

CANADA / JUDGMENT

Rai v. Athwal

2024 BCSC 1261

COURT

Supreme Court of British Columbia

DECIDED

12 July 2024

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2024 BCSC 1261 Rai v. Athwal

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Rai v. Athwal,

2024 BCSC 1261

Date: 20240712

Docket: E221953

Registry: Vancouver

Between:

Balwinder Singh Rai also known as Balwinder Rai

Claimant

And

Narinder Kaur Athwal also known as Narinder Athwal

Respondent

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Claimant:

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Counsel for the Respondent:

E.K. Chhina

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Place and Dates of Trial:

Vancouver, B.C.

June 3-7, 10-14

and 17-21, 2024

Place and Date of Judgment:

Vancouver, B.C.

July 12, 2024

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Introduction

- [1] The trial of this family law case dealt with a wide range of issues. Shortly after the trial, I gave an oral judgment with respect to parenting issues, reserving judgment on the financial issues that were before me. The present judgment deals with those financial issues.
- [2] The parties to this family matter met through an online dating site in January 2013, when they were aged 43 and 44 respectively. Both had established careers in senior management positions, both had accumulated assets and savings, and both had been previously married.
- [3] On June 23, 2013, the parties went through a Sikh religious marriage ceremony at the home of the respondent's father in order to confirm their relationship. The parties did not obtain a marriage license and do not have a marriage certificate. It is common ground that the parties were not legally married. As a result, the issues in this family law case fall to be decided under the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [4] The parties have two children: A.K., born in 2016 and now aged 8, and A.S., born in 2018 and now aged 6,
- [5] The parties were briefly separated in October or November of 2019, but reconciled after a short period. They separated for good on August 9, 2022.

[6] At present, the respondent is 55 years of age. The claimant will very shortly turn 54.

The Parties' Backgrounds

[7] Both parties were born in India.

[8] The respondent moved to Canada at age seven, attended school in Surrey, BC, and ultimately obtained a B.A. in Psychology from Simon Fraser University. She began working at Canada Post while still attending university, then worked there full-time after graduation. She began working as a supervisor in 1995, with a goal to move up in management. In 1998, she moved to Ottawa where she began to work in Canada Post's internal audit department. She was provided with training that allowed her to obtain a Certified Internal Auditor designation. This was not a traditional accounting-type audit position - rather, the respondent would review corporate performance in various ways. She noted that she might do a human resources audit for a time, then do an operations audit. For a period of time, she was seconded to a subsidiary's operations in Toronto to implement SAP (systems, applications & products) processes, and became lead of a testing team. From 2004 to 2010, she worked as a Manager for MMS Contract Operations. In November 2010, she became Manager, Change Management for Western Canada, helping to implement various changes in corporate functioning.

[9] The claimant grew up in India, obtaining a B.Comm. degree from Punjab University, then working for an electronics company in India. He spent just under four years in Ghana, working for a gold mining company, then moved to Canada in 1999. He began working in the human resources field for various public sector organizations, including Environment Canada, Capilano University, and the Abbotsford School Board. He worked his way up the ranks, starting as an Administrative Assistant in a human resources department, then as an HR Analyst, and then as an HR Manager. In 2007, he obtained his CPHR (Chartered Professional, Human Resources) designation. In January 2011, he became HR Director for the Coast Mountain School District in Terrace.

[10] When the parties met in early 2013, the claimant lived in a rented apartment in Terrace and the respondent lived with her parents in Burnaby. They began dating, getting together in person when the claimant travelled to the Lower Mainland for work, and then when the respondent spent some time in Terrace, where she was able to work remotely. There was some discussion of marriage in the spring of 2013, which the respondent was initially reluctant to pursue.

[11] In June 2013, the claimant was in the Lower Mainland, staying at his brother's home in Surrey. There was further discussion about marriage on June 23, 2013. It appears that the claimant's mother and the respondent's father played a large role in that discussion. It was decided that the parties would undergo a Sikh religious ceremony of marriage that very day at the home of the respondent's parents. The decision to conduct the ceremony appears to have been made very shortly before the ceremony, and the only people present were the parties, the respondent's parents, and the claimant's mother.

- [12] At the time they met, the claimant owned a house on Marshall Road in Abbotsford, where he had lived while working for the Abbotsford School District. He also owned two rental properties (one on Pauline Street in Abbotsford and one in Langley). The respondent had funds from the sale of a townhouse she had owned in Ottawa, that had been sold after she moved back to British Columbia. Each had some accrued pension entitlement and an RRSP. Each also owned a motor vehicle.

The Relationship

- [13] It is common ground that the parties commenced a marriage-like relationship on June 23, 2013.
- [14] After that day, there were discussions about where the parties were to live. It was agreed that the parties would live at the house the claimant owned on Marshall Road. The claimant left his work with the Coast Mountain School District in August 2013. He was unemployed for several months, then ultimately found a position in March 2014 as a Human Resources Consultant at Community Living BC. ("CLBC"). This was a lower level position than the director-level position he had held in Terrace. His salary was about \$82,000. The respondent, on the other hand, was earning over \$100,000 (inclusive of bonuses) with Canada Post.
- [15] The parties generally maintained separate finances during the course of the relationship. At times, they opened joint accounts and took out joint lines of credit. As well, there was one credit card used for family expenses on which both parties had cards. At all material times, however, the parties had their own separate bank accounts and other financial facilities that the other had no involvement with.
- [16] The claimant's mother initially lived with the parties in Abbotsford. That did not go well. While the claimant understood his mother to be attempting to provide input and guidance to the respondent, the respondent felt that the mother was being critical of everything from her cooking to the clothes she wore to temple. At some point later that year, the claimant's mother travelled to India for a period of time. She did not live with the parties again during the course of the relationship.
- [17] The respondent found the daily commute from Abbotsford to Vancouver to be problematic. It was agreed that the parties would purchase a home in Burnaby, not far from the home of the respondent's parents. The parties signed a purchase contract on October 7, 2013, with a closing date of November 7, 2013. The purchase price was \$1,165,000, and the parties were both to go on title. They obtained mortgage financing of \$932,000. Each party contributed \$29,450 toward a deposit paid on October 16, 2013. On November 4, 2013, the parties signed a Buyer's Statement of Adjustments which indicated that the funds required to complete were \$196,691.81. On November 5, 2013, the respondent transferred \$116,691.81 from her Scotiabank account to the conveyancing lawyer's trust account at Scotiabank. On November 6, 2013, the claimant transferred \$80,000 from CIBC to the conveyancing lawyer's trust account at CIBC. All of this is undisputed.

- [18] The claimant's evidence is that the \$80,000 represented funds he had borrowed by way of a CIBC mortgage on the Marshall Road property. He said that, in order to balance the parties' respective contributions, he obtained a bank draft from TD Bank for \$24,000, representing his savings plus money drawn on a TD line of credit, and that he provided that bank draft to the respondent. The claimant produced an account summary from TD Bank showing a \$24,000 bank draft being drawn from his account on November 6, 2013; however, the claimant says he was unable to obtain the draft itself. The respondent denies that she received this draft. Her bank statements from the time were not in evidence.
- [19] The parties moved into the new home in Burnaby (the "Family Home") in early November 2013. The home had two basement suites, one of which had not been fully completed when the house was finished. They completed the work on that suite, with help from the respondent's brother. Both suites were thereafter rented out, which helped with mortgage payments. Later on, a garage was converted to an office area which the parties used.
- [20] In late 2013, the claimant's mother and sister were invited to the house for lunch. The respondent volubly expressed her views as to the mother's conduct towards her. The mother and sister felt unwelcome and left without eating. While there continued to be some contact for a period of time, it seemed clear from the evidence that the relationship between the respondent and the claimant's family has been somewhat strained in the years since.
- [21] As noted above, the claimant began working for CLBC in March 2014. Although the parties each had cars at this time, the evidence indicated that they often commuted together, with the respondent dropping off the claimant in South Vancouver then continuing on to her work in Richmond.
- [22] The claimant sold the Marshall Road property in May 2014. He paid \$38,000 to the respondent from the sale proceeds. His evidence was that this was paid to the respondent in respect of the extra expense she said she incurred from his leaving his job in Terrace and not being able to obtain a job until several months later. The respondent's evidence was that she made the majority of payments for their Abbotsford home including groceries and other expenses, that her pay was not sufficient to cover all those expenses, and that she had to go into her credit line to the extent of about \$38,000. She said she asked him to pay off the line of credit once he sold his property, and that he gave her funds to do so. The respondent also gave evidence that she had dipped into her credit line to finish off the second basement suite after they moved into the Family Home in November 2013.
- [23] When A.K. was born in the spring of 2016, the respondent took a maternity leave from her employment with Canada Post. The claimant also took some vacation time.
- [24] The respondent returned to her work with Canada Post in the spring of 2017. Her parents, who lived nearby, assisted with care for A.K. It was clear in the evidence that the respondent remained very close to her parents.

- [25] Shortly thereafter, the respondent became pregnant again. There were complications with the pregnancy, and by mid-August, the respondent's doctor prescribed bed rest for the balance of her pregnancy. The parties, together with A.K., moved to the house of the respondent's parents, where they stayed for several months. The parents assisted with care for A.K., while the claimant continued to work full-time. Although the respondent continued to be an employee of Canada Post, she did not attend work and instead collected short-term disability benefits.
- [26] In November 2017, the claimant obtained a new position as Director of Human Resources at the Vancouver Public Library ("VPL"). This represented a return to a director-level position, comparable to the position he had held in Terrace, and a substantial increase in salary.
- [27] A.S. was born in the spring of 2018. The respondent's short-term disability leave ended and she began a maternity leave, followed by a parental leave.
- [28] In November 2018, the parties traded in their respective vehicles and purchased a 2018 Mercedes-Benz GLE. Part of the money came from the respondent's RRSP, which pre-dated the relationship. Part of the money was borrowed. For approximately one year, the parties shared one vehicle, with the claimant commuting to his work in Vancouver by transit.
- [29] On January 31, 2019, the claimant sold his Pauline Street property. The various closing documents indicate that the net sale proceeds were \$47,591.67. The claimant's evidence was that a significant portion of these funds was used to retire the outstanding financing with respect to the 2018 Mercedes, although there were no documents evidencing this in the record before me.
- [30] In June 2019, the parties refinanced the Family Home, obtaining financing from Scotiabank (which is the institution the respondent had historically banked with).
- [31] On July 5, 2019, the parties entered into an "Investment Contract" with Coal Harbour Project Ltd. ("CHPL"). CHPL was, at that time, owned by the respondent's brother, Gurpreet Athwal. They signed a one-page document providing that they were loaning \$400,000 to CHPL, and that CHPL would repay the funds on December 20, 2022 (some 41 months later), plus \$320,000 interest, for a total of \$720,000.
- [32] The respondent's parental leave from Canada Post was scheduled to expire in July 2019. The claimant did some research with respect to Canada Post's human resources policies, and learned that it had a program by which an employee with pre-school aged children could apply for a "Care and Nurturing Leave". This would be an unpaid leave for up to five years. One of the benefits of this leave was that the employee would be permitted to "buy back" pension entitlement for the missed years of contributions upon a return to work. A key disadvantage was that one of the terms of the leave was that the employee's former position would not be held for them, and that they would have to post in to a new position at Canada Post when they were ready to return to work.

[33] The claimant's evidence was that the motivation for taking such a leave was that the respondent did not want to place the children in daycare - something that the respondent had been adamant about since before A.K.'s birth. The respondent says there was never any discussion of daycare, and that the parties agreed that the respondent would take the leave but would never return to work. Her evidence was that their agreement was that she would retire at the conclusion of the leave and begin collecting a pension at age 55. The claimant said there was no such agreement.

[34] The respondent completed a Canada Post form requesting this leave on June 23, 2019, and it was approved on July 24, 2019.

[35] The form sets out the following with respect to "Substantive Position & Return to Work":

As per the Terms & Conditions of Employment for Management and Exempt employees, your return to your substantive position is not guaranteed upon the conclusion of any of the leaves mentioned above, regardless of the length of your absence.

When you are ready to return to work, if your substantive position is available, you may be reinstated into that position at the sole discretion of Canada Post. If your substantive position is no longer available, Canada Post will assist you with your search for a new position within CPC by providing you with access to the internal jobs site. This will allow you to actively search and apply to internal competitions, as well as leverage tools to help make yourself more visible to hiring managers.

If a new position has not been secured by you at the conclusion of your leave of absence, your employment with Canada Post will be severed in accordance with the terms of severance outlined below.

[36] Those Terms of Severance are as follows:

In the event of your severance from employment, you agree that the maximum liability of Canada Post to you shall be the greater of any severance payment which may be owing to you pursuant to the provisions of the Canada Labour Code, or a lump sum payment in lieu of notice equivalent to three weeks of base salary per year of completed, uninterrupted employment, to a maximum of 18 months of base salary. You agree that any payment to you shall be subject to all applicable statutory deductions, as well as to deductions for any pension arrears, benefits arrears or other amounts that may be owing by you to Canada Post at the time of your severance from employment.

[37] With respect to benefits premiums:

you will be responsible for both your share and the employer's share of the premiums. Premium arrears will accumulate for all your benefit coverage, where applicable, while on leave. The premium arrears will be recovered from your pay when you return to work over a period of twice the duration of your leave.

Should you not return to work for any reason or leave Canada Post prior to completing your repayment schedule, you will receive a written notice requesting repayment in full of any benefit premiums that are outstanding in relation to your unpaid leave period. These premiums must be remitted to Canada Post within 30 days of the date of the written notice.

- [38] The leave documents provide that certain benefit plans automatically continue while the employee is on leave - basic life insurance and long-term disability. Certain other benefit plans automatically stop while the employee is on leave - dental care and vision and hearing care. Other benefit plans are optional, and the employee is required on the leave form to indicate whether they will continue. Those benefits are "Life and Accident Insurance Plan (LAIP)" and "Extended Health Care Plan (EHCP)". The respondent's form indicated that she opted not to continue either of those coverages.
- [39] On September 9, 2019, the parties agreed to a change to the nature of their financial dealing with Gurpreet Athwal. As noted above, in July, they had provided a loan of \$400,000 with an agreement that it be repaid after 41 months with 80% interest. Two months later, they agreed instead to convert the \$400,000 loan into an investment in a newly incorporated numbered company, 1222637 B.C. Ltd. They were to receive 49% of the shares, with Gurpreet Athwal to contribute \$600,000 to the company and receive 51% of the shares. It was understood that the company would purchase a property and then re-sell it at some future time. The company was incorporated and the shares issued, but no other formal documentation was created to reflect the arrangement at that time.
- [40] The claimant at this point was taking transit to and from work, with the respondent driving the Mercedes. The claimant suggested that they trade in the Mercedes and that for the value they would receive they could purchase two vehicles - one for each of them to be the primary driver of. The respondent did not want to do this.
- [41] The claimant purchased a Tesla Model 3 at a cost of approximately \$70,000. None of the purchase documents were in evidence, and this cost was not reflected in any of the banking documents in evidence, but it seemed to be common ground that this happened at some point in the second half of 2019. It was also common ground that the purchase funds were drawn from a joint line of credit. The respondent was furious at this purchase. Her evidence was that they had obtained a substantial line of credit in order to have an "emergency fund for the children".
- [42] There was an altercation between the parties at some point in about October or November 2019. Each alleged the other had pushed them. The police were called and asked the parties to stay apart for that night. The respondent ended up taking the children away to her parents' house and the claimant did not see the children for a week or two.

- [43] A neighbour attempted to act as a mediator to assist the parties to reconcile. The neighbour's evidence was that the key issues on the mediation were disputes over (a) the claimant's purchase of the Tesla Model 3, and (b) the claimant's contributions to parenting. The neighbour also said that each of the parties accused the other of being aggressive.
- [44] These disputes were resolved by several steps being taken. First, on November 27 and 28, 2019, the respondent withdrew approximately \$183,000 from the parties' joint line of credit which she initially deposited into her savings account. On January 30, 2020, \$70,000 from those funds were paid to her brother's company, CHPL. Her brother then used those funds for business expenses, including paying day-to-day debts of CHPL; however, he promised his sister that he would pay her \$70,000 when she needed it. There were no documents with respect to this arrangement, and no interest was payable. The respondent explained that these funds were intended to be kept safe for her, and available to her in four years when she would have to buy back her pension entitlement. She said that no documents were needed for this arrangement, and no interest should be payable, because she and her brother were family. The parties, of course, paid interest on the funds borrowed through the joint line of credit for the next two years.
- [45] As well, an arrangement was made by which the respondent and the claimant would gift a 29% interest in 1222637 B.C. Ltd. to Gurpreet Athwal. In furtherance of that arrangement, a shareholder's agreement was entered into. All of these documents were dated January 8, 2020. The claimant's evidence was that the respondent insisted that the deal they had made earlier was unfair to her brother, and that the high rate of return he had approached them about needed to be reduced. The respondent's evidence was that the earlier agreements were a "favour" from her family and that she wanted to ensure that the claimant had no further favours. Mr. Athwal also asserted that he was doing all the work (he was the sole director) and paying expenses not covered by the parties' initial advances - however, when the property was eventually sold, those expenses were treated as a priority loan and refunded before the shareholders were repaid their advances and the profit divided.
- [46] In late 2019, the parties reconciled after a short period of separation.
- [47] There was little evidence relevant to financial matters with respect to anything in 2020. That of course was the Covid-19 pandemic.
- [48] On March 28, 2021, the parties traded in their 2018 Mercedes for a new Tesla Model Y, for which they were both registered owners.
- [49] In July 2021, the property that had been purchased in 2019 by 1222637 B.C. Ltd. was sold. The parties were reimbursed their \$400,000 initial investment on July 19, 2021. On July 24, 2021, the parties repaid the outstanding balance of \$199,000 on the joint line of credit. That line of credit was subsequently closed. The sum of \$45,000, representing the parties' share of the profit from 1222637 B.C. Ltd., was paid to the parties on July 29, 2021, and the company was subsequently wound up.

- [50] The claimant said that the respondent told him that she was getting a further \$20,000 from their dealings with 1222637 B.C. Ltd. that would be used to help with buying back her pension. She denied having any such discussion and denied receiving or having access to any further funds from her brother or his company.
- [51] On May 30, 2022, the respondent withdrew US \$8,200 in cash from a U.S. dollar account he had at TD Bank. Bank statements for this account dating back to 2017 were produced, and indicate that these funds had sat in the account virtually untouched throughout this time. The claimant's evidence was that this was money his mother had given him to hold for his sister, who was undergoing cancer treatment through the U.S. medical system, and might need funds at any time to cover medical services that turned out to be not fully covered by her insurance. He said that the funds were withdrawn on May 30, 2022, and given to his sister. His sister's evidence was generally supportive of this assertion, although she did not recall the specific dates on which she had been given money. The respondent says she was entirely unaware of this account.
- [52] At some point in about July 2022, the parties had agreed to replace their old wood fence with a metal fence. They obtained estimates that it would cost about \$17,000, and in anticipation of that, secured a new joint line of credit in the amount of \$15,000 to pay for the fence. Arrangements with the repair person were not yet finalized when this plan was overtaken by other events.
- [53] In July 2022, the claimant approached the respondent and told her he was going to ask for an end to their relationship, and said he hoped they could do it amicably. His evidence was that the claimant asked for time to think. This happened a couple of more times. Ultimately, on August 9, 2022, there were a series of interactions between the parties. While there were no physical interactions, that evening both parties ended up calling the police again. Once again, the police asked the parties to spend the night apart. Once again, the respondent took the children to her parents' place and refused to allow the claimant to see the children for a period of time. At some point on August 9, 2022, the respondent transferred \$1,000 from the parties' joint bank account to her personal account, leaving a balance of only \$761.07 in the joint account. Nothing in the record indicated the time of day, but it presumably occurred prior to the cut-off for electronic transactions to be recorded that day.
- [54] The parties agree that August 9, 2022 is their date of separation.

Events After Separation

- [55] Most of the events of August 2022 are relevant only to the parenting issues that, as noted above, were determined in the oral judgment I gave. I will not refer to them in this judgment.

- [56] On August 10, 2022, the respondent drew down the parties' joint line of credit by the full \$15,000 in available credit, and deposited those funds into her personal Scotiabank savings account. Of those funds, \$10,000 was withdrawn from the savings account on August 15, 2022, and the respondent was unable to say where that money went.
- [57] The respondent also instructed the tenants of the two basement suites to make all further rent payments electronically to her. She deposited all of the rent to her personal account.
- [58] Later in August, the claimant arranged for his paycheques, which had previously been deposited to the parties' joint account, to be deposited to his personal account, and for automated payments that had previously come from the joint account to instead be made from his personal account. The largest of these payments was the mortgage.
- [59] The respondent made efforts to secure assistance from religious leaders to mediate a reconciliation. In about mid-August, a Mr. Singh met with the parties individually and for one joint session. The claimant's evidence is that he made it clear that he was not interested in another reconciliation.
- [60] The parties each retained lawyers in mid-August 2022. This action was commenced on August 19, 2022. The respondent filed her Response to Family Claim and Counterclaim the following Wednesday, August 24, 2022.
- [61] At some point in August 2022, the claimant changed the locks on the Family Home.
- [62] The parties had a joint Costco Mastercard which was used for family expenses. The August 9, 2022 bill for the card was for \$2,630.27. The claimant paid \$2,630.27 toward this bill on August 29, 2022, while the respondent paid \$2,500 toward this bill on August 30, 2022. It appears from this that both were attempting to continue to ensure that the parties' joint financial obligations were met.
- [63] Various court applications were filed in September 2022. Most of them were relevant to parenting issues, and I will not deal with those here. An application filed by the respondent on September 13, 2022, included claims for interim child and spousal support as well as exclusive occupancy of the Family Home. The claim for exclusive occupancy was ultimately dismissed. On November 18, 2022, after both parties had made preliminary financial disclosure, Associate Judge Harper ordered that the claimant pay interim spousal support of \$2,889 per month and interim child support of \$2,342 per month, these being calculated on the claimant's 2021 income of \$165,515. She also directed that the respondent apply all of the rental income she was receiving to the mortgage, and that the claimant was to be responsible for any portion of the mortgage not covered by the rent.
- [64] As well, on November 10, 2022, counsel for the claimant wrote proposing that (a) the parties close all joint bank accounts and credit cards, and (b) the Tesla Model Y be transferred to the respondent's name only. This was agreed to and implemented over the next few weeks.

- [65] From December 2022 onward, the claimant has paid child support and spousal support to the respondent as required by Associate Judge Harper's order (and by an amendment that will be referenced below). As well, the rents from December 2022 until the Family Home was sold were paid to the claimant and he made all mortgage payments.
- [66] The Family Home was listed for sale in early December 2022. The parties entered into an agreement on December 18, 2022, to sell the home, with a completion date of February 28, 2023.
- [67] The parties attended a Judicial Case Conference on January 5, 2023, with Associate Judge Hughes. At that time, it was agreed that upon the sale of the home, each party would receive \$250,000, with the balance of the net proceeds to be held in trust.
- [68] The net proceeds of sale of the Family Home, other than the advances agreed to at the Judicial Case Conference, have been held in trust since completion by counsel for the claimant. The initial amount placed in trust was \$644,036.30. A portion of those funds was used to pay for a s. 211 report. The net amount remaining in trust is \$613,286.30 plus some accrued interest.
- [69] A consent order made in the spring of 2023 varied the payments for child and spousal support. The order reflected the claimant's then-known 2022 income of \$168,791, as well as an imputation of \$34,840 in income to the respondent. The amounts payable by the claimant, effective as of July 1, 2023, were to be \$2,381 per month in child support and \$2,010 in spousal support. The order also provided for certain special and extraordinary expenses to be shared by the parties proportionately.
- [70] The respondent has continued to live in the basement of her parents' home. She has, since December 2022, been paying rent of \$2,500 per month.
- [71] The claimant has, since the sale of the Family Home completed in February 2023, been living in rented premises in Burnaby. The unit he was initially in flooded in May 2023, which led to him moving to his current location.
- [72] The respondent has taken the position throughout this proceeding that she has no intention to, and is not required to, return to work. Notwithstanding that position, she has made various inquiries of Canada Post's human resources department from time to time. The actual inquiries were not put in evidence, so it is not known what she was saying to the authors of the various letters. No Canada Post employee gave any evidence at trial. With that caveat in mind, I note that:
- a) There is an email of October 7, 2022, confirming that the policy governing the respondent's Care and Nurturing Leave (as quoted above) remained in effect, and that "your substantive position is not currently vacant, as such, should you intend to return to work from your leave you would have to compete for an alternate job within Canada Post"; and

- b) There is a letter from Canada Post's Human Resources department dated June 5, 2024, stating:

According to our records, you have been on Care & Nurturing Leave since September 9, 2019. Per your request or the maximum allowed (under the terms and conditions of your employment), whichever is earlier, your leave will expire on September 6, 2024.

Unfortunately your substantive position is not available to you and there is currently no other position available to which you can return.

In order to continue your employment relationship with Canada Post, you must secure a position by September 6, 2024.

If for some reason your situation has changed and you are unable to return to work, please contact me.

If you have not successfully secured a position with Canada Post by the end of the day on September 6, 2024, your employment relationship with Canada Post will end.

If you intend to return to work, please visit [website specified] to view the latest job offerings and contact me to make aware of your intent to return to work.

[73] As well, the respondent put in evidence various pay stubs she has received from Canada Post, which she suggested set out the amount she will have to repay Canada Post for benefits after her leave is concluded. The most recent such statement was dated March 30, 2023. It said the benefits arrears totalled \$21,663.53 broken down as follows:

BC Med arrears

\$416.25

EHCP arrears

\$8,571.76

Dental arrears

\$82.54

Basic Life arrears

\$2,266.67

LAIP arrears

\$874.36

LTD arrears

\$9,451.95

- [74] The respondent was unable to explain why benefits arrears were accruing in all of these categories when her leave forms indicated that the only benefits that would continue during her leave were Basic Life and Long-Term Disability. Her evidence was that Canada Post is a big organization and they do not usually make mistakes about things like benefits calculations.
- [75] An email sent by a contact centre employee in March 2023 estimated the likely benefits arrears as of September 2024 as \$29,396.53, and suggested that the respondent did have life and accidental insurance coverage. There was no evidence explaining why, when or how such benefits were put in place, given that they were clearly declined on the respondent's leave application.
- [76] A Canada Post letter dated January 9, 2023, provided an estimated cost of \$98,857.34 to pay for pension contributions owed for the leave period, assuming a leave end date of September 9, 2024, but cautioned that the exact balance can only be provided once the leave has ended. A further letter dated January 11, 2023, estimates that upon buyback of the pension entitlement, and assuming retirement as of September 9, 2024, the respondent's pension income would be \$4,480.02 per month. The latter letter identifies the "annualized base pay" of the respondent's position with Canada Post as of January 2023 as \$98,840. These numbers are all confirmed by a "personalized pension statement" prepared as of December 31, 2023. That statement shows a base salary from 2019 to 2023 ranging from \$94,133 to \$98,840.
- [77] The respondent confirmed in her cross-examination at trial that she has no intention of returning to work. She reiterated her evidence that there was always a plan for her not to return to work, and instead to put her focus on the children's learning, their public school, and their extracurricular activities. She says that even though the children are in school full-time, there are still a lot of things she needs to take them to, and she wants to make that her priority.
- [78] The respondent has not requested access to Canada Post's internal job site, and she has not requested access to the "leverage tools" referenced in the leave documents. Her evidence was that she is not sure there is even an internal site anymore. She did go on the external Canada Post job posting website shortly before trial, and commented that it did not provide any management level jobs in BC that she would qualify for.
- [79] The respondent has not updated her resume, and has not applied to any jobs. Her only effort to look at potential positions outside of Canada Post was to do an internet search for "auditor" positions. Her comment was that most of those positions seemed to require an accounting designation, which she has never had.

Issues

- [80] As noted, I dealt with the parties' parenting issues in an oral judgment given shortly after the trial. This judgment deals with the outstanding financial issues, which I summarize as follows.
- [81] There are various disputes with respect to child and spousal support. In particular, the claimant says that income should be imputed to the respondent for purposes of both the Federal Child Support Guidelines, SOR /97-175 [FCSG], and the Spousal Support Advisory Guidelines [SSAG], based on her earning capacity. The respondent, on the other hand, says that her intention is to retire at the conclusion of her leave - she says that it is reasonable for her to retire at age 55, given the pension entitlement she has accrued, and that in any event, she and the claimant had agreed to this back in 2019 when she applied for the leave. The claimant says that there was no such agreement, and in any event, the respondent has an obligation pursuant to the FCSG to work to the extent she is able.
- [82] The determination of whether and to what extent income should be imputed will affect both the quantum of child support and the appropriate sharing of special or extraordinary expenses pursuant to s. 7 of the FCSG.
- [83] With respect to spousal support, the claimant disputes whether the respondent has established entitlement. If entitlement is found, then the same issues with respect to the respondent's income for purposes of calculation will arise.
- [84] The claimant asserts that the child and spousal support he paid pursuant to the interim orders made is greater than his actual liability, and as a result seeks a retroactive adjustment for this alleged overpayment. The respondent seeks retroactive child and spousal support, arguing that the claimant should have begun paying support in August 2022 (prior to any interim orders being made), and also that the imputation of income to her in the consent order in the spring of 2023 was inappropriate.
- [85] Finally, the parties seek an order of the court dividing family property. There are competing claims for exclusions, and with respect to one specific asset (a rental property in Langley), the claimant seeks an unequal division. The respondent also seeks occupation rent for the claimant living in the Family Home from August 2022 to February 2023.

Reliability and Credibility

- [86] Reliability and credibility are related but distinct concepts. The distinction between them was considered in *R. v. Morrissey* (1995), 22 O.R. (3d) 514 at 526, 1995 CanLII 3498 (C.A.), cited in *United States v. Bennett*, 2014 BCCA 145 at para. 23:

Testimonial evidence can raise veracity and accuracy concerns. The former relate to the witness's sincerity, that is, his or her willingness to speak the truth as the witness believes it to be. The latter concerns relate to the actual accuracy of the witness's testimony. The accuracy of a witness's testimony involves considerations of the witness's ability to accurately observe, recall

and recount the events in issue. When one is concerned with a witness's veracity, one speaks of the witness's credibility. When one is concerned with the accuracy of a witness's testimony, one speaks of the reliability of that testimony. Obviously a witness whose evidence on a point is not credible cannot give reliable evidence on that point. The evidence of a credible, that is, honest witness, may, however, still be unreliable. ...

[87] In considering these matters, the evidence of a witness must be assessed for "its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions": *Faryna v. Chorny*, [1952] 2 D.L.R. 354 at 357, 1951 CanLII 252 (B.C.C.A.).

[88] A frequently cited list of factors in assessing evidence as to both the veracity of a witness and the accuracy of that witness' evidence is found in *Bradshaw v. Stenner*, 2010 BCSC 1398 at para. 186, *aff'd* 2012 BCCA 296. It includes:

- a) The ability and opportunity of the witness to observe events;
- b) The firmness of their memory;
- c) Their ability to resist the influence of interest to modify their recollection;
- d) Whether their evidence harmonizes with independent evidence that has been accepted;
- e) Whether the witness changes their evidence during cross-examination (or between examination for discovery and trial) or is otherwise inconsistent in their recollection;
- f) Whether their evidence seems generally unreasonable, impossible or unlikely;
- g) Whether the witness has a motive to lie; and
- h) The demeanour of the witness generally.

[89] A trier of fact may accept none, part or all of a witness' evidence and may attach different weight to different parts of a witness' evidence: *Gill Tech Framing Ltd. v. Gill*, 2012 BCSC 1913 at para. 28.

[90] I reviewed issues of reliability and credibility in the oral judgment I gave with respect to parenting matters. I concluded at that time that I have concerns with the evidence of both parties and that the evidence of both must be approached carefully. Several of the matters canvassed in that review related to parenting issues. While those issues are not relevant to this judgment, all of these issues were tried in the same trial and my concerns about reliability and credibility are applicable to the financial matters.

[91] One of my specific concerns is relevant to the financial issues. I found the evidence as to the respondent's various financial dealings with her brother to be strange to the point of being unbelievable. The conversion of the loan with a written agreement for an 80% return (albeit over 3½ years) into a 49% interest in a property to be purchased seems to be a change that is unlikely to be of financial benefit. The gifting of the 26% interest to the brother later is

clearly detrimental to the interests of the respondent and her family. The giving of \$70,000 in borrowed funds, on which the respondent and the claimant were having to pay interest, to her brother's company to use for day-to-day business expenses, and the explanation that "we don't count pennies", are both quite incredible. My concerns about the respondent's evidence on these points also impacts my views of the credibility of her brother.

Child Support

- [92] There are various disputes with respect to child and spousal support, and in particular with respect to determination of the respondent's income for purposes of the FCSG and SSAG.
- [93] The primary issue is the claimant's request that income be imputed to the respondent. The respondent did not return to work after A.S.'s birth. Rather, she has been on a "Care and Nurturing Leave" which is set to expire in August 2024. She has stated that she intends to retire at that time, and focus her time and energy on volunteering with the children's schools and extracurricular activities. She says there was an agreement with the claimant that she would do so. The claimant says that there was no such agreement, and in any event the respondent has an obligation pursuant to the FCSG to work to the extent she is able.
- [94] Two other issues are raised:
- a) The claimant submits that, if income is not to be attributed to the respondent, then her anticipated severance payment should be included in income; and
 - b) The respondent says that a capital cost allowance ("CCA") deduction from the claimant's rental income should not be part of the calculation of income for support purposes.

Positions of the Parties

- [95] The claimant submits that income should be imputed to the respondent on the basis that she is not earning income to her capacity. The claimant says that the income should be imputed from and after February 1, 2023 - that being approximately six months after separation, which is said to be a reasonable time for the respondent to have made efforts to either return to work at Canada Post or apply for employment elsewhere based on her education and employment history.
- [96] With respect to salary, the claimant argues that the respondent's salary should be imputed to be \$98,000. This is based on the 2023 base salary for her position of \$98,840 - up from \$94,133 in 2019. The claimant notes that, in addition to base salary, the respondent generally earned bonuses in the range of \$10,000 - in her last two full years of work (2014 and 2015), her income employment was \$102,801 and \$101,093, at a time when the base salary was \$91,341.

- [97] The claimant notes that, although the Care and Nurturing Leave had a maximum term of five years, there was nothing preventing the respondent from returning to work prior to the end of those five years. There are no health issues of the respondent, and no special needs of the children, that would prevent the respondent from working.
- [98] The claimant submits that it is not reasonable for the respondent to decline to seek out employment, and to simply rely on her pension, when she could be earning double the amount of the pension. It is clear she has made no effort to obtain a new position. She is not working to her full potential, and that is as a matter of choice.
- [99] Alternatively, the claimant submits that if the respondent is not imputed an income on the basis of a failure to work to her capacity, she ought to be imputed an income of \$100,000 for the period of September 6, 2024 to March 6, 2026, based on her entitlement to severance based on 18 months' pay in lieu of notice. The claimant submits that the severance payment should be applied as salary for the notice period that it is intended to cover.
- [100] The claimant seeks an order that s. 7 expenses be paid proportionately to the parties' FCSG incomes. The claimant submits that the applicable proportion is 64% by the claimant and 36% by the respondent.
- [101] The claimant submits that s. 7 expenses would include all health and child care amounts. With respect to extracurricular activities, the claimant agrees that it should include the Saturday morning programs the children currently attend, plus spring and summer camps as agreed, but that other activities should be only covered as agreed or as determined by the parenting coordinator.
- [102] The parties had, prior to trial, treated contributions to a joint RESP for the benefit of both children as being an extraordinary expense. The claimant proposed at trial that, from this point onward, the parties should establish separate RESPs, to which each will contribute, and that RESP contributions would no longer be treated as a special expense. I understand that the respondent agrees with this proposal, and in fact has already established a separate RESP.
- [103] The respondent submits that the parties' intention was always for her to retire at the end of her Care and Nurturing Leave, and that it is reasonable to do so. The respondent submits that her not working is important to the children's religious and cultural education, and it allows her to help the children with both their school homework and also with their extracurricular activities including Punjabi lessons and associated worksheets. The respondent says that there are no appropriate jobs available for her at Canada Post in the Lower Mainland, and that it would not be appropriate for her to take a lower level job given that her income from such a position would be less than the pension income to which she is entitled. She notes that she has been mostly out of the workforce since going on maternity leave in 2016. She says that she has not maintained her certifications, and that her prospects of future employment are slim. The respondent says that given she has nearly 30 years of pension entitlement, and is eligible to retire and start collecting a

substantial pension later this year, it is reasonable for her to do so.

Legal Context

[104] The primary issue that arises with respect to child support is the determination of the respondent's income, and specifically whether income should be attributed to the respondent. With respect to that issue, s. 147(1) of the FLA provides that each parent has a duty to provide support for their child. Section 150(1) requires the amount of child support to be determined in accordance with the FCSG.

[105] Section 19(1) of the FCSG provides that:

The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

- (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;

[106] The applicable legal principles were summarized in *Marquez v. Zapiola*, 2013 BCCA 433 at paras. 36-38:

[36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.

[37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work.

[38] Although the legal foundation for awarding spousal support is different from that of child support, the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living. "Means" has been interpreted to include all capital and other sources of income.

[Citations omitted.]

[107] Principles relevant to the exercise of this "broad judicial discretion" include the following:

- a) Parents have a joint and ongoing legal obligation to support their children, which includes a duty to seek employment where the parent is healthy and there is no reason why the parent cannot work;

- b) A parent cannot avoid child support by a self-induced reduction of income;
- c) The right to support is the right of the child, not the right of the parent;
- d) Bad faith is not required;
- e) A court must consider what is reasonable under the circumstances, and this will include the age, education, experience, skills and health of the parent as well as the availability of work, freedom to relocate and other obligations; and
- f) A mother's desire to be "available" for children before and after school was not sufficient reason to justify under-employment, in the absence of evidence of a child's special need.

[See *Watts v. Willie*, 2004 BCCA 600; *Barker v. Barker*, 2005 BCCA 177 at para. 19; *Hanson v. Hanson*, 1999 CanLII 6307 (B.C.S.C.); *M.A.G. v. P.L.M.*, 2014 BCSC 126; *Llewellyn v. Llewellyn*, 2002 BCCA 182 at para. 31.]

[108] The respondent relies on a series of cases, primarily focused on spousal support, where a key issue was whether income should be imputed to a payor spouse who had chosen to retire "early". Most of these authorities deal with applications to vary existing spousal support orders. In almost all of them, if the parties had children, the children had grown up, such that there were no concurrent claims for child support.

[109] Generally speaking, the income amounts used for calculating child and spousal support are the same. As set out in chapter 6 of the SSAG:

The starting point for the determination of income under the Spousal Support Advisory Guidelines is the definition of income under the Federal Child Support Guidelines.

The Federal Child Support Guidelines provide an expansive definition of "income" for child support purposes, one that reflects and clarifies much of the pre-Guidelines law on income determination. Sections 15 to 20 of the Child Support Guidelines, along with Schedule III, create a framework for income determination. Prior to the release of the Spousal Support Advisory Guidelines, most courts used the same definition of income for both child support and spousal support purposes and that practise has continued since January 2005.

Some of the technicalities of Schedule III are sometimes forgotten in spousal cases. The income imputing provisions of section 19 are, if anything, even more important than in child support cases. In every spousal support case, two incomes are in issue. Income may need to be imputed to a payor spouse, but in addition a spousal support case may also require that an income be imputed to the recipient spouse, because of self-sufficiency issues. In these cases, income is imputed to the recipient under s. 19(1)(a), for under/unemployment.

[110] That said, there are circumstances in which different income amounts can be used for child and spousal support. As set at Spousal Support Advisory Guidelines: The Revised User's Guide (April 2016) at section 6(g):

Another set of difficult "income" issues can be succinctly characterized as "two incomes", one for child support and another, different income for spousal support. The question is not, "can a payor have two incomes?", but really "in what circumstances should a payor have two incomes?" These issues are difficult because they are not just about "income", but about more fundamental principles of support.

The authors go on to give examples of cases where different incomes can be used for child support and spousal support calculations; however, none of them are applicable to the present case.

[111] The Revised User's Guide also discusses the concept of "early retirement" in the context of the SSAG, at chapter 19(a):

When the payor retires "early" and seeks a reduction in spousal support, there will be close scrutiny of the decision to retire. When will a retirement be described as "early"? The courts are not always clear. For our purposes, an "early" retirement is either a retirement on a reduced pension or a retirement on a full or unreduced pension before 65 years of age, in the absence of health issues or other special circumstances. If the court sees the early retirement as "voluntary" and not necessary or reasonable, then it is likely that spousal support will not be changed. As Gordon notes, many of these cases involve longer marriages and significant compensatory claims:

[112] I turn to the cases referenced by the parties. I begin with a Court of Appeal judgment that, although not expressly referenced by the respondent in submissions, is relied upon in several of the other cases - *Ross v. Ross* (1994), 94 B.C.L.R. (2d) 206, [1994] B.C.J. No. 1526 (C.A.). In *Ross*, the parties had been married for 47 years, and their children had long since been independent adults. An order made in 1988 provided for payment of spousal support of \$700 per month. At the time, Mr. Ross had elected early retirement from a career in retail business and begun to work as a college instructor, which supplemented his pension income. In 1993, at the age of 70, he ceased to work as a college instructor. He immediately applied for a variation of the support order on the basis that, moving forward, he would have access only to his pension income. Justice Lambert concluded that:

[14] The fundamental question in this case is whether the fact that Mr. Ross is still capable of working at age 71 is a circumstance that should cause this Court to order that he pay maintenance to Mrs. Ross in a situation where if he does not work their incomes from pensions are equal and she has significantly more in capital assets than he does. As a part of that question and one of its aspects there is a concern about whether the answer to the question is affected by the fact that Mrs. Ross has bought a condominium to provide a secure and comfortable home and needs funds to meet her mortgage commitments.

- [15] In my opinion, the law does not require Mr. Ross to continue to work after age 71 in order to permit Mrs. Ross to retain her condominium. Mr. Ross may well have a continuing capacity to work at age 71 but neither sub-section 61(2) nor 62(1) of the Family Relations Act requires this Court to make an order that would compel him to work by requiring him to pay maintenance to the point that he could not survive on his income without working.
- [113] In *Powell v. Levesque*, 2014 BCCA 33, the parties separated after an eight-year marriage-like relationship. The parties entered into a consent order that provided for the appellant to pay the respondent spousal support, and also for a division of the appellant's pension. After having paid spousal support for 12 years, the appellant retired from the military at the age of 44 and after 26 years of service. She applied to vary the support obligation. The appellant had degenerative arthritis arising from a knee injury suffered while in active service. The Court concluded that the chambers judge had erred in finding that the appellant had retired early and voluntarily. Justice D. Smith noted at para. 33 that:
- [33] In *Ross v. Ross* (1994), 7 R.F.L. (4th) 146 (B.C.C.A.), this Court held (at para. 15) that the law does not require payor spouses to maintain spousal support at a level that forces them to continue to work after becoming eligible for full retirement benefits. The appellant in this case, although only 44 years of age at the time of her retirement, could not be compelled to remain at that employment after she had completed her 25 years of service in order to maintain her spousal support obligation under the Consent Order. Moreover, the appellant's increasing physical limitations arising from her knee condition, which the judge acknowledged "no doubt made some aspects of her military employment quite uncomfortable" (para. 28), clearly influenced her decision to retire despite her attempt to continue with her military employment for an additional year after she had completed her obligatory service.
- [114] Justice Smith went on to comment at para. 37 that:
- [37] In summary, the appellant's decision to retire after 26 years, having completed 25 years of service in the CAF, and in the face of increasing health issues, was not in my view unreasonable. This resulted in a decrease in her level of employment income of \$43,000 and in her total income (after her pension benefit had been divided with the respondent) of \$14,000. There was no evidence to support a finding that she had a greater earning capacity than what she was able to earn at Tim Hortons. In my view, the appellant met the threshold test of a material change in circumstances for variation of the spousal support provisions of the Consent Order.
- [115] The two paragraphs I have cited from *Powell* could arguably give rise to two distinct tests - with para. 33 suggesting that once a party has become "eligible for full retirement benefits", they are not subject to having income imputed to them based on their actual earning capacity; while para. 37 suggests that the actual test is whether the decision to retire was reasonable in all the circumstances, with the fact that the party is "eligible for full retirement benefits" as simply one of the factors to be considered in the reasonableness

analysis.

- [116] I refer back to the excerpt quoted above from *Marquez* - as part of a discussion of imputation of income for purposes of both child and spousal support, where the Court concluded that:

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.

[Emphasis added.]

- [117] In *McPherson v. McPherson*, 2019 BCSC 933, the payor spouse sought to vary a 2005 order providing for payment of spousal support for an indefinite period. The payor spouse had, at the time of the application, recently qualified for an unreduced pension and elected to take voluntary early retirement at the age of 60. That decision was not brought on by health concerns or external factors; rather, Mr. McPherson wanted to leave the working world behind and pursue his "passion" for rescue dog training: para. 23. The court noted that Mr. McPherson:

- [24] relied heavily on *Powell v. Levesque*, 2014 BCCA 33, but that decision does not stand for the proposition that retirement will automatically be considered reasonable if the payor is eligible for a full pension. Each case must be evaluated independently. All of the circumstances surrounding a particular decision to retire must be must be considered and measured against the recipients ongoing entitlement or need for support.

- [118] The law was summarized as follows:

- [21] Law courts have no power to compel people to work: *Vennels v. Vennels*, [1993] B.C.J. No. 378 (BCSC). This is a free country and people may configure their economic lives however they please. However, when a person with spousal support obligations retires - particularly at an earlier-than-expected age - the direct and simple question to be determined is whether the decision to do so is reasonable in the circumstances: see, for example, *Jordan v. Jordan*, 2011 BCCA 518 at para. 40; also *Gajdzik v. Gajdzik*, 2008 BCSC 160 at para. 54. If such a decision is found to be unreasonable, then as a matter of law it comprises no material change in circumstances and will not affect support obligations: see *Szczerbaniwicz v. Szczerbaniwicz*, 2010 BCSC 421 at paras. 25-25, citing *Francis v. Logan*, 2008 BCSC 1028 at paras. 34-36.

- [119] In *Wellard v. Wellard*, 2020 BCSC 1877, the claimant sought to impute income to the respondent who had taken early retirement at age 60 - just a year after the parties had separated. The court noted the following comments from *Szczerbaniwicz*:

- [26] Therefore, if the court finds that a party's retirement was motivated by the desire to avoid a maintenance obligation, it will most likely impute income. Even if the party's motivation was not to avoid maintenance, the court will likely impute income so long as the party has the ability to earn an income.
- [27] If the retirement is not voluntary because of economic circumstances, medical reasons, or an employer's actions and the payor is unable to work, the court will tend to reduce the maintenance payable; otherwise, if the payor is still capable of earning an income, his application to terminate or vary spousal support will likely fail
- [120] The court imputed income to Mr. Wellard, explaining:
- [195] The respondent in this matter is in a position similar to the defendant in *Szczerbaniwicz*. While I have not inferred that the respondent retired early for the purpose of avoiding spousal support obligations, the respondent was not required to retire for medical reasons or for any reason other than his own personal preferences. He made the decision to retire knowing the claimant had an outstanding claim for spousal support. I therefore conclude that it is appropriate to impute an income to the respondent.
- [121] *Harper v. Harper*, 2021 BCSC 758, is one of the few cases in which retirement was in issue at a time when child support was still payable. The payor spouse, Mr. Harper, sought a review of both child and spousal support payable pursuant to a consent order from 2018. He had retired from the Victoria Police Department in 2021 after 26 years of service, at the age of 55, having achieved a full pension. His income had decreased from a pre-retirement salary of \$142,000 to unreduced pension benefits of \$65,892. He explained that he did not want to continue working. The recipient spouse argued that it was open to Mr. Harper to work at a number of different jobs given his experience, including being a private investigator or in the security industry.
- [122] The court accepted Mr. Harper's evidence that the parties had spoken many times of their plans to retire as soon as they were eligible to receive a full benefit. The court continued:
- [12] However, that is not the end of the question. The question is whether it is reasonable for Mr. Harper to stop working at any job at the age of 55 given that he is no longer married to Ms. Farrington, the plans that they made together are no longer in effect, and he is now a payor of support.
- [15] unlike the payor in *Powell*, Mr. Harper is in good health and has not indicated that he intends to continue working in some other capacity. As found by the court in *McPherson v. McPherson*, 2019 BCSC 933, "[e]ntitlement to a full pension is but one factor to consider in evaluating the overall reasonableness of an individual's decision to retire from the workforce. It is not determinative on its own."
- [123] The Court noted general principles governing imputation of income in child support cases, and imputed to Mr. Harper an income of \$30,000 per year on top of his pension income.

[124] *Yarmie v. Yarmie*, 2024 BCSC 457, was a review of a spousal support order made in 2016 which required the respondent to pay \$2,800 per month to the claimant. The review was triggered by the respondent's retirement in 2021 at age 60. The court concluded (para. 45) that the respondent was eligible to retire on a full pension when he did so, that he did so because he had turned 60, and that he remained capable of working on a substantially full-time basis.

[125] The court noted *Marquez*, which it said addressed "the general test for imputation of income", but that it "did not specifically concern the retirement of a payor spouse": para. 89. With respect to that issue, the court considered the excerpts cited above from *Ross and Powell*: paras. 95-98. The court then considered *Szczerbaniwicz and Harper*, as well as the following comment from Prof. Rollie Thompson's article *Slackers, Shirkers and Career-Changers: Imputing Income for Under/Unemployment* (2007), 26 C.F.L.Q. 135 at p. 11:

In line with the change of employment cases, a surprisingly strict approach emerges from these [retirement] cases: even if a payor's early retirement is reasonable, the payor has a duty to take full-time (or maybe substantial part-time) employment after retirement, subject to any ongoing health problems.

[126] I note that Prof. Thompson's observation is based upon a review of then-recent appellate judgments, including *Donovan v. Donovan*, 2000 MBCA 80, the approach in which was expressly adopted in *Watts* at paras. 16 and 23.

[127] I note as well Prof. Thompson's conclusion with respect to the retirement cases he reviewed, that:

These are all "early" retirement cases, voluntary retirement well in advance of normal retirement ages. I would hypothesize that voluntary retirement at a later age is less likely to be contested and less likely to have imputing arguments raised.

[128] I return to the judgment in *Yarmie*. The court in that case, having considered (at paras. 108-110) that there was "uncertainty as to the legal principles to be applied" in retirement cases, concluded that binding appellate authority in *Ross and Powell* gave primacy to the right of the payor spouse to retire, that the approach taken in *Harper* was incorrect, and that the comments in Prof. Thompson's article did not reflect the law in British Columbia. Rather, the applicable principles were (para. 110):

- c) Additional income should not be imputed to a spouse who retires prior to the age of 65 where the decision to retire is reasonable (*Powell*);
- d) A decision to retire upon being eligible for a full pension can be considered reasonable (*Ross and Powell*). This is especially so where the payor's pension has been divided with the payee spouse, the parties' incomes from pensions are equal and the payee spouse has more assets than the payor spouse (*Ross*);

- e) A decision to retire motivated by bad faith or to avoid paying support is not reasonable (McCallum [v. McCallum, 2015 BCSC 837], Szczerbaniwicz, and Ashton [v. Ashton, 2015 BCSC 790]); and
- f) Where a payor spouse has made a reasonable decision to retire, they should not be forced to continue to work solely to support the payee spouse (Rochon [v. Rochon, 2018 BCSC 1899]). In particular, contrary to what is set out in Harper, and to a lesser extent Szczerbaniwicz, it is not open to me to impute an income where the decision to retire is reasonable, regardless of whether the retired payor spouse is capable of earning additional income.

[129] With respect to the claimant's alternate claim - to have the respondent's severance included in income - the claimant references the judgment in D.Z. v. R.H.Z., 2020 BCSC 891 at paras. 114-118, where Justice Adair accepted authorities establishing that severance payments are a substitution for loss of employment income, and generally should be considered as part of Guidelines income, but that for support purposes, the severance should be considered applicable to the extended period for which the payments are intended to cover her loss of income, rather than automatically considering them applicable to the year in which they are received.

Analysis

[130] This is a case in which the parties have ongoing obligations to support their children. They will continue to have those obligations for at least another decade. I struggle with any interpretation of the income imputation rules that would place the obligations of parents to their children as secondary to the right of one parent to retire as soon as they have qualified for an unreduced pension.

[131] In my view, the clear trend of the authorities in cases of child support is that income will be imputed to a spouse who is intentionally earning less than they are capable of earning unless the decision to earn less is objectively reasonable in all of the circumstances. In my view, on a fair reading of the judgments in their entirety, the courts in both Ross and Powell both considered the full range of surrounding circumstances in concluding that income should not be imputed. Specifically, the statement in the first sentence of para. 33 in Powell must be read, not as a standalone rule of law, but in light of the full analysis of reasonableness contained in the balance of para. 33 and of para. 37 - which consider circumstances including the appellant's health and the fact that she had begun work at a lower income at a Tim Horton's.

[132] Thus, it is my view that the Marquez principles remain applicable, and that I must consider the respondent's decision to retire at age 55 in light of her ongoing legal obligation to support her children and its reasonableness in light of her age, education, experience, skills and health, as well as the availability of work, her ability to relocate for work, and the fact that she will (assuming she "buys back" her pension entitlement) have qualified for an unreduced pension.

- [133] It is clear from Llewellyn that the respondent's desire to be available to volunteer at the children's school and in their extracurricular activities is not a sufficient reason to justify not working. Nor are there special needs of the children that would restrict her availability to work. Pursuant to the oral judgment I gave with respect to parenting matters, the parties will, by the end of July 2024, have shared parenting and, by mid-2025, will be moving to a week-on, week-off parenting schedule.
- [134] The retirement cases to which I was referred all involve payor spouses (rather than recipient spouses). Generally speaking, the same rules apply to both. I would note, however, that in respect of spousal support, the objectives of spousal support include "as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time": FLA s. 161(d). That objective does not sit well with the ability of a recipient spouse to retire and make no efforts at self-sufficiency, while expecting the payor spouse to pay spousal support long-term calculated on the basis of an income for the recipient spouse that is substantially below their actual capacity.
- [135] The parties gave contradictory evidence as to whether they had agreed in 2019 that the respondent would not return to work after her Care and Nurturing Leave was completed. I do not accept the respondent's evidence that there was such an agreement. I say that in part because of my conclusions as to the respondent's credibility. As well, it seems to me to be inconsistent with the respondent's own attitudes to money throughout the relationship, and there is nothing in any document prior to separation in which such an agreement is confirmed.
- [136] In any event, circumstances have changed dramatically since 2019. The parties are now having to pay for two households, including substantially more clothing and other child-related equipment at each of their households. The law is clear that the right to child support is the right of the child, and it would be inappropriate for the children to bear the burden of an agreement to which they were not privy.
- [137] It is my view that the respondent's earning capacity is significantly in excess of her pension entitlement, that she has an obligation to work to her capacity in order to support her children, and that in all the circumstances her decision to retire at age 55 is not reasonable for purposes of either the FCSG or the SSAG. As a result, income should be imputed to her in accordance with FCSG s. 19(1).
- [138] Assessing the respondent's income earning capacity is made more challenging by the respondent's lack of any real effort to seek out employment - either with Canada Post or elsewhere. Her former position has a current base salary of \$98,840, and it is clear that when she was employed full-time she steadily earned additional income of at least \$10,000 per year on top of her base salary.
- [139] I accept that the respondent's former position is not presently available. I am concerned, however, about the evidence that was provided with respect to her prospects within Canada Post. It seems to me that her inquiries were limited and focused in such a way as to make it

seem that there would be no suitable position. The leave documents indicated that, upon being ready to return to work, she would be provided access to an internal job site and leveraging tools that she has chosen not to access. No witness was called from Canada Post, so we are left with what are in effect hearsay responses to inquiries where it is not known what the actual inquiries were.

- [140] It does seem clear that the respondent's inquiries of Canada Post were limited to positions in British Columbia. Given the family circumstances, I agree that it is appropriate for the respondent to be looking for work in the area in which she now lives.
- [141] In any event, the test is not whether the respondent can find suitable employment with her existing employer. She is capable of finding employment, and the expectation is that she will earn to her capacity regardless of who her employer is. In my view, she has several years of experience at senior management levels dealing with issues such as change management, contract management, and reviewing corporate performance. That is the sort of experience and reflects acquired skills that should be readily marketable.
- [142] That said, I do not think it would be fair to the respondent to impute her with the approximately \$110,000 she would likely earn were her former position to be available to her. Whether she is taking a lower level position with Canada Post, or starting with a new employer with whom she does not have a track record, who would be aware that she has not worked regularly in recent years, it is likely that the respondent's salary upon a return to work would be somewhat reduced.
- [143] In my view, in all of the circumstances, a salary of \$80,000 per annum should be imputed to the respondent. That is, in my view, a realistic assessment of her earning capacity.
- [144] In light of my conclusion on this issue, I do not need to decide whether the respondent's anticipated severance should be included in her income for support purposes.

The CCA Deduction

- [145] The respondent submits that a deduction made by the claimant on his 2022 and 2023 income tax returns for capital cost allowance in respect of the Langley rental property should be added back into the claimant's income for Guidelines purposes, citing s. 11 of Schedule III of the FCSG.
- [146] Section 16 of the FCSG requires that a spouse's annual income be adjusted in accordance with Schedule III to the FCSG. Section 11 of Schedule III provides the following adjustment:

Capital cost allowance for property

11. Include the spouse's deduction for an allowable capital cost allowance with respect to real property.

- [147] I was provided with no case authority interpreting this provision. I have found it helpful in understanding its context to reference the discussion in *Zadera v. Zadera*, 2023 BCSC 1880, where Justice Schultes considered the proper treatment of capital cost allowances with respect to personal property. He noted s. 19(1)(g) of the FCSG, which permits a court to add back expenses that have been deducted from income for income tax purposes, and s. 19(2), which provides that for purposes of s. 19(1)(g), "the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act [R.S.C. 1985, c. 1 (5th Supp.)]". At paras. 51-52, he referenced two other authorities:
- [51] With respect to the specific deductibility of capital cost allowance, *Egan v. Egan*, 2002 BCCA 275, explains:
- [25] [T]he absence of any reference in Schedule III to CCA relating to personal property permits the Court to assess the reasonableness of the deduction of these expenses pursuant to ss. 19(1)(g) and (2) of the Guidelines. Sections 19(1)(g) and (2) make it clear that the deduction is not automatically permitted for Guidelines purposes simply because it is permitted under the Income Tax Act. Rather, the court is entitled to look at the nature and extent of the deduction claimed to determine whether it is reasonable from a Guidelines, rather than an Income Tax Act, perspective. In many cases, it may well be that deductibility under the Income Tax Act and deductibility under the Guidelines will coincide.
- [52] The Court also referred with approval to the guidance on this point provided by the Saskatchewan Court of Appeal in *Rudachyk v. Rudachyk*, [1999] S.J. No. 312:
- [29] In [Wakeling JA's] view, a pragmatic approach should prevail involving a determination of the likelihood of a particular asset being replaced, the cost of replacement, and the question of whether the equipment would be continued to be needed to produce income. The primary object of this analysis was to determine whether the deduction claimed was real or was more in the nature of a book entry to artificially reduce income.
- [30] I respectfully agree with the interpretation of s. 11 adopted by the Saskatchewan Court of Appeal and with the pragmatic approach taken by that court in relation to the issue of deductibility of contested CCA claims for Guidelines purposes. In my view, that approach contemplates that if there is some evidence supporting the reasonableness of the expense (beyond the fact that it allowable under the Income Tax Act), the court is unlikely to deny the deduction in calculating the payor's income. Similarly, the court will be unlikely to second-guess the rates permitted under the Income Tax Act and Regulations unless the allowable rate appears to be unusual, or based on a particular policy being pursued by the taxation authorities, rather than on the likely economic life of the asset in issue.
- [Emphasis added in *Zadera*.]
- [148] *Zadera* and *Egan* deal with the deductibility of capital cost allowances with respect to personal property. Presumably the specific instruction in s. 11 of Schedule III to add back capital cost allowances taken with respect to real property reflects a view that real property

is generally something that does not have a great likelihood of being replaced within a timeframe appropriately contemplated, and that as a result, a real property CCA deduction should always be added back for FCSG purposes - notwithstanding that it is a valid deduction under the Income Tax Act.

- [149] The claimant had completed his own income tax returns for several years, then for his 2022 taxes had an accountant assist him. His evidence was that the accountant identified a deduction that was available to him, in that he could claim a capital cost allowance with respect to the Langley rental property. The Statement of Real Estate Rentals form in the claimant's 2022 tax return includes a deduction of \$4,057.65 for "total capital cost allowance claim for the year". For 2023, the amount was \$3,895.34. The attached asset summary indicates that this claim relates to Class 1-a. Class 1 relates to buildings purchased after 1987, including fixtures, and permits depreciation to be claimed for tax purposes at a rate of 4% per year. Buildings and fixtures are real property.
- [150] In my view, the deduction is an "allowable capital cost allowance with respect to real property" and is exactly the sort of deduction that is allowable for income tax purposes that must be added back when calculating income for FCSG purposes.

Prospective Child Support

- [151] Based on the above analysis, the claimant's income for child support purposes is \$175,977 (employment income of \$170,970, net rental income of \$1,112, CCA allowance added back of \$3,895). [These are actual numbers -DivorceMate will gross up the amount added back for the CCA allowance, giving rise to a grossed-up income amount of \$178,922.] The respondent's income for child support purposes is \$80,000.
- [152] Based on these income amounts, effective as of August 1, 2024, I calculate the net child support to be paid by the claimant to the respondent as \$1,261 per month (\$2,500 less \$1,239).

Occupation Rent

- [153] The respondent seeks occupation rent for the period after the claimant changed the locks on the Family Home. The evidence indicated that this occurred at some point in the latter part of August 2022, but no specific date was given. The respondent submits that occupation rent should be paid from the beginning of August 2022. She submits that it would be appropriate to deal with this by setting off any need to account for the \$16,000 she removed from the joint account and joint line of credit on August 9 and 10, 2022.
- [154] The claimant notes that he took responsibility for paying the mortgage throughout the time period in issue, and that the respondent lived rent-free at her parents' home until the end of November 2022. While the respondent began paying rent to her parents and brother of \$2,500 per month for the final three months before the Family Home was sold, by that time she was receiving several thousand dollars a month in support payments, while the house

itself was in the process of being listed for sale. It is noteworthy as well that the respondent removed herself and the children from the home on August 9, 2022, after the claimant had already left, and when he visited the Family Home a few days later it was clear that they were not there.

[155] I note three authorities. In *Shen v. Tong*, 2013 BCCA 519, Garson J.A. noted at paras. 49 and 91:

[49] Mr. Shen acknowledged that his claim for occupation rent or compensation for his rental expenses after being asked to vacate the family residence was not a "stand-alone" claim. Rather, he says he should be compensated for his rental expenses by a further reapportionment of the equity in the family residence in his favour under s. 65(1)(f): *Stasiewski v. Stasiewski*, 2007 BCCA 205. At trial Ms. Tong's counsel objected to this claim being advanced at all on the basis that it was not pleaded. In my view, if a rental compensation claim was to be considered at all, it should have been considered as a factor to be weighed in the division of assets. The trial judge erred by accounting for the claim on a stand-alone basis, even though she recognized the facts did not amount to ouster.

[91] Occupation rent, or alternatively compensation for the expenses of the non-occupying spouse as a measure of the non-occupying spouse's entitlement to occupation rent (*Oyama v. Oyama*, 2009 BCCA 114, 63 R.F.L. (6th) 1 at para. 5), is not a stand-alone claim under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. In a family law case it is generally advanced in the context of a claim for reapportionment of property under s. 65(1) of the FRA when an equal division of property has been found to be unfair. The exercise of discretion under s. 65(1) is circumscribed by the listed factors in subsections (a) to (f). In particular, subsections (e) and (f) are relevant to a claim for occupation rent. See *Donovan v. Donovan* (1986), 7 B.C.L.R. (2d) 221 at para. 15 (B.C.S.C.).

[Emphasis in original.]

[156] I note the comments of Verhoeven J. in *Ross v. Ross*, 2013 BCSC 1716 at para. 50:

[50] On the approach used by other jurisdictions, as I interpret it, the overriding question is whether occupational rent, as a discretionary remedy to be used cautiously, should be utilized in order to achieve justice and equity in all of the circumstances of the case. This approach appropriately places little if any emphasis on the question of fault or blame for the decision of one spouse or the other to leave the matrimonial residence.

[157] These comments have been cited with approval in various cases, including *Piderman v. Piderman*, 2015 BCSC 475 at para. 52, where McEwan J. continued on at para. 53:

[53] I think this is the proper way to approach occupation rent, that is, as a tool to achieve fairness. Were I to take a stricter approach, treating occupation rent as something akin to an entitlement, the outcome would, I think trigger other issues about fairness. I would think that, in general, claims for occupation rent ought not to be hoarded and advanced for the first time at trial. Failure to give notice of such a claim is apt to be interpreted, in the

complex emotional aftermath of a marriage, as acquiescence, or a form of spousal or child support. I find that to be the case here. I dismiss the claim for occupation rent.

[158] The cases cited to me in which occupation rent has been ordered all involved lengthy periods of time when one party had exclusive occupancy of jointly owned premises. In light of the different financial arrangements that were in effect from the time of separation to the time the Family Home was sold, and given the cautious approach mandated by the authorities, this is not a case in which there is a substantial unfairness that would justify adjustments as a result of the claimant occupying the Family Home until the end of February 2023.

Property Division

[159] The parties seek orders dividing family property. There are competing claims for exclusions, and with respect to one specific asset (a rental property in Langley) the claimant seeks an unequal division.

Positions of the Parties

[160] Each of the parties provided Scott Schedules, which were helpful in identifying those issues that require determination. Both parties were agreed that the most appropriate mechanism to balance the parties' respective entitlements is to adjust the distribution of the remaining proceeds of sale of the Family Home.

[161] With respect to the Family Home, the parties agree generally that the proceeds should be divided equally, but the respondent asserts that she should be paid the first \$36,691.81 from the sale proceeds based on having paid that much extra to fund the completion of the purchase transaction in November 2013. They also agree that just over \$41,000 held in a Scotiabank savings account since July 2021 is subject to equal division and will have to be part of the calculation.

[162] The other real property in issue is the Langley property. The parties are generally agreed that this belonged to the claimant pre-relationship, and that as a result only the increase in value of the property is subject to division. The parties disagree on how to calculate the claimant's net equity in the property at the start of the relationship - their difference primarily relates to ascertaining the amount due on the mortgage as of June 2013. As well, the claimant argues that there should be an unequal division of value with respect to this property.

[163] The parties also agree that their respective motor vehicles will be retained by the registered owner, with the values to be accounted for in the division of property. It is agreed that the claimant's Tesla Model 3 is valued at \$22,100, while the respondent's Tesla Model Y is valued at \$41,986. However, each of the parties claims an exclusion with respect to the Tesla Model Y:

- a) the respondent claims the sum of \$25,000, which she says can be traced from a pre-relationship RRSP into the Mercedes, and from there, into the Tesla Model Y when it was used as part of the trade-in, while
- b) the claimant claims that sale proceeds of the Pauline Street property, which he owned pre-relationship, were used to pay down the loan on the Mercedes a few months after it was purchased.

[164] Both of the parties are generally agreed that their respective pension plans and Canada Pension Plan entitlements are to be adjusted in accordance with the applicable legislative provisions. They are also agreed that their respective RSPs are excluded property for which no division is required. They agree that the jointly held RESP will be jointly administered for the benefit of the children, and that moving forward, they will not contribute further to that but will each contribute to their own RESPs for the benefit of the children. There is one complexity with respect to treatment of the "bought-back" portion of the respondent's pension, which I will deal with below.

[165] In terms of bank accounts, the parties are generally agreed as to sharing, subject to the following:

- a) The respondent submits that the amount in the claimant's TD chequing account (*2872) at the time of separation (\$17,870) should be divided, while the claimant says this was a revolving account used to pay regular expenses and should not be subject to division;
- b) The respondent submits that the US \$8,200 that the claimant gave to his sister from a TD U.S. dollar account in his name in May 2022, a few months prior to separation, should be brought into the calculation - the claimant says those were funds from his mother that he was holding for the benefit of his sister until she needed them;
- c) The respondent submits that the \$10,203 held in a TD savings account, which the claimant says he withdrew and gave to his sister at some point after 2022, should also be taken into account in the division of assets, while the claimant says that these also were funds from his mother that he was holding on his sister's behalf;
- d) The claimant submits that the additional \$20,000 the respondent was to have received from the property sold by 1222637 B.C. Ltd. should be taken into account - the respondent denies there were any such funds; and
- e) The claimant says the respondent should account for the \$16,000 withdrawn by the respondent on August 9-10, 2022, while the respondent says those funds should be set off against occupation rent.

[166] The only debt in issue is the amount owing to Canada Post for arrears of benefits. The respondent claims that a total debt of \$20,239.05, which has accrued and which the respondent will have to pay, should be included in the calculation.

Legal Context

[167] Division of property following a separation is governed by Part 5 of the FLA, pursuant to which all assets held by either or both of the parties at the date of separation are presumptively divisible as family property, and are normally to be divided equally: FLA s. 81(b), 84. The value of the family property is determined based on the fair market value at the time of trial: FLA s. 87.

[168] Some property may be excluded from the division of family property. FLA s. 85 provides that:

- (1) The following is excluded from family property:
 - (a) property acquired by a spouse before the relationship between the spouses began;
 - (g) property derived from property or the disposition of property referred to in any of paragraphs (a) to (f).
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.

[169] However, s. 84(2)(g) explicitly includes in family property:

- (g) the amount by which the value of excluded property has increased since the later of the date
- (i) the relationship between the spouses began, or
- (ii) the excluded property was acquired.

Thus, excluded property claims are limited to the value of the original exclusion.

[170] The FLA also permits orders for unequal division of family property, but limits the circumstances where that may be available. It requires, before unequal division is made, a finding that "it would be significantly unfair to equally divide family property": s. 95(1). The FLA also provides at s. 95 that:

- (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;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
 - (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;

- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (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,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.

[171] There are extensive Court of Appeal authorities with respect to the interaction between ss. 81, 84, 85 and 95. As explained in *V.J.F. v. S.K.W.*, 2016 BCCA 186:

[8] The definition of "family property" in s. 84 has been said to establish a "communal pot" (see *P.G. v. D.G.* at paras. 83-4) from which only excluded property is removed. The definition in s. 84(1)(a) is very broad, reaching all property owned or beneficially owned by "at least one spouse" on the date of separation. Section 84(1)(b) then extends the reach of the definition to property or a beneficial interest acquired after separation if it was "derived from" property described in s. 84(1)(a). Section 84(3) confirms the inclusion of various forms of property as well as:

- (g) the amount by which the value of excluded property has increased since the later of the date
- (i) the relationship between the spouses began, or
- (ii) the excluded property was acquired.

[9] Section 85(1) defines "excluded property" to include inter alia property acquired by a spouse before the spouses' relationship began, property inherited by a spouse, and gifts received by a spouse from a third party (para. (b.1)). Ms. Hamilton on behalf of Ms. W. emphasized that para. (b.1) was added by amendment to the FLA in 2014. When asked to explain the effect of this section, the Attorney General told the Legislature:

Again, we're not aware of case law, but family law lawyers were concerned with the way the provision was written. There was a possibility that gifts between spouses might be excluded, and the intention is only that a gift from a third party should be excluded. [British Columbia, Official Report of Debates of the Legislative Assembly, 40th Parl., 2nd sess., Vol. 9 No. 3 (March 27, 2014) at 2531; emphasis added.]

Importantly for our purposes, para. (g) of the definition of excluded property also reaches "property derived from" excluded property or from the disposition of excluded property.

[10] The consequence of the categorization of property as either family property or excluded property is that on separation, each spouse is generally entitled under s. 81 to an undivided half interest in family property as a tenant in common. The court may divide it unequally only if equal division would be "significantly unfair" having regard to all the factors listed in ss. 95(2) and (3). Excluded property in contrast must not be divided unless it would be significantly unfair not to divide it having regard to only two factors - the duration of the parties' relationship and any direct contribution by a spouse to the preservation or maintenance of the property (s. 96(b)). Obviously, the phrase "significantly unfair" is intended to set a higher bar for the exercise of judicial discretion than the 'unfairness' test in the FRA: see *Family Law Explained*, supra, at s. 95; *L.G. v. R.G.* 2013 BCSC 983 at para. 71; *Jaszczewska v. Kostanski* 2015 BCSC 727 at para. 166-9. As observed by Mr. Justice Savage (as he then was) in *Slavenova v. Ranguelov* 2015 BCSC 79:

The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions. [At para. 60.]

[Emphasis in original.]

[172] What is required to prove a claim to excluded property was discussed in *Shih v. Shih*, 2017 BCCA 37:

[40] The flaw I see in the Asselin analysis adopted by the judge is that it rests on the assumption that the FLA demands "precision" or "mathematical certainty". I can see nothing in the Act that demands "precision" or "mathematical certainty" in the standard of proof for establishing a claim to excluded property.

[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.
- [45] In *P.G. v. D.G.*, 2015 BCSC 1454, Madam Justice Fenlon (as she then was) discussed the purpose of the excluded property model of the FLA and emphasized the need to fit with parties' expectations of fairness.
- [76] ... In the British Columbia Ministry of Attorney General's White Paper on Family Relations Act Reform: Proposals for a new Family Law Act, (2010), the reason for introducing an excluded property regime was described as follows (at 81):

The most compelling reasons for moving to an excluded property regime are to make the law simpler, clearer, easier to apply, and easier to understand for the people who are subjected to it. The model seems to better fit with people's expectations about what is fair. They "keep what is theirs," (such as pre--relationship property and gifts and inheritances given to them as individuals) but share the property and debt that accrued during their relationship.

- [173] As explained in *C.P. v. K.W.A.*, 2018 BCSC 332 at para. 93, when it comes to proving an exclusion:
- [93] [T]his exercise was not meant to be overly complicated or burdensome. The objectives of the new model must be considered together with the reality that many parties will co-mingle excluded property with family property over time, including using excluded property to purchase other property or refinancing excluded property to purchase other property. The court must also consider evidentiary difficulties inherent in family law actions, as the Court of Appeal noted in *Shih*. Where documents are less than complete, the credibility and reliability of the parties' and other witness' testimony will become critical in the overall assessment.
- [174] Where a party seeks to trace excluded property through one or more different assets, the following comments from *C.M. v. N.L.*, 2020 BCSC 3 at paras. 173-174 may be of assistance:
- [173] Excluded property may be traced. The methodology to be applied to the tracing exercise is under debate. While it is unlikely that formal rules of tracing apply, given that a marriage is a joint endeavour and assets may become intertwined as the relationship continues, the

principles of formal tracing may guide the analysis (V.J.F. v. S.K.W. at 13 footnote 1; Jaszczewska v. Kostanski, 2016 BCCA 286 at para.59; Zellweger at para. 48). Precise and mathematical tracing runs counter to the simplicity and clarity sought in the exclusion regime (C.P. v. K.W.A. at paras.95-100). The court in Shih approved of wording used by the trial judge that where it is asserted that excluded property has changed character, each "link in the chain" required to trace the property into the currently owned asset must be established (Shih at para.39). The "link" methodology implies a common sense approach to tracing so that if there is sufficient linkage between an excluded asset and an asset existing as at separation, then the character of an asset as excluded remains (Wolfe v. Wolfe, (2003), 43 R.F.L. (5th) 223 at para. 51). A pro rata approach might also be used whereby the ratio of excluded property in relation to other contributions is calculated to achieve a fair result (Wolfe at para. 53; C.P. v. K.W.A. at para.136). A pro rata method may not be appropriate if there are gaps in the evidence or dissipation of the original asset (C.P. v. K.W.A. at paras. 136-138). Practicality suggests that an excluded property need be valued only at commencement and then on the valuation date (Zellweger at para. 48). If there is enough value in an asset at separation to account for excluded property, it should not matter that the excluded property was used for financing (Zellweger at para. 49).

- [174] Overall, the object of the tracing exercise is to balance ease, clarity and simplicity with fairness (C.P. v. K.W.A., at para.97). While the onus is on the party seeking exclusion to prove with clear and cogent evidence that property is excluded, the tracing exercise is not meant to be overly complicated or burdensome (C.P. v. K.W.A., at para. 93).
- [175] The jurisdiction to order an unequal division of family property was explored in Jaszczewska v. Kostanski, 2016 BCCA 286 at paras. 38-41 and 43-44:
- [38] It is safe, therefore, to conclude that the Legislature intended to limit the circumstances in which a departure from equal division of family property could be justified because of unequal contributions to its acquisition, preservation, maintenance or improvement. The FLA starts with the presumption found in s. 81 that family property is to be equally divided. As I read s. 81, each spouse is presumptively entitled to an undivided half interest in all family property, regardless of their respective use or contribution. I do not think the use of the words "regardless of their respective use or contribution" in s. 81(a), rather than in s. 81(b), is inconsistent with that view. Any potential uncertainty on this point would have been removed if s. 81(b) had read "on separation, each spouse has a right to an undivided half interest in all family property, regardless of their respective use or contribution". But as I read it, the phrase in s. 81(a) refers to the basis of entitlement to family property. Entitlement exists independent of contribution or use, and the extent of that entitlement on separation is defined in s. 81(b).

- [39] Also, because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property. Once again, because of s. 81, this entitlement exists independent of the parties' respective contribution to the post-separation increase in value.
- [40] Nonetheless, the scheme contemplates judicial discretion to depart from an equal division. That discretion is recognized in s. 81 and further articulated in s. 95. Section 95 defines both the test and the factors for a court to consider in exercising its discretion.
- [41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.
- [43] The determination of whether an equal division would be significantly unfair is also guided by a more precise identification of relevant factors than was found in the FRA. Importantly, the Legislature did not include in s. 95(2) the principle of relative contribution found in s. 65(1)(f) of the FRA. Under s. 65(1)(f), a court could consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. Section 95(2), by comparison, refers rather narrowly to career contributions (95(2)(c)) and to post-separation increases in value beyond market trends caused by one spouse (95(2)(f)). I agree with the judge's view that if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so. Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives discussed earlier that underlie the FLA division of property regime.
- [44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.

- [176] The governing principles were further explained in *Singh v. Singh*, 2020 BCCA 21 at para. 134:
- [134] In summary, 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: *Jaszczywska* at para. 41. 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.
- [177] With respect to the factor in s. 95(2)(i) ("any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness"), the Court concluded at paras. 136-140 that the broad language is limited by the scope of the preceding factors, such that it is limited to matters arising from "the economic characteristics of a spousal relationship". As explained at para. 139:
- [139] The economic characteristics of a spousal relationship is a broad class, but one that is narrower than the general term in s. 95(2)(i). With regard to Sullivan's third requirement, there are clearly other factors relevant to the class that are not enumerated in s. 95(2)(a)-(h). For example, this limited class would allow for the consideration of the relative contribution of spouses to the acquisition, preservation, maintenance, or improvement of family property during the relationship, as suggested by *Jaszczywska* at para. 44.

Analysis

- [178] I propose to deal with the matters that require my decision in the order I have set them out above in my summary of the Positions of the Parties.
- [179] I preface my comment by reiterating what I said above under the heading Reliability and Credibility - that is, that I have concerns with the evidence of both parties, and that the evidence of both must be approached carefully. As such, it is important in my analysis to be able to refer to external or contemporaneous documents or surrounding circumstances where I am asked to consider factual issues as to which the parties disagree. At the same time, given that many of the transactions in issue date back to 2013, I keep in mind the caution in *Shih* that it is not unusual, in relationships of significant length, that documents will have been destroyed and memories dimmed.

The Family Home

- [180] I begin with the dispute about whether the parties made unequal contributions to the purchase of the Family Home, notwithstanding their stated goal of being equal owners who contributed equally. As I described above, it appears that they met with their conveyancing lawyer to sign a statement of adjustments on Monday, November 4, 2013, where they would

have learned that the precise amount required to complete was \$196,691.81. On the Tuesday, the respondent sent \$116,691.81 to the lawyer's trust account, leaving exactly \$80,000 outstanding. On the Wednesday, the claimant sent \$80,000 to the lawyer's trust account, which he said came from a CIBC loan taken out against the Marshall Road property. At that point, the lawyer had all the money required to complete, with the respondent having contributed \$36,691.81 more than the claimant.

- [181] Also on November 6, 2013, the claimant made two deposits into his main TD Bank operating account totalling \$24,000, and then obtained a draft from the account for \$24,000. He said they were each from a line of credit - one at CIBC and one at TD. The claimant said the \$24,000 draft was to be sent to the respondent to equalize payments; the respondent said she never received it.
- [182] Neither the bank draft itself nor any of the respondent's banking records from this time were in evidence.
- [183] The question of whether the \$24,000 did in fact reflect an equalizing payment by the claimant is difficult to resolve. On the one hand, the parties clearly intended for there to be equal contributions, and there is no indication that the respondent ever sought to be reimbursed for any difference in their calculations. On the other hand, there was no good explanation provided for (a) why the respondent had contributed more than half of the required funds on the Tuesday, if the expectation was that the claimant would be able to fund the full 50%, and (b) why the bank draft obtained on the Wednesday was for \$24,000 rather than the \$18,346 that would have been required to equalize their contributions. All of this was happening at a time when the claimant had been unemployed for three months and was relying on the respondent to cover shortfalls in their living costs when he could not contribute equally to them. That said, it was also happening at a time when the parties were preparing to incur moving and renovation costs. It is possible that the excess funds were meant to be a contribution to those costs; however, that was not an explanation that either party provided.
- [184] Ultimately, I am not persuaded that the claimant made an equal contribution, and I find on the basis of the evidence before me that the respondent contributed an extra \$36,691.81 from her excluded property to the purchase of the Family Home. She is entitled to be reimbursed that excess contribution as part of the final accounting.
- [185] The claimant made a second claim with respect to the Family Home. He submits, based on a comment the respondent made, that the \$38,000 he paid to the respondent in June 2014 from the sale of the Marshall Road property was used in whole or in part to fund renovations to the Family Home. With respect to that, I note that the claimant's own evidence was that the \$38,000 was primarily to reimburse the respondent for expenses incurred while he was unemployed and they were living together in Abbotsford beginning in August 2013. The respondent confirmed that evidence, but also stated at a later point that she had gone into her line of credit when funding the renovations after the parties moved

in to the Family Home.

[186] I do not accept this submission of the claimant. Apart from the fact that his submission goes far beyond his own evidence on this point, the respondent's evidence that he relied on in no way states that the full amount of the renovations was covered by the \$38,000 he paid to the respondent. I do agree that the \$38,000 seemed high when it was attributed solely to the shortfall in living costs for the seven months the claimant was unemployed. Given that the respondent was earning over \$100,000 per year, I struggled to understand how there could have been a \$5,000 per month shortfall in covering their living expenses. It would not be surprising to me that part of that \$38,000 would have related to renovation costs. However, it seems clear that the respondent was covering both living expenses and renovation costs to the extent she was able, and accessing her line of credit when necessary. In the circumstances, I am simply not in a position to find that the parties' contributions to the costs of renovation were unequal.

The Langley Property

[187] I turn to the Langley property. The first dispute with respect to this property relates to determining its value, net of the mortgage, at the time the relationship commenced. The parties accept the appraisal evidence that its value as of June 23, 2013 was \$190,000. The difficulty is to determine the amount owing on the mortgage at that time.

[188] The original mortgage of the Langley property, which was taken out at the end of March 2007, was in the amount of \$159,750. An April 2007 letter from the mortgage broker suggested the mortgage was a fixed rate, 60-month closed mortgage at 5.15%. An amortization schedule printed on February 26, 2007, and attached to the letter, projected that as of March 28, 2012, the outstanding mortgage balance would be \$141,843.17. The Form B mortgage registered against title on March 28, 2007, had the same principal amount and term, but stated that the interest rate was prime rate plus 3% per annum.

[189] The property was refinanced on February 11, 2015. At that time, the mortgage balance was \$114,753.97. The new mortgage was for a five-year term, with an interest rate of 2.99%.

[190] The documents do not indicate how the mortgage balance went from \$159,750 on March 28, 2007 to \$114,753.97 on February 11, 2015. The claimant did not have any evidence as to how exactly this happened. In particular, there is nothing in the evidence that would assist in determining what portion of the decrease occurred before and after June 23, 2013.

[191] The respondent argues that I should assume that the mortgage balance continued to decrease at the rate anticipated by the 2007 amortization schedule from March 2007 to June 2013. Implicit in this is the suggestion that any substantial decreases in the mortgage balance occurred between June 2013 and February 2015. That would amount to a decrease of nearly \$30,000 from the \$141,843.17 the respondent suggests was owing as of June 2013 to the \$114,753.97 we know was owing as of February 2015. I note that for much of that time period, the claimant was unemployed, then working at CLBC for a much lower income than

he had previously earned.

[192] The claimant submits that I should calculate the mortgage amount by assuming a straight-line reduction such that between March 2007 and February 2015, the mortgage balance decreased by on average \$468.70 per month. On that basis, the balance as of late June 2013 would be \$123,659.43.

[193] In my view, the claimant's calculation is more realistic. Using that calculation, the value of the claimant's interest in the Langley property as of June 23, 2013 was \$190,000 less \$123,659.43, for a net amount of \$66,340.57. Its current value is \$485,000 less a mortgage of \$32,000, for a net of \$453,000. The increase in value is \$386,660.

[194] The claimant seeks an unequal division of this amount. He submits that he and the respondent commenced their relationship later in life, when both were established; that they were deliberate in their efforts to make equal contributions to property they intended to be held jointly; and that those assets that were held separately were maintained separately. The claimant had owned the Langley property for more than six years prior to the relationship, having purchased it as an investment towards his retirement. He says he was solely responsible for the management of the property and handled all dealings with the tenant. He notes that there has been only one change of tenant since the relationship began - which was in 2014. The claimant also noted that he has been paying down the mortgage since separation, with the mortgage balance having decreased from \$40,000 to \$32,000 in that time. He submits that it would be significantly unfair for him to be deprived of 50% of the value of this separately held property, and that the increase in value of the Langley property should be divided 70% in his favour.

[195] The respondent's evidence was that she met and spoke with a potential tenant when the property was being re-tenanted in 2014, and that she helped clean it at that time. She also asserted that it was at her suggestion that the claimant stopped using a management company and chose to deal directly with the tenant. She says that she has therefore contributed to the value of the property during the relationship.

[196] The respondent submits that the claimant has not met the high threshold to establish significant unfairness. The respondent notes that, while the claimant may have had minimal pension entitlement in 2007 when he purchased the property, he has been working in pensionable positions for most of the time since then and so is not without retirement assets.

[197] Ultimately, I agree with the respondent that this is not a case in which the threshold for significant unfairness has been met. The structure of the FLA is such that, absent significant unfairness, the growth in value of an excluded asset is to be shared. The claimant's assertion at its root is based in the assertion that his relative contribution to the Langley property was greater than that of the respondent. The Court in Jaszczewska made clear that that the circumstances in which this factor will be considered are likely to be constrained. In this case, the Langley property has mostly required little attention from

either of the parties. The property has had one tenant since 2014, who has generally paid his rent on time. This is not a case where there has been any notable contribution to its value by either party.

[198] To the extent there is unfairness here, it arises from the extent to which the asset's value has increased since the start of the relationship. That is inherent in the nature of real property in British Columbia and is not a factor falling within the scope of s. 95.

[199] That said, I do think it would be appropriate that the decrease of \$8,000 in the mortgage principal since separation should be for the credit of the claimant. Otherwise, the increase in value should be divided equally. By my calculation, given that the claimant is going to retain the property, the respondent is entitled to a credit of \$189,330 (being half the increase in value of \$386,660 less \$8,000).

Motor Vehicles

[200] This issue pushes the bounds of tracing of excluded property.

[201] When the relationship began, each of the parties had a motor vehicle. Initially, the claimant had a Subaru, while the respondent had an Audi which she traded in for a Honda. When the parties purchased a new 2018 Mercedes-Benz GLE in November 2018, the claimant's 2010 Subaru was traded in for a credit of \$10,000. It appears that a deposit of \$2,500 was paid - it is not clear from where - and that the balance was paid by two bank drafts, one from Scotiabank for \$25,000 that the respondent says represents funds from her RRSP, and the other from CIBC in the sum of \$37,629.10.

[202] The evidence as to the existence of this RRSP is thin. No RRSP statements predating the Mercedes purchase were produced. However, the claimant's 2018 tax return does show \$35,796 as RRSP income (the respondent says this is the grossed-up value of a net withdrawal of \$25,000). The respondent has produced "Income Tax Return Information" printouts from CRA for 2013 through 2017, and none of them show any RRSP contributions. She says that all of these are consistent with her recollection that she had a pre-relationship RRSP that she used as part of the purchase of the Mercedes.

[203] The claimant gave evidence that the purchase of the Mercedes was financed in part, and that he paid out that financing from the net sale proceeds he received when the Pauline Street property was sold in January 2019. The claimant obtained and produced documents showing the net sale proceeds he received were \$47,591.67. The Order to Pay shows that the funds were to be deposited to a CIBC account. Unfortunately, no documents have been produced with respect to that account. The claimant's evidence was that he used the bulk of the funds he received in that CIBC account to pay out the amount owing on the vehicle financing for the Mercedes. However, his evidence was that he tried but was unable to locate documents showing this. It does appear to be common ground that the financing was repaid at some point prior to the Mercedes eventually being sold, and no explanation has been given as to how else it might have been repaid.

- [204] If the claimant's evidence is accepted, then it would appear that there could be three different exclusions traced into the Mercedes: the claimant's Subaru, the funds from the respondent's RRSP, and a portion of the funds from the sale of Pauline Street (noting that, arguably, any increase in the value of Pauline Street during the relationship might not be subject to an exclusion claim).
- [205] The total purchase price for the Mercedes, including taxes, was just over \$75,000, of which 1/3 would have come from the respondent's RRSP. On March 28, 2021, the Mercedes was traded in for a Tesla Model Y. The parties were provided a trade-in credit of \$37,700 for the Mercedes - meaning it had lost roughly half of its value over the time the parties were driving it.
- [206] The total purchase price of the Tesla Model Y (including taxes) was \$76,432.91. The evidence indicates that its market value is now \$41,986 - it has thus lost 45% of its value in the three years since it was purchased.
- [207] In my view, there is simply too much uncertainty in the evidence surrounding the use of funds in respect of these vehicles to trace funds. At its best for the respondent, given the decreases in value of each of the two vehicles since the initial purchase of the Mercedes, there is an arguable claim for a \$6,500 exclusion claim, but the number of steps in the tracing process, the competing claim with respect to the loan repayment from the claimant's excluded funds, and the multiple reductions in vehicle market values all lead me to the conclusion that this is not an appropriate case in which to accept a multi-stage tracing claim.
- [208] In my view, the claimant is entitled to a credit representing half of the \$19,686 difference between the value of the two Teslas.

The Respondent's Pension Buy-Back

- [209] As noted above, there is a complexity with respect to the application of Part 6 of the FLA in the context of the portion of the respondent's pension that she plans to buy back later in 2024. The respondent submits that she will be paying the necessary funds to the pension administrator using post-division funds, and as a result, the pension administrator should be instructed to take this into account for the division of the respondent's pension. She submits that either party should be at liberty to apply for directions should any issues arise with respect to this.
- [210] The claimant argued that the respondent's pension should be divided pursuant to Part 6. I do not have a record of the claimant responding specifically to the respondent's submission about the buy-back amount.

- [211] In one sense, what is proposed by the respondent is fair to her, because the amount required to buy back the pension will come from her post-division assets. On the other hand, the claimant will lose out on the benefit of any employer-funded contributions to the respondent's pension with respect to that September 2019 to August 2022 time period that may be triggered by payment of the buy-back amount.
- [212] On balance, I conclude that the directions sought by the respondent are appropriate, and given that this does appear to be a somewhat unusual direction, the parties should have liberty to apply for further directions should there be complications in its implementation.

Bank Accounts

- [213] I will deal jointly with the claimant's TD chequing account (*2872) that had a \$17,870 balance as of August 9, 2022, and the \$16,000 that the respondent withdrew on August 9-10, 2022, from the joint bank account and the joint line of credit and placed in her own savings account. The balance in the claimant's account had been built up over time, in part because a portion of his salary was being paid directly to that account. The money taken by the respondent was from joint assets. It appears that both were used to some degree to pay joint expenses over the next few months, but neither party has fully accounted for all of the money in these two accounts. As set out below, I have chosen to commence the calculation of retroactive child and spousal support as of December 1, 2022, in part on the basis that the parties were jointly covering expenses from August through November of that year. It is my view that, in light of this circumstances, and in light of the roughly equal amounts in these two accounts, it is appropriate to complete the balancing of family property without reference to them.
- [214] With respect to the funds in the claimant's former U.S. dollar account, which were withdrawn in May 2022 (several months prior to separation), it is my view that these funds should not be treated as family property for purposes of asset division. Despite the uncertainty of the claimant's sister as to timing, it is clear that she was given some money through her brother. The fact that this account was kept in U.S. dollars appears to be consistent with it being held for use in the United States (which is where the sister was living and incurring medical expenses). I would not include this amount in any of the final adjustments.
- [215] I draw a different conclusion with respect to the \$10,203 held by the claimant in a Canadian dollar savings account. That savings account continued to be in place until well after separation. If the money was being held for the sister, it would seem to me to make sense that it would have been held in the same U.S. dollar account. These funds are *prima facie* family property, and I do not consider the claimant to have established otherwise.

[216] Finally, I am not satisfied on the evidence that it has been established that the respondent has or was entitled to an additional \$20,000 from the parties' dealings with 1222637 B.C. Ltd. I do view the entire series of transactions as very suspicious, but am not satisfied that I should deem such funds to exist in the absence of any documentary evidence with respect to them.

[217] By my count, adjustments to be made with respect to the parties' bank accounts are:

- a) \$10,203 in respect of the funds held by the claimant in a TD account (*2431); and
- b) \$70,000 which the parties agree is held on the respondent's behalf by her brother.

Benefits Arrears Debt

[218] It is my view that the debt incurred in respect of ongoing benefits coverage from Canada Post, prior to separation, is appropriately considered a family debt. I do not see debt incurred after separation for the respondent's own benefits as being family debt.

[219] I am not satisfied with the explanation given for the charges shown on the respondent's pay stubs in respect of coverages other than the two (Basic Life Insurance and Long-Term Disability) that the documents surrounding her leave indicate were to remain in place.

[220] The respondent's December 2021 pay stub indicates that the arrears for basic life were \$1,738.50 and for long-term disability were \$6,682.37. Her December 2021 pay stub indicates that the arrears for basic life were \$2,138.71 and for long-term disability were \$8,845.05. By my calculation, assuming a steady rate of increase over the course of 2022, the arrears as of August 9, 2022 would have been \$1,980 for basic life and \$7,992 for long-term disability.

[221] Thus, I recognize a total family debt of \$9,972 for which the respondent will be responsible that must be taken into account.

Calculation

[222] The remaining joint funds, being the \$41,038 remaining in a joint savings account and the \$613,286 plus interest held by the claimant's solicitor, are to be divided equally, subject to the following adjustments:

- a) \$36,692 in the respondent's favour representing her excess contribution from excluded assets to the Family Home;
- b) \$189,330 in the respondent's favour in respect of the Langley property;
- c) \$9,843 in the claimant's favour in respect of the difference in Tesla values;
- d) \$5,101 in the respondent's favour representing half the value of the TD savings account;

- e) \$35,000 in the claimant's favour reflecting half of the amount held by the respondent's brother; and
- f) \$4,986 in the respondent's favour reflecting half of the debt related to Canada Post benefits.

[223] By my calculation, the net adjustment is \$191,266 in the respondent's favour.

Spousal Support

[224] At issue are both entitlement and quantum of spousal support.

Positions of the Parties

- [225] The respondent claims both compensatory and non-compensatory spousal support. The respondent says that she left her high-paying management position at Canada Post in order to have children and to raise them. She has been financially dependent on the claimant since the children were born. During the time she has been on leave, the respondent has not been in a position to pursue her career. During the course of the relationship, the claimant has advanced to a director-level position and significantly increased his income. He has been able to advance in his career due to the respondent taking on responsibility for the children and the house.
- [226] With respect to non-compensatory support, the respondent says that she does not have the financial ability to provide for herself and the children to an appropriate standard of living in the absence of spousal support.
- [227] The respondent says that quantum of spousal support should be guided by the SSAG ranges. The respondent seeks an order that spousal support be ordered on an indefinite basis, with a review at the mid-point of the SSAG duration range. The respondent says that pursuant to the SSAG, the minimum duration would be half the length of the relationship (4.5 years), while the maximum duration would be until the youngest child turns 18 (12 years).
- [228] The claimant says that the respondent has not demonstrated entitlement to compensatory support, as she has not provided evidence that her capacity to earn an income was impacted by the parties' relationship or its breakdown. Rather, the claimant says that it was the claimant who originally left his career to join the respondent in the Lower Mainland, was unemployed for several months, and then had to re-establish his career with work at a lower level. The claimant further says that the primary impacts on the respondent's capacity to earn income arise from her failure to take any steps to return to work since the parties separated in August 2022.
- [229] The claimant says that spousal support should be at the low end of the range for both quantum and duration, noting that (a) the claimant has paid interim support for the past 19 months, as well as thousands of dollars towards s. 7 expenses, (b) the parties had a medium-length relationship, which began at a time when both had established careers, and (c) the respondent has made no efforts to become self-sufficient in the 22 months since

separation. The claimant says that support should be for a limited duration of less than three years, and that it should be at the low to medium end of the range of quantum.

Legal Context

[230] FLA s. 161 provides that:

In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

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

[231] The principles governing entitlement to compensatory and non-compensatory spousal support are well established, and are clearly set out in the leading cases of *Chutter v. Chutter*, 2008 BCCA 507 and *Parton v. Parton*, 2018 BCCA 273. Compensatory support is explained in *Chutter* at paras. 50-51:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow*, at paras. 24, 41). 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*, at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

[51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient

spouse's efforts. As noted in Moge at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added).

[Emphasis in original.]

[232] With respect to non-compensatory support, referring to paras. 54-56:

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

[55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[56] The Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:

[21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.

[233] With respect to quantum, the following is summarized in *Parton* at paras. 43 and 46:

- [43] Once entitlement is established, the amount and duration of spousal support are determined based on consideration of the conditions, means, needs and other circumstances of the spouses: s. 162, Family Law Act. The "means" of a spouse include his or her capital base, employment income or earning capacity and any other available source of benefits or gains: *Leskun v. Leskun*, 2006 SCC 25 at paras. 29-32. The duration of spousal support may be for a limited term or indefinite, depending on the length of the marriage and self-sufficiency considerations: *Chutter* at paras. 108-109; *McIntire v. McIntire*, 2012 BCCA 214 at para. 17.
- [46] The SSAG is a useful tool in guiding the determination of the appropriate quantum and duration of spousal support. While advisory only, it is generally consistent with the law in British Columbia: *Chutter* at para. 100. The SSAG formulas provide a range for periodic payment or lump sum spousal support awards taking into account case-specific factors, such as the length of the marriage, the parties' ages and their respective incomes or capacities to earn.

Analysis

- [234] In my view, the respondent has established entitlement in this case on both a compensatory and a non-compensatory basis. The respondent did take time out of the workforce to raise children. During her time away, the claimant's career advanced substantially as he thrived in a director-level position. As well, in the absence of spousal support, there will be a substantial difference in the parties' standards of living.
- [235] In my view, spousal support should be payable at the mid-range amount. The respondent has retained a substantial portion of the initial \$250,000 advance, and will receive a significant portion of the funds being distributed on property division. She will have significant assets available to her moving forward which form part of her means.
- [236] Based on the income levels set out above with respect to child support, and assuming extraordinary expenses of approximately \$3,480 per year for the children's extracurricular activities, I calculate the mid-range amount as \$1,304. This would result in the parties' collective net disposable income being shared 51.4% for the claimant to 48.6% for the respondent. A DivorceMate calculation suggests that special expenses would be paid 63% by the claimant and 37% by the respondent.
- [237] For clarity, it is my view based on the analysis above in respect of income levels that, while there are cases in which it is appropriate to use different income amounts for child and spousal support, this is not such a case.
- [238] The SSAG recommend that spousal support be made indefinite, with no duration specified. Notwithstanding the claimant's submissions, it is my view that the order should follow the SSAG with respect to duration. I would, however, accept the respondent's submission that there should be a review in or after September 2033.

Retroactive Support Claims

[239] As noted above, the claimant asserts that the child and spousal support he paid pursuant to the interim orders made is greater than his actual liability, and as a result seeks a retroactive adjustment for this alleged overpayment. The respondent says that the interim orders inappropriately imputed her income, and that the claimant should have been paying support prior to being required to do so, and thus seeks retroactive child support.

Positions of the Parties

[240] The claimant submits that the respondent should be imputed income from February 2023 onward. The claimant submits that the respondent should have begun looking for work upon separation, and that should have resulted in her finding employment to her capacity within six months. The claimant also submits that the special expenses that were paid have been substantial and that they should be factored into the spousal support calculations. The claimant says that a total of \$30,270 is owed, based on DivorceMate calculations provided.

[241] I note that those DivorceMate calculations are based on the claimant's 2022 income being applicable beginning in July 2023. The claimant says this is the way these calculations are traditionally done - given that the 2022 income is not known until May or June of the following year.

[242] The respondent says that retroactive support should be calculated based on each party's actual income for the year in question, citing *K.A.M.R. v. W.H.G.*, 2014 BCSC 103. In *K.A.M.R.* at para. 9, the court noted FCSG s. 2(3), which provides that where any amount "is determined on the basis of specified information, the most current information must be used", and commented that:

[11] It is of note that the court says that principle of paying child support on the year's income in which it is paid is subject to the caveat "if known".

[243] The court referenced, at para. 10, *Chalifoux v. Chalifoux*, 2008 ABCA 70 at para. 24, where the Court commented that:

[24] In calculating the retroactive child support in this case the trial judge did so on the basis of the previous year's income. This is in error and the parties are directed to calculate the retroactive child support based upon the husband's Line 150 income in the year for which the support was payable.

[244] The court concluded:

[15] In *Fuzi v. Fuzi*, 1999 CanLII 4073 (B.C.S.C.) at para. 11, Justice Pitfield noted that the Guidelines are silent on this issue: "It is unclear whether annual income is historic income for closed taxation years, estimated annual income for the current year, or an estimate of likely future annual income." He concluded at para. 16 that:

- [16] the court will be required to make a determination of annual income for the year in which the application is heard based on the most current information available in respect of each source of income for the payor.
- [16] Calculating maintenance on the current year's income can create practical difficulties, particularly where the payor's income fluctuates or is uncertain. As a result courts often rely on the previous year's income as the best indicator of current income: Bell, para. 7. In addition, where yearly updates are necessary it is often more practical to order that the parties rely on the previous year's income.
- [17] While British Columbia courts have followed Fuzi and favoured the current year method where feasible, other provinces rely on the previous year approach. For example, in Vanos v. Vanos, 2010 ONCA 876, the court said:
- [14] When calculating prospective child support, income from the previous year is used to calculate future support, essentially as a matter of convenience, because actual income for the upcoming year is incapable of exact determination.
- [18] However, when dealing with the calculation of retroactive child support the income for the years in question is already known. Both Vanos and Chalifoux conclude that retroactive support should be based on the retroactive year's claimed incomes, not the previous year's income.
- [245] The respondent also argues that support should have been payable right from August 2022, and a retroactive calculation should extend back to that date.

Analysis

- [246] I agree with the respondent that, based on K.A.M.R., retroactive support calculations should be based on the retroactive year's claimed incomes for 2022 and 2023, given that those years are known. For 2024 amounts, the best available income information for the claimant will of course be his 2023 income.
- [247] I agree with the claimant that, in fairness to the claimant, the support calculations should include the known special and extraordinary expenses for each year, which will impact the amount of spousal support payable.
- [248] The more difficult question is the imputation of income to the respondent. In this case, the parties' youngest child was in a three-hour per day preschool from September 2022 to June 2023, then began attending kindergarten full-time in September 2023. That said, it had clearly been communicated to the respondent by early 2023 that the claimant expected her to be working to support her children, and it was in the spring of 2023 that an interim without prejudice order was made varying support payments based on an imputed income of \$38,840.

- [249] Also worthy of consideration in this determination are the facts that (a) the respondent had worked very little since the spring of 2016, and (b) the respondent has to date made no efforts whatsoever to find work of any kind.
- [250] In my view, the appropriate course in all of the circumstances is to begin imputing income to the respondent in September 2023, starting at the \$38,840 provided in the interim order. Beginning in January 2024, her income will be imputed at the \$80,000 amount discussed above with respect to ongoing support calculations, which for the reasons set out above is her current earning capacity.
- [251] Finally, given the financial arrangements that were in place up to the end of November 2022, including the diversion of all rental income to the respondent, while the claimant paid the entirety of the mortgage, and joint bills were paid by both parties, it is my view that the appropriate time for retroactive spousal support to commence is December 2022.
- [252] The amounts to be used for calculation of retroactive support are thus as follows (using the claimant's 2022 income of \$164,091 plus \$1,183 plus \$4,058, and based on the children residing primarily with the respondent):

Time Range

Claimant Income**

Respondent Income

Child Support

Spousal Support

Special Expenses

Dec 2022

\$169,332

\$0

\$2,420

\$2,827

80/20

Jan 2023 to Aug 2023

\$175,977

\$0

\$2,504

\$2,676

82/18

Jul 2023 to Aug 2023*

\$175,977

\$0

\$2,504

\$2,853

81/19

Sep 2023 to Dec 2023

\$175,977

\$38,840

\$2,504

\$1,897

72/28

Jan 2024 to Jul 2024

\$175,977

\$80,000

\$2,500

\$827

65/35

* Preschool fees ceased after June 2023.

** Base figures. DivorceMate will gross up for calculation purposes.

[253] I do not propose at this point to calculate the exact amount owing. The numbers I have generated will presumably impact the parties' calculations as to the sharing of special and extraordinary expenses to date as well. To the extent the parties are unable to agree as to the difference between the amounts I have calculated here and the amounts actually paid, they can deal with that by way of submissions in accordance with the protocol I have set out below.

Conclusion

- [254] Each of the parties asked that costs be determined following the trial. The respondent suggested that the fees related to the s. 211 report could be dealt with as a standalone issue, based on the wording of s. 211(5) which is said to take the fees relating to a s. 211 assessment out of the usual process for litigation-related disbursements. The claimant did not agree, arguing that s. 211(5) provides only for a provisional allocation subject to such orders for costs as may be made at the conclusion of litigation. My preference would be to leave argument as to the basis on which such fees are to be allocated to a subsequent hearing.
- [255] If either party wishes to make submissions with respect to costs, or with respect to the fees charged for the s. 211 report, they may file a written submission within 45 days of the release of these reasons for judgment. The other party's submissions in response should be received within 30 day thereafter. The applicant may submit a brief reply submission within seven days of the other party's submission. I will determine after reviewing the submissions whether a hearing is necessary.
- [256] There are certain issues that I have left for the parties to resolve, based on directions given. If the parties are unable to resolve those matters, or if I have failed to deal with any matter that was properly before me, or if there are any mathematical errors in the calculations I have made, those can be drawn to my attention by way of submissions that should be made in accordance with the same timeline as for submissions on costs.

"Veenstra J."

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