

CANADA / JUDGMENT

Popein v. Popein

2024 BCSC 1159

COURT

Supreme Court of British Columbia

DECIDED

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2024 BCSC 1159 Popein v. Popein

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Popein v. Popein,

2024 BCSC 1159

Date: 20240628

Docket: E59979

Registry: Kamloops

Between:

Terri Lynn Popein

Claimant

And

Lawrence Thomas Popein

Respondent

Before: The Honourable Justice Ahmad

Reasons for Judgment

Counsel for the Claimant:

A. Marr

Respondent, appearing on his own behalf:

L. T. Popein

Place and Date of Trial:

Kamloops, B.C.

November 14-17

and 20-24, 2023

Place and Date of Judgment:

Kamloops, B.C.

June 28, 2024

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I. Introduction

- [1] The claimant, Teri Lynn Popein and the respondent, Lawrence Thomas Popein commenced cohabitating on July 1, 2010 and married on May 5, 2012. They separated on February 27, 2021. The parties have two children, B., born on May 9, 2014 and K., born on December 3, 2015.
- [2] The parties have resolved various issues including parenting responsibility, parenting time, and the appointment of a parenting coordinator by way of a consent order made on June 16, 2023. The remaining issues to be determined are the parties' obligations regarding the payment of retroactive and prospective child support and s. 7 expenses, the division of family property and family debt, and the respondent's claim for spousal support.
- [3] Both parties seek an order for divorce.

II. Credibility and Reliability

- [4] In assessing credibility, I rely on the principles as set out in the often-cited passages of Justice O'Halloran in *Faryna v. Chorny*, [1952] 2 D.L.R. 354, 1951 CanLII 252 (B.C.C.A.) at 357, and of Justice Dillon in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, aff'd 2012 BCCA 296.
- [5] Related to, but distinct from, credibility is reliability. Credibility concerns the veracity of a witness; reliability involves the accuracy of the witness's testimony. Accuracy engages consideration of the ability of the witness to observe, recall and recount what occurred: *R. v. Khan*, 2015 BCCA 320 at para. 44.
- [6] In this case, several witnesses gave evidence. Vicki McKim, Jamie Harris, Bryan McNeely, Tanya Olson, Richelle Cotter and Julia Nasadyk gave evidence on behalf of the claimant. The respondent did not call any additional witnesses. Both he and the claimant gave evidence on their own behalf.
- [7] For the most part, all of the witnesses who gave evidence on behalf of the claimant were credible and, in my view, made a sincere effort to provide their evidence in a fair and balanced manner. Some of the witnesses were able to provide relevant observations regarding the issues raised. For example, Ms. McKim (the claimant's mother), Ms. Cotter, Ms. Olson, Mr. McNeely and Ms. Harris observed and were able to corroborate some of the claimant's allegations relating to the respondent's conduct, including her allegations of physical and verbal violence. All of the witnesses gave evidence regarding the interactions between the parties more generally. However, given the personal nature of the issues raised, including personal finances and the parties' interactions in the privacy of their home, very few of the witnesses were able to provide direct evidence of the issues.
- [8] Of note, Ms. Nasadyk purported to give evidence of the respondent's involvement in Protex, a business in which the respondent has claimed an interest and in which he claims to have invested \$50,000. Both issues were very much an issue in the proceeding. However, despite

her role as general manager of Protex, it was clear that Ms. Nasadyk had little to no direct knowledge of the circumstances surrounding the respondent's involvement in that business. Rather, much (but not all) of her evidence was based on hearsay and uncorroborated assumptions. She was not a reliable witness.

- [9] Ultimately, with the exception of evidence corroborating the respondent's conduct toward the claimant, for the most part, the issues can be determined on the basis of the parties' evidence alone. While I have considered all of the witnesses' evidence, the most significant evidence came from them.
- [10] The claimant was a thoughtful and considered witness. She conceded points that were favourable to the respondent including about his contribution to the completion of the Family Home after it was purchased in 2010. She was organized and was clear about specific financial transactions, including the nature of those transactions and the accumulation and payment of the parties' debt. Her evidence was consistent on both direct and cross-examinations.
- [11] The claimant was a credible and reliable witness.
- [12] Like the claimant, the respondent made some concessions where appropriate. For example, he did not dispute the claimant's dedication and effort in maintaining the family's finances or her parenting skills in raising the children. He was less forthright about other important aspects of the case. In particular, he appeared to downplay or re-cast certain aspects in a light that was favourable to him. For example, the respondent characterizes his layoff during the COVID-19 pandemic as a decision he made to stay home with the children. In fact, he was receiving CERB benefits due to the layoffs in the construction industry.
- [13] As another example, although he generally conceded some allegations of violence, for the most part, he only did so for those incidents that were recorded or for which he was convicted. He denied others that were not verified by some means other than by the claimant's evidence alone. In my view, the recorded incidents and those incidents observed by third parties support the other allegations made.
- [14] While I do not conclude that the respondent was wholly incredible, in my view, he tended to give his evidence in a manner that was most favourable to his position.
- [15] Where the evidence of the claimant and the respondent conflict, I accept the evidence of the claimant.

III. Background

- [16] I have considered all of the evidence, including the oral evidence of the parties and the documentary evidence, before me. However, in these reasons, I do not purport to canvass all the details of the evidence that was advanced, except as they specifically relate to an issue in dispute. A summary of the key points of the evidence, drawn largely from the claimant's written summary of facts, which I found to be fair and accurate, is set out below.

Pre-Relationship Finances

- [17] Through her work ethic and focused financial discipline, by the time the claimant was 29 years old, she had saved close to \$100,000 and had acquired a truck and two boats with no debt. In the spring of 2010, she had sufficient savings to purchase bare land at 8710 Badger Drive, Kamloops, B.C. for approximately \$107,000. She funded the construction of a home on the property that ultimately became the parties' family residence (the "Family Home"), with a \$328,000 mortgage.
- [18] The respondent came into the relationship with a truck which was almost re-possessed and for which the claimant lent him approximately \$3,000 for repairs. He had no other significant assets or savings, nor did he have any significant debt.

The Family Home

- [19] The parties moved into the Family Home in July 2010, together with Bryan McNeely, whom they previously knew through the respondent.
- [20] After moving into the Family Home, the parties immediately started in renovations, beginning with the unfinished basement, and later on the surrounding landscape. The respondent had a background in construction, and therefore took the lead in many of the projects. The claimant and Mr. McNeely helped with the physical labour as much as they could based on their abilities and skillsets. The claimant funded all expenses associated with the renovations, including any materials and third-party contractors required.
- [21] The claimant produced some handwritten records in which she appears to have noted the value of work completed by the respondent by reducing rent or other household expenses that she maintained was owing to her. The respondent denies that he was charged rent or that rent was offset by his contribution to the home renovations.

Finances During the Relationship

- [22] After some time, the claimant no longer purported to charge the respondent rent. Rather, he began contributing to the family finances by depositing a portion of his pay cheque into the parties' joint account used for paying expenses. Apart from the respondent's initial suggestion that both parties pool money into a joint account, there does not appear to have been any thoughtful discussions about the specifics of this arrangement. The respondent, in his sole discretion, determined the amount of his contributions, which he acknowledged

had no formal basis or justification, apart from what seemed fair to him.

- [23] The claimant managed the parties' bills and expenses throughout the marriage. Early on, she grew dissatisfied with the finances within the relationship, particularly with the disproportionate contribution to debt and what she considered was the lack of adequate contribution to payments from the respondent, given his income. Despite their purported shared finances, the claimant had no knowledge of what the respondent received on any given pay cheque, and the respondent had no interest in enquiring about the extent of the family's debt and expense load.
- [24] Both parties used joint credit cards, with the respondent frequently using the joint accounts for personal expenses, the extent of which was a point of contention for the claimant. While the claimant used the amounts that the respondent contributed to help offset the bills and expenses she paid, the respondent's spending, largely for personal or convenience items, often outpaced his contributions, leaving little to no contribution towards more significant fixed expenses that the claimant maintained for the family.
- [25] On multiple occasions, the claimant tried to discuss the parties' worsening financial situation with the respondent, but was typically met with avoidant, dismissive, and oftentimes hostile responses. These conversations never led to any substantive change or meaningful resolution in their financial situation.

The Children and Parenting Responsibilities

- [26] After B. was born in May 2014, the claimant took maternity leave for approximately 4 ½ months, returning to work in September 2014, as a previous layoff affected her entitlement to a full paid year. The respondent also took a leave from work from July 2014 until about February 2015. The parties determined that it was more advantageous for the respondent to take a leave from his employment than it was for the Claimant to take an unpaid leave, given the claimant's higher earning capacity.
- [27] While pregnant with K., the claimant took a short-term disability leave from September 26 until K.'s birth on December 3, 2015, due to concerns with the final months of her pregnancy. She then took a full year maternity leave, returning to work at the end of November 2016. The respondent also took a 2 ½ month leave, using up his vacation from June 27 to July 18, 2016, then a subsequent parental leave from July 19 to September 12, 2016.
- [28] While both parties contributed to the upbringing of the children, the claimant carried the bulk of what the respondent referred to as the "motherly duties", including shopping and buying clothes, and was solely responsible for managing the children's appointments. He explained the latter was largely influenced by the impracticality of his volatile schedule on the railroad.

- [29] While both parties provided relief to the other when one party had to work, the claimant tended to spend the majority of her non-working hours directly involved with the children, even when the respondent was also available. The claimant testified that when she came home from work, the respondent would take that as his cue that his responsibilities ended, leaving her to care for the children. That was the case even when the respondent stayed home for parental leave for B., during which the claimant maintained a heavy involvement in B's infant care.
- [30] As the children grew older, the respondent would indulge in his social life late to the night / early morning hours and would often fail to notify the claimant of his whereabouts hours before she was due to go to work. The claimant testified that she spent many sleepless nights either worrying about whether the respondent would return in time to care for the children, and on a few occasions, having to physically search for the respondent, so she could leave for work.
- [31] The respondent's conduct took a toll on the claimant, particularly with respect to her employment. She began showing up late to work with some regularity because of her inability to leave the children unattended when the respondent could not be found in time. She also attended work on many occasions in an unfit state, given the sleep deprivation she would experience, which is particularly notable because her job involves various elements of safety. During these times, the claimant was notably unfocussed in the workplace.

The Parties' Employment

- [32] At the time of the marriage, the claimant had been employed at the pulp mill in Kamloops, where she had worked since March 2007.
- [33] The respondent was employed by CP Rail primarily as a conductor from March 2004 to December 2016.
- [34] In the latter part of 2016, the respondent came into an opportunity to leave CP Rail and enter into a business venture with a company called Protex. The respondent maintains that he discussed that opportunity with the claimant who, he says agreed that the change would address the parties' difficulty in caring for the children while both on shift work. The claimant denies that claim. She says their childcare needs did not require him to change his job as she managed all of the childcare needs which were around her shifts.
- [35] Ultimately, the respondent began his new business venture, which required a \$50,000 investment, for which the respondent turned to the claimant. Because she did not have the cash available, funding that investment required the claimant to take out a loan, which she did not want to do. However, the respondent was persistent and the claimant eventually acquiesced. The parties ended up consolidating a variety of their debts, in conjunction with the \$50,000 loan (the "Protex Loan") to fund the respondent's investment, into a home equity line of credit (HELOC), using the equity that was available in the Family Home. The credit available on the HELOC was \$232,500, which the parties eventually maxed out.

- [36] Despite the investment, the specifics of the respondent's involvement with Protex remain uncertain. While he maintains that he acquired an ownership interest, no written agreement documenting that interest was prepared.
- [37] The respondent's position at Protex provided him with a more regulated schedule than he had at the railway, typically working 8:00 a.m. to 4:00 p.m. At the same time, he also operated a side business known as "JellyBean" in which he sold a streaming services device from the Protex premises. Despite the move and his regular hours, the parties engaged in full-time daycare for the children for the first time in late 2016, which continued until the daycare closed due to the COVID-19 pandemic in March 2020.
- [38] However, the respondent's position at Protex was short-lived, as he was ousted from the company in the fall of 2017. While the reasons for the ouster are not entirely clear, the respondent concedes that he had an issue with cocaine use that possibly may have contributed to the falling out with the Protex owners.
- [39] The respondent commenced litigation against Protex in respect of his ouster. That litigation, which was funded in part with \$20,000 from the HELOC, is ongoing. The claimant is not privy to the status of that litigation.
- [40] On October 30, 2017, the respondent obtained employment as a carpenter foreman with a construction company in the Kamloops area, where he continues to be employed. During the weeks that he has parenting time with the children, he works a 6-hour day, leaving at 3 p.m. or earlier to pick the children up from school. He works 9 to 10 hours a day during his non-parenting weeks.

Allegations of Abuse

- [41] The claimant testified about the physical, verbal, and emotional abuse she was subjected to after the birth of B. The physical abuse was sporadic and typically correlated with the respondent's level of intoxication. The first instance of physical abuse occurred in 2014 and involved two separate occasions where the respondent struck the claimant on the back during an argument, with the claimant spending those nights sleeping on the floor of infant B.'s room. The following morning, the respondent was seemingly oblivious to what had occurred the night prior, asking why the claimant was on the floor.
- [42] Other incidents of physical abuse involved the respondent picking the claimant while she was seated in a chair and throwing her against a wall while at another couples' house, smashing the claimant's wrist against a granite table top while K. was present, assaulting the claimant's arm and face during an argument in the fall of 2020, and strangling the claimant while on a camping trip.

- [43] The claimant also testified about threats of physical violence including holding a knife to the claimant's face during an argument, threatening the claimant with a shotgun, threatening to "beat the fuck" out of the claimant in front of B., and threatening to burn the Family Home down during an argument in front of the children.
- [44] With some exceptions, the respondent disputes the claimant's allegations of physical abuse and threats of physical abuse. However, he was charged and convicted of two counts of assaults in respect of two of the allegations, and a witness testified, to the allegation of strangulation while camping. As noted, other witnesses' evidence support these allegations. I accept that all of the incidents occurred as the claimant describes.
- [45] In addition to the physical abuse and threats, the respondent frequently talked down to the claimant, often in front of friends, and made abhorrent comments and insults that cut to the core of her self-worth and made her feel worthless. In addition to other disgraceful vulgarities, comments included calling her a beluga whale, pathetic, and useless.
- [46] The claimant produced three recordings made near the end of the relationship in which the respondent threatened the claimant with the expense, and what he would seek financially, anytime she raised the possibility of divorce. In the recordings, he says (often screaming), among other things that she would have to go bankrupt to divorce him, that he is going to take her for everything, and that she is going to end up paying him money to live by himself, presumably referencing his belief that she would be ordered to pay spousal support.
- [47] As a result of the abuse, the claimant felt stuck. She explained that she did not want a broken family and was concerned with how she would manage the parties' level of debt on her own if the parties were to separate. She said she was "basically scared".
- [48] Eventually, she was able to end the relationship after reporting some of the incidents of physical abuse to the police, leading to the respondent's arrest and removal from the Family Home on February 27, 2021. On November 22, 2021, the Respondent was tried and convicted of two counts of assault against the claimant and sentenced to a conditional discharge with 18 months' probation.

Post-separation

- [49] In the immediate aftermath of the respondent's arrest and the parties' separation, the claimant was forced to go on a short-term stress leave from work, which was ultimately extended on successive occasions until she was cleared to return in late November of 2021. Upon her return to work, her doctor recommended that she not engage in night shifts as a means to alleviate any initial pressures, which lasted for an additional year.
- [50] Since separation, the claimant has serviced the vast majority of the parties' debts, including the HELOC, without any contribution from the respondent, the primary exception being the \$20,000 line of credit used to service the respondent's part-time JellyBean business. He ceased making payments on that line of credit at the end of August 2023.

[51] From the date of separation at the end of February 2021 to the end of September 2022, the children resided primarily with the claimant. Commencing at the end of September 2022, the parties moved to a week-on, week-off parenting schedule which they have continued until the date of trial.

[52] Neither party has paid child support to the other since separation.

IV. Issues

[53] The issues to be determined are:

- a) The parties' obligations regarding the payment of retroactive and prospective child support and s. 7 expenses;
- b) The parties' incomes for the purposes of determining child support and s. 7 expenses;
- c) How should the family property and family debt be divided, in particular:
 - i. Would equal division of the family property and family debt be significantly unfair; and
 - ii. If so, what is the appropriate division of the family property and family debt; and
- d) Is the respondent entitled to spousal support and, if so, the amount and duration of spousal support?

V. Discussion and Analysis

A. Child Support and Section 7 Expenses

1. Basic Child Support

[54] Pursuant to s. 150 of the Family Law Act, SBC 2011, c. 25 [FLA], an order for child support must be determined in accordance with the Federal Child Support Guidelines, SOR/97-175 [Guidelines].

[55] Pursuant to ss. 3 and 7 of the Guidelines, child support is payable on an ongoing basis.

[56] Regarding retroactive claims, notice of both parties' claim for child support was given on the filing of the claim and counterclaim in March 2021, within a month of separation. In my view, that immediate notice of the claim justifies a retroactive award as well: *D.B.S. v. S.R.G.*, 2006 SCC 37.

[57] Given the children's primary residence with the claimant period after separation on February 27, 2021 to the end of September 2022, she is entitled to child support for that 10-month period in the amount set out in the applicable table annexed to the Guidelines: Guidelines, s. 3; *Uren v. Reambeault*, 2010 BCCA 332 at para. 7.

[58] Given the shared parenting time after September 2022, the amount of child support payable for the period October 2022 to the date of trial, and prospectively, will be calculated pursuant to s. 9 of the Guidelines, as net offset of the child support that would otherwise be payable by each of the parents.

[59] The amounts payable will be determined based on the parties' income for the relevant period. I discuss that issue below.

2. Special Expenses

[60] In addition to table child support, section 7 of the Guidelines provides that the court may order an amount to cover a portion of certain expenses, taking into account the necessity and reasonableness of the expense. As a guiding principle, s. 7 expenses are to be shared by the spouses in proportion to their respective incomes: Guidelines, s. 7(2).

[61] The terms of the consent order of the parties dated June 16, 2023, provide a mechanism for the determination and arrangement for the division of special or extraordinary expenses. Para. 9.a. provides:

In addition to expenses that fall within the definition of "special or extraordinary expenses" under s. 7 of the Federal Child Support Guidelines, the parties will share in proportion to their income expenses for up to four of the Children's extracurricular activities agreed upon in advance, unless otherwise agreed to between the parties in writing. [Added emphasis.]

[62] Since separation, the claimant has incurred various expenses for registration and related costs of the children's activities including soccer, baseball, swimming, tumbling, cheer, piano, singing, and Girl Guides. Although the respondent paid for half of those expenses in 2021, the year the parties separated, he has made no or limited contributions since then.

[63] The claimant has submitted receipts for the expenses to which the respondent did not contribute. However, she testified that she did not retain receipts for all such expenses and seeks global reimbursement of \$3,000 for those retroactive expenses.

[64] Despite his payment in 2021, there is no evidence that the respondent agreed to payment of any of the unpaid expenses in advance, nor was any written agreement to that effect produced. I infer that no such agreement exists. Accordingly, to constitute a recoverable s. 7 expense, it must fall within the definition of "special or extraordinary expenses" under the Guidelines.

[65] Under s. 7(1)(f) of the Guidelines, several factors must be considered to determine whether an expense qualifies as an "extraordinary expense". Recreational sports and other similar extracurricular activities are generally considered "ordinary" (i.e., not extraordinary). The question is whether the participation goes beyond that of the "average child": Guidelines, s. 7(1.1), *DLC v. FMC*, 2010 BCSC 1312 at para. 67. The onus is on the recipient parent to establish: *L.A.M. v. S.C.M.*, 2020 BCSC 67 at para. 31.

- [66] I accept that the children's participation in all of the activities for which the claimant seeks reimbursement is important for their development. The fact that the claimant encourages their participation is understandable and, indeed, laudable. However, the presumption is that extracurricular activities are not "extraordinary". There is no evidence to suggest that their participation in extracurricular activities goes beyond that of other children who are good, or even better than average, at their extracurricular activities.
- [67] Moreover, given her income, I am unable to conclude that the claimant is unable to reasonably cover those expenses so as to come within s. 7(1.1)(a) of the Guidelines. The claimant does not suggest that is the case.
- [68] In light of the authorities, I reject the claim for reimbursement for the expenses incurred by the claimant for the children's extra-curricular activities as a s. 7 expense. Notwithstanding that conclusion, I encourage the respondent to consider the benefit of such activities for the children and reconsider his position on the payment for those expenses on a going-forward basis.

3. What are the Parties' Incomes?

a. Legal Framework

- [69] Pursuant to s. 16 of the Guidelines, a spouse's income is determined using the "total income" in that spouse's T1 General form, as may be adjusted in accordance with Schedule III.
- [70] However, pursuant to s. 19(1)(a) of the Guideline, the court may impute such amount of income as it considers appropriate in the circumstances including where:

the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage

- [71] The test is set out in *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37 as follows:

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 [citations omitted].

- [72] The test is subjective.

- [73] Pursuant to s. 213(1)(a)(i) and (2)(b) of the FLA, where a person fails to disclose information, the court may draw an adverse inference, including by attributing income to that person in an amount that the court considers appropriate.

b. Analysis

i. The Claimant

- [74] The claimant has been employed at the pulp mill in Kamloops since March 2007. She is currently employed as a brownfield operator and earns \$46.72 per hour.
- [75] The claimant's gross earnings increased in 2017, 2018, 2019, and 2020. In those years, she earned \$106,117, \$116,539, \$124,029, and \$144,067, respectively. In 2021, the claimant took an extended stress leave, resulting in earnings of \$68,982 in that year.
- [76] The claimant's income for 2021 and 2022 was \$68,982 and \$129,407, respectively. Given the consistent nature of her employment, I accept those figures accurately represent her income for 2021 and 2022 for the purpose of calculating child support payable and the parties' proportionate share of s. 7 expenses.

ii. The Respondent

- [77] The respondent was employed by CP Rail from March 2004 to December 2016, primarily as a conductor. Although he obtained his certification as a locomotive engineer during his employment with CP Rail, he did not regularly work in that capacity. In 2012, 2013, 2015, and 2016, the last full years he worked full-time for CP Rail, he earned gross annual incomes of \$96,092, \$93,935, \$84,264, and \$87,375, respectively.
- [78] As described above, at the end of 2016, the respondent left CP Rail to pursue an opportunity with Protex. His involvement in Protex ended in approximately October 2017. His income in 2017 was \$36,278.
- [79] Since then, the respondent has been employed as a carpenter foreman for a construction company in Kamloops. As indicated on his income tax returns, he earned \$36,278 and \$58,327 in 2017 and 2018, respectively.
- [80] The respondent has not filed income tax returns since 2018.
- [81] His T4s for the years after 2018 record earnings of \$57,356 (2019), \$54,190 (2020), \$65,997 (2021), and \$75,104 (2022). However, his year-end paystubs reflect payments to him of \$79,120 (2021) and \$93,514 (2022), amounts that are \$13,123 and \$18,410 more than the amounts recorded on his T4s for 2021 and 2022, respectively. While the details were not entirely clear, the respondent testified that the difference is the amount of a loan from his employer to pay for his family lawyer. He testified that, although the loan has been partially re-paid through overtime work and bonuses, a portion remains outstanding.
- [82] Relying on s. 213(a)(i) and (2)(b) of the FLA, the claimant argues that the discrepancies between the respondent's 2021 and 2022 T4s and the 'year-to-date totals' on his pay stubs, together with the respondent's failure to file income tax return warrant an adverse inference against him.

- [83] I agree. Regardless of the amounts paid as employment income, the pay stubs reflect, and the respondent appears to concede, that the monies available to him in 2021 and 2022 exceeded the amount on his T4. While I accept that a portion of those funds may have been advanced in the form of a loan, without any further documentary evidence (including, for example, his filed income taxes for the years after 2018), it is impossible to determine the specific amount that may be subject to repayment.
- [84] In addition to that issue, the claimant argues that income should be imputed to the respondent on the basis of what she submits is his intentional under-employment, specifically: (a) the respondent's failure to seek re-employment with CP Rail where he had earned in excess of \$96,000 in one year; and (b) his decision to work less than full-time hours at his current employment with the construction company.
- [85] As noted, the test for imputing income is subjective. To assess the reasonableness of the respondent's employment, it is necessary to consider the context in which he has had made the decisions he has regarding employment.
- [86] In both cases, the respondent has justified his decision on what he claims are the needs of the children and his desire to be at home with them. He argues that both the unpredictable hours of his work at CP Rail and working full-time hours at the construction company make spending time with the children difficult.
- [87] As the starting point on that analysis, I acknowledge that, ideally, every parent would be able to maximize their time with the children. That is especially true in these circumstances given the limited time that each parent has with the children and the children's ages. However, even well-intentioned underemployment can still support a finding of underemployment under s. 19(1)(a) of the Guidelines. Put another way, for the purpose of that section, "intentionally underemployed or unemployed" does not require a finding that a parent is intentionally seeking to evade their child support obligations or other finding of bad faith: *Van Gool v Van Gool*, 59 B.C.L.R. (3d) 395, 1998 CanLII5650 (BCCA); *Hanson v. Hanson*, [1999] B.C.J. No. 2532, 1999 CanLII 6307 (BCSC) at paras. 10 -13.
- [88] In *Llewellyn v. Llewellyn*, 2002 BCCA 182 at paras. 30 - 31, the court expressly held that a parent's desire to be available at home for her children was not a sufficient reason to justify under-employment in the absence of a child's special needs. Income was imputed to that parent.
- [89] The "important question is whether the payor spouse has demonstrated an intention to be underemployed, with the consequence that his children do not benefit from his potential earning capacity ": *Barker v. Barker*, 2005 BCCA 177 at para. 18.
- [90] Ultimately, "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": *Marquez* at para. 37; *Van Gool* at para. 34

- [91] Having considered those factors, I am satisfied that it is appropriate to impute income to the respondent.
- [92] First, having been employed by CP Rail for over 12 years prior to December 2016, it is clear that the respondent has both the knowledge and the experience to work there now, certainly as a conductor or perhaps even as a locomotive engineer for which he has been certified. As he previously earned between \$84,000 and \$96,000, I easily conclude that he could earn in that range, if not more, now. He has chosen not to.
- [93] Similarly, citing his desire to maximize the amount of time he can spend with the children, he has chosen to work less than full-time hours at his construction job during his parenting weeks. Even accepting that he works one or two hours more on his non-parenting weeks, his decision to work ten hours less during his parenting week (two hours per day) results in a lower income than he is capable of.
- [94] His decision in both cases has deprived the children of the benefit of his potential earning capacity.
- [95] I accept, as the respondent argues, that both alternatives, returning to CP Rail or increasing his hours at his current employment, will require that he employ childcare assistance, perhaps even at a cost more than he will earn by working the extra hours at the construction company. However, in the circumstances of this case, I am satisfied that is not a factor that obviates the obligation to maximize earning capacity.
- [96] Based on his previous earnings from CP Rail, it is appropriate to impute income of \$80,000 for 2021 and \$90,000 for 2022 to the respondent.

4. Conclusion on Child Support and Proportionate Share of Section 7 Expenses

[97] To summarize, for the purposes of determining child support obligations and the parties' proportionate share of s. 7 expenses, both parties are found to be residents of British Columbia and:

- a) The claimant's income for 2021 is \$68,982;
- b) The claimant's income for 2022 is \$129,407;
- c) The respondent is imputed to have a gross income for 2021 of \$80,000; and
- d) The respondent is imputed to have a gross income for 2022 of \$90,000.

[98] Based on the incomes for 2021 and 2022:

- a) For the period February 27, 2021 to September 30, 2022, the respondent shall pay to the claimant Guidelines table support totalling \$24,882, comprised as follows:
 - i. \$12,390, being \$1,239 per month for the period February 27, 2021 to December 31, 2021 (10 months); and

- ii. \$12,492, being \$1,388 per month for the period January 1, 2022 to September 30, 2022 (9 months);
- b) For the period October 1, 2022 to October 31, 2023:
 - i. The claimant owes to the respondent Guidelines table support totalling \$ 24,726 (\$1,902.05 x 13 months); and
 - ii. The respondent owes to the claimant Guidelines table support totalling \$18,044 (\$1,388 x 13 months).
 - iii. To satisfy the obligation to pay child support for the period October 1, 2022 to October 31, 2023, the claimant will pay to the respondent the net set-off sum of \$6,682 (\$24,726 - \$18,044).
- c) The net amount owing by the respondent to the claimant for retroactive child support for the period February 27, 2021 to October 31, 2023 is \$18,200 (\$24,882 - \$6,682).
- d) Commencing on November 1, 2023 and continuing as long as the children are eligible for support under the FLA, or until further agreement of the parties or Court order:
 - i. The claimant will pay to the respondent the sum of \$ \$1,902.05 on the first day of each month;
 - ii. The respondent will pay to the claimant the sum of \$1,388 on the first day of each month; and
 - iii. In satisfaction of the party's obligation to pay child support, the claimant will pay to the respondent the net set-off sum of \$514.05 on the first day of each month;
- e) Commencing on November 1, 2023, the parties' proportionate share of the children's special or extraordinary expenses is 59% for the claimant and 41% for the respondent.
- f) Commencing in 2024, and for so long as the children are eligible to receive child support:
 - i. the parties will exchange:
 - (1) copies of the respective income tax returns, including all attachments, no later than June 1 of each year; and
 - (2) copies of any notices of assessment provided by Canada Revenue Agency in each year forthwith upon receipt.
 - ii. The parties will reassess the base amount of child support pursuant to s. 3 of the Guidelines each year. Any adjustments in child support will be effective as of July 1 of each year.

B. Division of Property and Debt

1. What is Family Property and What is Family Debt?

a. Legal Framework

[99] Part 5 of the FLA governs property division.

- [100] With certain exceptions, all real or personal property owned by either spouse on the date of separation is "family property": FLA, ss. 84(1) and 85. Pursuant to s. 81 of the FLA, on separation, each spouse has a right to an undivided half interest in all family property, without regard to their respective use or contribution.
- [101] Excluded from "family property" and the presumption of equal division is the excluded property set out in s. 85. Excluded property includes property acquired before the relationship began: FLA, s.85(1)(a).
- [102] However, the amount by which the value of the excluded property has increased since the relationship began or the excluded property was acquired is considered family property: FLA, s. 84(2)(g).
- [103] "Family debt" includes, among other things, all financial obligations incurred by a spouse during the relationship: FLA, s. 86.

b. Analysis

- [104] The claimant prepared a Scott Schedule setting of the family property and debts held by each party as of the date of trial, together with her assessment of the value of that property and debt. She also sets out the property that she claims as excluded property.
- [105] Not included in the schedule are the parties' respective pensions for which no valuations were presented at trial. The parties have agreed to deal with the valuation and division of the pensions as a separate matter. All issues relating to the parties' pensions are adjourned generally.
- [106] With the exception of the values attributed to a trailer and a dirt bike in his possession and the Family Home, the respondent does not dispute the itemized list and values set out in the Scott Schedule, including the claimant's excluded property claims.
- [107] With respect to the disputed items in his possession:
- a) The claimant has attributed a value of \$30,000 to a 2015 Jayco trailer for what the respondent says was only \$2,000 more. The respondent says the value is somewhere between \$20,000 and \$30,000. A value of \$25,000 is appropriate; and
 - b) The claimant has attributed a value of \$4,000 to a 2012 dirt bike. The respondent says the parties paid \$5,000 for the bike which is now only valuable as a "parts bike". A value of \$1,000 is appropriate.
- [108] The dispute in the value of the Family Home centers around the date of valuation, for which three valuations are available:
- a) \$780,000, the value set out in a joint appraisal as of April 2023, the closest date to the trial;
 - b) \$860,000, the value set out in an appraisal obtained by the respondent as of January 2022; and

- c) \$600,000, based on a comparative market analysis prepared by a realtor for the claimant in February 2021 (the date of separation).

[109] For the purpose of this initial analysis, relying on s. 87 of the FLA, I have used the value as of the date of trial. On that basis, the following table summarizes the value of family property and family debt:

Respondent

Claimant

Family Property

Chattels

8710 Badger Drive

\$780,000

Less: Pre-relationship investment

(\$107,000)

2012 GMC Sierra

\$14,000

2013 Axis Boat

\$70,000

2015 Jayco Trailer

\$25,000

2010 TTR Dirt Bike

\$3,000

2003 Polaris Sport Master Quad

\$3,000

12ft aluminum fishing boat

\$600

2019 Ford F150

\$65,000

2012 KTM 450 Dirt Bike

\$1,000

Bank Accounts and other Investments

TD Canada Trust Account 0580

minimal

TD Canada Trust Account 5596

minimal

Education Savings (B.)

unknown

Education Savings (K.)

unknown

IPC Investment Corp. Lira

\$21,208

Less: Pre-relationship investment

(\$11,489)

IPC Investment Corp. RSP

\$37,824

Less: Pre-relationship investment

(\$10,479)

Protex Shares (initial investment, value unknown)

\$50,000

Total Family Property

\$141,000

\$800,664

\$941,664

Family Debt

TD Fixed Rate Mortgage

\$139,923

TD Home Equity Line of Credit

\$232,500

TD Basic Business Account (JellyBean loan)

\$20,000

TD Line of Credit (Protex) 4084-01

Costco Mastercard

Consolidated into Tangerine

Amex Card

Consolidated into Tangerine

President's Choice Mastercard

Consolidated into Tangerine

Walmart Mastercard

Consolidated into Tangerine

BMO Mastercard

Consolidated into Tangerine

Tangerine Mastercard

\$6,500

2019 Ford F150 Loan

\$62,400

Total Family Debt

\$82,400

\$378,923

\$461,323

Total Value of Family Property

\$480,341

2. Is Equal Division of the Family Property and Family Debt Significantly Unfair?

a. Legal Framework

[110] The property division regime under the FLA creates a presumption that family property, including the growth in the value of excluded property, will be divided equally at the date of trial, without regard to each spouse's respective use or contribution: FLA, ss. 81 and 87.

[111] However, that presumption may be displaced if an equal division would be "significantly unfair" as set out s. 95 of the FLA.

[112] Section 95 reads, in part:

95 (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to

- (a) equally divide family property or family debt, or both, or
- (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
 - (a) the duration of the relationship between the spouses;
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith, substantially reduced the value of family property;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

[Added emphasis.]

[113] Section 95(3) provides:

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.

[114] As reflected in the language of s. 95(2), it is not necessary that all of the s. 95(2) factors are present for a finding of "significant unfairness". The Court may make a finding of significant unfairness based on one or more of those factors.

[115] Once an anchor in one of the s. 95(2) factors have been established, "it is then necessary to consider the entire factual circumstances of the parties, all the relevant facts, all the relevant circumstances, and of course the effect of equal division, in order to fully inform oneself and to justify whether or not unfairness has been established": *Boldo v. Horobin*, 2023 BCSC 360 at para 73.

[116] However, as the Court of Appeal noted in *Singh v. Singh*, 2020 BCCA 21 at para. 134, citing *Jaszczyewska v. Kostanski*, 2016 BCCA 286 at para 41:

"it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division."

[117] The first step in the "significant fairness" analysis is to notionally divide the family property, taking into account the exclusions, in accordance with the provisions of the FLA: *Remmem v. Remmem*, 2014 BCSC 1552 at para. 47.

b. Analysis

[118] Based on what I have found to be the value of the family property and the family debt as of the trial date, the notional division on an equal basis results in each party's entitlement to \$240,170 (\$480,341 / 2).

[119] Although the claimant acknowledges that she is not entitled to retain the Family Home as a right, she notes that if she does, taking into account the related debt and her pre-relationship investment, she would retain \$300,576, or \$60,405 more than she would be entitled to on an equal division of family property. In other words, equalizing the family property would require her to pay the respondent \$60,405.

[120] The claimant argues that given the parties' relative contributions to the household finances and burdens and the respondent's conduct both during the marriage and after separation, that result would be significantly unfair. The respondent disputes the claimant's position. He argues there is no compelling or persuasive reason to depart from the presumptive provisions of the FLA.

[121] I will consider those positions based on the relevant s. 95(2) factors.

Section 95(2)(a): Duration of the Relationship

[122] The FLA does not specify what duration is sufficiently short to trigger a section 95(2)(a) analysis.

[123] In this case, the duration of the parties' relationship from the date of cohabitation until the date of separation is approximately 11 years. I accept, as the claimant argues, that the medium length of the relationship does not preclude a finding of significant unfairness where other s. 95(2) factors are present. However, I cannot conclude that the 11-year relationship is a factor that warrants a finding that equal division of family property would be significantly unfair.

Section 95(2)(c): Contribution to the Career or Career Potential

[124] Both parties have claimed that they contributed to the career or career potential of the other. The respondent claims that he forewent his career at CP Rail so that he could be more available for the children, which enabled the claimant to continue her employment and increase her earnings at the pulp mill. However, while he has brought his claim for spousal support on that basis, the respondent does not seek unequal division of property. I consider this claim under my discussion of his claim for spousal support.

[125] Relying primarily on the \$50,000 Protex Loan, the claimant argues that she contributed to the respondent's career choices to her detriment.

[126] I accept that it was at the respondent's insistence that the claimant agreed to co-sign the Protex Loan using the equity in the Family Home and the credit that she had earned over the years. She did so against her better judgment. I also accept that she did so with limited knowledge of the proposed use of funds, not due to her inattention or ignorance, but due to the respondent pressuring her to just "get it done".

[127] As well demonstrated by her agreement to sign the Protex Loan, the claimant allowed the respondent to pursue career opportunities even to her and the family's detriment. Notably, the investment in Protex came at the cost of the secure and high-income employment with CP Rail. When the respondent's endeavour with Protex failed, the claimant was forced to increase her work hours in order to service the parties' increasing debt, including the Protex Loan.

[128] I am satisfied that the claimant's contribution to the respondent's career choices militates in favour of an unequal division of family property.

Section 95(2)(d): Whether Debt was Incurred in the Normal Course of the Relationship

[129] In *N.H. v. M.H.*, 2018 BCSC 921, Justice Marzari considered the division of a \$150,000 line of credit incurred during the course of the marriage. The circumstances of the debt in that case were described as follows:

[138] There is no question that the LOC, now sitting at just under \$150,000, was incurred during the course of the marriage and qualifies as family debt. However, I find that the debt was taken out over the house for the purposes of an investment scheme that was entirely Mr.

H's and not incurred in the normal course of the spousal relationship. This was not a debt that was incurred through mutual agreement or even forbearance, but as a result of the control that Mr. H had over Ms. K in this relationship. Finally, I find that Mr. H also has complete control over the repayment terms and the ultimate satisfaction of this debt, and has not included Ms. K or her counsel in the negotiations or legal proceedings involved in recovering the debt. It would be significantly unfair in all the circumstances to require Ms. K to be responsible for repayment of a debt that she did not willingly incur and which she is excluded from the process for recovering.

[130] In those circumstances, the Court ordered that the husband was entirely responsible for repayment of the amounts owing on the line of credit.

[131] The claimant argues the circumstances in this case mirror those in N.H. However, in my view, it is notable that, while ill-managed and squandered by the respondent, the Protex Loan was taken out in furtherance of the respondent's career opportunity, something that, on its face, is within the normal course of a relationship.

[132] I do accept, however, that, like Ms. K. in N.H., the claimant in this case, was provided with limited details regarding the respondent's role in Protex but agreed to the loan, not by true mutual agreement, but by the respondent's insistence to just "get it done". Also notable is the fact that despite agreeing to the Protex Loan, the claimant had no control (or even knowledge) over the specific use of the funds and she is now precluded from the litigation to recover the funds.

[133] While I cannot conclude that the Protex Loan was made outside of the normal course of the relationship, I am satisfied that the above circumstances militate in favour of an unequal division of the loan as family debt.

Section 95(2)(g) - Spouse Substantially reduced the value of Family Property

[134] As noted, the \$50,000 was seemingly lost within a year of the parties' investment in Protex when the respondent was ousted from the company in the fall of 2017. Also lost was the Mercedes vehicle for which the respondent had traded their parties' previous vehicle, leaving the parties with the debt for the Mercedes but no vehicle.

[135] As no one directly involved with Protex gave evidence, it is difficult to make any finding regarding the specific circumstances of the respondent's ouster from Protex. However, I do accept that the respondent's own conduct, including his admitted cocaine use, was a factor and contributed to the falling out. At the very least, had he ensured that the terms of his alleged ownership interest were documented (adequately or at all) to protect that interest and the parties' investment, the parties may, at least, have been able to recover the investment. His failure to do so also contributed to the loss.

[136] This factor also favours a finding that the equal division of the Protex Loan as a family debt would be significantly unfair.

Section 95(2)(i) - Any other factor that may lead to significant unfairness

[137] Section 95(2)(i) of the FLA is a general term allowing for the consideration of "any other factor" that may lead to significant unfairness. However, the consideration is not of any factor that may lead to significant unfairness, but rather is limited to factors that relate to the "economic characteristics of the spousal relationship": Singh at paras. 138-139.

[138] Referring to other cases in which this factor has been considered, the claimant suggests "other factors" in this case include:

- a) a disparity in contributions to expenses or debts (E.H.H. v C.L.M., 2017 BCSC 1299; Nanara v. Nanara, 2017 BCSC 1447; A.J.E. v. T.B.W., 2017 BCSC 1657);
- b) a spouse's general disregard for their own financial future (A.J.E.);
- c) underemployment (Nanara);
- d) post-separation maintenance and financial responsibility to real property (E.H.H.; Davie v De Mark, 2017 BCSC 872);
- e) market-driven increase to the value of real property (Davie); and
- f) the original purchase of real property is the product of one spouse's savings (Davie).

[139] Broadly speaking, all factors relate to the relative financial contributions to the family property: the first three factors reflect the parties' relative financial contributions during the relationship, including their ability to make those contributions; the second two factors consider the post-separation issues; and the last factor reflects the claimant's pre-relationship property. I will address the factors relied on by the claimant in those categories.

[140] In assessing all of the categories, I bear in mind that "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. As the Court noted in Slavenova v. Rangelov, 2015 BCSC 79 at para. 60, "[e]xactly equal contribution is more likely exceptional than commonplace". I accept that if the disparity in the parties' financial contributions was the only factor on this analysis, it would unlikely be sufficient to establish "significant" unfairness.

[141] With that in mind, I turn to the specific factors set out above.

Relative Contributions of the Parties During the Marriage

[142] In Chang v. Chang, 2020 BCSC 1783, this Court considered the relative contributions of the parties during the marriage. In that case, Justice McDonald succinctly noted:

- [108] To clear the high hurdle of significant unfairness, Ms. Chang 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. Reapportionment requires "something objectively unjust, unreasonable, or unfair in some important or substantial sense": Singh at para. 134.
- [143] In that case, the Court found that the "significant disparities in the parties' financial contributions" went beyond simple differing financial contributions, but were "intentional and unexplained". It noted:
- [116] Mr. Chang testified that he gave Ms. Chang cash, or he contributed directly to family expenses, when he had money left over or when he felt that he could afford it. I find that in addition to choosing to earn very little income, Mr. Chang decided that his earnings should go firstly and principally to cover his own personal, discretionary expenses for items such as memorabilia and spare tools, before he contributed anything to family expenses. Mr. Chang provided no reasonable explanation for his behaviour. Throughout the relationship, Mr. Chang deliberately prioritized his own spending needs above the financial needs of his family.
- [117] Under cross-examination, Mr. Chang admitted that he never asked Ms. Chang about the details of purchasing or financing of the Family Home because he regarded it as her inheritance and her responsibility. He never contributed directly to the mortgage, something he tried to justify by pointing out that Ms. Chang never asked him to contribute.
- [118] However, he did agree that Ms. Chang would sometimes speak to him about the trouble she had keeping up with the bills. It was clear to me that throughout the relationship, Mr. Chang viewed the financial obligations associated with the Family Home as none of his concern.
- [144] In other words, it was not the disparity in the parties' financial contributions alone that factored in the Court's analysis. Rather, it was the intentional and unexplained nature of the disparity, together with the respondent's ambivalent attitude toward the finances, that made equal division significantly unfair. Similarly, while Mr. Chang made contributions to the childrearing, elder care, and maintenance of the family property, he was unable to explain why Ms. Chang was responsible for the majority of the child-rearing and household duties during the periods in which he was unemployed or working part-time.
- [145] In this case, there is no dispute that the respondent made some contributions both financially and otherwise to the household. However, like Mr. Chang, those contributions were made at his discretion, with no rationale or attempt to ensure that he maximized his contribution to household expenses or at least covered his personal expenses. He was not responsible for ensuring any specific family debt or expense was paid.

- [146] By contrast, the claimant single-handedly managed the parties' bills and expenses. She made significant efforts to exercise financial restraint and ensure that funds were available to meet the family's expenses and growing debt. The respondent was content to have her carry that burden, referring to her as his "secretary" during cross-examination. Worse, he dismissed the claimant's attempts to discuss the parties' worsening financial situation. He simply did not view it as his concern.
- [147] There is no explanation for the disparity in those financial contributions.
- [148] The same is true for the disparity in household and child-rearing obligations. In that regard, the respondent maintains that he left his employment with CP Rail so that he could be available for the children. However, there is nothing on the evidence to suggest that anything changed in those duties even after he did so. In fact, the parties paid for childcare during that time. Even then, the claimant had to miss work or was late for work when the respondent decided to stay out late into the night. Again, there is no explanation for that conduct.
- [149] In my view, the intentional and unexplained nature of the disparity of the parties' contributions during the marriage militates in favour of a finding that an equal division of family property would be unfair.

Post-separation Contributions and Circumstances

- [150] In her written submissions, the claimant relies on the "market-driven" increase in the value of real property as an "other factor" to support an unequal division of property. In my view, however, that position directly contradicts s. 95(2)(f) of the FLA which contemplates significant unfairness may arise if a spouse "after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends". [Added emphasis.] In other words, post-separation increases in value due to market trends will generally not give rise to a finding of significant unfairness.
- [151] However, a party's post-separation contribution to a mortgage is a factor that may increase the value of the property to invoke that section.
- [152] In *Mao v. Rao*, 2021 BCSC 2073, the Court considered a spouse's claim for reapportionment of the equity in the family home to account for her sole post-separation contribution to the mortgage and other costs including for property taxes, home insurance, and utilities. In that case, the parties had purchased the family home during their 12-year marriage.
- [153] Referring to the decision in *Jaszczewska*, the Court confirmed that "in general, a spouse will be presumptively entitled to share in the increase in the value of family property post-separation, regardless of contribution": *Mao* at para. 208 [Added emphasis]. However, it clarified that the general proposition is not to say that unequal contribution will always be irrelevant, noting:

- [214] To the extent that the respondent's post-separation mortgage payments resulted in a reduction in the principal outstanding on the mortgage, they also caused an increase in the equity in the family property beyond market trends. I note that the claimant will benefit from valuing the home at the later date of trial by gaining his proportionate share of appreciation in value in market trends.
- [215] This factor supports an unequal division of that equity to give the respondent the benefit of those payments: s. 95(2)(f).
- [154] In this case, with the exception of the line of credit associated with the respondent's Jellybean business, between the separation and trial, the claimant has serviced the vast majority of the family debt including on the HELOC (including the Protex Loan), the mortgage payments, property taxes payments, and payments on the credit cards. In particular, after separation, the claimant had paid \$63,750 on the mortgage and \$13,377 towards property taxes. The respondent has made no payments towards those items.
- [155] I am satisfied that to the extent the post-separation payments resulted in the reduction in the mortgage principal, they also caused an increase in the value of the family home beyond market trends. Those payments favour an unequal division of equity in the family property.

Pre-Relationship Contributions

- [156] As the final "other factor", the claimant notes that the Family Home existed only because of her efforts and savings. There is no dispute that is the case. However, as I have found that the original \$107,000 investment in the property is excluded, and therefore, not subject to division, that contribution has already been accounted for.

Section 95(3) - 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, with reference to the Objectives of Spousal Support

- [157] The most relevant objective of spousal support to the case at bar is the need to recognize the economic disadvantage arising from the relationship. While the claimant does not advance a claim for spousal support, I am satisfied that the objective remains a relevant consideration on this analysis.
- [158] Through her work ethic and financial discipline, prior to the relationship, the claimant enjoyed financial security. She was prudent with how she incurred expenses and was able to acquire significant assets with no debt. That changed after the relationship. I am satisfied that the change was affected by the circumstances of the relationship.

- [159] In particular, the abusive conduct of the respondent in the latter half of the relationship developed a dynamic between the parties underpinned by elements of control by the respondent over the claimant. The verbal abuse inflicted on her served to diminish her self-esteem and lose confidence and her voice in the relationship. For example, when the claimant tried to discuss the parties' finances with the respondent, she was shut down and did not pursue the issue.
- [160] The respondent's treatment of the claimant facilitated his ability to do as he pleased within the relationship, whether that meant indulging in his social life to the detriment of the family, incurring charges on joint credit cards that outweighed his contributions, or making significant decisions in direct conflict with the best interests of the family, such as the investment in Protex or the decision to leave a secure and well-paying job.
- [161] The dynamic is well-exemplified in the audio recordings adduced by the claimant in which the respondent systematically confirms all the reasons the claimant should believe that leaving the relationship would be worse than putting up with his conduct.
- [162] On the evidence, I am satisfied that, but for the relationship with the respondent, the claimant would be in vastly different financial circumstances than she is today.
- [163] This factor supports a finding that equal division of property would be significantly unfair.

3. What is the Appropriate Division of Family Property and Family Debt?

- [164] Having concluded that an equal division of the family property and family debt would be significantly unfair, the issue to be determined is how should that property and debt be divided. I will start with the division of the Protex Loan.

What is the appropriate division of the Protex Loan?

- [165] As set out above, I have concluded that, however imprudently managed, the Protex Loan was likely within the normal course of the relationship. More significant, however, are the circumstances in which the claimant agreed to co-sign the loan and the fact that the claimant has no ability to recover the funds. As the Court noted in N.H. at para. 138:

It would be significantly unfair in all the circumstances to require [the claimant] to be responsible for repayment of a debt that she did not willingly incur and which she is excluded from the process for recovering.

- [166] The circumstances of this case are more egregious in that the claimant, through the HELOC, also funded a portion of the litigation costs to recover the funds. Especially given the respondent's potential to recover the funds from Protex, it is appropriate that the Protex Loan be apportioned 100% to him.

- [167] I will consider the re-apportionment of the rest of the family debt below.

What is the appropriate division of family property and the rest of the family debt?

- [168] Referring to the same factors on which I have concluded that an equal division would be significantly unfair, the claimant argues that 70% reapportionment of family property and debt in her favour is appropriate. In addition, relying on her sole maintenance of the Family Home after separation in the form of mortgage and other payments, she argues that the valuation date should be as of the date of separation.
- [169] I will address both arguments below, starting with the second.
- [170] In *Slavenova* at para. 53, the Court identified two "alternate routes to address potential unfairness that may arise from a party's post-separation contributions", namely:
- a) Under s. 95, the Court can order reapportionment to address any "significant unfairness" that may arise from an equal division of property and debt in light of the spouse's post-separation contribution; or, alternatively
 - b) Under s. 87, the Court may depart from the presumptive date of hearing or agreement as the valuation date. That section provides that unless an agreement or order provides otherwise, the value of family property or family debt must be determined according to fair market value as of the date of an agreement dividing family property and debt or as of the date of hearing before the court.
- [171] Other cases add other options: Assessing the property as of the trial date, but crediting the payor of the post-separation mortgage payments with one-half of the amount of those payments before the property is divided: see, for example, *Rudyak v. Bekturova* 2017 BCSC 2223 (affirmed on appeal in 2018 BCCA 414); *Mao* at para. 217.
- [172] In *E.H.H.*, the Court valued the family home as of the trial date, but calculated the equity in the home by subtracting the balance of the mortgage which was owed as of the date of separation so that the respondent would receive the benefit of her five years of post-separation payments to the mortgage. After that calculation was done, the net equity in the family home was divided 70% to the respondent and 30% to the respondent: *E.H.H.* at paras. 231 - 232.
- [173] In this case, while I have determined that an equal division of property and debt would be significantly unfair, other than the claimant's sole post-separation contributions to the mortgage, I am not persuaded that there is any reason to depart from the presumption that property should be valued as of the trial date. As noted by this Court, before s. 87 can be invoked, there should be "compelling evidence to depart from the standard valuation date as the date of trial thereby disentitling one property owner the benefit of the increase in value of the property which is brought about by market forces and not as a result of direct effort of the other party": *K.A.L. v. K.J.L.*, 2017 BCSC 651 at para. 286.

[174] In my view, the approach taken in E.H.H. is appropriate. By subtracting the mortgage as of the date of separation from the value of the Property as of the trial date, the claimant will receive the benefit of her post-separation contributions. Those contributions increased the equity in the Family Home.

[175] That adjustment, together with the 100% reapportionment of the Protex Loan, accounts for two of the main factors on which the finding of significant unfairness was based.

[176] The significant unfairness created by factors other than the circumstances leading to the Protex Loan and the claimant's post-separation mortgage payments can be addressed by dividing by family property and debt on a 65% / 35 % basis in favour of the claimant.

4. Summary of Findings Regarding Division of Family Property and Family Debt

[177] To summarize my findings:

- a) The claimant's excluded property (the "Excluded Property") consists of:
 - i. \$107,000 paid toward the claimant's purchase of the Family Home;
 - ii. \$11,489 balance in her LIRA account as of October 13, 2010; and
 - iii. \$10,479 balance in her RSP account as of October 13, 2010;
- b) The family debt consisting of the \$50,000 Protex Loan shall be re-apportioned solely to the respondent;
- c) All issues relating to the parties' pensions, including valuation and division, are adjourned generally;
- d) The value of the Family Home shall be calculated by subtracting the balance of the mortgage owing as of February 27, 2021 (the date of separation) from the value of the Family Home as of the trial date (\$780,000); and
- e) With the exception of the Excluded Property, the \$50,000 Protex Loan (which shall be borne solely by the respondent), and the value of the parties' pensions (which has been adjourned), the balance of the family property and family debt as property described in above shall be apportioned 65% to the claimant and 35% to the respondent.

[178] The parties have liberty to re-appear before me if they require clarification or further orders to carry out any aspects of property division.

C. Spousal Support

[179] Section 161 of the FLA sets out the objectives to be considered in determining entitlement to spousal support. They are:

- a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;

- b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period.

[180] Based on those objectives, there are three bases for entitlement to spousal support: compensatory, non-compensatory, and contractual support: *Moge v. Moge*, [1992] 3 S.C.R. 813, (compensatory support); *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, (non-compensatory support); and *Miglin v. Miglin*, 2003 SCC 24 (contractual support).

[181] In *M.S. v. E.J.S.*, 2017 BCSC 564, Justice Murray summarized those categories of support, in part, as follows:

[182] Compensatory support, which relates to the first two objectives, is intended to provide redress for economic disadvantage arising from the marriage or the conferral of an economic advantage on the other spouse.

[183] The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge v. Moge*, [1992] 3 S.C.R. 813 at 861-863; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at para. 39).

[184] Non-compensatory support, which relates to the last two objectives, aims to narrow the gap between the needs and means of the spouses on marital breakdown

[185] As referenced in those passages, compensatory and non-compensatory support combine to encompass the objectives of spousal support set out in section 161 of the FLA. All of the objectives must be considered; no single objective is paramount: *Moge* at 852.

[186] As I understand the respondent's argument, he claims entitlement on both compensatory and non-compensatory grounds.

[187] On the compensatory grounds, he revisits his argument that he gave up remunerative employment with CP Railway to ensure that one parent was home to attend to the children's needs, while the claimant was able to continue her work at the pulp mill. He argues that as a result, he has earned less than the claimant, and continues to do so. He points to the resulting disparity in their incomes as the second basis on which he claims entitlement to spousal support on non-compensatory grounds.

[188] In my view, an award for spousal support in favour of the respondent is not warranted on either compensatory or non-compensatory grounds.

- [186] As a starting point, income disparity alone does not entitle a spouse to spousal support on either a compensatory or non-compensatory basis: *Lee v Lee*, 2014 BCCA 383 (non-compensatory grounds); *Armstrong v Armstrong*, 2012 BCCA 166 (compensatory grounds); Spousal Support Advisory Guidelines at para. 3.2.2.
- [187] More specifically regarding the claimed compensatory grounds, I do not accept that the respondent was required to sacrifice his employment with CP Rail to assume primary childcare and household responsibilities. In fact, the claimant had made arrangements for paid childcare when the respondent was in the process of leaving that employment. Even after the respondent left, the parties continued with those arrangements until the COVID-19 pandemic forced them to end.
- [188] Moreover, notwithstanding his decision to leave CP Rail, any imbalance in the parties' responsibilities, including childrearing, remained with the claimant.
- [189] I also do not accept that other breaks in the respondent's employment were made as a sacrifice for the family or for the claimant's career. For example, the respondent characterizes his layoff during the COVID-19 pandemic as a decision he made to stay at home with the children because they no longer had daycare. In fact, he was receiving CERB benefits due to the layoffs in the construction industry.
- [190] I am also satisfied that the respondent is not entitled to spousal support on non-compensatory grounds.
- [191] First, there is no evidence of economic hardship arising from the relationship. The respondent currently earns at least \$75,000 and perhaps as high as \$93,000. He has made no move to obtain different employment since the separation in February 2021 and, in fact, the respondent works fewer hours than are available to him. That being the case, it is difficult to ascertain any economic hardship brought on by the relationship.
- [192] Indeed, his income earning potential is not limited to what he earns at his current job. While at CP Rail, he earned between approximately \$84,000 and \$96,100. It is not unreasonable to assume that had he not left that employment, he could be earning perhaps in the range of \$100,000 by now. With no evidence to the contrary, I conclude that employment remains available to him, either as a conductor or as a locomotive engineer.
- [193] In light of the above, there is no basis on which to conclude that either the relationship or its breakdown has unduly impacted the respondent financially in any way that is disproportionate to the impact on the claimant.
- [194] Finally, it is significant that any income disparity is largely due to his own conduct, including his misconduct that led to his ouster from Protex, and most recently his decision to limit his availability to work, and his failure to obtain re-employment with CP Rail. That conduct has aggravated any financial need he is experiencing and, to the extent that he has a claim, has aggravated the need for spousal support.

[195] As a result of the above analysis, the respondent has failed to establish any entitlement to spousal support. His claim for spousal support is dismissed.

D. Divorce

[196] The parties have been separated for over a year. There is no prospect of reconciliation. Pursuant to s. 8 of the Divorce Act, I am satisfied the grounds for divorce have been met.

[197] I grant the divorce which shall take effect on the 31st day after the date of this order.

VI. Costs

[198] Unless there are matters of which I am not aware, the claimant is entitled to the costs of this proceeding.

"Ahmad J."

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