

CANADA / JUDGMENT

R.E.L. v. K.J.B.A.

2023 BCSC 602

COURT

Supreme Court of British Columbia

DECIDED

17 April 2023

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2023 BCSC 602 R.E.L. v. K.J.B.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.E.L. v. K.J.B.A.,

2023 BCSC 602

Date: 20230417

Docket: E2058661

Registry: Prince George

Between:

R.E.L. also known as R.E.A.

Claimant

And

K.J.B.A.

Respondent

Corrected Judgment: The text of the judgment was corrected at paragraphs 102 and 115 on June 9, 2023.

Before: The Honourable Justice Duncan

Reasons for Judgment

Counsel for the Claimant:

S. Elson

Counsel for the Respondent:

G. Whidden

Place and Date of Trial:

Prince George, B.C.

October 3 - 7 and 25, 2022;

December 9, 2022; and

Date of Written Supplementary Submissions:

January 16, 2023

Place and Date of Judgment:

Prince George, B.C.

April 17, 2023

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Introduction

- [1] The claimant, REL, also known as REA, and the respondent, KJBA, were married on November 29, 2003. Over the course of their marriage they had four children, now ranging in age from nine to 17. They separated in September 2020 and by the time of trial had reached a comprehensive agreement on parenting time, commendably putting the interests of their children first.
- [2] The outstanding issues for resolution are divorce, division of family debt and assets, the respondent's excluded asset claim, and spousal and child support.
- [3] I granted the divorce by desk order under a separate file number (Prince George Action No. E2261581) because, at the time the pleadings in the matter before me were filed, the parties had not been ordinarily resident in British Columbia for one year.

The Background

- [4] The only witnesses at trial were the claimant and the respondent. The claimant is 42 years of age. The respondent is 52.
- [5] The claimant was born and raised in the United Kingdom. When she was 21, she moved to New Zealand, where her parents had relocated. She worked briefly at a radio station and then at a health food store.
- [6] The respondent was born and raised in Quebec. He moved to British Columbia in 1986 to finish high school, then went on to attend the University of British Columbia. He attained a Bachelor of Applied Science in chemical engineering and a masters degree in pulp and paper engineering.

- [7] The respondent worked from 1993 to 2000 for Fletcher Challenge in Campbell River in various roles. He was interested in working internationally and secured a job with Fletcher Challenge in New Zealand in 2000. His partner at the time accompanied him to New Zealand, but they broke up about six or eight months after the move.
- [8] The parties met in late 2001 through the claimant's mother, who worked for Fletcher Challenge. They began living together some time in 2002 and were married in November 2003. The claimant continued to work at the health food store and the respondent at Fletcher Challenge.
- [9] Fletcher Challenge was purchased by Norske Skog, which was focussed on expanding its Australian holdings and reducing its New Zealand holdings. In 2004, the respondent secured work for Norske Skog in Australia, and the parties moved. The claimant did not work there as the parties had decided to start a family and she was expected to be the primary caregiver of their children.
- [10] The parties' first child, G, was born in Australia in May 2005. Their second child, A, was born in December 2006. The claimant was a stay-at-home mother and the respondent was the sole breadwinner.
- [11] The respondent began at Norske Skog as a project manager, then advanced into a management role. He started to receive executive incentives, or bonuses, in addition to his base salary.
- [12] In 2007, the parties moved again for the respondent's employment, this time to Castlegar. The respondent and claimant discussed the move and agreed on it as a beneficial one for the family. Additionally, the respondent's job in Australia was focussed on newsprint and he could see it had a limited lifespan due to falling demand for that particular paper product.
- [13] The family settled in Castlegar where the respondent worked for Mercer. He started as a technical manager then moved into management roles. His salary increased over the years to about \$200,000, plus up to \$100,000 in bonus payments.
- [14] Two more children were born in Castlegar: a third daughter, S, in June 2010 and a son, E, in May 2013.
- [15] The claimant continued in her role as a homemaker. She looked after the children and the house while the respondent worked at a demanding job. She did some volunteer work in the community, but focussed most of her energies on the couple's four children.
- [16] The respondent took the children to different activities, when his work schedule permitted, and he coached them in various sports.

- [17] The claimant planned to start looking for work once E started school, but the respondent took a job in St. John, New Brunswick in 2018 when E was about to start kindergarten. The respondent said they discussed living in a larger community than Castlegar with better opportunities for the children. The respondent felt the marriage was under strain at this point and thought a move might be beneficial. He was also attracted to the idea of working for a company that produced more than one type of commodity.
- [18] Despite the fact that she was in a new community with four young children, the claimant found a temporary job at a book store. She enjoyed the work. The respondent, on the other hand, encountered conflict in his job and was terminated in late 2018. He understood he had been brought in to succeed someone in higher management, but that individual was apparently not interested in retirement.
- [19] The respondent's salary in St. John was \$375,000 plus bonuses, but he did not work long enough to realize any bonuses. He received six months pay for severance (\$130,000) but began looking for work almost right away. I infer this is because the family spent what the respondent earned and saved very little money outside of retirement and education accounts.
- [20] There was no employment suitable for the respondent in Canada, but a friend told him about a pulp mill in Australia which was looking for someone with his qualifications. The respondent ensured the claimant was on board with yet another move and pursued the job.
- [21] In March 2019, the respondent went to Australia to start with his new employer. The family was to join him in the summer after the children finished the school year in St. John.
- [22] When the claimant prepared to travel to Australia with the children, the respondent provided her with a temporary visa which would require her to leave the country every three months. She felt fearful about her status and pressed the respondent to secure her more certain status in Australia. She arrived in Australia with the children in either July or August and by the end of September the respondent's employer had arranged a long-term temporary work visa for her.
- [23] The family rented a home in Australia. They had difficulty selling their home in St. John and eventually took a not insignificant loss on its sale price.
- [24] The job in Australia did not last. The respondent did not like the work culture at the pulp mill. Environmental and safety practices were not consistent with his values and he looked for another job. The respondent knew the marriage was very strained and felt a job back in Canada, where the claimant had permanent residency status, would be best.

- [25] The family relocated to Prince George in March 2020, where the respondent took the position as Vice President of Operations with Canfor Pulp. Canfor Pulp paid for moving expenses and a rental property for a time after the move. Canfor Pulp also paid the respondent a relocation allowance of \$45,000, which permitted the family to purchase household necessities, such as electronic devices and small appliances. Their Australian ones were not compatible with Canadian wiring standards.
- [26] The family purchased a newly built home in Prince George for \$710,000 in July 2020. They purchased it with a 20% down payment, funded by the respondent's \$75,000 signing bonus and a withdrawal of \$69,517 from the claimant's tax-free savings account ("TFSA"). They took out a mortgage of slightly under \$600,000. At the time of trial, the balance owing on the mortgage was approximately \$537,000.
- [27] The parties purchased two vehicles: a 2019 Toyota Forerunner and a 2019 Ford F-250. They financed the entirety of both purchases, including the taxes owing.
- [28] The St. John home finally sold in June 2020. The parties only netted \$23,000 from the sale.

Separation

- [29] The claimant testified that the parties separated on September 24, 2020, the day after her birthday, although she was vague on surrounding details.
- [30] The respondent says the separation occurred on September 18, 2020. They had an argument and he told the claimant the marriage was over. He recalls the date clearly because he was only going to say the marriage was over once and then carry through with separation. He put a mattress in his home office and started sleeping there.
- [31] The parties rented a nearby basement suite so that the parent who was not spending time in the family home with the children would have somewhere to stay. They alternated for a time in this fashion until February 1, 2021, when the respondent secured his own rental accommodation, leaving the claimant in the family home with the children. From that time, the claimant has been responsible for paying the mortgage and utilities, including property taxes. The parties have shared the cost of house insurance.
- [32] The claimant retained the Toyota after separation and has since made all the payments on the associated loan, while the respondent retained the Ford and made all the payments on the associated loan.
- [33] Between separation and a Judicial Case Conference ("JCC") on February 9, 2021, there was no agreement in place concerning child and spousal support. The parties lived as before, relying on the respondent's paycheque. The balance on their joint credit cards ballooned in this timeframe, in excess of the maximum balances, and their line of credit increased.
- [34] Counsel filed an agreed statement of facts, which included the balances on the line of credit and joint credit cards at various points in time:

Debt

Amount owing as of Date of Separation

Amount owing as of February 1, 2021

Total current amount owing

Interest Payments made by the Respondent since February 1, 2021

RBC Line

of Credit

\$41,500.00

\$49,600.00

\$48,264.94

\$5,359.14

RBC Visa

\$2,618.76

\$17,164.30

\$14,684.11

\$5,991.22

TD Visa

\$8,763.37

\$18,168.39

\$5,640.15

\$5,496.35

[35] The balance on the joint lines of credit and credit cards between the date of separation (which is not specified in the agreed statement of facts, but which I have accepted was September 18, 2020) and February 1, 2021, when the respondent moved out of the family home, grew by \$32,050.56.

[36] On February 9, 2021, an interim support agreement was reached at a JCC on the basis of the two younger children remaining primarily with the claimant and the older ones living with the respondent. The respondent agreed to pay interim child support in the amount of \$4,350 and spousal support of \$4,900.

- [37] In March 2022, A moved back with the claimant and the respondent's income increased from \$315,000 to \$340,000. He did not inform the claimant of the increase. She learned of it sometime later in the spring.
- [38] On June 21, 2022, the parties entered into a consent order to address the change in the respondent's salary and A's choice to move back in with the claimant. The respondent agreed to interim child support of \$6,607 based on three of the children living with the claimant, and spousal support of \$3,779.
- [39] After the trial concluded on October 7, 2022, counsel for the claimant applied to re-open the evidence due to a change in the living circumstances of the children. Counsel for the respondent was not opposed and, on December 9, the claimant testified that the parties' eldest child, G, had moved back in with the claimant a couple of weeks after the trial concluded.
- [40] Since separation, the claimant has not sought employment or undertaken any job training. She has no post-secondary qualifications. She planned to take a community support worker course starting in September of this year, but the cost was prohibitive and she has deferred it for a year so she can have more financial certainty from the sale of the house and the conclusion of this litigation.
- [41] The claimant says she wants to work but she was very vague about what type of work she would like to pursue. She was cross-examined about working as an educational assistant, something a career counsellor had mentioned, but she does not feel she wants to work in the school system.
- [42] The claimant drops the children off at school in the morning and picks the younger ones up at 2:30 p.m. She wants to be able to continue providing them this type of support, particularly A, who has struggled with anxiety.
- [43] The claimant knows the family home will have to be sold, which means another move and settling the children into new routines. She hopes to maintain their enrolment in their current schools, although she realizes she will have to move out of their current catchment area due to the cost of real estate. The claimant has looked into renting a four-bedroom house but felt the cost of \$4,000 per month was prohibitive.
- [44] The claimant has not considered daycare for the youngest children, due to the expense. She has no direct knowledge of the cost, but rather relied on the advice of friends who told her it was very expensive. She does not think the youngest child, at nine, is able to be on his own for very long, even in the care of his next oldest sibling S, who is 12. The claimant has not looked into after school care as she prefers to have the children home after school.
- [45] The claimant does not know who would care for the children over the summer if she was working, as the respondent also works. She would have to take time off work if one of them was home sick. She has no family support network in Prince George to help her.

[46] The respondent works long days and frequently on weekends. He was unable to take his week of parenting time during spring break 2022 because he was too busy working.

Credibility and Reliability

[47] Mr. Whidden, counsel for the respondent, took the position in his submissions that the claimant was not a credible or reliable witness. This submission was tied in part to the vagueness of the claimant's education plans and her seemingly flippant responses to some questions on cross-examination concerning whether or not she wanted to work as an education assistant.

[48] The claimant was certainly much less detail-oriented than the respondent. The vagueness of her answers about retraining or finding employment stem, in my view, from having to cope with the end of her marriage and being the full-time caregiver for three of the four children for much of the time since the parties separated, in a town where she has no family support. Frankly, she sounded lost and overwhelmed as she testified about her future plans.

[49] Ms. Elson, counsel for the claimant, noted that the respondent did not advise the claimant that he had received a raise after separation. He also removed the claimant from his extended benefits plan without first notifying her. She found out he had removed her from the extended benefits plan when she was having dental work done.

[50] The respondent was also less than forthcoming about the details of a substantial bonus (\$250,000) that he stood to receive at the end of 2022. Puzzlingly, by the time of trial, he had taken no steps to find out when he would receive this substantial payment, yet he took the time to find out the resale value of the parties' two vehicles as well as the amount of the loan the claimant had paid off.

[51] The resolution of most of the issues between the parties does not turn on credibility or reliability assessments. The only exception to that is the date of separation. I accept the respondent's recollection that the date of separation was September 18, 2020 when he moved a mattress into his office and slept there, rather than the claimant's recollection that it was the day after her birthday. A difference of five days matters little, except possibly in the minutiae of calculating interest owing on the family debt.

1. Division of Assets - s. 81 of the Family Law Act, S.B.C. 2011, c. 25 [FLA]

i. Household Contents

[52] At my urging, the parties agreed on the division of the contents of the family home. The agreement was marked as an exhibit.

ii. The Family Home

[53] The parties agree that the family home must be sold. They will list it for sale, with the parties having joint conduct of the sale, within 30 days of the release of these reasons. After the payment of outstanding property taxes and real estate fees, the net proceeds of sale will be divided equally between the parties.

iii. Vehicles

[54] At the time of trial, the respondent testified, based on queries of local car dealerships, that the value of the Toyota was \$46,335 with a balance owing of \$23,827.51 and the Ford had a value of \$55,598.50 with a balance owing of \$42,893.67. He seeks an equalization payment of \$4,901.33 from the claimant to balance the equity between the parties.

[55] The vehicle purchases were both highly leveraged. The claimant has made more progress paying down the loan on the Toyota since separation than the claimant has made on paying down the loan on the Ford. The legal rationale for valuing the equity in the vehicles at the time of trial, rather than at the time of separation, was unclear in the respondent's submissions and I decline to make the equalization order sought.

iv. The Respondent's Excluded Asset Claim - s. 85 of the FLA

[56] The respondent advanced an excluded asset claim in relation to RRSP or pension contributions he made prior to the marriage. He produced a document entitled "Portfolio Value Report by Account", dated in early 2000. The respondent said it showed the balance in his investment accounts when he was leaving Canada:

1. an Action Direct Investment which was valued at \$10,001.85. He believes he liquidated it, possibly to buy a car when he went to New Zealand;
2. an Action Direct RRSP which was valued at \$22,735.65. He did not contribute to it until 2007 when he returned to Canada. In 2008 he believes he consolidated it with a TD Waterhouse account;
3. an Altamira Special Growth fund valued at \$493.51. The respondent said he liquidated it;
4. an Altamira RRSP worth \$7,650.7 was opened in 1992 and he did not withdraw from it;
5. Fletcher Challenge pension which he began in 1994. In 2000 it was worth \$45,021.52. In 2008, he transferred it into a locked in account with TD Waterhouse and has made no withdrawals;
6. Fletcher Challenge share purchase plan value at \$245.69. The respondent says he no longer has this account;
7. a Templeton investment which the respondent said belonged to his former partner.

[57] The respondent has attempted to track where the funds from these accounts went. He believes the Altamira fund was purchased by Banque Nationale, but he ultimately had the Altamira RRSP moved to his Manulife account in 2018. He also transferred his Irving pension contributions in the amount of \$20,857.83 into Manulife, although they are clearly

family property as they were earned during the course of the marriage. He opened a TD Waterhouse self-directed RRSP account, the 37S account, after he returned to Canada in 2008. He transferred his Fletcher Challenge pension into this account, which he still maintains. It has approximately \$52,000 in it.

- [58] The respondent was firm on cross-examination that he never transferred money out of the RRSP accounts he established before the marriage. He claims \$85,869.98 as excluded property, based on an estimate in the growth of the RRSP funds during the marriage.
- [59] In *Shih v. Shih*, 2017 BCCA 37, the Court commented on the test for excluded property under s. 85 of the FLA. Justice Kirkpatrick said:
- [41] The inherent challenge which confronts litigants under the FLA is that in many relationships of any significant length, documents will have been destroyed and memories dimmed. A legal standard that demands mathematical certainty or precision risks defeating legitimate claims.
- [42] In my opinion, the proper test for establishing a claim to excluded property under s. 85 of the FLA is the same as in any civil case - proof on a balance of probabilities. The requirement of certainty and precision in my view improperly tips the standard closer to the criminal standard of proof beyond a reasonable doubt.
- [43] I do not quarrel with the proposition that, in order for a party to establish excluded property, he or she must do so with clear and cogent evidence. If documentary evidence is not available, the party bearing the onus of proof will need to testify as to their recollection of the transactions in dispute. That evidence will be scrutinized for credibility.
- [44] However, in balancing the evidence as a whole, the trial judge must be permitted to draw reasonable inferences from evidence that is less than certain or precise in order to do justice between the parties.
- [60] The documentation concerning the excluded asset claim is far from crystal clear, but I am satisfied on a balance of probabilities that the respondent made contributions to RRSP or pension accounts before the relationship and did not make any withdrawals from them during the relationship.
- [61] I am satisfied that \$75,400 should be fixed as the amount of the respondent's excluded asset claim. That is roughly the amount that his Action Direct RRSP, Altamira RRSP and FCCL pension were worth in 2000 before he went to New Zealand, according to Exhibit 6. The growth in those accounts will be shared equally in the division of assets.
- [62] I recognize that this leaves a gap of three years between the time the respondent left Canada and the parties' marriage. The accounts may have made or lost money in that timeframe, but determining that at this stage that would be guesswork.

v. Pensions

[63] The parties agree that the claimant is entitled to division of the respondent's Canfor Pulp pension, with the parties to share the cost of the division. In the alternative, the parties may agree to a lump sum settlement of the pension issue.

[64] The parties agree that their Canada Pension Plan credits will be divided, as per the applicable rules.

vi. Savings

[65] The parties agree that there will be an RRSP spousal rollover (with the exception of \$75,400 in recognition of the respondent's successful excluded asset claim) and TFSA equalization, with the claimant receiving half of the value of the respondent's TFSA.

2. Family Debt - ss. 81 and 86 of the FLA

[66] Section 81 of the FLA provides:

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

- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
- (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

[67] Section 86 provides:

Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

[68] The respondent submits that joint debt should be valued at a date other than separation, preferably February 2021 when the parties had a JCC and agreed on interims spousal and child support. The respondent maintains that the claimant was largely responsible for the increase in the line of credit and joint credit card debt and appears to have acquired several thousand dollars in her sole savings account at the expense of the joint account. At the same time, however, the respondent acknowledges he took \$5,000 out of the joint account after separation to pay for legal counsel.

[69] Absent a forensic accounting of the parties' line of credit and joint credit cards between separation on September 18, 2020 and the JCC in February 2021, when child and spousal support amounts were agreed upon, it is not possible to determine whether dividing joint debt at a date other than separation is consistent with ss. 81 and 86 of the FLA.

[70] Section 95 of the FLA provides for an unequal division of family property, debt, or both, if equal division would be significantly unfair. The threshold to do so is a high one and "will require something objectively unjust, unreasonable or unfair in some important or substantial sense": *Jaszewska v. Kostanski*, 2016 BCCA 286. It has not been met in this case.

[71] The parties will equally share in the family debt as of separation in September 2020, a total of \$52,882.13. The claimant will reimburse the respondent for half of the interest payments he made on that amount from the date of separation until the accounts were closed. If the parties cannot agree on that calculation, they may take out an appointment with the Registrar to determine what the claimant owes.

[72] The parties discovered further joint debt after separation:

Utility bill from New Brunswick - \$1,281.10 (paid by the respondent);

2019 tax liability of the respondent - \$3,391.80 (to be divided equally); and

2021 property taxes for the family home - \$7,220 (paid by the claimant).

Total: \$11,892.90

[73] The respondent owes the claimant \$3,610 for his share of taxes on the family home. The claimant owes the respondent \$640.55 for the New Brunswick utility bill.

[74] The 2022 property taxes are unpaid and will be paid out of the proceeds of sale of the home.

3. Determination of the Respondent's Income for Support Purposes

For 2021

[75] The respondent submits that his basic income for child support purposes in 2021 should be set at \$411,811. This figure consists of his base income of \$340,000, plus a bonus of \$70,440 paid in February 2021 which brought his income to \$400,440. Additional taxable benefits received by the respondent from his employer added up to Line 150 income in 2021 of \$411,811.

[76] The claimant maintains that the respondent's income was actually \$426,811. The \$15,000 difference stems from how counsel have characterized the respondent's use of his executive perquisite account.

[77] The Canfor Executive Perquisite Plan dated July 1, 2018 was in evidence. It explains how participants in the plan can select to use it in one of 12 different ways, including towards the cost of a vehicle, financial planning, home computer equipment, annual medical examinations and other taxable benefits. The amount can also be taken as a lump sum payment.

[78] In the respondent's 2020 Form F8, he explained in "Schedule A, Other Income" that:

My employment contract provides that I am paid an additional \$30,000 per year through a perquisite account. Of that amount \$15,000 is paid as a vehicle allowance. The other \$15,000 is paid if I am required to pay out of pocket expenses related to my employment.

- [79] The respondent does not use the other \$15,000 to pay out of pocket expenses related to his employment. He chooses to divert it into an additional pension fund with his employer. The plan describes this as a "taxable benefit offset by tax-deductible contribution - year-end credit balances may be directed to the FPO attached to the Canfor Defined Benefit Pension Plan, to the extent allowed by CRA."
- [80] Counsel for the respondent advanced no authority for why that \$15,000 should be excluded from his income for support purposes. It is simply the respondent's choice to put the money towards his retirement fund when he could take it as income.
- [81] I find the respondent's 2021 income for support purposes is \$426,811.

For 2022

- [82] The respondent's base salary increased in March 2022 to \$340,000. He received a bonus in February 2022 of \$103,655. His base salary, bonus and taxable benefits from employment was \$458,655. To that amount must be added the \$15,000 portion of his perquisite account which he chooses to contribute to his employer's pension fund, for a total of \$473,655.
- [83] This leaves consideration of the \$250,000 bonus that the respondent received at the end of 2022. The bonus was offered in relation to work done by the respondent to achieve efficiencies at Canfor Pulp's operations, up to and including closing some of them. Depending on the outcome of the work, the respondent could have faced termination for redundancy.
- [84] The clamant received limited disclosure of the details of the bonus prior to trial, but maintains that it is income for child and spousal support purposes and should be included in his income for 2022.
- [85] Mr. Whidden, counsel for the respondent, maintains that the \$250,000 bonus is temporally too far removed from the marriage and the result of work that is different from what the respondent did during the marriage to be considered income for spousal support.
- [86] Counsel cited a number of authorities to me on this point. Mr. Whidden relied on a case from Ontario (Thompson v. Thompson, 2013 ONSC 5500), but Mr. Justice Punnett's decision in Judd v. Judd, 2010 BCSC 153, conveniently summarizes the applicable principles. The payor husband, in the context of a review of spousal support, argued that his regular wage increases and a 7% increase due to promotion should not be considered in fixing the amount of spousal support. Punnett J. said:

[21] The issue of whether post-separation increases in income should be taken into account has been the subject of a number of decisions, both in British Columbia and elsewhere. I have been referred to *Kelly v. Kelly*, 2007 BCSC 227; *Logan v. Logan*, 2007 BCSC 904; *Emery v. Emery*, 2007 BCSC 1747, 47 R.F.L. (6th) 72; and *Beninger v. Beninger*, 2007 BCCA 619, 75 B.C.L.R. (4th) 228. I have also reviewed *Hartshorne v. Hartshorne*, 2009 BCSC 698, 70 R.F.L. (6th) 106; *M.M.F. v. R.B.*, 2008 BCSC 984, 57 R.F.L. (6th) 172; *Walsh v. Walsh* (2006), 29 R.F.L. (6th) 164 (Ont. S.C.J.); *Chalifoux v. Chalifoux*, 2006 ABQB 535; *D.B.C. v. R.M.W.*, 2006 ABQB 905, 69 Alta. L.R. (4th) 170; *Rozen v. Rozen*, 2003 BCSC 973, 37 R.F.L. (5th) 205; *Giguere v. Giguere* (2003), 46 R.F.L. (5th) 184 (Ont. S.C.J.); and *Fletcher v. Fletcher*, 2003 ABQB 890.

[22] In *Hartshorne*, Justice Leask addressed a number of the above authorities as follows:

[110] It is telling that both parties rely on *D.B.C.* The authorities canvassed in that decision illustrate the deeply contextual nature of these determinations. As was observed by the authors of the SSAG at c. 14.3, determining whether to consider post-separation increases in income involves a "complex, fact-based approach":

Some rough notion of causation is applied to post separation income increases for the payor, in determining both whether the income increase should be reflected in increased spousal support and, if it should by how much. It all depends on the length of the marriage, the roles adopted during the marriage, the time elapsed between the date of separation and the subsequent income increase, and the reason for the income increase (e.g. new job vs. promotion within same employer, or career continuation vs. new venture). The extent of sharing of these post-separation increases involves a complex, fact-based decision. [Emphasis added]

[111] I have considered the authorities provided by the parties. The cases where post-separation increases in the payor's income are not considered, or are only partially considered, are distinguishable on their facts from the *Hartshornes'* situation. For example, they involve circumstances where the payor spouse changed positions or employers since separating, often making lifestyle sacrifices to do so [see *Chalifoux v. Chalifoux*; *D.B.C.*; *Kelly*]; the payor spouse's business underwent a reorganization requiring more work on the payor's part [see *Rozen v. Rozen*]; the payor spouse had been given new career opportunities by virtue of luck or connections [see *Fletcher v. Fletcher*; *Robinson v. Robinson*]; the initial increase in income occurred long after the divorce [see *Bryant [v. Gordon]*, 2007 BCSC 946, 45 R.F.L. (6th) 99]; *Kelly*]; the recipient spouse was employed and/or was supported in her career aspirations by the payor during the relationship [see *Bryant*; *Kelly*]; or the recipient spouse had not made reasonable efforts to become self-sufficient [see *Bryant*; *Walsh v. Walsh*].

[Citations for previously cited cases omitted.]

[23] The resolution of the issue of post-separation wage increases is clearly fact based. The principle that appears to emerge from current case authority is that the connection the increase in salary has to the recipient's contribution during the marriage is determinative. If the increase in salary is founded in expertise and seniority established during the marriage and no intervening event or events are the cause of the increase, then the increase is to be

included unless the recipient's role during marriage necessitates a different determination. If an event after separation is the reason for the increase, in whole or in part, then the increase may be excluded from consideration, also in whole or in part.

- [24] In this case, the husband, although trained before the marriage, developed his expertise and seniority during the marriage. The wife subordinated her career to the needs of the family by working part-time, becoming a full-time stay-at-home mother for a number of years, and, perhaps most significantly, moving to and remaining on the Sunshine Coast, where there are limited employment opportunities, for the benefit of their children. As noted by Leask J. in *Hartshorne* at para. 117, this couple "divide[d] their family responsibilities in such a way as to make a joint investment in one career".
- [25] The post-separation increases appear to be divisible into two categories: those arising from regular salary increases and those arising from the promotion. Should a distinction be drawn between them?
- [26] The authorities noted above indicate that the portion arising from regular wage increases due to length of service with the same employer should be included for the purposes of a review, taking into account the length of the marriage and the roles of the parties in the marriage.
- [27] More problematic is the increase arising from the promotion which presumably requires the husband to work longer hours and to take on more responsibilities. Arguably the promotion, at least in part, recognized the husband's length of service and experience which were acquired during the marriage. Presumably, it also recognized his abilities and performance from both before and after the separation.
- [28] The question, in this instance, is whether the promotion is sufficiently disconnected from the marriage that the salary increase should not be included in this review. In my opinion, the husband's promotion is sufficiently connected to the wife's contributions as a wife and mother and his increased income should be taken into account on this review.
- [29] I decline to include the one-year increase arising from the husband's additional duties with respect to the Olympics as that short-lived increase is based on a unique event which is not connected to what transpired during the marriage.
- [87] Justice Punnett's decision in *Judd* was cited with approval in *Helle v. Helle*, 2019 BCCA 97. Justice Willcock for the Court said, at para. 39, that two of the most important considerations from the jurisprudence are first, the expertise the respondent acquired during the parties' relationship and second, the extent to which the respondent found himself in favourable circumstances as a result of the joint enterprise of the marriage. The parties made a "joint investment in one career" by having the appellant take on the bulk of the caretaking responsibilities for the children while the respondent pursued his career outside the home.

[88] I am not persuaded that the respondent's \$250,000 bonus should be excluded from the calculation of spousal support. It was paid only two years after separation by the same employer the respondent had worked for since the parties relocated to Prince George in 2020. The hours of work were not delineated in the evidence as markedly different, nor were the duties. The respondent had to decide if some of Canfor Pulp's operations should be shuttered, a decision which could have impacted his job security. The task was undoubtedly an unpleasant one, but it was not one that was so markedly different from his regular employment that should de-link the associated bonus payment from consideration as spousal support.

[89] The respondent's income for support purposes in 2022 is set at \$723,655.

Determining the Respondent's Income in 2023 and Future Years

[90] First, I accept that 2022 was an outlier year of earnings for the respondent, given the \$250,000 bonus. This makes the assessment of the respondent's income on a go-forward basis difficult to assess, along with the fact that the Court does not have a pattern of at least three full years of historical earnings to draw on. The respondent's base salary of \$340,000, plus the \$15,000 from his perquisite account which he contributes to his pension and the standard bonus or incentive payments which are generally received in the first quarter of the calendar year, is likely the best predictor of his current salary.

[91] The parties will exchange annual income information on May 1 of each year and adjust support accordingly, for so long as child and/or spousal support is payable.

4. Imputation of Income to the Claimant

[92] The respondent seeks to impute an income of \$40,000 per year to the claimant. This income is based on the claimant's expression of interest in taking training to be a community support worker, a job which pays between \$20 and \$25 per hour. He maintains she could go out and find a job in Prince George "tomorrow" and that there is no reason why she should not be working.

[93] Section 19(1) of the Spousal Support Advisory Guidelines [SSAG] sets out a non-exhaustive list of circumstances in which a court may impute income. The factors include:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[94] As Madam Justice Horsman, then of this Court, said in *Haley v. Haley*, 2022 BCSC 1945:

- [133] Imputing income for intentional unemployment or under-employment does not require a finding of bad faith on the part of the spouse in respect of whom the imputation is sought; it only requires a finding that they are not earning to capacity: *M.C.V. v. F.V.*, 2018 BCSC 96 at para. 153.
- [134] The imputation of income should not be the product of speculation or guess-work. The court must find that the parent is realistically capable of earning the income that is sought to be imputed and determine whether they have taken reasonable steps to obtain employment commensurate with factors such as age, health, education, skill and work history: *Bourque v. Gerlach*, 2006 BCCA 157 at para. 63; *Marquez v. Zapiola*, 2013 BCCA 433 at para. 37 [*Marquez*]; *Shen v. Tong*, 2013 BCCA 519 at paras. 81-82.
- [95] The claimant is 42. The main barriers to her obtaining employment at this stage are her lack of an advanced education and lack of work history. Additionally, she has four school-aged children living with her. In the near future, she will be required to prepare the family home for sale and find a suitable place for them all to live. This will likely require a change of schools and other alterations to their routines.
- [96] I think it is unrealistic to find that the claimant could have hit the job market running soon after separation, as Mr. Whidden suggests. She was new to Prince George, she had no training or work experience apart from a job at a book store, and the country was in the throes of the COVID-19 pandemic, until at least the end of 2021. By that point, however, the claimant should have been making efforts to find work of a part-time nature that she could do while the children were in school.
- [97] I am prepared to impute an income to the claimant in 2022 on the basis of a 20-hour work week at minimum wage, which was \$15.65, for a total of \$16,276. I will impute an income to the claimant in 2023 based on a 30-hour work week at \$15.65, for a total of \$24,414. By 2024, the claimant should be capable of working a 40-hour work week at minimum wage and income will be imputed to her on that basis. If she earns more, that can be dealt with at the annual exchange of income information and support adjusted accordingly.
5. Spousal Support - s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)
- [98] In *Haley*, supra, Horsman J. summarized the legal principles relating to spousal support:
- [187] Pursuant to s. 15.2(6) of the Divorce Act spousal support is intended to:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;

- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable time period.

[188] These objectives are mirrored in s. 161 of the FLA.

[189] Pursuant to s. 15.2(4) of the Divorce Act, in making a spousal support award the court must consider "the condition, means, needs and other circumstances of each spouse", including "the length of time the spouses cohabited", "the functions performed by each spouse during cohabitation", and "any order, agreement or arrangement relating to support of either spouse".

[190] There are two grounds for entitlement to spousal support that apply in this case-- compensatory support, which primarily relates to the first two objectives listed in s. 15.2(6) of the Divorce Act, and non-compensatory support, which primarily relates to the last two objectives: *Chutter v. Chutter*, 2008 BCCA 507 at para. 47 [Chutter], citing *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 [Bracklow]. The court is called upon to apply the relevant factors and strike the balance between the various grounds for entitlement in a way that best achieves justice in the circumstances of a case. The doctrine of equitable sharing is the overarching principle that must guide the process: *Chutter* at para. 49.

[191] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of economic advantage on the other spouse: *Chutter* at para. 50. The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming childcare and household responsibilities may impact their future financial prospects: *Chutter* at para. 50. There may be a corresponding advantage to the payor spouse in the ability to pursue career opportunities free of such responsibilities.

[192] Non-compensatory support is "grounded in the 'social obligation model' of marriage in which marriage is seen as an inter-dependent union". Upon marriage dissolution, it falls on the former partner, and not the state, to meet the needs of a disadvantaged spouse: *Chutter* at para. 54. In *Bracklow*, the Supreme Court of Canada held that need alone may be sufficient to ground a claim for spousal support: at para. 43.

[193] "Need" in this context refers to something more than the basic necessities of life. The concept of need may vary depending on the circumstances of the parties. In longer marriages, courts may measure need against the marital standard of living: *Chutter* at para. 90. The flip side to this justification for needs-based support is that the payor spouse must have the financial means to provide such assistance.

- [194] Once entitlement to support is established, the issue becomes the appropriate amount and duration of support. The SSAG has been endorsed in British Columbia as a useful tool in determining the quantum of support: Chutter at para. 100. Quantum refers to both the amount and the duration of spousal support.
- [99] The respondent wants to retire in nine years when he turns 60. By that point, he will have paid support for 11 years. Conversely, the claimant will have had that length of time to re-enter the workforce.
- [100] Mr. Whidden maintains that the claimant is not motivated to work because of the generous support she is receiving, although the amount of support is guided by federal legislation as well as the respondent's income rather than any altruism on the respondent's part. Additionally, counsel points out that the claimant will receive about \$500,000 in assets for her retirement. The respondent seeks an end date for spousal support when the parties' youngest child graduates from high school, in eight years.
- [101] The claimant has a strong claim to spousal support on both the compensatory and non-compensatory grounds. For the duration of the parties' marriage, she put any career aspirations she might have had on hold for the sake of the respondent's career. She looked after the four children of the marriage and the household so the respondent could devote himself to his work. When the claimant found a part-time job, she had to quit it to follow the respondent from St. John, New Brunswick to Australia to re-establish the household. Before long, the family unit was again uprooted due to the respondent's dissatisfaction with his employer, and they had to settle once again in a new location.
- [102] I am not satisfied that an end date to spousal support should be ordered in the circumstances of this case. The question of ongoing entitlement to spousal support may be addressed at a review when the youngest child finishes high school. Until then, the quantum will be adjusted when the parties exchange their financial information.
6. The Respondent's Income Exceeds to the Ceiling in the SSAG and the Federal Child Support Guidelines [FCSG]
- [103] The respondent's income exceeds the \$350,000 ceiling in the SSAG and the \$150,000 ceiling in the FCSG. Mr. Whidden maintains that I should exercise my discretion and reduce the amount of child and spousal support payable. He suggests a fixed amount of spousal support of \$3,000 per month until the parties' youngest child finishes high school, at which time spousal support will terminate.
- [104] I will deal with child support first.
- [105] In *Hathaway v. Hathaway*, 2014 BCCA 310, the Court of Appeal reviewed the law in relation to situations where the payor's income exceeds both ceilings. Justice Harris for the Court said:

- [26] In cases where a payor earns more than \$150,000, s. 4 of the Federal Child Support Guidelines, SOR/97-175 [FCSG], authorizes the court to deviate from them if it considers the prescribed amount to be "inappropriate", having regard to the condition, means, needs and other circumstances of the children.
- [27] Whether a court should depart from the FCSG is a matter of discretion. This Court will only interfere with such an exercise of discretion where the judge "acted on a wrong principle, or failed to give sufficient weight to all relevant considerations": *Downtown Eastside Sex Workers United Against Violence Society v. Canada (Attorney General)*, 2010 BCCA 439 at para. 38, citing *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3; *Harekin v. University of Regina*, [1979] 2 S.C.R. 561; and *Mining Watch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2.
- [28] The leading authority on the principles governing a judge's discretion under s. 4 of the FCSG is *Francis v. Baker*, [1999] 3 S.C.R. 250. Madam Justice Newbury provided a concise summary of these principles in *Metzner v. Metzner*, 2000 BCCA 474 at para. 30:
- 1) It was Parliament's intention that there be a presumption in favour of the Table amounts in all cases (para.42);
 - 2) The Guidelines figures can only be increased or reduced under s. 4 if the party seeking such a deviation has rebutted the presumption that the applicable Table amount is appropriate (para.42);
 - 3) There must be clear and compelling evidence for departing from the Guidelines figures (para.43);
 - 4) Parliament expressly listed in s. 4(b)(ii) the factors relevant to determining both appropriateness and inappropriateness of the Table amounts or any deviation therefrom (para.44);
 - 5) Courts should determine Table amounts to be inappropriate and so create more suitable awards only after examining all circumstances including the factors expressly set out in s. 4(b)(ii) (para.44);
 - 6) Section 4(b)(ii) emphasizes the "centrality" of the actual situation of the children. The actual circumstances of the children are at least as important as any single element of the legislative purpose underlying the section (para.39). A proper construction of s. 4 requires that the objectives of predictability, consistency and efficiency on the one hand, be balanced with those of fairness, flexibility and recognition of the actual "condition, means, needs and other circumstances of the children" on the other. (para.40)

- 7) While child support payments unquestionably result in some kind of wealth transfer to the children which results in an indirect benefit to the non-paying parent, the objectives of child support payments must be kept in mind. The Guidelines have not displaced the Divorce Act which has as its objective the maintenance of children rather than household equalization or spousal support (para.41).
- 8) The court must have all necessary information before it in order to determine inappropriateness under s. 4. If the evidence provided is a child expense budget, then "the unique economic situation of high income earners" must be considered.
- 9) The test for reasonableness of expenses will be a demonstration by the paying parent that the budgeted expense is so high "as to exceed the generous ambit within which reasonable disagreement is possible": *Bellenden v. Satterthwaite*, [1948] 1 All E.R. 343 at 345.
- [29] I would add to this list the comment from *Hollenbach v. Hollenbach*, 2000 BCCA 620 at para. 45, in which this Court interpreted Francis as creating a "formidable onus" for wealthy payors seeking to establish that the FCSG amount is inappropriate.
- [106] Mr. Whidden points to the fact that the respondent had two of the four children in his care for a time after separation and that the claimant has not yet contributed to child support. He submits that I should exercise my discretion and find that the child support payable to date "is suitable in the circumstances".
- [107] There was no suggestion that the budget prepared by the claimant for the three children that were in her care at the time of trial was inappropriate or extravagant. And there is no credible evidence that the respondent is living a hand to mouth existence because of his support obligations. He added a weekend stop in New York City to a work trip and he has traveled to Las Vegas with his new partner. The respondent has also spent several thousand dollars on jewellery for his new partner. He was quick to explain that she also bought him things and paid for her share of travel, but those considerations are irrelevant to his responsibility to support his former spouse and children. The respondent has failed to displace the presumption in favour of the table amounts for child support in this case.
- [108] As for spousal support, Mr. Whidden submitted that it should be determined based on the "minimum plus" approach in s. 11.3 of the SSAG. He says it should be at the low end of the range, based on an income of \$350,000 and taking into account the actual amount of child support being paid.
- [109] The "with child" spousal support calculations already take into consideration the fact that the payment of child support usually results in a reduced ability to pay spousal support. Considering the respondent's child support obligations when determining his income for spousal support purposes would result in child support obligations being considered twice.

[110] Capping the respondent's income for spousal support purposes at \$350,000 would be manifestly unfair because that does not represent what he has earned and continues to be capable of earning.

[111] An order for spousal support at the low end of the SSAG range for 2021 and for 2023 onwards, or at least so long as the respondent's income meets or exceeds the 2021 level, is consistent with the approach taken in similar cases: *Stober v. Stober*, 2015 BCSC 743 (\$600,000); *Piche v. Chiu*, 2015 BCSC 335 (\$465,000); *C.E.A. v. B.E.A.*, 2014 BCSC 1500 (\$592,122); *D.L.D. v. R.C.C.*, 2013 BCSC 590 (\$652,000); and *Teja v. Dhanda*, 2007 BCSC 1247, appeal partly allowed on other issues, 2009 BCCA 198 (\$425,000).

[112] As I stated earlier, however, 2022 was an outlier year of earnings and, as I will explain in the next section, I am satisfied that an amount less than the low end of the table range is fit in the circumstances.

7. Support Amounts

2021

[113] Based on the respondent's income of \$426,811 and the claimant's income of zero, he should have paid the following amounts of spousal and child support:

February 2021 to December 2021:

Child support based on two children with each parent: \$5,425; and

Spousal support at the low end of the range: \$4,413.

2022

[114] Based on the respondent's income of \$723,655 and an income of \$16,276 imputed to the claimant, spousal support at the low end with two to four children formula ranges from \$7,116 to \$9,305. I have determined spousal support for 2022 should be set at \$7,116 per month for the entire year. This provides some equalization in the parties' respective net disposable incomes.

[115] As for child support, I have not deviated from the table amounts:

Child support for E and S January 1, 2022 to March 1, 2022 at \$8,702/month;

Child support for E, S and A from April 1, 2022 to October 1, 2022 at \$11,653/month; and

Child support for all children from Nov 1, 2022 to Jan 1, 2023 at \$14,113/month.

2023

[116] The parties will exchange financial information on May 1. I have imputed \$24,414 income to the claimant in 2023. Spousal support will remain at the low end of the SSAG for so long as the respondent's income exceeds \$350,000.

8. Life Insurance

[117] The claimant seeks an order that the respondent name her as the beneficiary under his current life insurance policy through Canfor Pulp or that he take out a policy as security for future child and spousal support.

[118] Section 12 of the FCSG provide that the court "may require in the child support order that the amount payable under the order be paid or secured, or paid and secured, in the manner specified in the order." The payor may be ordered to obtain new or additional life insurance coverage, or appoint a spouse or child as a beneficiary of existing coverage: *R.E.Q. v. G.J.K.*, 2019 BCSC 1116, aff'd 2020 BCCA 254.

[119] Section 170(e) of the FLA provides

In an order respecting child support or spousal support, the court may provide for one or more of the following:

- (e) that a person who has a contract of life insurance within the meaning of Part 3 of the Insurance Act
- (i) designate his or her spouse or child as a beneficiary, irrevocably or for the period designated by the court, and
- (ii) either pay all premiums on the policy, or authorize his or her spouse to pay all premiums on the policy and to compensate the spouse for doing so;

[120] This subsection applies only to existing policies: *L.S.M.K. v. J.W.K.*, 2019 BCSC 2025 at paras. 75 and 76.

[121] The respondent took the position that he could not name the claimant as the trustee or the beneficiary of his Canfor Pulp life insurance, which has a value of \$850,000. I was not directed to any language in the policy that would lead to this conclusion.

[122] The parties' four children are the current beneficiaries of the policy, but the respondent has either declined to name a trustee or declines to say who he has elected. I order the respondent to name the claimant or her nominee as the trustee of the Canfor Pulp policy to secure it for the benefit of the children, pursuant to s. 12 of the FCSG.

[123] The claimant is entitled to insure the respondent's life as security for spousal support, at her own expense.

Costs

[124] If the parties cannot agree on costs, or there are matters I am unaware of which could affect the assessment of costs or other matters arising from these reasons, counsel must contact Scheduling within 30 days of the release of these reasons to arrange a date for a hearing.

"Duncan J."

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