
CANADA / JUDGMENT

Polard v. Polard

2017 BCSC 1963

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 1963 Polard v. Polard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Polard v. Polard,

2017 BCSC 1963

Date: 20171101

Docket: 14-3701

Registry: Victoria

Between:

Vanessa Nicole Polard

Claimant

And:

Jamieson Alan Polard

Respondent

Before: The Honourable Mr. Justice B.D. MacKenzie

Reasons for Judgment

Counsel for the Claimant:

A.J. Duncan

Counsel for the Respondent:

C. Murray

Place and Date of Trial:

Victoria, B.C.

May 8-12, 2017 and

October 12-13, 2017

Place and Date of Judgment:

Victoria, B.C.

November 1, 2017

Background

- [1] Mr. and Ms. Polard's marriage broke down in February 2014, although they remained in the same residence until Mr. Polard moved out at the end of September 2014. They were married for approximately 16 years and in a relationship for approximately 20 years. They have two daughters. Dominique will be 18 in November. She graduated from high school in June. Gabrielle is now 15 and in Grade 10. Both children have been avid dancers and notwithstanding their parents' separation, both are apparently doing well.
- [2] For most of the time since they separated, Mr. and Ms. Polard have been able to agree on a parenting schedule that appeared to be working and in the children's best interests. Pursuant to this agreement, Ms. Polard has been the primary caregiver and Mr. Polard has had generous parenting time with the girls, primarily focussing on alternate weekends.
- [3] They are also joint guardians. Both parties agree that the other is a loving parent and at least until the trial of this matter in May 2017, enjoyed a positive relationship with their daughters. However, during submissions in the early part of October, I was advised that things have perhaps changed somewhat and without being advised of much more, that Gabrielle is now expressing a desire to spend more time with her father. As a result, Mr. Polard suggests there should be a shared parenting regime as far as Gabrielle is concerned.
- [4] The difficulty with this suggestion, as both parties have acknowledged in their respective submissions, is that I have no evidence on this particular issue. As a result, when calculating Mr. Polard's past child support obligations, this will be based on the children's primary residence being with Ms. Polard. Counsel have agreed that if there has been a recent change in Gabrielle's residence, such that this would affect Mr. Polard's support obligations, they will be able to work that out between themselves, with respect to any net amount that might be payable by Mr. Polard for past child support.
- [5] While there was agreement on parenting time, Mr. and Ms. Polard were unable to reach agreement on several of the various financial issues that arise when spouses separate. This inability to reach a reasonable compromise on such matters as spousal and child support, imputation of income and division of family property, including what may or may not be

excluded property, resulted in several days of trial and two days of argument, a lot of the time referencing Mr. Polard's status as a beneficiary in a family trust set up by his father for business and estate planning purposes. Further complicating these financial questions is the fact that Mr. Polard had been employed for several years in his father's business, ARC, which Mr. Polard's father sold to a company named ARO, in October 2013. It would appear the parties enjoyed a comfortable lifestyle prior to separation, thanks to Mr. Polard's employment in his father's business. However, these relatively prosperous times came to a halt when Mr. Polard Sr. sold his business and the new employer terminated Mr. Polard and two of his siblings from their executive positions. Mr. Polard lost this employment in October 2015. He received three months' severance pay, ending in January 2016.

- [6] Mr. Polard has been out of work since then and received Employment Insurance for 2016. He testified that since being terminated, he has been focussing his energies on starting a new business in the field of information technology. On this point, contrary to Mr. Polard's assertion, Ms. Polard says that he has done little to find gainful employment. In fact, she says there is no incentive for him to do so until this litigation is over, given the financial support he receives from his father, apart from any benefits derived from his father's discretionary trust.

EXCLUDED PROPERTY

- [7] As I have mentioned, a lot of time at trial focussed on the workings of the Polard Family Trust ("Trust") and the benefits that Mr. Polard has already received or had allocated to him from this Trust, as well as the potential distribution of assets or benefits in the future. On this point, Ms. Polard concedes that capital allocated to Mr. Polard from the Trust is excluded property but submits that the capital allocated from the Trust should be taken into account either as income to Mr. Polard in the year it was received, or alternatively, in support of an unequal division of family property in Ms. Polard's favour, in order to achieve some degree of equity between the parties.
- [8] Mr. Polard obviously agrees with this characterization of the Trust as excluded property and also submits that any benefit he might receive from the Trust in the future, or any interest in the Trust, which according to the evidence is incapable of valuation, should be excluded property as well. Ms. Polard accepts this proposition as well. The issue of whether capital allocated to Mr. Polard will be treated as income or taken into account in determining if an unequal division of family property is appropriate will be discussed below.
- [9] There was also evidence that Mr. Polard's father provided the parties with \$70,000 in 2013, prior to their separation. On this particular point, Mr. Polard agrees that this gift is not excluded property but submits that it is a relevant factor when determining whether or not Ms. Polard has established that it would be significantly unfair to divide the family property equally. Similarly, Mr. Polard says his pre-cohabitation equity of \$13,000 in the Stevenson Place property he and his father and brother bought prior to Mr. and Ms. Polard commencing their relationship should be excluded property or, in the alternative, is relevant

with respect to whether or not an unequal division of family property is justified. Mr. Polard says this contribution, if not excluded, along with the \$70,000 gift, should militate against an unequal division of the family property.

- [10] As far as Mr. Polard's claim that the \$13,000 in pre-cohabitation equity is concerned, I agree with Ms. Polard that this should not be considered excluded property, as the uncontradicted evidence is that after she moved into the Stevenson Place home, she commenced contributing to expenses, including the mortgage. In this regard, it is conceded that the Stevenson Place property was sold for less than it was purchased for and the only reason Mr. Polard realized any equity as a result of that sale was because the mortgage was reduced, partly because Mr. Polard's father forgave his \$20,000 mortgage and partly because Ms. Polard contributed during the course of the relationship to reducing the principle amount of the mortgage. For these reasons I am not satisfied Mr. Polard has established that this contribution should be considered excluded property.
- [11] At the same time, Ms. Polard submitted that she contributed approximately \$10,000 of her savings to the purchase of the parties' next home. However, Mr. Polard says there is insufficient evidence to establish that these were pre-relationship savings and as such this \$10,000 should not be excluded property. I agree with this submission as well. Therefore, neither of these amounts will be considered excluded property.

FAMILY PROPERTY

- [12] As far as family property is concerned, the parties agree that the vehicles, the RRSPs and the net proceeds from the sale of the matrimonial home are family property, to be considered in the division of property analysis. The RRSPs are modest as are the valuations for the motor vehicles. The primary asset is the net proceeds from the sale of the matrimonial home. The home was sold in January 2016. In April 2016 each party withdrew \$25,000 from the proceeds. The parties' joint line of credit was also paid out. In addition, approximately \$9,800 was applied to payment of past s. 7 expenses. As a result, there is now approximately \$238,759 in counsel's trust account.
- [13] As an aside, both parties agree that the real estate equity was initially approximately \$285,000. This number includes the \$50,000 already disbursed to the parties but deducts the other interim distributions.

Division of Property

- [14] Under the Family Law Act, S.B.C. 2011, c. 25 (FLA), it is presumed family property or debt will be divided equally (s. 81). However, s. 95(1) allows for an unequal division if the court concludes it would be "significantly unfair" to equally divide family property or debt, a significantly higher hurdle than under the prior legislation.

- [15] In this analysis, pursuant to s. 95(2), the court may consider the duration of the relationship between the spouses, a spouse's contribution to the career or career potential of the other spouse, and "any other factor" other than the consideration referred to in s. 95(3). This provision states:
95. (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [16] On this point, Ms. Polard says it would be significantly unfair to her if the family property was divided equally. Mr. Polard disagrees, and says Mr. Polard has not established an equal division would be significantly unfair, given the totality of the circumstances.
- [17] Significant unfairness is not defined in the FLA, but in *L.G. v. R.G.*, 2013 BCSC 983 at para. 71, the court concluded the term "is a caution against a departure from the default of equal division in an attempt to achieve 'perfect fairness.'" Only when an equal division would be "unjust or unreasonable" should the court depart from an equal division (para. 71).
- [18] Similarly, our Court of Appeal in *Jaszczewska v. Kostanski*, 2016 BCCA 286, said at para. 42 that significant unfairness must be something objectively unjust, unreasonable, or unfair in some important or substantial sense.
- [19] In determining the question of whether an equal division would be significantly unfair, the analysis first requires the court to determine the extent of the family property, pursuant to ss. 84-86 of the FLA, and then go through the notional exercise of dividing the property and debt equally. Once this is done, the court must then determine whether such an equal division would be significantly unfair, given the provisions of s. 95. See *Remmen v. Remmen*, 2014 BCSC 1552, and *Blair v. Johnson*, 2015 BCSC 761.
- [20] In the present case, when calculating one-half of the value of the agreed upon family property, comprised of the proceeds from the sale of the matrimonial home, the parties' RRSPs and their automobiles, the parties are very close in their respective valuations: Ms. Polard says one-half of the family property would be \$195,014, and Mr. Polard comes up with \$196,180.
- [21] Ms. Polard however says that the analysis should also consider the sizeable amount of Mr. Polard's excluded property, as a result of the capital paid or allocated to him through the Trust, such that he became the "beneficial owner" of capital in the range of \$394,000 to \$530,000, depending on the outcome of an appeal of the Canada Revenue Agency reassessment of Mr. Polard's 2013 tax return and the potential to have the \$75,000 tax refund turn into a tax liability of approximately \$136,570.

- [22] Mr. Polard acknowledges the existence of this "excluded property," but says, for what it is worth, that this "benefit" is closer to \$449,000, subject to a tax debt of \$140,760. Moreover, Mr. Polard says it is not known when or if he will "realize" any recovery on this "excluded property." In addition, he says there is no "value" held in the Trust, as the distribution of any capital is at the sole discretion of his father. To put the position of Mr. Polard in simple terms, he says he has never actually received any money from the tax manoeuvres utilized by his father and his accountants in order to reduce the tax bill when his father's business was sold, and there is no guarantee he ever will. As Mr. Polard says, the whole point of the exercise was to reduce his father's taxes, not to actually distribute capital to his four children before his death.
- [23] Indeed, the evidence of Mr. Polard Sr. is clear, the capital allocated to his son and the resulting on-demand promissory note his father signed on behalf of a numbered company, will not be paid to Mr. Polard until his parents pass away. At the same time, Ms. Polard says the promissory note speaks for itself. It is a legally enforceable document which Mr. Polard can demand be paid at any time.
- [24] Be that as it may, I agree with Ms. Polard when she says this sizeable amount of excluded property on Mr. Polard's side of the ledger is relevant when considering whether or not the family property should be divided equally.
- [25] Mr. Polard does not dispute that this is a relevant factor, but emphasizes that, given the evidence of Mr. Polard Sr. and his accountant, it is unknown when he will recover any of the excluded property. He also submits that in this analysis, I should consider the \$13,000 he put into the Stevenson Place property prior to the parties' cohabitation, as "another factor" in the fairness analysis. While I have not found the \$13,000 to be excluded property, I accept this is a factor in the s. 95 fairness analysis. I also take into consideration, as urged by Mr. Polard, the \$70,000 gift from his father, utilized by the parties to their mutual benefit, when determining whether an equal division would be significantly unfair to Ms. Polard.
- [26] In opposing an unequal division of family property, Mr. Polard acknowledges this was a lengthy relationship and marriage, some 20 years, but emphasizes the relatively young age of Ms. Polard, 42 years old, when the marriage broke down. He also points out Ms. Polard had earned a permanent teaching certificate from Manitoba prior to coming to B.C. and commencing her relationship with Mr. Polard, and while not being able to obtain a permanent teaching certificate in B.C. because of a lack of substitute teaching hours, she did obtain a certificate as an early childhood educator, resulting in her being in the workforce, at least to a limited degree, for the last several years. As a result, Ms. Polard is presently employed in this field at Camosun College, earning a steady but modest income, with benefits and a future pension.
- [27] Conversely, while Ms. Polard acknowledges the relative youth of both parties at the time of separation, she says this was a lengthy traditional marriage where she gave up a teaching career in Manitoba to move to B.C. to commence her relationship with Mr. Polard.

Moreover, I am satisfied the uncontradicted evidence establishes that when the children were born, Ms. Polard assumed the role of primary caregiver, permitting Mr. Polard to work full-time and advance his career within his father's company, at the expense of her career. As a result, Ms. Polard submits her short-term and long-term earning potential has been significantly compromised and this militates in favour of an unequal division of the family property.

- [28] Ms. Polard also says she relied on Mr. Polard's statement that, because of the significant Polard family wealth which they as a couple would benefit from in due course, it was unnecessary to diligently invest in RRSPs for their retirement, resulting in the modest RRSP Ms. Polard has now accumulated. Finally, while Ms. Polard acknowledges Mr. Polard Sr.'s generosity when he forgave the \$20,000 mortgage and gifted his son and her the \$70,000, but because this was utilized by the family during the marriage, she submits it should carry little weight in the fairness analysis.
- [29] Ms. Polard says in these circumstances, it would be significantly unfair to divide the family property equally, where both would receive approximately \$196,000 but where Mr. Polard would remain the beneficial owner of the significant excluded property, even though it is acknowledged that he has not benefitted directly at this point in time. She therefore proposes an unequal division of the proceeds of the sale of the matrimonial home, 70/30 in her favour. She has calculated this would result in her receiving approximately \$200,000 (including the \$25,000 she has already received) from the sale proceeds, and Mr. Polard receiving approximately \$86,000 (including \$25,000 he has already received).
- [30] Given the totality of the circumstances, and applying the relevant factors in s. 95(2) and the objectives of spousal support as referenced in s. 95(3) of the FLA, I agree with Ms. Polard's submission. I find she has established that an equal division of the proceeds from the sale of the matrimonial home would be significantly unfair, and that an appropriate division of this family property would be a 70/30 division in her favour.
- [31] The exact amount owing will be calculated by counsel and paid forthwith to Ms. Polard from the sale proceeds presently held in trust.

The Parties' Respective Incomes

- [32] The parties agree that Mr. Polard has ongoing support obligations to the children as well as to Ms. Polard. He quite properly agrees Ms. Polard is entitled to spousal support, the only question being quantum and duration. The amount of both child and spousal support depends of course on the parties' incomes since separation and in the future.

Ms. Polard's Income

- [33] As far as Ms. Polard's income since separation, the parties agree on the appropriate amount for determining Mr. Polard's spousal support obligations. Given Ms. Polard's evidence as to her recent employment at Camosun College, the parties agree that income should be imputed to Ms. Polard for 2017 in the amount of \$25,000 and for 2018, income of \$30,000. Ms. Polard's employment income for support purposes for 2014 was \$14,083, for 2015 - \$17,152, and for 2016 - \$18,917.
- [34] Given the agreement between counsel as to the imputation of income for Ms. Polard, all I need say is that I accept Ms. Polard has made reasonable efforts to obtain appropriate regular employment commensurate with her qualifications and experience, with a view to achieving economic self-sufficiency in due course. On this point, Ms. Polard's future support will be based on a minimum income of \$30,000. If her actual earnings are higher, her actual income will be the appropriate amount for calculation purposes.

Mr. Polard's Income

- [35] Ms. Polard says the most significant issue is whether Mr. Polard's reported income is the appropriate income for support calculations, suggesting Mr. Polard's income is somewhat opaque, given the presence of the Polard Family Trust and the termination of his employment with the company that purchased his father's business.
- [36] On this issue, Ms. Polard points out that Mr. Polard declared income in 2013 of approximately \$613,000 because of the distribution of a capital gain from the sale of his father's business. He then earned approximately \$125,000 when the parties separated in 2014, and his income for 2015 with the new company was about \$134,000. It was only when his severance pay expired in January 2016 did Mr. Polard have to rely on Employment Insurance.
- [37] Ms. Polard therefore submits these past income levels should guide the court when determining what would be an appropriate imputation of income to Mr. Polard for subsequent years.
- [38] Ms. Polard also says Mr. Polard is intentionally underemployed and not diligently seeking suitable full-time employment, given he has a business degree and several years of experience in information technology in his father's business. For example, Ms. Polard researched job postings in the information technology field which she submits Mr. Polard would be qualified for. She pointed out three job offers with the B.C. Public Service advertising full-time jobs in the information technology field with a range of income from \$65,000 to \$74,000, and one where the salary was "up to" \$90,000. As a result, Ms. Polard submits a reasonable level of income should be imputed to him in order to calculate an appropriate level of support, given his ongoing support obligations.

- [39] In this regard, Ms. Polard emphasizes the court has broad discretion to impute income in order to ensure children are supported in accordance with the means or earning capacity of their parents. As Martinson J. said in *Hanson v. Hanson* (1999), 92 A.C.W.S. (3d) 1024, parents must earn what they are capable of earning in order to meet their support obligations, having regard to the health, age, education, experience and skills of the spouse.
- [40] Ms. Polard also emphasizes that as Mr. Polard's brother and sister were let go from their executive positions with the new company prior to Mr. Polard's termination, and by his own admission, Mr. Polard knew well before October 2015 his future with ARO was tenuous and he would in all likelihood be let go as well, yet he did nothing to prepare for this eventuality until after he was in fact terminated.
- [41] In this analysis, Mr. Polard acknowledges his primary focus since losing his job in October 2015 has been on developing his own technology business. While this is commendable, and one hopes this enterprise will eventually be successful, it has resulted in minimal earnings to this point in time, such that Mr. Polard's income for 2016 was Employment Insurance in the amount of \$20,226, coupled with an RRSP withdrawal of roughly \$25,000. Mr. Polard's 2017 income as of October 2017 is an extremely modest amount from his new business.
- [42] As a result, on the basis of what Ms. Polard says is Mr. Polard's underemployment, pursuant to s. 19(1)(a) of the Federal Child Support Guidelines, S.O.R./97-175, she says it is "reasonable" to impute annual income to Mr. Polard in a minimum amount of \$90,000 for the years 2016 and 2017 and going forward.
- [43] Ms. Polard also refers to s. 19(1)(e) and says an additional \$15,000 should be imputed on the basis that Mr. Polard has ostensibly loaned nearly \$400,000 to his father's numbered company, as evidenced by the promissory note from the numbered company, and according to Mr. Polard Sr., this source of income is invested and presumably generating income. Ms. Polard submits that at 3% or 4% this would generate investment income for his father's company of approximately \$15,000 or so. As a result, Ms. Polard submits Mr. Polard should have income imputed to him in the amount of \$105,000 for 2016 and going forward. On this point, Mr. Polard says because he has no control over what his father does with the funds he is investing and because the promissory note is simply part of the necessary paper trail utilized by his father for tax purposes, no income should be imputed to him under this heading.
- [44] Ms. Polard also referred to s. 19(1)(i) of the Guidelines and to "additional discretionary imputation due to financial assistance from family," such as Mr. Polard's rent-free accommodation in a home his father recently purchased, as well as loans for legal expenses. However, given the unique circumstances in this case, I am not satisfied these last factors should result in any additional imputation of income to Mr. Polard under either s. 19(1)(i) or this general heading.

- [45] Turning to Mr. Polard's position, he says no income should be imputed to him after he lost his job with the new company in October 2015. He does however accept that as of November 2017 imputation of income "at a maximum of \$50,000" is appropriate, saying the two year "transition period" was necessary because of what he says was "a career change that was outside his control." Mr. Polard says that as he is continuing to concentrate on developing his own business, which he has been working on since early 2016, it would be appropriate to allow for this adjustment period, justifying no imputation of income for the last two years. Mr. Polard is however cautiously optimistic that in due course he will again be earning income in the \$125,000 range.
- [46] In support of his position, Mr. Polard says "some career adjustments are unavoidable" and he should not be required to pay support based on his prior "career", which is no longer sustainable, nor is his past income indicative of what would be a fair level of income once he lost his job at ARO.
- [47] Mr. Polard says that, given the number of failed job applications he applied for in the information technology field, it was reasonable for him to start a new business, as non-productive as it has been. Moreover, the mere fact there was a job posting with a salary of up to \$90,000 is not determinative of what would be a reasonable imputation of income. There is no guarantee he would have been the successful candidate. Mr. Polard submits therefore that it is reasonable to base his support obligations for 2016 on his actual income, continuing through 2017 until November, when he agrees it would be reasonable to impute income to him of \$50,000, "regardless of whether his actual earnings reach that level," rather than his past earnings.
- [48] Mr. Polard therefore says Ms. Polard has not met the burden of establishing an evidentiary basis for the imputation of income to Mr. Polard in these circumstances, beyond the \$50,000 for 2017 and afterwards (*Marquez v. Zapiola*, 2013 BCCA 433 at para. 36).
- [49] In reply, Ms. Polard says Mr. Polard has elected to slowly attempt to earn income by setting up his own business, instead of diligently looking for work within the information technology area where his apparent skills and expertise, acquired during his employment in his father's business, could be put to use and provide a regular source of income, which in turn would provide his children with a reasonable level of support commensurate with Mr. Polard's earning capacity.
- [50] Moreover, Ms. Polard says Mr. Polard has little incentive to aggressively search for regular employment or to vigorously pursue customers for his new business. Ms. Polard points out that thanks to the significant financial assistance and generosity of his father, including rent-free accommodation in the home his father recently purchased where Mr. Polard has been helping in renovations, Mr. Polard is not like others who, without steady work, are without suitable accommodation or suffer a significant change in lifestyle. As a result, Ms. Polard says that, while Mr. Polard resided for some time with his parents, his circumstances are "vastly superior" to those of other parents who have modest incomes, and in order to meet

the objectives of the Guidelines, a significant amount of additional income should be imputed to him.

[51] In this analysis, Ms. Polard reminds the court that s. 1 of the Guidelines states:

The objectives of these Guidelines is:

(a) To establish a fair standard of support for children that ensure that they continue to benefit from the financial means of both spouses after separation.

[52] Given the principles enunciated in the authorities and the objectives of the Guidelines, I agree with most of Ms. Polard's submissions on this issue.

[53] While I appreciate the attraction of starting one's own business, I am persuaded Mr. Polard has not diligently attempted to find alternate employment doing the same type of work he did in his father's business and the new company. As Ms. Polard says, he did not change "careers" per se, he changed employers. The field of information technology did not disappear along with his employment at ARO. I am satisfied there were and are many opportunities in information technology available to persons with the skills and experience of Mr. Polard. As Ms. Polard says, by all accounts Mr. Polard was a valued employee and not someone who was simply gifted a job in his father's company and did nothing but collect a paycheque. Mr. Polard agreed that during his time at this father's company he acquired "significant management skills" and testified he "was good at what I did." In addition, I find Mr. Polard's evidence as to his present financial situation ambiguous and equivocal. For example, he acknowledged during his testimony some six months prior that he was starting to make some money and that "I've got money now but I don't know what my income is." At the same time he testified he had not billed for his services since March because he was behind on his paper work. As a result, I agree with Ms. Polard that Mr. Polard has been underemployed since separation and an appropriate level of income should be imputed to him when calculating his support obligations.

[54] What is a reasonable amount of imputed income is however somewhat difficult to quantify, and once again involves the court exercising its discretion in an attempt to ensure the children are supported in accordance with the financial means of Mr. Polard, given the particular circumstances of this case. The comments of our Court of Appeal in *Marquez* at para. 37 are instructive:

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.

- [55] In my view, the submission of Ms. Polard that Mr. Polard should have income of \$90,000 imputed to him from basically the end of his severance period in January 2016 to the present time is not reasonable or realistic.
- [56] Balancing all the competing factors in this analysis and given the totality of the circumstances, I find it is appropriate to impute income to Mr. Polard on a graduated basis in the following amounts.
- [57] For the year 2016, for the purposes of calculating Mr. Polard's support obligations, his imputed income will be \$60,000. For the year 2017, income will be imputed to Mr. Polard in the amount of \$70,000, and for 2018, the amount of \$80,000. For subsequent years, Mr. Polard's support obligations will be based on a minimum income of \$80,000. If he earns more, support will be based on that higher income.
- [58] As the parties now have my conclusions on income levels for the relevant years, counsel agreed they can make the necessary calculations in order to precisely ascertain the amount of support that should have been paid since separation, once the amount of support paid to date has been subtracted from the equation. I do note however that my calculation is such that at \$60,000 for 2016 and \$70,000 for 2017, Mr. Polard would owe little in spousal support. The shortfall in child support obligations on these income levels would be more significant, about \$12,000 in total for 2016 and up to October 2017 if my math is correct, but not such that this would cause undue hardship to Mr. Polard given his means and circumstances.

How Much Support Has Been Paid

- [59] At the outset I will state Mr. Polard's support obligations will commence as of October 1, 2014. Moreover, just to be clear, his support obligations will be based on his actual 2014 earnings of \$125,453, his 2015 earnings of \$134,103, and the imputed amounts of \$60,000 for 2016 and \$70,000 for 2017.
- [60] Also for the sake of clarity, as I was advised during argument that Gabrielle's residence might be changing or in flux, I will leave it up to counsel and their clients to do the proper calculations given there may have been a change from Gabrielle living primarily with Ms. Polard to her being in a shared parenting regime.
- [61] I will also order that, as I have agreed with Ms. Polard that an equal division of the proceeds from the sale of the matrimonial home would be significantly unfair, for the purpose of calculating Mr. Polard's spousal support obligations from October 2014 to the present month, and going forward, spousal support will be at the low range, as Ms. Polard has suggested.
- [62] So what amount of support has Mr. Polard paid to date, given Ms. Polard has had her claim for support outstanding since October 2014. On this issue, notwithstanding the meticulous and comprehensive accounting each party has done, the parties say this is not "controversial" and they are not far apart in their respective calculations. Both counsel in

submissions said the only disagreement as to what was paid is during the period from October 2014 to the end of December 2014. As far as this timeframe is concerned, Ms. Polard says Mr. Polard paid \$18,072, whereas Mr. Polard calculates he paid \$19,987, a difference of \$1,915.

- [63] On this point, I accept Mr. Polard's submission and find that he has paid \$19,987 for the period from October 2014 to December 2014. Counsel will add this amount to the amount of support the parties agree Mr. Polard has paid from January 2015 to October 10, 2017.
- [64] At the close of submissions, counsel for Mr. Polard submitted that his calculation failed to include two mortgage payments he paid in May and June 2015 in the amount of \$2,200 for each month. As a result, he says this should increase his contribution to the overall support payments by \$4,400. As it is acknowledged Mr. Polard paid the mortgage, this appears to be a mere oversight on the part of counsel. I will add this to the total amount of support Mr. Polard has paid since October 2014. Once counsel have made the necessary calculations, any ultimate shortfall in support payments will be paid forthwith out of Mr. Polard's share of the remaining proceeds from the sale of the matrimonial home.
- [65] As an aside, Mr. Polard says the question of whether he has had underpaid his support obligations since separation necessarily brings into consideration the principles enunciated by the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37, when considering a claim for retroactive support. Even though Ms. Polard initially described the issue as one of retroactive support, she says it really is not, it is past or overdue support, as she has been waiting since filing her claim in 2014 for what she submits is an appropriate amount of both child and spousal support.
- [66] I agree with Ms. Polard that it is not necessary to apply the D.B.S. analysis in these circumstances. Nevertheless, I will simply state that even under a D.B.S. analysis, and taking a "holistic" approach to this question, I would reach the same conclusion, as I am satisfied there has been no delay on the part of Ms. Polard, the children are in need of support and as I have mentioned, I am not satisfied there would be any significant hardship to Mr. Polard in making this order.

Section 7 Expenses

- [67] As I mentioned at the outset, both Dominique and Gabrielle are avid and apparently proficient dancers. As a result, the parties agree that dance expenses can properly be considered as an extraordinary expense. In addition, both parties agree that the children's medical and dental expenses and other health-related expenses are clearly appropriate s. 7 expenses. Once again, however, in attempting to ascertain the appropriate share of s. 7 expenses, this requires a determination as to what has been paid for 2015, 2016 and 2017. Moreover, in her written submissions, Ms. Polard seeks indemnification for what she says was her equal sharing of whatever is determined to be an extraordinary expense. The basis for this submission is that the parties have paid most of the past s. 7 expenses out of their

respective capital from the proceeds of the sale of the family home. That is, the parties have paid these expenses equally. Ms. Polard submits that, given her income and her submissions as to what would be proper imputed income to Mr. Polard, her proportionate share would be well below 50%, and now seeks \$5,000 compensation for overpayment of her share of s. 7 expenses.

- [68] The difficulty with this particular submission is Ms. Polard has listed the following as s. 7 expenses: "camp, school, tutor, guitar, net ball, etcetera," for the period 2015 through 2016, totalling, according to her calculations, about \$3,800. Mr. Polard says these are not all extraordinary expenses. On this issue, I agree with Mr. Polard.
- [69] I am not satisfied the various school items listed nor activities such as guitar, net ball and camp can properly be characterized as extraordinary expenses. I am also not satisfied that Dominique's graduation expenses, whatever they were, are properly s. 7 expenses. On this particular point, I simply pause to suggest that perhaps both extended families might very well consider it appropriate to assist in their grandchildren's various activities depending of course on their own particular financial circumstances.
- [70] Whilst I am reluctant to descend into the task of calculating to an exact figure what Ms. Polard has paid in extraordinary expenses, such as dancing and medical expenses, and counsel can once again agree to the exact figure, it appears to me it is in the neighbourhood of \$17,856. However, because the incomes for 2015, 2016 and 2017 vary from year to year, counsel will have to calculate what the parties' proportionate share is of the dance, medical and health expenses for those years.
- [71] Going forward, these s. 7 expenses, along with Dominique's appropriate post-secondary education expenses, will be shared by each party in proportion to their respective incomes. The parties are of course at liberty to agree between themselves as to any other special expenses which will be shared once again in proportion to their respective incomes.
- [72] In the end, Ms. Polard will be entitled to some indemnification given that I agree that by paying past s. 7 expenses out of capital from the proceeds of the sale of the family home, she has paid approximately 50% of the total, which is more than her proportionate share based on the parties' incomes. While I am tempted to order a somewhat arbitrary amount in favour of Ms. Polard on this issue, as she has suggested, that would be inappropriate. I will again leave it up to the parties to calculate what is owing based on the parties' respective incomes or pursuant to any other agreement or compromise they wish to make.
- [73] Finally, to complete the division of family property, the parties will retain for their own use their respective vehicles and RRSPs. The parties will exchange financial information and tax returns by July 1st with a view to updating Mr. Polard's support obligations. While I am not prepared to make an order or comment on the question of duration, I am prepared to accede to Mr. Polard's submission that he be at liberty to apply for a review of Ms. Polard's entitlement to spousal support six years from the date of this judgment.

[74] During submissions both parties agreed there should be no formal order respecting the children's primary residence as they are confident they can agree, in consultation with their daughters, what is in their best interests. Similarly, they agree there is no need for a specified parenting regime. At the same time, I will stipulate that as guardians they will share parental responsibilities as outlined in s. 41 of the FLA.

Divorce

[75] There will be an order for divorce based on living separate and apart since September 2014.

Costs

[76] Given my findings on the various issues, especially my conclusions on the question of an unequal division of property and the imputation of income to Mr. Polard, I find Ms. Polard has achieved substantial success. Unless there are matters I am unaware of, Ms. Polard is entitled to costs on Scale B.

"B.D. MacKenzie, J."

The Honourable Mr. Justice B.D. MacKenzie

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