parties eventually became a couple but they never married. Their relationship lasted until the parties' separated in 2017. Mr. Pidwerbeski owned property at the outset of the relationship.
- [3] As of the date of separation, Mr. Pidwerbeski owns considerable property, while Mr. Garcia has no assets. Mr. Pidwerbeski alleges that throughout their relationship, Mr. Garcia agreed that he would not claim an interest in Mr. Pidwerbeski's home, something that Mr. Garcia denies.
- [4] The principal issues raised in this family law litigation are:
- a) When did the parties begin living in a marriage-like relationship?
 - b) How should family property and family debt be divided?
 - c) Is the respondent, Mr. Garcia, entitled to spousal support?
- [5] For the reasons that follow, I have determined that:
- a) the parties commenced cohabitating in a marriage-like relationship in 1998;
 - b) family property and family debt should be divided equally by the parties; and
 - c) Mr. Garcia is not entitled to spousal support.

CREDIBILITY AND RELIABILITY

- [6] Mr. Pidwerbeski and Mr. Garcia offered differing accounts of a number of things, including when their relationship began and whether they reached agreements that Mr. Pidwerbeski alleges were meant to protect his property and safeguard his retirement. Therefore, the credibility and reliability of the claimant and respondent are at issue in this case.
- [7] The principles governing the assessment of credibility are well established: *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.) at 356-357; *Bradshaw v. Stenner*, 2010 BCSC 1398 at paras. 185-87, *aff'd* 2012 BCCA 296, leave to appeal *ref'd* [2012] S.C.C.A. No. 392.
- [8] In *Bradshaw*, at para. 186, Justice Dillon held that: " 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 (*Faryna* at para. 356)". Justice Dillon, at para. 187, adopts language from *Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 (Q.B.) at para. 13, to explain that where testimony conflicts, it should be assessed against the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions".
- [9] The court may believe "all, part or none of a witness's evidence, and may attach different weight to different parts": *Radacina v. Aquino*, 2020 BCSC 1143 at para. 96, citing *R. v. D.R.*, [1996] 2 S.C.R. 291 at para. 93; *R. v. Howe* (2005), 192 C.C.C. (3d) 480 (Ont. C.A.) at para. 44.
- [10] In addition to the claimant and respondent, the parties called numerous third- party witnesses to testify. Mr. Pidwerbeski called his friends Keith Rice-Jones, Diane Thomas and Penelope Ames as witnesses. He also called Scott Thomas, his landscaper, and Christine Righello, his tenant, as witnesses. Mr. Garcia called his relatives, Alec MacDonald and Janice Wardrop, and a friend, Nancy McRitchie, to testify at the trial.

BACKGROUND

The Claimant's Personal History

- [11] Mr. Pidwerbeski, is presently 62 years old. Mr. Pidwerbeski has a bachelor's degree. He holds a provincial instructor's diploma to teach college courses and he has a certified designation in human resources. He also has experience operating his own business providing painting services.
- [12] In 1986, Mr. Pidwerbeski purchased a home in Vancouver located on Turner Street (the "Home"). The Home included one or more rental suites that Mr. Pidwerbeski rented out to generate rental income.
- [13] Mr. Pidwerbeski's career has been active and varied. He has worked as a college instructor, a career coach and a manager in human resources.

- [14] Since 2013, Mr. Pidwerbeski has been working on a full-time basis outside of the province. Mr. Pidwerbeski is presently employed as a human resources manager in Alberta.

The Respondent's Personal History

- [15] The respondent, Mr. Garcia, is presently 42 years old. He grew up in a smaller community in British Columbia living with his large family. He testified that his upbringing was strict. He was raised in a deeply religious household that followed the Jehovah's Witness faith.
- [16] Mr. Garcia graduated from high school in 1995. In the fall of 1996, he moved to Vancouver to study computer technology at a private college where Mr. Pidwerbeski happened to be teaching.
- [17] After graduating from college in 1997, Mr. Garcia began working as part of a software team for a company in Vancouver. Mr. Garcia received two promotions during the five years he was employed by this company.
- [18] In approximately 2007, Mr. Garcia resumed his post-secondary education. He completed a short specialty training program to operate and administer databases. Mr. Garcia then decided to pursue a bachelor's degree. While attending school from 2008 to 2011, Mr. Garcia worked occasionally, for example, at summer camps and doing contract database work.
- [19] In 2010, Mr. Garcia received a scholarship to study full time at Simon Fraser University. In 2012, Mr. Garcia decided to pursue an honours designation for his undergraduate degree.
- [20] Around the time that Mr. Garcia was to commence courses towards an honours designation, he learned that his father had terminal cancer. Mr. Garcia deferred his studies to spend time with his father. By May 2014, Mr. Garcia completed the credits necessary to graduate with an honours designation for his undergraduate degree.
- [21] In approximately 2014, Mr. Garcia began working as a teaching assistant at Simon Fraser University. This was Mr. Garcia's only source of employment from then until the parties separated.
- [22] In 2015, Mr. Garcia commenced a master's degree program in psychology at Simon Fraser University. At the time, Mr. Garcia's long-term goal was to obtain a doctorate degree and become a psychology professor.

The Parties' Relationship

- [23] The parties met in approximately 1996, while Mr. Garcia was studying at the private college where Mr. Pidwerbeski was an instructor. They formed a close friendship that eventually developed into a romance.

- [24] Mr. Pidwerbeski was forthright about his attraction to Mr. Garcia. However, at this point, Mr. Garcia had no experience with romantic relationships and he was unsure of his sexual orientation. Mr. Garcia described admiring Mr. Pidwerbeski's sophistication and confidence. While Mr. Garcia was attracted to Mr. Pidwerbeski, he described feeling considerable guilt about his feelings, which he attributed to his strict religious upbringing.
- [25] Mr. Pidwerbeski described feeling very concerned about supporting Mr. Garcia as he came to terms with his sexual orientation. Mr. Pidwerbeski believed that Mr. Garcia's sheltered, religious background made it difficult for him to accept that he was gay and that he could live in a committed same-sex relationship. Both parties described Mr. Pidwerbeski playing a mentor-like role to Mr. Garcia as well as eventually becoming his romantic partner.
- [26] In 1997, Mr. Pidwerbeski offered to rent the basement suite in the Home to Mr. Garcia. Sometime after Mr. Garcia moved into the basement suite, the parties began to have a sexual relationship.
- [27] In 1997, Mr. Garcia came out to his family. Mr. Garcia told his father and step-mother that he was gay and that he was in love with Mr. Pidwerbeski. As a consequence, Mr. Garcia was expected to have no further contact with his father and the other members of his family, such as his grandparents, who practised the Jehovah's Witness faith.
- [28] In 1998, Mr. Garcia moved upstairs to live with Mr. Pidwerbeski. He described selling some of his furniture, including his bed, before he moved upstairs.
- [29] In approximately 2002, Mr. Pidwerbeski received a job offer to work for a client in the Cayman Islands. He relocated to the Cayman Islands to pursue that employment opportunity. A few months later, Mr. Garcia followed bringing the parties' pets with him.
- [30] The parties lived together as a couple in the Cayman Islands, where they enjoyed significantly higher earnings. However, Mr. Pidwerbeski's job opportunity eventually ended. He returned to Canada in about 2005. Mr. Garcia stayed on working in the Cayman Islands, but he too eventually returned to Canada in approximately 2006. The parties continued to live together in the Home upon returning from the Cayman Islands.
- [31] The parties' relationship ended in March 2017. Mr. Garcia continued to live in the Home until October 1, 2019, while Mr. Pidwerbeski continued living and working at his job outside of the province following the parties' separation.

Issue 1: When did the parties begin living in a marriage-like relationship?

The Parties' Positions

- [32] Mr. Pidwerbeski submits that the parties did not begin to live in a marriage-like relationship until 2007, after they returned from the Cayman Islands. However, the notice of family claim alleges that the parties began living in a marriage-like relationship in 2006. Mr. Garcia submits that the parties began their marriage-like relationship in 1997 when he moved into the basement suite of Mr. Pidwerbeski's Home.

The Law

- [33] Section 3(1) of the Family Law Act, S.B.C. 2011, c. 25 [FLA] defines a spouse to include a person who has lived with another person in a "marriage-like relationship" continuously for at least two years. The relationship in such circumstances begins on the date the spouses began to live together in a marriage-like relationship: FLA s. 3(3).
- [34] To determine whether the parties' relationship was marriage-like, I must take a holistic approach that weighs all relevant factors and treats no particular factor as dispositive: *Austin v. Goerz*, 2007 BCCA 586 at paras. 58 and 62.
- [35] There is no check-list for determining if a relationship was marriage-like, and consideration ought to be given to the unique circumstances of each case: *Weber v. Leclerc*, 2015 BCCA 492 at para. 25; *Rochon v. Rochon*, 2018 BCSC 1899 at para. 240. However, I can take into account objective criteria or commonly accepted "indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship": *Weber* at para. 25; *Rochon* at paras. 240-242.
- [36] Courts in British Columbia have concluded that it may be useful to refer to some commonly accepted indicators such as "shared shelter, sexual and personal behaviour, services, social activities, economic support and children, as well as the societal perception of the couple": *Dey v. Blackett*, 2018 BCSC 244 at para. 193, citing *M. v. H.*, [1999] 2 S.C.R. 3 at para. 59 and *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.) at para. 16; *Voth v. Martin*, 2019 BCSC 834 at paras. 11 and 12.

Analysis

- [37] I will start by considering the parties' shelter arrangements. Mr. Pidwerbeski described offering to rent Mr. Garcia the basement suite of the Home because he was concerned about Mr. Garcia's safety. He said that when Mr. Garcia moved in, he was lost and he needed lots of support. Mr. Pidwerbeski often invited him upstairs to visit, watch a film and have a meal.
- [38] Mr. Garcia moved into the basement suite in August 1997 and he agreed to pay rent. He had only recently graduated from college and he was just starting his first job. Mr. Garcia agreed that initially, there was an economic imbalance between the parties.

- [39] In early 1998, Mr. Garcia moved upstairs. Mr. Garcia testified that they shared the master bedroom. Mr. Pidwerbeski denied this and he insisted that Mr. Garcia occupied the second bedroom. Mr. Pidwerbeski stated that he and Mr. Garcia were just roommates who had sex.
- [40] Ms. McRitchie, who was a friend of the parties at the time, testified that she met them in 1998. She visited them often and they gave her a tour of the Home, including the master bedroom, which she understood they shared. She recalled that the second bedroom was filled with "stuff", including lots of clothing and boxes.
- [41] I did not believe Mr. Pidwerbeski's claim that he and Mr. Garcia lived in separate bedrooms once Mr. Garcia moved upstairs. I find that starting in early 1998, the parties began sharing a bedroom. This finding is consistent with Mr. Pidwerbeski's stated interest in establishing a relationship with Mr. Garcia and with both parties' evidence regarding the extensive attention and support that Mr. Pidwerbeski provided to him at this time.
- [42] Regarding the economic support that the parties provided to each other, I note that by 1998, the parties had named each other as the beneficiaries to their respective RRSPs. In September 1999, Mr. Pidwerbeski drafted a will naming Mr. Garcia as his partner and beneficiary of his estate. Starting in 1999, Mr. Pidwerbeski and Mr. Garcia identified each other as common-law partners on their tax returns.
- [43] During his cross-examination, Mr. Pidwerbeski was asked about his decision to name Mr. Garcia as his partner in the draft will. Mr. Pidwerbeski was vague and somewhat evasive in his answers. He explained that "health issues" had caused him to draft this will and he attempted to minimize the importance of the draft will by stating that he could not recall signing a final version. Overall, I found Mr. Pidwerbeski's evidence inconsistent with documentary evidence, such as the parties' banking records, which confirm that as early as 1998, the parties were identifying one another as common-law spouses.
- [44] Mr. Garcia described that by 1998 or 1999, he was working full time and earning a good salary. He and Mr. Pidwerbeski would grocery shop together. Mr. Garcia paid for the utilities and groceries, while Mr. Pidwerbeski covered the mortgage payments. Mr. Garcia said the parties used Mr. Pidwerbeski's accounts to manage their money and pay their bills and Mr. Garcia would deposit money he earned into Mr. Pidwerbeski's accounts.
- [45] Mr. Garcia said that he managed their finances because Mr. Pidwerbeski disliked that task. Mr. Pidwerbeski agreed that Mr. Garcia managed the finances and that he had total access to Mr. Pidwerbeski's bank accounts. Mr. Garcia continued to manage the parties' finances until their separation.
- [46] Regarding the parties' sexual, personal and service behaviour, I believe Mr. Garcia's evidence that the parties commenced a sexual relationship in early 1998. Given that Mr. Garcia had no prior sexual experience, I find it more likely than not that Mr. Garcia would distinctly remember when this dimension of their relationship began.

- [47] Mr. Garcia's relatives, Ms. Wardrop and Mr. MacDonald, testified about when they learned that Mr. Garcia was gay and that he was living with Mr. Pidwerbeski. They visited the parties at the Home early in the relationship and they described observing the parties acting as though they were involved in a loving and committed relationship. Ms. McRitchie's evidence also confirmed this.
- [48] Mr. Rice-Jones and Ms. Ames described first meeting Mr. Pidwerbeski while he was painting at their homes. They eventually befriended him and they described meeting Mr. Garcia when Mr. Pidwerbeski brought him over to visit. They formed the impression that Mr. Pidwerbeski and Mr. Garcia were friends and possibly lovers.
- [49] Mr. Rice-Jones said that he and his wife typically saw Mr. Pidwerbeski three to four times per year. He viewed Mr. Garcia as part of the "furniture" at Mr. Pidwerbeski's house. Ms. Ames described Mr. Garcia as just being part of the background at Mr. Pidwerbeski's parties. It was clear that both of these witnesses found Mr. Garcia to be much less gregarious than Mr. Pidwerbeski.
- [50] At some point early in the parties' relationship, Mr. Garcia had one-time sexual encounters with two other individuals. The parties offered differing evidence regarding the events surrounding these sexual encounters. However, I find that these encounters were isolated events and the parties continued their relationship after these events.
- [51] Regarding the parties' social behaviour, Mr. Pidwerbeski testified that he did not like Mr. Garcia's friends and he rarely saw them. However, Mr. Pidwerbeski went to great lengths to introduce Mr. Garcia to people in his social circle, including friends from Mr. Pidwerbeski's church community.
- [52] Mr. Garcia testified that he and Mr. Pidwerbeski discussed their commitment to one another at the beginning of their relationship in 1998. He fell in love with Mr. Pidwerbeski and said that he was committed to a long-term relationship with him from the start.
- [53] Many witnesses confirmed that the parties were living in a marriage-like relationship as early as 1998. For example, Ms. McRitchie testified that Mr. Pidwerbeski introduced Mr. Garcia to her as his partner or live-in boyfriend. She toured the Home and understood that the parties shared the master bedroom. She also understood that the parties moved to the Cayman Islands as a couple.
- [54] Although Ms. McRitchie testified to having a falling out with Mr. Pidwerbeski, I still found her to be an objective and honest witness. I detected no bias or ulterior motive on her part. Ms. McRitchie explained that after her dispute with Mr. Pidwerbeski, she decided to end her friendship with him and she found it awkward to maintain a friendship with Mr. Garcia under the circumstances. In my view, her reluctance to maintain a friendship with Mr. Garcia that would exclude Mr. Pidwerbeski, seems consistent with the parties' involvement in a marriage-like relationship at the relevant time.

- [55] I find that Ms. Ames, Mr. Rice-Jones and Ms. Thomas had fewer opportunities than Ms. McRitchie to observe the parties' relationship and their daily routines, especially in the early years. Ms. McRitchie lived in the same neighbourhood as the parties. In addition to visiting the parties at home, she often encountered them at the park or at the grocery store. In my view, Ms. McRitchie had ample opportunities to observe the parties as they went about their daily lives.
- [56] Ms. Wardrop testified that in 2001 or 2002, Mr. Pidwerbeski consulted her about his intention to purchase a ring for Mr. Garcia. Ms. Wardrop understood that the ring was intended to be an engagement ring. However, Mr. Pidwerbeski insisted that the ring was nothing more than a friendship ring.
- [57] Mr. Pidwerbeski insisted that around the time he bought the ring, there was no sense on his part that he was going to settle down with anyone, including Mr. Garcia, because Mr. Pidwerbeski had not realized that this was even possible for gay couples. However, he did agree that he had discussions with Mr. Garcia about settling down, but he insisted it was Mr. Garcia who was very clear that he did not want anything more than "whatever it was" they already had together.
- [58] I found Mr. Pidwerbeski's evidence about the ring and his state of mind in 2001 confusing and contradictory. I disbelieved Mr. Pidwerbeski's evidence that for many years, including right up to the time when the parties returned from the Cayman Islands, he and Mr. Garcia were just roommates who had sex. He was unyielding in his evidence despite being taken to numerous examples of aspects of his relationship with Mr. Garcia that suggested they were living in a marriage-like relationship. I found Mr. Pidwerbeski's evidence inconsistent with the documentary evidence and the evidence of witnesses, such as Ms. McRitchie, whose evidence I accept.
- [59] After considering the evidence as a whole, I find that the parties entered into a marriage-like relationship in February 1998. This is approximately when Mr. Garcia moved out of the basement to live upstairs with Mr. Pidwerbeski in a shared bedroom, and the time when many of the objective criteria or common indicators of a marriage-like relationship were present.

Issue 2: How should family property and family debt be divided?

- [60] I will begin by identifying the potential family property and family debt.

Potential Family Property and Family Debt

Real Estate

- [61] According to an Assessment Roll Report, on December 12, 1986, Mr. Pidwerbeski purchased the Home for \$85,000. Mr. Pidwerbeski applied to register the title in his name that same day.

[62] The parties agree the Home has been subject to a mortgage since its purchase date. The parties further agree to the following values and mortgage balances for the Home:

Date

Value

Mortgage Balance

January 15, 1998

\$238,000

Not determined

January 15, 2007

\$575,000

\$138,609

March 15, 2017

\$1,875,000

\$540,625

March 2, 2019

\$1,800,000

\$502,212

January 25, 2020

\$1,800,000

\$488,527

[63] Sometime between 2009 and 2010, the Home was redeveloped to include a new house and a separate coach house. The redevelopment created separate rental units in the Home, including a main unit for the parties to occupy. As part of the redevelopment, the Home's street address changed from Turner to Kootenay Street.

[64] On May 3, 2013, Mr. Pidwerbeski purchased a condominium in Weyburn, Saskatchewan (the "Condo"). Mr. Pidwerbeski paid \$240,662 for the Condo and he financed the purchase through a mortgage. As of the last mortgage renewal in June 2019, the balance owing on the mortgage was \$198,816.

[65] Mr. Pidwerbeski has tried unsuccessfully to sell the Condo. According to a local realtor's letter, the fair market value of the Condo as of May 27, 2019 was somewhere between \$195,000 and \$205,000. The parties agree that the Condo's value has decreased from the purchase price. However, there was no property appraisal of the Condo and there is no agreement as to its current value.

RRSPs/Pension

[66] Mr. Pidwerbeski's pensions and RRSPs are as set out in Schedule A.

[67] Mr. Garcia agreed that he had no claim against Mr. Pidwerbeski's pensions earned through his employers, Schulte Industries and the Blood Tribe, because they were accumulated after separation.

[68] However, Mr. Garcia claims a half interest in the GWL Pension valued at \$56,341 which he submits was mostly accumulated before separation. Mr. Pidwerbeski argued that some of the GWL Pension was accumulated after separation, but he provided little evidence to assist me in assessing what portion was accumulated post-separation.

[69] Mr. Pidwerbeski also contributed to an RRSP at Vancity. According to a statement dated June 10, 2000, Mr. Pidwerbeski held RRSPs at Vancity valued at \$4,735. According to Mr. Pidwerbeski's RRSP contribution records from the Canada Revenue Agency, he made his first \$1,000 contribution to his RRSP in 1997.

[70] In 1998, he contributed a further \$1,000 and in each of 1999 and 2000, he contributed \$2,000 towards his RRSP. The records do not say if those contributions were made to an RRSP at Vancity, but I find that is a reasonable inference to draw because it appears that Vancity is the only place where Mr. Pidwerbeski held an RRSP account at the time.

Debts

[71] The parties agree that the mortgage balance on the Home was \$488,527 as of January 2020.

[72] Mr. Pidwerbeski submits that the mortgage balance on the Condo was \$198,816 as of June 2019. It appears possible that the Condo is now worth less than the mortgage balance.

[73] The parties agree that after the parties' separation, Mr. Pidwerbeski covered what they described as an "annual operating loss" for the Home and the Condo in the following amounts: \$13,150.34 for 2017; \$20,876.01 for 2018; and \$17,004.97 for 2019. Mr. Garcia agrees that he is responsible for an equal share of these "annual operating losses" totalling \$51,031, as family debts.

[74] Mr. Pidwerbeski claims that his monthly MasterCard charges (which he estimated at \$3,665 each month) from the date the parties separated up to May 31, 2019 are family debt. Mr. Garcia denied that such charges were family debt.

Excluded Property

- [75] Section 85(1) of the FLA sets out property that is excluded from family property, including property acquired by a spouse before the relationship between the spouses began. The spouse making an excluded property claim bears the onus of demonstrating the exclusion: FLA s. 85(2).
- [76] The parties agree that Mr. Pidwerbeski is entitled to certain excluded property that is set out in Appendix A to this judgment.
- [77] However, Mr. Garcia's counsel takes the position that Mr. Pidwerbeski has failed to establish an excluded property claim related to the Home because he failed to prove the mortgage balance on the Home when the parties' began living together in 1998.
- [78] In *Y.L. v. G.L.*, 2020 BCSC 808, at para. 79, Justice Matthews summarized the law as it relates to the onus of proof for establishing excluded property claims:
- [79] Section 85(2) of the Family Law Act provides that the onus is on the spouse who claims that the property is excluded to demonstrate that: *A.A.P. v. G.T.F.*, 2015 BCSC 662 at para. 67. The burden of proof is the balance of probabilities: *Shih v. Shih*, 2017 BCCA 37 at para. 42. In *Shih*, at paras. 43-44, the Court of Appeal explained that while clear and cogent evidence is required to meet the burden of proof, the trial judge is entitled to draw reasonable inferences from the evidence that is less certain in order to do justice between the parties. If documentary evidence is not available, the testimony of a party, subject to scrutiny for credibility, can be led as to the transactions that support the argument that certain property is excluded property or derived from excluded property. The Court of Appeal has also explained that s. 85(1)(g) of the Family Law Act, by using the words "derived from", allows for a more flexible approach to identifying excluded property in the property held by the parties at the time of separation than do formal common law rules of tracing: *Jaszczevska* at para. 59. See also *C.P.* at paras. 93-99.
- [79] In my view, it is clear that Mr. Pidwerbeski purchased the Home in late 1986 for \$85,000. Mr. Pidwerbeski gave no evidence regarding the opening balance of the mortgage on the Home. However, in my view, it is reasonable to infer that the opening balance would not have exceeded the purchase price.
- [80] Mr. Pidwerbeski testified that by 1998, the mortgage balance was \$40,000 to \$60,000. He always rented out parts of the Home and he used the rent to assist with paying the mortgage. I believed Mr. Pidwerbeski's evidence in this regard and I find his evidence consistent with other evidence that Mr. Pidwerbeski qualified, on his own, to refinance and increase the Home's mortgage on a number of occasions.

- [81] Therefore, when I consider the purchase price and the ongoing payments Mr. Pidwerbeski made, I find it reasonable to infer that Mr. Pidwerbeski paid down the mortgage balance to \$60,000 by the time Mr. Garcia moved upstairs in 1998. In my view, this evidence is sufficiently reliable and consistent with the evidence as a whole.
- [82] In light of the foregoing, I find that there is clear and cogent evidence capable of satisfying the burden of proof discussed in Y.L. I have concluded that it would be unjust and unfair to deny Mr. Pidwerbeski an excluded claim over the Home that he purchased more than a decade before the parties began living together, solely because Mr. Pidwerbeski failed to tender documents stating the 1998 mortgage balance.
- [83] The parties agree that the Home had an appraised value of \$238,000 as of January 15, 1998. Therefore, Mr. Pidwerbeski is entitled to an excluded claim of \$178,000 in respect of the Home.[1]
- [84] Contributions made to an account post-separation are also excluded property: Jean Louis v. Jean Louis, 2020 BCCA 220 at para. 66. Mr. Pidwerbeski made post-separation RRSP and TFSA account contributions through HSBC in the amount of \$51,865 and \$6,009, respectively. Mr. Garcia is not entitled to any share of those monies.
- [85] A \$1,000 contribution Mr. Pidwerbeski made to his RRSP at Vancity is also excluded property because he contributed that money in 1997, before the parties began living in a marriage-like relationship.
- [86] Mr. Pidwerbeski makes an excluded property claim in respect of the \$56,341 GWL Pension. According to Mr. Pidwerbeski, this amount is the result of a transfer of amounts originally contributed in 2006, plus amounts from his employers in Saskatchewan, into the Blood Tribe plan.
- [87] As I understand it, Mr. Pidwerbeski's submission is that some part of the \$56,341 GWL Pension was accumulated after the parties separated in March 2017. However, he provided no evidence to establish what part of the GWL Pension results from his post-separation contributions. Mr. Pidwerbeski bears the onus of demonstrating that the GWL Pension is excluded property and I find that he has failed to do so.

Findings on Family Property and Family Debt

- [88] Pursuant to FLA s. 84(1), I find that the Home, subject to Mr. Pidwerbeski's excluded property claim, and the Condo are family property. I also find that Mr. Pidwerbeski's GWL pension is family property and that his Vancity RRSPs, subject to Mr. Pidwerbeski's excluded property claim, are family property.
- [89] The parties agree that the mortgages on the Home and the Condo are family debt and each is responsible for one-half of the current balance as set out in Schedule A.

- [90] The parties further agree that they are equally responsible for the "annual operating losses" that Mr. Pidwerbeski paid from 2017 to 2019. Mr. Garcia shall reimburse Mr. Pidwerbeski for his one-half share of those amounts.
- [91] I disagree with Mr. Pidwerbeski's claim that his MasterCard bills incurred in the 25 months following the parties' separation are family debt. Mr. Pidwerbeski failed to demonstrate that these charges were financial obligations that he incurred after the date of separation for the purpose of maintaining family property. Therefore, I find that the post-separation MasterCard bills are not family debt.

Division of Family Property and Family Debt

The Parties' Positions

- [92] Mr. Pidwerbeski relies on ss. 92(c), 85, 95(2) of the FLA for the division of family property and family debt. Mr. Pidwerbeski submits that he and Mr. Garcia entered into a binding oral agreement in which Mr. Garcia agreed that the Home was not family property and he would make no claim against it.
- [93] In the alternative, Mr. Pidwerbeski submits that family property and family debt should be reapportioned in his favour on the basis that equal division would be significantly unfair. The crux of Mr. Pidwerbeski's reapportionment argument is that he made significantly greater contributions to family property than Mr. Garcia. He submits that he financially supported Mr. Garcia during the many years while Mr. Garcia was attending post-secondary education. Mr. Pidwerbeski further submits that Mr. Garcia promised to reciprocate by financially supporting him after he retired.
- [94] Mr. Garcia denies that the parties had an oral agreement in respect of the Home. Mr. Garcia submits that there is no basis to find that it would be significantly unfair to equally divide the family property and family debt.
- [95] Mr. Garcia does not dispute that the Condo might be worth less than the mortgage balance. However, he submits that the Condo should be sold and the net sale proceeds or shortfall from the sale should be divided equally. Mr. Garcia agrees he is responsible for one-half of the expenses related to the Condo until it is sold.

The Law

- [96] Section 81 of the FLA establishes a presumption that family property and family debt is to be divided equally:

81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and

- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.
- [97] Again, Mr. Pidwerbeski requests an unequal division of the family property and family debts pursuant to s. 95 of the FLA. Section 95 provides that a court may order unequal division if it would be "significantly unfair" to equally divide family property or family debt and it sets out a number of factors that the court may consider.
- [98] Section 95(2)(b) authorizes the court to consider the terms of any agreement between the spouses in determining if it would be significantly unfair to equally divide family property.
- [99] Section 95(3) also authorizes the court to consider, in the reapportionment analysis, whether "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".
- [100] In *Jaszczewska v. Kostanski*, 2016 BCCA 286 at paras. 36, 41-44, the court explained that the purpose of s. 95 is to constrain judicial discretion in dividing family property.
- [101] The phrase "significant unfairness" in s. 95 creates a high threshold. Mere unequal financial contribution is insufficient to ground a finding of significant unfairness: *Singh v. Singh*, 2020 BCCA 21 at paras. 129-131, 134. To succeed in establishing that equal division would be significantly unfair, a party must show "marked, prolonged, and intentional or unexplained disparities in contribution to family burdens": *Singh* at para. 133 citing *Khan v. Gilbert*, 2019 BCCA 80 at para. 32. A finding of "significant unfairness" requires "something objectively unjust, unreasonable or unfair in some important or substantial sense": *Singh* at paras. 131-132, citing *Jaszczewska* at para. 44.
- [102] The following factors raised in s. 95(2) are potentially relevant considerations to the reapportionment analysis:
- a) the duration of the relationship: s. 95(2)(a);
 - b) the terms of any agreement between the spouses, except written and witnessed agreements respecting division of property and debt: s. 95(2)(b);
 - c) a spouse's contribution to the career or career potential of the other spouse: s. 95(2)(c); and
 - d) any other factor, other than the consideration referred to in s. 95(3), that may lead to significant unfairness: s. 95(2)(i).
- [103] The parties' lengthy relationship, which began in 1998, should be taken into account in the reapportionment analysis.

Analysis

[104] Mr. Pidwerbeski submits that it would be significantly unfair to equally divide the Home and the other family property on three grounds, namely that:

- a) a binding oral agreement respecting the Home exists between the parties;
- b) Mr. Garcia contributed significantly less to the family property; and
- c) the parties agreed that Mr. Pidwerbeski would support Mr. Garcia through school, and that Mr. Garcia would then reciprocate by supporting Mr. Pidwerbeski after he retired. I will refer to this alleged agreement in the remainder of these reasons as the "Return to School Plan".

I will address each of these submissions in turn.

Binding Oral Agreement Respecting the Home

[105] Mr. Pidwerbeski submits a binding oral agreement exists between the parties that should be taken into account under s. 95(2)(b) of the FLA. Specifically, he says the parties agreed that if they separated the Home would not be treated as family property and it would remain Mr. Pidwerbeski's property. He described his concerns early in the relationship that Mr. Garcia was not committed to him.

[106] Mr. Pidwerbeski said that his father and his sister warned him to protect his property, and that around 1999, his sister had warned him that Mr. Garcia might be a "gold digger". Mr. Pidwerbeski said that Mr. Garcia reacted to this concern by laughing and telling him he did not want the house. Mr. Pidwerbeski said that, upon the parties' return from the Cayman Islands, he offered to put Mr. Garcia on title to the Home, but Mr. Garcia declined that offer, saying that the Home belonged to Mr. Pidwerbeski.

[107] In cross-examination, Mr. Pidwerbeski was specifically asked why, having been warned that Mr. Garcia might be a "gold-digger", he never sought help from the lawyer who drafted his will to document the alleged agreement about the Home. I found Mr. Pidwerbeski was evasive in his answers and he avoided directly answering this question.

[108] Mr. Garcia agreed that near the two-year mark Mr. Pidwerbeski told him about his concerns that Mr. Garcia might be involved in the relationship for purely monetary reasons. Mr. Garcia denied promising that the Home would always remain Mr. Pidwerbeski's exclusive property. According to Mr. Garcia, Mr. Pidwerbeski was looking for assurances that Mr. Garcia was committed to a long-term relationship. Mr. Garcia assured him that he was not involved in the relationship for monetary gain or to take away his house. In fact, the parties' relationship continued for many years after this conversation took place.

- [109] Mr. Pidwerbeski's counsel referred me to the decision in *Doell v. Prentice*, 2018 BCSC 1115 in support of the argument that parties may enter into a binding oral agreement regarding the division of property. In *Doell* at para. 87, the court decided that an oral agreement not to divide property was an important factor in deciding whether it would be significantly unfair to divide family property equally.
- [110] In *Doell* at para. 66, the court accepted the unchallenged evidence of Mr. Prentice that Ms. Doell had refused to make any contribution to the property he owned because she would get nothing out of it if they split up.
- [111] The court found that the evidence established an agreement existed between the spouses, in the form of conditions set by Mr. Prentice for living together. The agreement provided that "the parties would keep their finances separate; the assets of each party would remain the assets of each party; and if they split up there would be no lawyers involved": *Doell* at para. 71.
- [112] *Lupien v. LeBlanc*, 2019 BCSC 431 concerned a family law proceeding that bears some similarities to the case at bar. Mr. LeBlanc and Ms. Lupien were unmarried spouses who lived together for 15 years in a home that Mr. LeBlanc owned with another individual. Mr. LeBlanc argued that his interest in the home was not equally divisible because, at the commencement of co-habitation, the parties orally agreed that Ms. Lupien would make no claim against the property if they separated.
- [113] The court in *Lupien* noted that unlike the case in *Doell*, the evidence did not clearly establish the existence of an agreement since Ms. Lupien denied the existence of the agreement and "her conduct in paying for groceries, utilities and assisting with renovations also [belied] a clear understanding that she had no interest in the home": *Lupien* at para. 36.
- [114] In assessing the evidence of independent witnesses before ultimately determining that there was no oral agreement, the court in *Lupien* stated as follows:
- [33] Mr. LeBlanc called a number of other witnesses in support of his claim that this oral agreement existed.
- [34] It is difficult in this case to determine if an oral agreement existed. There is no doubt Ms. Lupien did not contribute to the mortgage payments, property taxes, or insurance. She did, however, pay for the groceries, utilities and assisted with renovations. There is no evidence of a conversation as to what should occur should the parties separate. Rather, the witnesses called on this point affirmed an arrangement where Ms. Lupien paid for things such as groceries but did not pay for the mortgage. None of these witnesses, however, indicated that Ms. Lupien ever said to them, or stated in their presence, that she was giving up any claim to the house.
- [35] From his testimony, Mr. Peterson's concern appeared to be whether he would be getting any rent proceeds from Ms. Lupien as he was, at the time, the part owner of the property. It was in that context that a conversation took place, the full details of which he was not clear on in

his evidence. The one aspect of the conversation that he did recall was Mr. LeBlanc saying that he would pay everything associated with the cost of the home - "Melanie" would not have an interest and the house would go to the kids. Mr. Peterson noted that Ms. Lupien had no reaction to this statement, did not protest, and just nodded her head.

- [115] The evidence in the present case establishes that as time went by, the parties increasingly treated the Home as if they both owned it. For example, they jointly decided whether and how to renovate the Home, and later, to redevelop it. Mr. Garcia assisted in deciding how to design the Home and was involved in the renovation and building process.
- [116] Mr. Garcia agreed that his name was never added to the title to the Home or the mortgage, despite Mr. Pidwerbeski's offer to add him. Mr. Garcia said that he declined the offer because he feared that his lack of income and credit history would concern the bank and hamper financing.
- [117] I prefer Mr. Garcia's evidence regarding the discussion that the parties had regarding the ownership of the Home. Mr. Garcia does not deny that early in the relationship, Mr. Pidwerbeski expressed concern about whether Mr. Garcia was motivated to pursue the relationship for monetary gain. In light of the other evidence, including that Mr. Garcia had only recently come out as gay and that this was his first romantic relationship, it seems more likely than not that Mr. Pidwerbeski was actually looking for reassurance that Mr. Garcia desired a stable, long-term relationship with Mr. Pidwerbeski.
- [118] There was no evidence, nor submission made, that Mr. Pidwerbeski conditioned the parties' living together on the alleged agreement about the Home, as had been the case in Doell. In my view, had Mr. Garcia continually agreed to such an arrangement, there would have been no reason for Mr. Pidwerbeski to later offer to add Mr. Garcia to the title of the Home.
- [119] I believed Mr. Garcia's explanation that he declined Mr. Pidwerbeski's offer to add him to the title out of concern that it would negatively impact refinancing efforts. In my view, that explanation is consistent with the evidence that Mr. Garcia's earnings and credit history were less substantial than Mr. Pidwerbeski's history.
- [120] In conclusion, I find that insufficient evidence exists to establish the existence of an oral agreement about the Home as alleged by Mr. Pidwerbeski and as contemplated by s. 95(2) (b) of the FLA. I have reached this conclusion based on all of the circumstances, including:
- a) Mr. Pidwerbeski's offer to add Mr. Garcia to the title to the Home during their relationship and Mr. Garcia's reasons for declining that offer;
 - b) the parties speaking of the Home as "their" home, discussing and making plans to renovate and eventually rebuilding the Home with a view to their long-term living arrangements; and
 - c) the evidence that Mr. Garcia made direct financial contributions to the Home, such as payment of some of the renovation costs, permits and property tax.

Contributions to Family Property

- [121] I will now consider Mr. Pidwerbeski's submission that equal division would be significantly unfair because Mr. Garcia contributed significantly less to the family property. In considering this argument, I note that "a dollar for dollar comparison of contribution" will usually be insufficient to establish that equal division is significantly unfair: Khan at paras. 28, 32 and 36.
- [122] Mr. Pidwerbeski submits that, throughout the relationship, he worked and earned more than Mr. Garcia and he covered all of the financial costs to maintain property, such as the Home. Mr. Pidwerbeski also alleges that Mr. Garcia made virtually no non-monetary contributions to the Home, such as helping with yard work or maintenance chores.
- [123] In response, Mr. Garcia submits that, at some points during the relationship when he was not attending school, he earned an annual income comparable to that of Mr. Pidwerbeski. He further submits that he, like Mr. Pidwerbeski, used his income to cover family expenses and sometimes directly contributed to the Home.
- [124] Mr. Garcia said that he emptied his RRSPs to pay for expenses associated with the parties moving to the Cayman Islands. He also said that he earned and saved a substantial amount of money while he was working in the Cayman Islands. Mr. Garcia said the parties relied on his savings to help cover their living costs after they returned to Canada. He also said he used part of his savings to fund his education costs.
- [125] Mr. Garcia said that he contributed to the upkeep of the Home in non-monetary ways. He did yard work on occasion and he acted as the primary point of contact for the rental agent, the tenants and the landscaper. Ms. Righello confirmed observing Mr. Garcia rake the leaves at least once and she said Mr. Garcia was her main point of contact for tenancy issues until the parties separated.
- [126] As I have already addressed above, the parties jointly organized to renovate the kitchen and later, to redevelop and rebuild the Home. Again, Mr. Garcia agreed that he never participated in the mortgage applications for the Home, citing his belief that his inclusion would hamper the financing applications. While Mr. Garcia agreed he had less income to contribute towards the financial costs involved, he says that he still made contributions and was directly involved in design decisions.
- [127] I find that Mr. Garcia did contribute to the maintenance and accumulation of family property. He managed the parties' finances, dealt with tenants, did some work around the Home, and participated in design decisions for the Home. I also find that he contributed to the family expenses, including Home-related expenses.

- [128] I believed Mr. Garcia's evidence that he deposited money sourced from his earnings into bank accounts held by Mr. Pidwerbeski to assist with covering expenses. Mr. Pidwerbeski gave him full access to these accounts to pay family expenses and manage the parties' money. I accept Mr. Garcia's explanation that his lesser monetary contributions resulted from his pursuit of post-secondary education, an arrangement that Mr. Pidwerbeski agreed to.
- [129] I therefore reject Mr. Pidwerbeski's assertion that Mr. Garcia made no financial contributions to the family expenses or family property. This assertion is inconsistent with documentary evidence that Mr. Garcia tendered at trial and with the overarching evidence that the parties had lived in a marriage-like relationship since 1998 and conducted their day to day lives in a manner typical of spouses engaged in a fully-integrated economic and emotional union.
- [130] After reviewing all of the evidence, some of which I have summarized above, I have concluded that the disparities in the parties' contributions to family property do not rise to meet the high threshold of significant unfairness demanded for unequal division pursuant to FLA s. 95(1).

The Alleged Return to School Plan

- [131] I will now consider Mr. Pidwerbeski's submission that the Return to School Plan is capable of grounding a finding that equally dividing the family property would be significantly unfair within the meaning of s. 95 of the FLA.
- [132] It is undisputed that, in 2007, the parties agreed that Mr. Garcia should return to school to pursue a university education. Initially, the Return to School Plan was for Mr. Garcia to get a bachelor's degree. Later, it evolved into Mr. Garcia pursuing a master's degree and possibly a doctorate.
- [133] In cross-examination, Mr. Garcia denied the suggestion that he had promised to support Mr. Pidwerbeski in retirement in exchange for Mr. Pidwerbeski supporting him through school. Mr. Garcia was adamant that he used his savings from the Cayman Islands to fund part of his studies and to assist the parties with their living expenses. In essence, Mr. Garcia's evidence was that the parties engaged in ongoing discussions about their shared goals, including his educational and employment goals and Mr. Pidwerbeski's retirement goal.
- [134] Upon his return from the Cayman Islands, Mr. Pidwerbeski explained the Return to School Plan to many of his friends. Mr. Rice-Jones and Ms. Thomas confirmed that Mr. Pidwerbeski described the plan to them while Mr. Garcia was present. No witness could recall whether Mr. Garcia spoke, but Mr. Rice-Jones recalled that Mr. Garcia smiled during the discussion. Ms. Thomas testified that Mr. Pidwerbeski told her the idea was that when Mr. Pidwerbeski retired, Mr. Garcia would still be in the workforce earning money to support them both.

- [135] The issue is whether Mr. Garcia's return to school, while Mr. Pidwerbeski focussed on work, amounts to a circumstance that makes it significantly unfair to equally divide family property. In my view, the existence of this arrangement does not amount to "something objectively unjust, unreasonable or unfair in some important or substantial sense" making it significantly unfair to equally divide family property: Singh at paras. 131-132, citing Jaszczevska at para. 44.
- [136] I find that like most couples, Mr. Garcia and Mr. Pidwerbeski had ongoing discussions about how they could collectively achieve their goals. This is consistent with the overall context of the parties' relationship, including their age difference and the reality that they found each other at different stages of their careers and educations. It also seems likely, given their age difference, that the parties would have planned for Mr. Garcia to work beyond Mr. Pidwerbeski's retirement date.
- [137] Therefore, subject to Mr. Pidwerbeski's claim for excluded property, the family property and family debt shall be divided equally. The family property, family debt and excluded property claims are set out in Appendix A.

Miscellaneous Expenses & Occupation Rent

- [138] Occupation rent is a discretionary tool to achieve fairness and ouster is no longer required: McFarlen v. McFarlen, 2017 BCSC 1737 at para. 20.
- [139] Mr. Pidwerbeski seeks occupation rent from Mr. Garcia in relation to the time that Mr. Garcia occupied the Home following the parties' separation. According to Mr. Pidwerbeski, the Home could not be rented to offset expenses while Mr. Garcia occupied the Home from March 2017 to September 2019.
- [140] However, Mr. Garcia has already agreed to contribute one-half of the "annual operating loss" that Mr. Pidwerbeski incurred for 2017, 2018 and 2019. Moreover, there is no suggestion that Mr. Pidwerbeski was forced to incur the cost of alternative accommodation as a result of Mr. Garcia remaining in the Home. At the time the parties separated, Mr. Pidwerbeski was already required, by reason of his work location, to rent accommodation in Alberta. Therefore, I dismiss the claim for occupation rent.

Issue 3: Is the Respondent Entitled to Spousal Support?

The Parties' Positions

- [141] In closing submissions, Mr. Garcia's counsel submitted that if I divided family property equally, Mr. Garcia conceded that he is only entitled to spousal support for a limited period of time, namely, for a period of one year after he receives the proceeds from his equal share of family property. As I have determined that family property and family debt is to be divided equally, I will consider Mr. Garcia's request for spousal support on the basis that it is a time-limited request.

- [142] From March 2017 to October 1, 2019, Mr. Garcia continued residing in the Home. However, in September 2019, the parties agreed that Mr. Garcia would move out of the Home and in exchange, Mr. Pidwerbeski would pay him \$1,200 as interim, without prejudice, spousal support until further order or agreement. The parties entered into a consent order to that effect. Mr. Pidwerbeski paid Mr. Garcia \$1,200 per month in spousal support until March 2020, but he ceased paying spousal support as of April 2020, notwithstanding the consent order.
- [143] Mr. Garcia's claim for spousal support is advanced under the FLA and it is based on non-compensatory grounds. He submits that the parties had fully integrated their financial lives and that he experienced a significant decline in his standard of living post-separation. Mr. Garcia says that he has a need for spousal support at the end of a long relationship, which ended while he was attending university and having health problems that prevented him from working. Mr. Garcia submits that he will require time and support to complete his master's degree and to become economically self-sufficient.
- [144] Mr. Pidwerbeski denies that Mr. Garcia is entitled to spousal support. He requests that significant income be imputed to Mr. Garcia for the purpose of determining whether Mr. Garcia is entitled to spousal support.

The Law

- [145] Section 161 of the FLA sets out the objectives of spousal support. The objectives that are potentially relevant to this case are:
- a) to recognize economic advantages and disadvantages arising from the relationship;
 - b) to relieve economic hardship arising from the breakdown of the relationship; and
 - c) to promote the economic self-sufficiency of each spouse.
- [146] After it is determined that a spouse is entitled to support, the duration and the amount of such support are determined with reference to the conditions means, needs and other circumstances of each spouse, including the length of the parties' cohabitation, the functions that each party performed while they lived together and any agreement between them regarding support: FLA s. 162.
- [147] Spousal support based on non-compensatory grounds comes from the "social obligation model" of marriage, which regards marriage as an "interdependent union": Chutter v. Chutter, 2008 BCCA 507 at para. 54. This model embraces the idea that, upon dissolution of a relationship, a former partner should be required to meet the needs of a disadvantaged spouse, not the state: Chutter at para. 54.

- [148] The courts have considered the concept of "needs" in the context of non-compensatory spousal support. It is something more than the basic necessities and may vary depending on the parties' particular circumstances: Chutter at para. 55 citing Myers v. Myers (1995), 65 B.C.A.C. 226 at para. 10.
- [149] In Yemchuk v. Yemchuk, 2005 BCCA 406 at paras. 41, 48-49, the court referred to Myers and further held that in the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown and is not confined to deciding whether a spouse can meet stated expenses with the income available to him.
- [150] The court in Lee v. Lee, 2014 BCCA 383 commented on situations where a spouse experiences a marked decline in standard of living upon the breakdown of the marriage:
- [65] If Mr. Lee had not formed this new relationship, the case law in British Columbia would have permitted an award of spousal support to him, given the length of the parties' marriage (which presumably creates interdependence) and the expansion of the meaning of "need" in the family law context. But whether it would have been a "material error" in law or a wrong exercise of discretion to refuse support in such circumstances is another matter. To rule as a matter of law that Mr. Lee should be compensated indefinitely for the "loss" of the ability to share in Ms. Lee's income and lifestyle would, taken to its logical conclusion, mean that support must be ordered on one model or the other in virtually every case that comes before the court.
- [66] At the same time, the case law of this province referred to above does indicate that a party who experiences a marked decline in standard of living due to divorce should receive some financial assistance (either in the form of re-apportionment of assets or maintenance) in adjusting to his or her new situation - hence the concept of a "transitional" award, which is recognized by the SSAG. Such awards have regularly been made in favour of women, but rarely in favour of men, perhaps reflecting that, as Rogerson suggests, "Non-compensatory support is significantly structured by social norms of what is fair and just. The economic dependency of husbands on wives is not reinforced and naturalized by strong cultural norms, as is the dependency of wives on husbands ...". (At 234-5.) It seems to me that, setting aside for the moment the support already paid by Ms. Lee from August 1, 2012 to June 1, 2013, Mr. Lee could have expected some transitional award, if only on the "principle" that what is sauce for the goose is sauce for the gander. As it is, Ms. Lee did pay a total of \$17,500 to Mr. Lee, presumably assisting him in adjusting to his new circumstances.
- [151] The Spousal Support Advisory Guidelines (SSAG) recognize that when a relationship ends, a significant disparity in income between the parties will create an entitlement to some support and at the very least, time-limited transitional support: SSAG, Section 4.1.

[152] While the Guidelines are not binding, the courts in British Columbia have found the ranges established by the Guidelines are a useful tool in determining the amount and duration of claims for spousal support: *W. v. W.*, 2005 BCSC 1010 at para. 27

Spousal Support Analysis

[153] Mr. Garcia is currently 43 years old and Mr. Pidwerbeski is currently 62 years old.

[154] In considering Mr. Garcia's needs and his claim for non-compensatory spousal support, I am mindful that the parties' relationship lasted 19 years.

[155] When the relationship ended in March 2017, Mr. Garcia was attending university and his earnings in 2017 were \$15,914. In March 2017, Mr. Pidwerbeski was working full time out of the province and his 2017 earnings were \$116,797.

[156] I find that a significant income disparity existed between the parties at the time the relationship ended. That income disparity extended back many years in part due to the fact that Mr. Garcia had been attending university since 2008.

[157] Mr. Garcia lived in the Home from the time of the parties' separation until October 2019, at which time he moved out and he received spousal support of \$1,200 a month for eight months until March 2020.

[158] I must determine whether Mr. Garcia is entitled to spousal support on a non-compensatory basis with reference to the objectives of spousal support. There is no suggestion that Mr. Garcia made any career, educational or other sacrifices during the relationship to benefit Mr. Pidwerbeski's career.

[159] In assessing Mr. Garcia's need, I should also take into account the relative standards of living of the spouses following the relationship breakdown. Mr. Garcia lived rent-free in the Home following the separation in March 2017 until October 1, 2019. He described obtaining a roommate, but being cut off from access to rental income after the separation. However, given the post-separation annual operating losses on the properties, it seems unlikely there was any net rental income to draw upon.

[160] In 2019, Mr. Garcia successfully took out a small student loan for the first time. He also took out a \$5,000 bank loan and he borrowed from family to cover his expenses. Mr. Garcia described living frugally and according to his May 21, 2019 financial statement, his total monthly expenses are \$1,965 and his annual employment income is \$23,429.

[161] Mr. Pidwerbeski's May 31, 2019 financial statement lists his monthly living expenses at \$12,008. His gross T4 income for 2019 was \$109,017. Again, the parties agreed that Mr. Pidwerbeski covered the annual operating losses on the Home and Condo from 2017 onwards. Mr. Pidwerbeski testified that he rents a basement suite for \$1,000 per month.

- [162] Mr. Pidwerbeski also described living frugally, for example, by going without cable television. Mr. Pidwerbeski testified to using almost all of his salary to maintain his apartment, the Home and the Condo and to pay spousal support. With any remaining money, he has prioritized saving for retirement. Mr. Pidwerbeski testified that his employer matches his RRSP contributions. He described feeling anxious and overwhelmed by thoughts of poverty in retirement.
- [163] Mr. Garcia's counsel submits that Mr. Pidwerbeski could well afford to pay spousal support as evidenced by his ability to continue saving for his retirement. The submission that Mr. Pidwerbeski is living a superior lifestyle because he is managing to save for retirement must be considered in context.
- [164] At the time of separation, Mr. Pidwerbeski's retirement savings totalled approximately \$40,000. Since separation, his retirement savings have increased to approximately \$150,000. Mr. Pidwerbeski attributes the growth to a few factors including his employer's contributions, returns on his investments, and his personal contributions.
- [165] Even if I were to assume that Mr. Pidwerbeski's income is the source of one-half of the \$110,000 post-separation increase to his retirement savings, it would mean that over three years, he contributed approximately \$1,500 per month. Given that Mr. Pidwerbeski is 19 years older than Mr. Garcia and that he is now 62 years old, I disagree that saving for his impending retirement demonstrates a significant disparity in the parties' post-separation lifestyle.
- [166] After having considered the whole of the evidence, and having specifically considered Mr. Garcia's need in the context of the parties' long-term relationship, I am not convinced that there is a significant disparity in the relative standards of living of the spouses following their separation.
- [167] Both parties live in modestly-priced rental accommodation and lead frugal lifestyles. Since separation, Mr. Pidwerbeski has continued working out of province. Mr. Garcia has not worked. He said he was unable to work or study following the parties' separation due to medical issues. Mr. Garcia prioritized his need to recover over his need to work. However, he did not clearly explain why he took no steps to obtain paid work after he recovered.
- [168] I am also mindful that in effecting a division of family property, I have declined Mr. Pidwerbeski's request to reapportion the parties' interests in the Home. The loss of the Home's rental income stream has dealt a significant blow to Mr. Pidwerbeski's retirement plans. Unlike Mr. Garcia, Mr. Pidwerbeski will be required to make up for the loss of retirement savings in a compressed timeframe. Were I to order Mr. Pidwerbeski to pay the time-limited spousal support requested by Mr. Garcia, this would further shorten Mr. Pidwerbeski's financial "run-way" into retirement. I am not convinced, after considering all of the parties' circumstances, that the parties' post-separation lifestyles are markedly different.

- [169] One additional factor that I have taken into consideration relates to Mr. Pidwerbeski supporting Mr. Garcia's educational endeavours throughout the relationship. In my view, this support will enable Mr. Garcia to enhance his future earning capacity such that I find it likely, that shortly, Mr. Garcia's income is likely to exceed Mr. Pidwerbeski's.
- [170] For the reasons that I have explained, I find that Mr. Garcia has failed to establish that he is entitled to additional spousal support, beyond the support he has already received, on a non-compensatory basis.
- [171] I have also concluded that Mr. Garcia is not entitled to a transitional award of the kind discussed by the court in Lee. That is because I do not find that Mr. Garcia has encountered a marked decline in his standard of living following the parties' separation.
- [172] In reaching this conclusion, I considered that Mr. Garcia lived rent-free in the Home from March 2017 to October 1, 2019 and after that, Mr. Pidwerbeski paid him spousal support of \$1,200 per month up until March 2020. In effect, Mr. Garcia was provided with reasonable transitional support for approximately three years post-separation.
- [173] I will not consider Mr. Garcia's claim for retroactive spousal support in light of his counsel's submission that in the event family property is equally divided, Mr. Garcia will no longer assert a claim for retroactive spousal support.

Summary of Orders

- [174] The family property and family debt shall be divided as set out in Schedule A.
- [175] By consent, Mr. Pidwerbeski is entitled to ownership of excluded property listed under his name in Schedule A.
- [176] By consent, Mr. Pidwerbeski is entitled to ownership of the Volkswagen vehicle.
- [177] Mr. Pidwerbeski will transfer the sum of \$3,140 to Mr. Garcia by way of a spousal rollover from his RRSP.
- [178] All benefits accrued to Mr. Pidwerbeski under the GWL Pension are family property and Mr. Garcia is entitled to an equal share of the GWL Pension, to be divided in accordance with Part 6 of the FLA based on entitlement dates from February 1, 1998 to March 1, 2017. The benefit split shall be administered by the plan.
- [179] Each party is entitled to an equal amount of the unadjusted pensionable earnings that the parties both acquired in the Canada Pension Plan during their relationship to be split by the Canada Pension Plan administrator based on a relationship commencement date of February 1, 1998 and a relationship end date of March 1, 2017.
- [180] The Home and Condo shall be listed for sale. The parties will have joint conduct of sale, unless they otherwise agree in writing, with liberty to apply for directions. The parties shall equally divide the net proceeds or short-fall arising from the sale of the Home and Condo.

[181] Mr. Pidwerbeski may purchase Mr. Garcia's interest in the Home by obtaining a current appraisal from an appraiser approved by Mr. Garcia and then paying Mr. Garcia one-half of the value established by the appraisal, after the amount outstanding on the mortgage, and one-half of the cost of the appraisal, have been deducted. Such purchase, if it is to be carried out, must be completed within 90 days of this order.

[182] Mr. Garcia's claim for spousal support is dismissed.

Costs

[183] Unless there are circumstances of which I am unaware, given the parties' divided success in this family law litigation, each party shall bear his own costs.

[184] If either party wishes to bring other matters to my attention that may affect the order of costs, or if there are calculation errors in my reasons, he must contact SC Scheduling within 45 days of the date of these reasons to request an opportunity to make further submissions.

"E. McDonald J."

Schedule A

Division of Family Property & Family Debt

Pidwerbeski v. Garcia

Agreed Property:

Value of VW vehicle (by consent):

Total value:

Less Mr. Pidwerbeski's excluded vehicle claim (by consent):

Total available for division:

\$ 23,150

\$ 23,150

\$ (23,150)

\$ Nil

Disputed Property:

Real Estate

Home Value (by agreement):

Less mortgage (as of Jan. 2020):

Total Equity in Home:

Less Mr. Pidwerbeski's exclusion:

Weyburn Condo Value:

Less mortgage (as of June 2019):

Total equity in Condo:

Total amount available for division:

Mr. Pidwerbeski's 50% share:

Mr. Garcia's 50% share:

*Condo to be sold and the net proceeds or shortfall shall be divided equally

\$1,800,000

\$(488,527)

\$1,311,473

\$(178,000)

\$ (Unknown)

\$(198,816)

\$ (Unknown)*

\$1,133,473

\$566,736

\$566,736

Pension

GWL Pension:

Schulte GWL Pension:

Less Schulte GWL exclusion (by consent):

Blood Tribe Pension:

Less Blood Tribe Pension exclusion (by consent):

Total Pension available for division:

Each party's 50% share:

RRSP

Vancity RRSP:

Less Vancity RRSP exclusion:

HSBC TFSA:

Less HSBC TFSA exclusion:

HSBC RRSP:

Less HSBC RRSP exclusion:

Total RRSP available for division:

Each party's 50% share:

\$56,341

\$6,296

\$(6,296)

\$13,728

\$(13,728)

\$56,341

\$28,170**

\$7,280

(\$1,000)

\$6,009

\$(6,009)

\$51,864

\$(51,864)

\$6,280

\$3,140

**The Pension shall be divided in accordance with Part 6 of the FLA

Family Debt:

Annual Operating Loss 2017-2019 (by consent)

Mortgage on Home, as of January 2020 (by consent)

Mortgage on Condo, as of June, 2019 (by consent)

Estimated total family debt for division:

Each party's equal share of debt:

\$51,031

\$488,527

\$198,816

\$738,347*

\$369,187*

*The mortgage debts must be updated to reflect their current balance

[1] Calculated by subtracting the mortgage balance of \$60,000 from the 1998 assessed value of \$238,000 [$\$238,000 - \$60,000 = \$178,000$].

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