
CANADA / JUDGMENT

S.A.H. v. I.B.L.

2018 BCSC 544

COURT

Supreme Court of British Columbia

DECIDED

5 April 2018

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2018 BCSC 544 S.A.H. v. I.B.L.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.A.H. v. I.B.L.,

2018 BCSC 544

Date: 20180405

Docket: E13366

Registry: Smithers

Between:

S.A.H

Claimant

And

I.B.L.

Respondent

Before: The Honourable Madam Justice Shergill

Reasons for Judgment

Counsel for Claimant:

On her own behalf

Counsel for Respondent:

On his own behalf

Place and Date of Trial:

Smithers, B.C.

August 14-18, 2017

November 6-8, 2017

Place and Date of Judgment:

Smithers, B.C.

April 5, 2018

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A. OVERVIEW

[1] At first blush, the matter before this court appears to be relatively straightforward. The parties were married in 1990. They entered into an interim separation agreement in September 2013, and on October 2013, the claimant moved out of the family home. The parties' primary assets are their family home and retirement savings. Their three children have all graduated from high school and the youngest is 18 years old. As such, the usual concerns about parenting arrangements do not arise.

[2] The complexity in this case arises over issues related to imputation of income, and the determination of the parties' date of separation. Each wishes me to use their proposed date of separation as the date for valuing family property and family debt. The separation date also affects calculation of any spousal support.

B. ISSUES

[3] The central issues raised in this case relate to:

a) Determining the parties' date of separation;

- b) Dividing the family assets and debts;
- c) Whether the claimant is entitled to spousal support, and if so, how much and for how long; and
- d) Whether any retroactive or prospective child support is payable, and if so, by whom and in what amount.

C. CREDIBILITY

- [4] Credibility of the parties varied depending on the issues. In non-financial matters, both of them were generally forthright and made admissions that were not always in their interest. However, when it came to financial matters, both the claimant and the respondent gave evidence that was not always consistent, nor forthright.
- [5] I attribute at least some of the parties' lack of forthrightness, to their dysfunctional relationship dynamic. The unresolved tension between the parties coloured much of their evidence, and the trial often digressed into areas that were of little relevance to the issues at hand. This made the fact-finding process difficult, due in large part to the paucity of objective evidence or any meaningful organization of it. While the parties were respectful of the court, they were not always respectful of each other or the court process. This was particularly the case with Mr. L., whose disdain for the claimant was evident throughout the trial.
- [6] Except for financial matters, many of the facts in this case are not in dispute. While the parties differ in their interpretation of key events in their marriage, they generally do not dispute the occurrence of these events, except in a few areas, which I have noted below. Where there are conflicts in the parties' evidence, I generally have preferred the evidence of Ms. H. Ms. H.'s evidence was more internally consistent and consistent with the other evidence before me, including the documentary evidence, than that of Mr. L. Although both parties portrayed themselves as the victims in their relationship, Ms. H. was nevertheless more objective and balanced in her view of Mr. L., whereas Mr. L. had a difficult time separating himself from his subjective views of the claimant. His lack of objectivity was revealed both in the content and delivery of his evidence.
- [7] With respect to financial matters, each of the parties has argued that the other is not credible, and has not provided adequate financial disclosure. Each has urged me to draw inferences from this. I have addressed these concerns later in these Reasons for Judgment.

D. BACKGROUND

- [8] The parties represented themselves at trial. However, the claimant was assisted by a support worker who was present throughout the trial.

- [9] Ms. H. is well educated. She has a B.A. in psychology, and a Masters degree in journalism and communications. She has completed some courses towards a PhD, which she started in 2013 at the University of Northern British Columbia. Ms. H. is employed as a constituency assistant for a Member of Parliament, and also serves as an elected member of her local Town Council for which she receives a stipend.
- [10] The respondent is a full-time lawyer. He was called to the B.C. bar in 1985, and practices primarily in the areas of criminal and family law.
- [11] At the request of the claimant, and with the consent of the respondent, the court agreed to change the order of proceedings, so that the respondent could lead his evidence first. Much of the evidence at trial focused on whose fault it was that the marriage fell apart. Fault is not a relevant consideration in family law proceedings. As such, I will not delve into this evidence except insofar as it directly connects to the issues before me.
1. The Parties' Evidence
- [12] The claimant, (S.A.H.), was 56 years old at the date of trial, and the respondent, (I.B.L.), was 57. They have three children: S.A.L. born in March 1994; S.K.L., who was born in August 1996; and S.L.S.L., born in July 1999.
- [13] The parties were married in Kelowna on September 29, 1990. It was the first marriage for both of them.
- [14] Ms. H. and Mr. L. met each other around 1988 while they were both living in X Town. The claimant was the editor of a local newspaper, and the respondent worked as a staff lawyer for Legal Aid. The parties were engaged approximately six months after they met. They commenced cohabitation in the fall of 1989, and were married in the following year.
- [15] In 1990, Mr. L. was given an opportunity to work in Ottawa. Ms. H. agreed to move to Ottawa with Mr. L. She quit her job in X Town, and Mr. L. took a two-year leave of absence from his employment with Legal Aid. While in Ontario, and with Mr. L.'s support, Ms. H. obtained her Master's degree in journalism.
- [16] The parties moved back to X Town in 1992, where the respondent resumed his position with Legal Aid. Though this move benefitted Mr. L., he acknowledged that this was not a good move for Ms. H.'s career, as there were fewer opportunities for her in British Columbia. Ms. H. was able to find employment in Victoria, and the parties commuted between Victoria and X Town.
- [17] Around 1993, Ms. H. became pregnant, and commuting between X Town and Victoria was no longer feasible. Ms. H. asked Mr. L. to move with her to Victoria, where she had better employment opportunities. Mr. L. did not wish to move to Victoria.

- [18] Eventually Ms. H. found a well-paying job in Y Town, and the parties moved there in 1993 into a home that they bought together in October of that year. However, the parties' plans were to construct their own home. To that end, in the spring of 1994 they purchased 15 acres of forested land near a lake a few miles outside of Y Town. To facilitate purchases of both these properties, the claimant cashed in \$33,000 in savings bonds, which she owned prior to the marriage.
- [19] Construction of the second family residence was completed in 1998. The parties' sold their first home, and moved into the second home which was held solely in the claimant's name.
- [20] During this time and throughout the rest of their relationship, the parties co-mingled their finances. They shared some joint bank accounts, took advantage of spousal RRSP's, and set up RESP's for their children. However, they did not do joint financial planning, nor did they share details about their financial situation with each other. Household expenses were shared, roughly proportionate to each of theirs income earning abilities. Mr. L. earned more money, and paid for the mortgage. Ms. H. paid for the utilities. This pattern continued virtually the same throughout their relationship.
- [21] Shortly after moving into the newly constructed home, the parties commenced renovations of an old railway building which was located on the property. This was to be the site for Mr. L.'s new law office. Mr. L. worked on this project on evenings and weekends, with some assistance from Ms. H.
- [22] Mr. L. moved his practice into the space 2000. The problems in the parties' marriage began to surface not long after. By 2002, the marriage was in serious trouble. According to Ms. H, the parties had very poor communication patterns (as was evident during the trial) which were ultimately fatal to their marriage. Much of the marital conflict revolved around parenting styles. Mr. L. was a very lenient and indulgent parent, whereas Ms. H. was not.
- [23] Their incompatible patterns of resolving conflict were, ironically, the source of more conflict. Ms. H. wanted to address issues head on; Mr. L. preferred to leave things alone. As time went on, Ms. H. became more and more frustrated with what she perceived was Mr. L.'s refusal to address the problems in their marriage. Her frustration turned to anger, often directed at Mr. L. Mr. L. withdrew further. Sexual relations between them became infrequent.
- [24] The vicious cycle continued, and by the fall of 2002, matters had spiralled out of control. Arguments escalated to violent outbursts by Ms. H., consisting of yelling, throwing things, and on some occasions, physically assaulting Mr. L. Mr. L. testified that Ms. H. bit him on one occasion, punched him in the chest on another, and pushed him a number of times. Ms. H's father (L.H.) testified to witnessing one incident of pushing.

- [25] Although he was not physically injured by these assaults, Mr. L. testified that they had a devastating impact on him and their marriage. The physical assaults crossed a line that could never be uncrossed, and were the final straw that ended their relationship. He says that sexual relations came to a complete end when the violence began.
- [26] Ms. H. does not dispute that she was prone to angry outbursts, nor that she was violent on some occasions. She also does not deny that she was physically aggressive towards Mr. L. Rather, she disputes the frequency of her violent outbursts, and minimizes the impact of them on Mr. L. and their marriage. She agrees the marriage was under significant strain at this time, but disagrees that they stopped having sexual intercourse, which she says continued until 2013 -- though admittedly it was very infrequent. Whether or not the parties continued being sexually intimate after the fall of 2002 is the first main point of disagreement in their evidence.
- [27] The parties attended a couple's workshop, which was held over two weekends sometime around November 2002. Mr. L. says that the workshop did not help repair their relationship, and only reinforced his decision to withdraw from the relationship. Ms. H. testified that the workshop had the opposite effect, resulting in them having sexual relations (which Mr. L. vehemently denied).
- [28] According to Ms. H. sometime in November or December 2002, she discovered that she was pregnant. Mr. L. was not happy about the pregnancy and wanted to have nothing to do with it. Unfortunately, Ms. H. discovered it was a nonviable pregnancy, and miscarried at five weeks.
- [29] Incredibly, Mr. L. has no recollection of the pregnancy, saying only that it was not possible that Ms. H. was pregnant as they had ceased all sexual relations by this time. He does not suggest that Ms. H. was seeing someone else or could have become pregnant with someone else. He simply denies that she was pregnant at all.
- [30] Mr. L.'s refusal to assist Ms. H. during the pregnancy and its subsequent miscarriage, caused her to ask Mr. L. to move out of the family home, which he did in January 2003. Mr. L. moved into an apartment in town. As Mr. L.'s office was still located on the family property, he commuted daily to work out of his home office, and spend time with the children. Eventually, the travelling took its toll and around the end of March 2003, Mr. L. decided to move back to the matrimonial home.
- [31] The parties' evidence diverges again briefly at this point in the chronology. According to Mr. L., the move back home was motivated by two factors: it was more convenient to him as his law office was located on the family property; and he believed that it was in the best interests of their young children (who were all under the age of 10) for their parents to continue to reside together in the same home. Mr. L. testified that he saw first hand in his practice what separation could do to young children. He felt that by moving back into the family home, he could shield their children from the disruption associated with parents that have separated.

- [32] In further support of his position that the parties never reconciled after January 2003, Mr. L. testified that prior to moving back home at the end of March 2003, he presented the claimant with a document called "[I.]'s Terms of Reconciliation" ("Reconciliation Terms"). The document is dated March 29, 2003, and stipulates certain "conditions" under which the respondent said that he would agree to reconcile with the claimant. The terms include demands that: the claimant attend a program for anger management; complete her treatment with her psychiatrist; and spend structured time with the respondent and with the children. The document also requires that both the parties come up with protocol for conflict resolution with the help of a professional. Mr. L. says that none of these conditions were ever met, and thus the parties never reconciled.
- [33] Ms. H. does not dispute that Mr. L.'s move back home may have been motivated by the two factors he set out; or that he gave her his Reconciliation Terms; or that most of these 'terms' were not met. Instead, she argues that the document does not set out preconditions to their reconciliation, but rather goals that they were working towards in their marriage. She insists that the parties did reconcile, as evidenced by the fact that after Mr. L. moved back into the family home, they resumed parenting their children and managing a joint household, much as they had done prior to January 2003.
- [34] Both parties agree that after moving back into the family home, they frequently slept in the same bed, although Mr. L. says that he mostly slept in the children's rooms, whereas Ms. H. contends that he slept mostly with her in the master bedroom. Mr. L. asserts that despite moving back home, the parties did not resume sexual intercourse; Ms. H. argues they continued to be sexually intimate until 2013, though sex was not as frequent as she would have liked.
- [35] On March 12, 2004, Ms. H. commenced this action by filing a Writ of Summons and Statement of Claim. She sought a divorce and other corollary relief under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] and relief under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] based on the parties having separated on February 13, 2004. Mr. L. filed his Statement of Defence and Counterclaim on April 15, 2004, seeking inter alia sole custody of the children. In his pleadings, Mr. L. confirmed the February 13, 2004, separation date alleged by the claimant.
- [36] In November 2005, the respondent started renovating the basement. The basement renovations included a washroom, living and sleeping area, but did not include a kitchen. The renovations were completed in August 2006, at which time Mr. L. started sleeping in the basement.

- [37] As will be elaborated on later in these reasons, sometime in 2006, Ms. H. asked Mr. L. to attend counselling with her, which he did on a number of occasions over the course of the next four years. In March 2006, the respondent tried to limit the ability of the claimant to incur further debt on their joint line of credit, which was being used almost exclusively by Ms. H. In April 2006, the respondent took steps to cancel the associate credit card on the respondent's visa account.
- [38] In November 2007, the parties renewed a joint mortgage (originally dispersed in July 1998), for a three-year term. In 2008, Mr. L. bought a spousal RRSP for Ms. H. in the amount of \$15,000.
- [39] In 2009, Ms. H. sought the riding nomination for the provincial NDP. Mr. L. provided assistance to her in her bid for the nomination. Ms. H. and Mr. L. attended political events together, and her campaign brochures portrayed them as a happily married couple.
- [40] However, the parties were still having difficulties in their marriage. They made plans to purchase a second home where each of them would take turns residing while the other spouse would live in the family home with the children. To that end, on May 25, 2010, Mr. L. wrote a letter to his financial planner for some tax advice, saying in part, "we are separating and I wish to retain the family home". The "plan seems to be for the kids to stay in family home, S. and I to rotate in and out of the home on a schedule". In keeping with the plan, Ms. H. made an offer on a property on May 25, 2010, but the deal fell through.
- [41] The plan to physically separate did not pan out, and in November 2010, the parties renewed their mortgage for another three-year term. The parties continued with their living arrangements until the fall of 2013.
- [42] On September 4, 2013, the parties entered into an Interim Separation Agreement (the "Interim Separation Agreement"). On September 5, 2013, Ms. H. filed a Notice of Discontinuance of the family law proceeding.
- [43] On October 1, 2013, the claimant moved out of the family home and into a condominium. Subsequent to this move in 2013, the parties no longer filed their income tax returns as being married.
- [44] The Notice of Discontinuance was set aside by consent on May 4, 2017.

2. Evidence of Non-Party Witnesses

- [45] Ms. H.'s employer (N.C.), her church minister (Rev. A.A.), and a friend and neighbour (K.Q.), all testified about their observations of Mr. L. and Ms. H.'s relationship. I found all of them to be credible witnesses. Their testimony appeared to be independent of any bias favouring one party over the other, often overlapped, and was consistent with the other evidence at trial. Their evidence is summarized as follows:

- Mr. L. and Ms. H. appeared to be a happily married couple, though none of the witnesses observed any public displays of affection, or had seen them out on a date. They appeared to have a warm and happy home.
- Mr. L. and Ms. H. often participated in social activities together as a couple until 2013, when they publically separated.
- Both Mr. L. and Ms. H. were very private people, and did not generally discuss their personal life with them.
- None of the witnesses knew that the claimant had commenced a divorce action in 2004.

[46] Dr. F. was the claimant's treating psychiatrist. He was called by Ms. H. to testify about what transpired during treatment sessions held from 2006 to 2010, in which both Mr. L. and Ms. H. were participants.

[47] While I found Dr. F. to be a credible witness, his testimony was of very limited value. Dr. F. did not have an independent memory of the details of his counselling sessions with the parties. Although he took notes of all of his sessions, he was instructed by the claimant to only bring notes of six specific visits with him to trial. Without his complete files, Dr. F. was unable to provide reliable testimony as to what transpired during those visits, and as such, I am not able to put any weight on it.

E. DATE OF SEPARATION

1. Legal Framework

[48] The Court may grant a divorce on the ground that there has been a breakdown of marriage, under s. 8(1) of the Divorce Act, R.S.C. 1985 c. 3 (2nd Supp.) ["DA"]. Section 8(2) sets out the criteria required to establish a marriage breakdown; relevant for these reasons, it is living separate and apart for at least one year immediately preceding the determination of the divorce proceeding, and as at the commencement of same. Section 8(3) of the DA then states:

(3) For the purposes of paragraph (2)(a),

(a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and

(b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated

(ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

- [49] A physical separation is not necessary; parties can live in the same residence and still be considered separated. To determine the date of separation, the court may look at the pre- and post-separation behaviour of the parties: see *Rose v. Guiguet*, 2008 BCSC 1225; *Velisek v. Velisek*, 2000 BCSC 557; *Greaves v. Greaves* (2004), 4 R.F.L. (6th) 1, [2004] O.J. No. 2522 (Ont. S.C.J.); and *Campbell v. Campbell*, 2007 ABQB 637.
- [50] In the *Greaves* decision, the court found that the parties were living separate and apart, despite resuming regular and ongoing sexual relations, and the wife occasionally sleeping at the matrimonial home. The wife also returned to the matrimonial home regularly to look after the house, care for the plants and work in the garden.
- [51] In *Rose* the Court looked at the husband's intention and his actions, to find that while the parties had originally resumed cohabitation for the purposes of convenience, their actions revealed that a reconciliation occurred shortly thereafter (at para. 77):

While the main purpose of the couple's resumed cohabitation may initially have been for the convenience of Mr. Rose when he moved to Whistler to pursue a career opportunity, the couple's actions demonstrate that a reconciliation occurred shortly after the move. They did not recommence a casual relationship or one that could be described as roommates, or one that resembled an affair; the parties lived together in what appears to be their pre-separation level of commitment.

- [52] In *McGrail v. McGrail*, 2016 BCSC 104, Mr. Justice Verhoeven held that intention is key to the analysis of a date of separation. It need not be a mutually shared intention; a unilateral abandonment of the matrimonial relationship is sufficient: see *Dhillon v. Dhillon* (1998), 78 A.C.W.S. (3d) 963, [1998] B.C.J. No. 823 (C.A.), affirming the decision at trial of *Bauman J.*, as he then was, citing *Lachman v. Lachman* (1970), 2 R.F.L. 207 (Ont. C.A.).
- [53] In *Nearing v. Sauer*, 2015 BCSC 58, Madam Justice Fleming elaborated at para. 56 on the need for the court to focus its analysis on the generally accepted characteristics of marriage, as evidencing whether the parties had separated:

In *Sachdeva v. Sachdeva*, 2013 BCSC 313 [Sachdeva], this Court took a similar approach, relying primarily on *Rose v. Guiguet*, 2008 BCSC 1225, where Madam Justice Dorgan looked at both the husband's intention to live separate and apart and his actions. Typically when the parties dispute the date of separation, the court's analysis focuses on the generally accepted characteristics of marriage including the intention to remain married, having sexual involvement, carrying on activities in public, sharing financial resources and sharing significant family events: *Sachdeva* at para. 87. The court will also consider a range of other factors, including a clear statement by one of the parties of his or her desire to terminate the relationship. Sexual involvement, or lack thereof, is not conclusive: *Newth v. Booth*, 2011 BCSC 317 at para. 17.

[54] In finding that the parties' relationship did not include many of the "generally accepted" characteristics of a marriage, the court in Nearing noted that: "they led relatively separate lives, they did not integrate their finances, they had little, if any, social life together and most family events did not involve the respondent." The filing of income tax returns identifying a party as married, was a factor for consideration, but not determinative of the issue: Nearing, para. 57.

[55] As is evident from the case authorities, the determination of the parties' date of separation is a very fact specific exercise. I have found the following questions, framed in the form of a test, useful to determining the date of separation here:

1. Did at least one spouse have the intention to separate?
2. Was the intention to separate communicated to the other spouse?
3. Was the intention to separate acted upon? In other words, using generally accepted characteristics of marriage, did one or both spouses take action that is consistent with the separation, such as:
 - a. changing how they behaved with each other in public; and
 - b. changing how they behaved with each other in private.

[56] I will turn now to analysis of the evidence.

2. Analysis

[57] As noted earlier, the parties differ considerably in their view of when they started living separate and apart. The claimant argues that while the marriage was "extremely troubled", the parties did not separate until she moved out of the family home on October 1, 2013.

[58] The respondent asks me to find that the parties separated on February 13, 2004, although he says the relationship actually ended in January 2003, when he temporarily left the matrimonial home. Mr. L. describes the decision of the parties to live under the same roof for the ensuing 10 years as being one of convenience rather than evidence of reconciliation.

[59] I do not agree with the respondent that the evidence establishes that they separated permanently in January 2003. While it is true that both the parties initially formed the intention to separate in January 2003, neither of the parties considered that date significant enough to report it as their date of separation in their pleadings. Mr. L.'s explanation that he only confirmed February 13, 2004, as their separation date because the claimant had chosen it, is not credible. As a family lawyer, Mr. L. was fully aware of the legal import of stating the correct separation date in court documents.

- [60] Why the claimant chose February 13, 2004, as their separation date, remains a mystery. Neither party acknowledged any event in or around February 2004 that could explain this choice of date. Regardless, Ms. H. did commence divorce proceedings in March 2004, which evidences both her intention to separate and communication of it to Mr. L. However, the evidence falls short of meeting the third part of the test I have set out at para. 55, whether the intention to separate was acted upon.
- [61] The March 2004 intention to separate, though formulated and communicated, was not acted upon. According to Ms. H., several months after she had commenced this family law proceeding (May or June 2004), the parties reconciled for a second time. She says reconciliation was motivated by her fear that if she pursued her family law claim, Mr. L. (being a family lawyer) may succeed in getting custody of the children. Although Mr. L. denies that they reconciled or that he was motivated to do so, he maintains that they continued with their existing living arrangements, as he did not wish to put their children through the trauma of a divorce. To that end, neither he nor Ms. H. took any steps to further the litigation, which remained at a standstill until September 5, 2013.
- [62] In addition, their day-to-day life did not measurably change after the commencement of family law proceedings, either in terms of their private behaviour or how they interacted with each other in public. The evidence establishes that the parties' remained financially inter-dependent at the same level as they had always been, until October 1, 2013. They also continued to reside in the same home; share their financial resources; eat and cook their meals together; manage a joint household; parent their children together; do family activities together; and take family vacations together.
- [63] While the existence or absence of sexual intimacy is not determinative of the issue, I do not accept Mr. L.'s evidence that all sexual contact ended after the fall of 2002. There is uncontroverted evidence that Ms. H. became pregnant after this time. I accept Ms. H.'s evidence that sexual contact between the parties' continued well after 2004, albeit infrequently.
- [64] Their public life also did not change: they continued to attend social functions together and present themselves publically as a married couple. Indeed, it appears that no-one, except the parties and the claimant's father and her lawyers, was even aware that the claimant had filed for divorce in March 2004. Their children were still giving them anniversary cards until at least 2008, and up until her political campaign of 2014, all of Ms. H.'s political campaign materials had her marriage to Mr. L. featured prominently.
- [65] These events show that the parties are making a slow, incremental move towards separation, but are not evidence of separation. The most significant of these, Mr. L. sleeping in the basement of the family home, could at best be described as a distancing, rather than a clear break, in the parties' relationship. Notably, item 5 of the Reconciliation Terms describes Mr. L.'s desire to have quality time to himself, including a "place where [I.] can relax and play recorded music at high volume without bothering anyone (basement room)".

Despite sleeping in the basement, the parties continued to share the same bed during family vacations, and were intimate with each other even after Mr. L. started sleeping in the basement.

- [66] Although it appears that the parties' broached the topic of separation again in 2010, they did not follow through and instead, continued in the same manner until they could no longer tolerate living in the same home.
- [67] On an objective basis, the evidence supports a finding that the parties separated on October 1, 2013, when Ms. H. moved out of the family home pursuant to the Interim Separation Agreement.

F. DIVISION OF FAMILY PROPERTY AND DEBTS

- [68] These proceedings were commenced under the DA, and the FRA. The FRA was repealed in 2013 and replaced with the Family Law Act, S.B.C. 2011, c. 25 [FLA]. The parties amended their pleadings to conform with the FLA. As is their right under s. 252 of the FLA, the parties chose to also argue this case under the FLA with respect to all issues related to division of family property. I note, however, that even if the parties had proceeded under the FRA, the result in this case would have been the same.

1. Legal Framework

- [69] Pursuant to s. 81 of the FLA, each spouse is presumptively entitled to an undivided half interest in all family property as a tenant in common, and equally responsible for family debt. These rights and responsibilities accord to the parties regardless of their respective use or contribution. The date on which property rights vest is the date of separation: *Cole v. Cole*, 2016 BCSC 716 at para. 22.
- [70] Under the FLA, property is categorized as either "family property" or "excluded property". All real or personal property owned by either spouse at the date of separation is broadly defined as family property (s. 84(1)). "Excluded property" is property which presumptively remains with the owning spouse, and is not subject to division. It includes property acquired by a spouse before the relationship between the parties began (s. 85(1)(a)). Section 85(2) places the onus on the spouse claiming the exclusion, to prove that the property qualifies as excluded property.
- [71] Family debts are defined under s. 86(a) of the FLA as all financial obligations incurred by a spouse during the period beginning when the relationship between the spouses began, and ending on their separation. Thus, any debt acquired during the relationship, regardless of whether it was for a family purpose, is a family debt: *Cole* at para. 25.

2. Analysis

- [72] The claimant's and respondent's respective interests in the following assets are at issue:

1. Matrimonial home;
2. Registered Retirement Savings Plan (RRSP) savings held by each of the parties;
3. Vehicles;
4. The claimant's federal and provincial pensions;
5. The respondent's law practice; and
6. Household furnishings.

[73] The following debts are at issue:

1. A \$30,000 line of credit paid from the home equity which the respondent says the claimant ought to be solely or substantially responsible for; and
2. A \$22,000 payment which the claimant says she made in October 2013, to retire a family debt.

[74] Neither party takes issue with their joint and equal liability for the mortgage on the matrimonial home, which the parties agree stood at \$71,000 in September 2013.

a. Valuation Date

[75] While disagreeing on their date of separation, both parties have asked the Court to value their family property and debts as at the date of separation rather than the date of trial. Neither party seeks an interest in any increased value of family assets since September 2013. Consistent with this position, Mr. L. makes no claim for an interest in the claimant's condominium unit, which was owned by the claimant at the date of separation, and was purchased using funds derived from family property.

[76] S. 87 of the FLA stipulates that family property and family debt must be determined at fair market value, as of the date of an agreement, or the date of trial.

[77] Neither party addressed whether the Interim Separation Agreement constituted an agreement pursuant to s. 87(b)(i). Clause G of the Interim Separation Agreement stipulates that:

Neither party is prejudiced by the terms of this agreement and each party is free to seek different arrangements respecting the Family Home, the Mortgage and spousal support, in either a final separation agreement or an order of the Court.

[78] The Interim Separation Agreement divided family property and family debt such that, pursuant to the agreement:

- the claimant transferred her interest in the family home (which was previously registered solely in her name), to the respondent;
- the parties retired the joint family debt of \$71,000 (being the existing mortgage);

- the respondent refinanced the mortgage in his name alone;
- the respondent paid the claimant \$185,000 out of existing equity in the family home, to facilitate the claimant's purchase of her own home; and
- the claimant purchased a condominium unit solely in her name, moving into it on October 1, 2013.

[79] I do not view the Interim Separation Agreement as binding on the parties with respect to their positions at trial regarding the family home, mortgage and spousal support. But where, as in here, the parties positions are consistent with the Interim Separation Agreement, s. 87(b)(i) is invoked. Doing so permits this court to put into effect the wishes of the parties.

[80] Absent an agreement dividing family property and family debt, the court may still value the assets and debts prior to trial, on the grounds of significant unfairness: *Blair v. Johnson*, 2015 BCSC 761 at para. 69.

[81] Madam Justice Young noted in *E.H.H. v. CLM*, 2017 BCSC 1299, at para. 89, that there should be compelling evidence to warrant a departure from using the trial date as the valuation date. In my view, compelling evidence exists in this case. First, both parties wish the valuation date to be the date of their separation rather than the trial date. Second, valuing the assets and debts as at the date of trial would result in significant unfairness to the parties. Since the parties' separation of October 1, 2013, the family debts have been retired, and each party has been solely responsible for preserving and maintaining the family properties held in each of their names: see *Slavenova v. Rangelov*, 2015 BCSC 79; *E.H.H. v. C.L.M.*, 2017 BCSC 1299; and *K.A.L. v. K.J.L.*, 2017 BCSC 651.

[82] As such, the family assets and debts will be valued as at October 1, 2013.

b. Family home

[83] Mr. L. seeks to have the equity in the matrimonial home divided equally as at the date of separation. Although he spent a considerable amount of time providing evidence on improvements that he made to the family home after 2004, this was all predicated on the court finding that the date of separation was 2004. Mr. L did not argue that any improvements that were made by him to the property between 2004 to 2013, should result in an unequal division of the equity in the matrimonial home.

[84] Ms. H. agrees to an equal division of the equity in the family home, but only after she has been given credit for \$33,000 in Canada Savings Bond investments which she says she brought into the marriage, and which were used towards the purchase of the family home.

- [85] Mr. L. did not challenge Ms. H's evidence that she brought \$33,000 into the relationship, or that this money was invested in the matrimonial property. He also did not provide any submissions on whether the \$33,000 constituted excluded property under s. 85 of the FLA. Mr. L. was also entitled to, but chose not to argue that it would be significantly unfair not to divide the \$33,000 between the parties, pursuant to s. 96(2) of the FLA.
- [86] I find that the \$33,000 constitutes excluded property under s. 85 of the FLA. This amount is credited to the claimant, and is to be deducted from the total equity in the family home.
- [87] With respect to the value of the family home, there is a troubling lack of objective evidence on this issue. Mr. L obtained appraisals of the family home to determine its fair market value as of April 1, 2004, and September 2013. Dave Wertz of Wertz Appraisals completed the appraisal of the 2004 valuation in May 2017. The date on which the 2013 valuation was completed, is unknown. That is because Mr. L. only submitted the appraisal of the April 2004 valuation into evidence. Mr. L alleged that Ms. H had taken the second appraisal (valuing the property in September 2013) from his home, without his consent. Ms. H vehemently denied this.
- [88] Rather than simply obtaining another copy of the "missing" appraisal, Mr. L insisted that the claimant provide her copy to the Court. In an email to the claimant dated August 13, 2017, Mr. L states "[i]f you want to prove the value of the home in 2013, then you had better use your copy of Wertz's appraisal." Needless to say, Ms. H did not submit a copy of the 2013 appraisal into evidence either, saying only that she did not have it.
- [89] The end result is that the Court has no documentary evidence of the fair market value of the family home as at September 2013. Ms. H testified that the property appraisal established a fair market value of \$490,000. Mr. H did not challenge this; rather, he also used a market value of \$490,000 for calculating the parties' respective equity in the family home.
- [90] I therefore place the fair market value of the family home as at September 2013, at \$490,000. After deducting from that figure the \$33,000 constituting the claimant's excluded property, and the \$71,000 mortgage for which they are jointly responsible, the net interest in the family home to be divided equally between the parties, is \$386,000.
- [91] The claimant's share of the equity in the family home is \$193,000. The claimant was advanced \$185,000 from the home equity, at the time of entry into the Interim Separation Agreement. As such, the net amount owing to the claimant from the equity in the family home (including the \$33,000 constituting excluded property), is \$41,000.
- [92] The respondent argues that a \$30,000 line of credit paid from the home equity, is the sole or substantial responsibility of the claimant. The claimant says that the \$30,000 line of credit constitutes a family debt, and ought to be shared equally between the parties. I agree. The \$30,000 line of credit was incurred prior to the parties' separating, and therefore constitutes a family debt under s. 86 of the FLA; the requirement for significant unfairness under s. 95(2) of the FLA is not met. The respondent's claim for unequal division of this debt is

dismissed.

[93] For her part, the claimant seeks equal contribution from the respondent for \$22,000, which she says she paid on October 1, 2013 to retire a family debt. The respondent argues that there is no evidence that any such liability existed prior to the parties separating. I agree with the respondent.

[94] The claimant's evidence was vague with respect to the alleged payment. She was unable to provide any details of the loan. No bank statements were provided to verify the existence of the alleged loan. The claimant has failed to establish the existence of a family debt in the amount of \$22,000, and her claim for equal contribution from the respondent towards that debt, is dismissed.

c. RRSP's

[95] The parties agree that RRSPs held in each of their names as at the date of separation, are a family asset. They also agree that the RRSPs ought to be divided equally based on their value on the date of separation rather than at trial. However, neither party provided documentary evidence (i.e. RRSP statements) verifying the amount of their respective RRSP holdings as at October 1, 2013, or the date of trial.

[96] I agree with the parties that their respective RRSP's ought to be valued as at the date of separation, to avoid significant unfairness which would occur if the trial date is used for the valuation: see for example, *B.M.P. v. S.L.B.*, 2015 BCSC 448.

[97] Subsequent to September 2013, the respondent testified that he cashed out a significant portion of his RRSPs, in order to supplement his income, and pay interim spousal support. According to the respondent's May 5, 2017 Financial Statement, his RRSP holdings as at that date total \$189,141.18.

[98] In contrast, the respondent's April 2, 2013 Financial Statement reveals RRSP's totaling \$254,626.37. In addition, it appears the respondent made an RRSP contribution of \$5,000 in the 2013 tax year, as evidenced by his 2013 income tax return filed in 2014. Though the claimant has not challenged the respondent's valuation of \$254,626.37 in RRSP holdings as at October 1, 2013, it is unclear whether the \$5,000 contribution was made before or after that date.

[99] Accepting that the respondent held a total of \$259,626.37 in RRSPs by the end of the 2013 year, by May 2017, he appears to have cashed in RRSP's totalling \$70,485.19. However, the respondent's income tax returns suggest a different number. They reveal that between 2014 to 2016, the respondent cashed out \$80,094.23 in RRSP's. This suggests that the respondent may have held \$9,609.04 more in RRSPs as at the date of separation than indicated in his April 2013 Financial Statement. There is no evidence before me to explain this discrepancy. As indicated earlier, I do not have copies of the respondent's RRSP statements for the requisite time period, and am unable to make a determination of the value of the respondent's RRSP holdings as at the date of separation.

- [100] The determination of the claimant's total RRSP holdings as at October 1, 2013, is even more difficult. Not only is documentary evidence missing, so to is any disclosure of RRSPs (or pensions) in the claimant's sworn Financial Statement made May 1, 2017.
- [101] The respondent testified that he was not aware of the exact financial position of the claimant prior to the parties separating. It was not until the spring of 2013, when he opened the claimant's mail, that Mr. L. learned details of some of Ms. H.'s RRSP holdings.
- [102] Despite the respondent's requests, the claimant refused to file an amended Financial Statement providing details of all of her assets. Under cross-examination, she justified this refusal by stating that she felt that she was being intimidated by the respondent as he already had "all of her information". Such is not the case.
- [103] What can be gleaned from the sparse evidence is that on June 30, 2013, the claimant had \$78,651.48 in RRSP's at the Bulkley Valley Credit Union (BVCU); a further \$34,759.82 was held at Credential Asset Management as at June 30, 2015 in an account that was opened in 2006. As at August 10, 2017, a further \$22,188.32 was held at the CIBC and \$6,011.87 was held at the Royal Bank. However, no evidence was provided as to when these RRSP's were purchased, though we know these numbers alone total \$141,611.49.
- [104] The exact amount of the parties' respective RRSP holdings as at October 1, 2013, is not in evidence. However, it is clear that at the effective date, the respondent held substantially more in RRSP's than the claimant. As such, an equalization of the parties' RRSPs at the date of separation (i.e. October 1, 2013) ought to be made: see *Barker v. Barker*, 2005 BCCA 177.
- [105] I make the following orders with respect to the RRSP's held by each of the parties as at the date of separation:
1. The parties are to exchange documentary evidence establishing the value of all RRSP's held by them as at October 1, 2013, within 30 days of this order.
 2. Each of the parties shall retain the registered retirement savings plans held by them which are registered in their own names, save and except that the respondent shall transfer to the claimant, one half of the difference between their respective RRSP holdings as at October 1, 2013, by way of a tax-free rollover pursuant to the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).
 3. In the unlikely event that the claimant's RRSP holdings as at October 1, 2013, are greater than the respondent's RRSP holdings as at October 1, 2013, order 2 is varied, such that the claimant shall transfer to the respondent, one half of the difference between their respective RRSP holdings as at October 1, 2013, by way of a tax-free rollover pursuant to the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.).
- d. Vehicles

- [106] For reasons explained below, I also find that it is more appropriate to use the separation date as the date for valuation of the parties' vehicles.
- [107] The parties each owned a vehicle as at the date of separation, which they have had exclusive use of since that date. The respondent owned a 2007 GM Suburban truck, which he traded in on April 19, 2017 for \$6,400, replacing it with a brand new GMC Yukon XL which he bought for \$67,589.45.
- [108] The claimant seeks an interest in the 2007 GM Suburban truck, and does not seek an interest in the respondent's newly purchased GMC Yukon XL.
- [109] In his April 2013 Financial Statement, the respondent placed a value of \$14,000 on the GM Suburban. Despite the vehicle being traded in for \$6,400 in April, the respondent valued it at \$10,000 in his Financial Statement prepared May 2017, suggesting a depreciation rate of \$1,000 per year. Accounting for the depreciation value up to the date of separation, would put the respondent's estimate of the value of the GM Suburban at \$13,500.
- [110] In June 2013, the respondent traded in the claimant's 2001 Chevrolet Cavalier for \$500, replacing it with a 2009 Chevrolet Cobalt bought for \$12,500. The vehicle was paid for using the parties' joint line of credit. The claimant takes issue with the respondent trading in her vehicle without her consent. However, she does not dispute the respondent's entitlement to a one-half interest in the Chevrolet Cobalt as at the date of separation.
- [111] As with the respondent, the claimant did not provide a value for the Chevrolet Cobalt as at the date of separation. Her 2017 Financial Statement places a value of the vehicle at \$4,500. She did not prepare a Financial Statement in 2013. Based on the purchase price of \$12,500, this suggests a depreciation rate of \$2,000 per year. I find this depreciation rate unreasonable, particularly without any evidence to back it up. As the claimant's vehicle was purchased used only four months prior, it is unlikely to have depreciated significantly between the purchase date and the date of separation.
- [112] Having regard to the respondent's generous valuation of his vehicle, I find that the respective values of the respondent's and the claimant's vehicles as at the date of separation, is roughly equivalent.
- [113] As such, each of the parties is entitled to retain the full interest in their own vehicles.
- e. Pension
- [114] S. 84(2)(e) of the FLA includes as family property, a spouse's entitlement under a pension plan. The respondent seeks a one-half interest in the claimant's pensions. The claimant does not oppose this.

- [115] The claimant worked for the BC Public Service Agency between June 1993, and March 31, 2004, accumulating 8.41 years of contributory service, and 6.23 years of pensionable service. The Public Service Pension Plan statement dated July 20, 2013, establishes the commuted value of her pension on that date, at \$60,340. However, the respondent submits that the commuted value of the claimant's pension as at July 2013, is less than the actual value of the pension as at the date of separation.
- [116] The only information that I have about the claimant's federal government pension, is that she has been making contributions to her pension plan since approximately 2004 when she commenced working for the federal government. Aside from that, I have no details that would be of assistance in dividing Ms. H.'s federal government pension, though Ms. H. readily concedes that the respondent has equal entitlement to it.
- [117] Pursuant to s. 84(2)(e) of the FLA, the respondent is presumptively entitled to a one-half interest in the claimant's provincial and federal government pensions, to the date of their separation.
- [118] The administrators of Ms. H.'s provincial and federal government pension plans should be able to provide the parties with the calculations needed to properly divide Ms. H.'s pensions: see Cole at para 77. The parties are directed to make the necessary inquiries of the claimant's provincial and federal pension plan administrators, to enable proper division of these pensions.
- f. Respondent's Law Practice
- [119] In her Amended Family Claim, the claimant seeks 50% of the respondent's law practice and assets as at October 1, 2013, including receivables and work in progress, in accordance with the respondent's financial statements for his law practice.
- [120] This claim is flawed in many respects. No evidence was tendered ascribing any value to Mr. L.'s law practice, which is the respondent's income generating vehicle, and the sole manner in which he can earn an income.
- [121] While a law practice could constitute family property, our court has been reluctant to ascribe value to professional practices absent expert evidence, where the practitioner spouse "is the practice", i.e. the success of the practice relies solely on the work and efforts of the practitioner spouse: see Marrion v. Sargent, 2000 BCSC 843 at para. 67. In Petley-Jones v. Petley-Jones (1993), 41 A.C.W.S. (3d) 134, [1993] B.C.J. No. 1427 (S.C.) the Court accepted expert evidence ascribing a nominal value for the goodwill in the husband's law practice, holding at para. 8 that:

Given the nature of the practice, as well as Mr. Petley-Jones's stature in what is a relatively small commercial community and his personal relationship with his clients, I do not consider the assumption that the practice has a substantial ongoing value without him, to be sound. I accept that, beyond the capital account, a purchaser would pay something for the advantage of the practice being "in place" but I do not consider the goodwill to have any greater value.

[122] This case is distinguishable from those cases involving professional practices, where the non-practitioner spouse provides a direct and indirect contribution towards the practice: see *Lloyd v. Lloyd*, 2007 BCSC 349, where the wife worked as a legal assistant and bookkeeper in the husband's law practice for a period of time. In that case, Madam Justice Gropper determined that a value could be placed on the husband's law practice by assessing his work in progress and accounts receivable as of the date of separation. However, in the *Lloyd* case, the Court had documentary records establishing these items.

[123] In the case at bar, no financial statements of the respondent's law practice have been tendered into evidence at trial. The Court has no evidence as to the value of receivables or work in progress, if any. There is no reliable evidence as to what assets are owned by the respondent for use in his law practice, or the value of office equipment.

[124] The physical structure in which the law practice is located, is situated on the family property, and thus is included in the valuation of the family home.

[125] The claim for 50% of the respondent's law practice and assets as at October 1, 2013, including receivables and work in progress, is dismissed.

g. Household Furnishings

[126] The claimant seeks an equal division of three categories of household items: household furnishings, furniture that she says was gifted to the parties by the respondent's parents, and workshop tools.

[127] With respect to household furnishings, the claimant alleges that though some of these items were divided post-separation, a substantial number of them remained with the respondent when she moved out of the family home and still remain to be divided.

[128] The respondent says that prior to the claimant moving out of the family home, the claimant provided a list of household furnishings that she wished to take with her. He agreed to let her have 42 of the 48 items she was seeking. In addition, he says he paid Ms. H. \$500 in lieu of any other furniture claims she might make in the future.

[129] The claimant does not deny that she received 42 of the 48 items that she had sought. She also does not dispute receiving \$500, but maintains that her claim over the remaining household items was not extinguished. She says that were additional items that she had not yet sought division of which the respondent refused to divide and over which she still has a claim.

- [130] I am satisfied that the household furnishings were fairly divided by the parties. The claimant's claim for half of the household items listed in Exhibit 20, is dismissed, with the exception of the claim over the respondent's truck, which is addressed in these Reasons for Judgement in the "Vehicles" category.
- [131] The claimant also seeks an equal division of furniture that was owned by the respondent's parents, who temporarily moved to Y Town from Ottawa around 2008. The furniture was kept and used in the family home, but when the parties' separated, the claimant says that the respondent refused to give her any of it.
- [132] The respondent says that the furniture gifted by the respondent's parents: belongs to him; and is of similar value to the furniture taken by the respondent and therefore ought not to be divided.
- [133] I do not agree with the respondent that the furniture belonging to his parents constitutes excluded property as contemplated by s. 85 of the FLA. However, given the substantial amount of items that the claimant took with her, the respondent is entitled to keep all the furniture that previously belonged to his parents, with the exception of the La-Z-Boy recliner kept in the child's room. The claimant may take possession of the La-Z-Boy recliner, and transport it to her home at her own cost.
- [134] The final category of items over which Ms. H claims an interest, are the workshop tools. Workshop tools were bought over the course of many years. Most of them were purchased second hand, and many of them are over 10 years old. They were used almost exclusively by the respondent.
- [135] The respondent argues that the workshop tools have nominal resale value, totaling no more than \$2,100.
- [136] The claimant argues that the workshop tools are worth approximately \$5,000, and ought to be appraised by a professional appraiser. She asks this Court to order an appraisal of the workshop tools, and for the cost of the appraisal to be shared equally by the parties. In the alternative, the claimant wishes to take all of the workshop tools, with a payment to the respondent of \$1,000 representing one half of a value of \$2,000.
- [137] I am not prepared to order an appraisal of the workshop tools. Costs of an appraisal do not justify such an expenditure and it will simply result in further delays to a matter that has already taken too long to conclude.
- [138] I find that the value of the workshop tools attested to by the respondent is conservative but in keeping with the second hand nature of the tools. I fix the value of the workshop tools at \$2,500. The respondent is entitled to keep possession of the tools, and the claimant is entitled to a payment of \$1,250 from the respondent representing her one-half interest in the tools.

G. SPOUSAL SUPPORT

[139] The claimant has claimed spousal support from the respondent under both the DA and the FLA. Both statutes allow for the making of spousal support orders, and the objectives and factors that must be considered for spousal support mirror each other in the federal and provincial legislation: *Li v. Liu*, 2014 BCSC 1110 at para. 35.

1. Legal Framework

[140] S. 15.2(6) of the DA (s. 161 of the FLA) sets out the objectives of spousal support, as follows:

15.2(6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[141] As the court noted in *Bracklow v. Bracklow*, [1999] 1 SCR 420, at para. 35, "[t]he objectives reflect the diverse dynamics of the many unique marital relationships." No objective is paramount. All four objectives must be considered and balanced in the context of the circumstances of each case (*Fisher v. Fisher*, para. 34).

[142] Orders for spousal support under the DA are made pursuant to s. 15.2, which states:

15.2(4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[143] The factors set out in s.15.2(4) require the trial judge to balance the circumstances of each spouse, bearing in mind the objectives of spousal support stipulated in s. 15.2(6), to achieve an equitable alleviation of the adverse consequences of the breakdown of the marriage: *Bracklow*, at para. 36.

- [144] In making a spousal support order, the Court must first establish entitlement to receive spousal support, with the attendant liability to pay on the part of the payor spouse. Once entitlement has been established, issues of duration and amount arise. The primary marker for entitlement to spousal support is income disparity at separation.
- [145] There was in this case, at the date of separation, an income disparity between the spouses. The parties separated on October 1, 2013. The claimant's 2013 income tax returns reveal employment income of \$63,599. In contrast, the respondent's net employment earnings for the 2013 tax year were \$153,026.85.
- [146] However, income disparity is not enough. The court must inquire as to the cause of the income disparity between the spouses in order to establish entitlement. To that end, our courts have recognized three grounds for entitlement to spousal support: compensatory, non-compensatory, and contractual: *Chutter v. Chutter*, 2008 BCCA 507 at para. 47; *Bracklow*, para. 25.

Contractual Support

- [147] Contractual spousal support can arise from formal contracts, as well as implied or informal agreements: *Bracklow*, para. 38.
- [148] Neither party argued, nor do I find, that the circumstances leading to a contractual basis for spousal support are present in this case. The Interim Separation Agreement specified that neither party would be prejudiced by the terms of the agreement, and each was free to argue different positions at trial.
- [149] However, the parties both rely on the Interim Separation Agreement to address matters related to arrears or retroactive support. To that end, the parties' intention in the agreement is a relevant consideration when applying the factors set out in s. 15.2(6), and may influence the court's view of what might be an appropriate award (*Miglin v. Miglin*, 2003 SCC 24, para. 55). A determination that the agreement does not substantially comply with the broader objectives of the act, may result in the agreement being set aside, partially or wholly, so as to meet those objectives (*Miglin*, para. 57).

Compensatory Support

- [150] Ms. H. argues that she is entitled to compensatory support as she sacrificed her own career growth, both to support the respondent's career aspirations, and to act as the primary caregiver to their three children. She points to their various moves in order to advance the respondent's career, and the concomitant refusal of the respondent to move from X Town to Victoria, even though that would mean better job opportunities for her.

[151] Ms. H. characterizes their relationship as being a "traditional, long-term marriage". She says that the respondent's career required him to travel and work long hours. Consequently, the parties agreed that she would work part-time so that she could take on a greater portion of the childcare responsibilities.

[152] Mr. L. denies that Ms. H. played a greater role in childcare. He says that their marriage was one of equals, where both parents shared the childcare and domestic responsibilities. He argues that Ms. H. did not suffer any economic disadvantage during the marriage, and submits as follows in his closing arguments:

The parties relocated to [Y Town] for the purpose of the Claimant's employment. The Claimant had children, but in the context of government employment which allowed her to return to that employment easily, without loss of pension or benefits during her absences for child-bearing. There is no evidence that having children has negatively impacted her ability to earn income.

[153] Mr. L. acknowledges that Ms. H. might have suffered an economic hardship from the marriage, as "she could not easily leave the community of [Y Town] to seek better employment". Nevertheless, because Ms. H. was able to obtain a Masters degree during the marriage, Mr. L. says that "she has suffered little disadvantage that could entitle her to support, other than the possibility her post-separation income would be lower than the Respondents".

[154] In Chutter at para. 50, Madam Justice Rowles discussed the purpose of compensatory support, saying that it "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". She noted the economic consequences of one spouse assuming the primary childcare duties.

[155] The fact that a spouse works outside the home does not preclude an award for compensatory spousal support: see Chutter at para. 71.

[156] I do not agree with Ms. H. that the parties' marriage was a traditional one. The evidence shows that Mr. L. was equally involved in the children's care and household responsibilities, although the parties may have played different roles. As Ms. H. testified, Mr. L. "devoted virtually all of his at home time to the girls" and was a "very involved dad".

[157] It was more akin to a modern marriage, where both spouses shared the parenting responsibilities. However, Mr. L.'s career demanded a lot of him, and during times when he travelled, which seems to have been fairly frequently, Ms. H. did take on the lion's share of the parenting responsibilities. This was reflected in the fact that following the birth of their first child, Ms. H. did not return to work full-time.

- [158] Following each childbirth, Ms. H. took maternity leave ranging from six to eighteen months. She would then return to the work force initially at half time, and then increasing to 75% capacity, where she remained after their youngest child started school. While initially motivated by childcare responsibilities, at some point Ms. H.'s decision to remain at 75% capacity as the children got older, was motivated for other reasons.
- [159] Ms. H. testified that she was not interested in doing a full-time position as a constituency assistant, due partly to budgeting constraints, but also because of her own political interests.
- [160] Ms. H.'s political pursuits took up quite a bit of time. In addition to working as a constituency assistant, she served as a school board trustee for two elected terms between 2005 and 2011, for which she was paid a stipend. This position required local and national travel, which she said caused Mr. L. to complain that she was "gallivanting around the country". Ms. H. also sought a nomination for the provincial NDP to run in the 2009 provincial election. Though her bid was unsuccessful, she spent many long hours and worked "very hard", prompting Mr. L. to complain that she did "a lot of running around after hours". Despite Ms. H.'s contention that Mr. L. did not support her in these endeavours, there is evidence that he did.
- [161] There is evidence that Ms. H. was economically disadvantaged from the marriage, and that economic advantages were conferred to Mr. L., such that Ms. H. is entitled to an award for compensatory spousal support. Ms. H. made sacrifices such as working part-time to provide care for the children; moving to Northern BC following her first pregnancy; and remaining in Y Town at the end of her employment with the provincial government. These sacrifices conferred a benefit to Mr. L., such that he was able to continue with his career trajectory, uninterrupted, whereas Ms. H. could not.

Non-Compensatory Support

- [162] I also find that Ms. H. is entitled to non-compensatory spousal support as a result of economic hardship experienced by the breakdown of the marriage.
- [163] Non-compensatory spousal support is "grounded in the 'social obligation model' of marriage, in which marriage is seen as an interdependent union" (Chutter para. 54) or a "joint endeavour" where the "default presumption of this socio-economic partnership is mutuality and interdependence" (Bracklow (para. 20).
- [164] Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, not the state: Chutter at para. 54. "Need" alone may be sufficient to ground a claim for spousal support: Bracklow v. Bracklow, [1999] 1 S.C.R. 420, at para. 43.

- [165] "Needs" are something more than basic necessities and may vary according the circumstances of the parties and the family unit: Chutter at para. 55. Importantly, "need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. Rather, it 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.
- [166] Similarly, economic self-sufficiency is a relative concept, which is "informed by the standard of living previously enjoyed by the parties": Chutter at para. 56, quoting the Ontario Court of Appeal in *Allaire v. Allaire* (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256. As the court noted in *Fisher*, "[S]ection 15.2(6)(d) of the Divorce Act promotes the objective of economic self-sufficiency only if it is "practicable" to do so and where the objective can be realized "within a reasonable period of time"" (*Fisher* at para. 52).
- [167] In *Moge v. Moge*, [1992] 3 S.C.R. 813 at 870, the court held that the parties' standards of living are relevant considerations in determining spousal support:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. ... As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[Citations omitted.]

- [168] In *Fisher v. Fisher*, 2008 ONCA 11, the wife, who had worked either part-time or full-time throughout the 19 year childless marriage, was found to be economically disadvantaged by the breakdown of the marriage rather than the marriage itself. The court noted that her standard of living was significantly reduced when she moved into a small townhouse and lost the comfortable middle-class lifestyle to which she was accustomed.
- [169] Similarly, Ms. H.'s standard of living is lower than it was during the marriage. Her comfortable, upper middle class lifestyle has been replaced with a more modest one. She no longer resides in what both parties agree is a beautiful home (now solely occupied by Mr. L.), located on a heavily forested 15 acre property near the lake. She drives a second hand vehicle, and lives in a 1500 square-foot condominium unit in town, which is substantially smaller than the almost 4000 square-foot home in which she lived for almost 18 years with Mr. L.

2. Amount and Duration

- [170] Having found that Ms. H has entitlement on both compensatory and non-compensatory grounds, I turn now to calculation of the amount and duration of the award for spousal support.

[171] I begin first with the issue of income disparity. As noted elsewhere, there was a significant disparity in the parties' incomes at the date of separation.

[172] In the three years prior to their separation, Ms. H's income hovered around \$50,000. However, in 2013, the separating year, Ms. H's income rose to \$63,599 (I have excluded from this figure \$4,500 received in spousal support). No explanation was given for this increase; there is no indication that Ms. H changed jobs or received a work bonus during the 2013 year. However, in all of the years prior to separation (except 2010), Ms. H's line 150 income included rental income received by Ms. H. from Mr. L. for his law practice operations (which were located on the family property). It is possible that Ms. H's 2013 figures are inflated because of the inclusion of rental income, however, Ms. H did not supply her 2013 income tax returns, which could have provided some explanation. Ms. H's income is set out in the table below:

Table 1 - Claimant's Employment Earnings 2006-2017

YEAR

RESPONDENT'S

LINE 150 INCOME

RENTAL INCOME

RRSP

INCOME

SPOUSAL SUPPORT

LIVING

EXP.

SOURCE

2017

53,223

(net of union dues)

-

-

-

57,491

F8 FS May 2017

2016

53,793

-

-

-

-

T1 General

2015

59,906

-

-

12,000

-

Reassessment

+T1 General

2014

60,776

-

-

18,000

-

Reassessment

2013

68,099

-

-

4,500

-

Reassessment

2012

49,649

8,400

-

-

-

Reassessment

2011

57,336

4,772

-

-

-

T1 General

2010

72,755

-

23,067

-

-

Reassessment

2009

51,760

4,171

-

-

-

T1 General

2008

51,679

5,011

-

-

-

Reassessment

2007

49,118

5,050

-

-

-

Reassessment

2006

46,481

7,212

-

-

-

T1 General

[173] The following graph summarizes the respondent's income and historical earning patterns:

Table 2 - Respondent's Employment Earnings 2006-2017

YEAR

RESPONDENT'S

GROSS PROFESSIONAL INCOME

NET PROFESSIONAL INCOME

(Line 150)

RRSP INCOME

LIVING

EXPENSES

SOURCE

2017

204,000

*120,334

-

-

Extrapolated from Income Statement Jan 1/17-Jul 31/17

*expenses not all recorded

2017

200,000

40,000

-

115,504

F8 FS May 2017

2016

176,807

106,208

64,235

-

DRAFT

T1 General

2015

198,589

61,696

13,249

-

T1 General

2014

243,190

47,094

3,418

-

T1 General

2013

272,768

153,909

-

-

T1 General

2013

360,000

115,000

-

145,985

F8 FS April/13

2012

366,278

175,101

-

-

T1 General

2011

250,341

99,393

15,000

-

T1 General

2010

206,222

75,628

-

-

T1 General

2009

236,038

136,610

-

-

T1 General

2008

225,524

120,072

-

-

T1 General

2007

218,189

95,040

-

-

T1 General

2006

329,846

141,806

-

-

T1 General

[174] Even with Ms. H.'s potentially inflated earnings for 2013, there is a clear disparity of income between the parties. However, as can be seen from Table 2, in 2014, the income tax year immediately following separation, the respondent's income plummeted. He ceased making spousal support payments in September 2015, and argues that as of 2014, there no longer remained an income disparity between the spouses. It is in this context that the issue of imputation of income arises.

Income Imputation

[175] A number of things can be discerned from the income patterns above. In the five years up to and including separation, the respondent's net annual employment income averaged approximately \$125,000, with his gross professional income averaging approximately \$266,000, and his net income as a percentage of business income ratio equaling approximately 47%. In contrast, the three years post-separation (2014 to 2016) averages reveal approximately \$44,400 in net employment income and approximately \$206,000 in gross professional income, yielding a net income as a percentage of gross business income ratio of 22%. Not only has his gross business revenue declined, but his business expenses have also increased.

[176] The respondent calls this alignment of declining income with his new spousal support obligations, as a "perfect storm of crises", and attributes this dramatic drop in income to circumstances beyond his control. He claims that the loss of a senior staff member, coupled with hiring of an articulated student, and the discovery of a \$14,000 unpaid tax liability to the Canada Revenue Agency (CRA), all contributed to his inability to generate the same revenue as he had before, and an increase in his business expenses.

[177] The claimant contends otherwise. She points to what she says are anomalies in the business expenses claimed, inconsistencies between the respondent's stated financial crisis and his lifestyle, and lack of financial disclosure, as evidence of intentional underemployment or deception. She accuses him of "cooking the books" and points to the inordinately high level of business expenses and debts claimed for the 2014 to 2016 years. The claimant argues that I ought to impute income to him to the levels that it was at prior to their separation.

- [178] In *Heard v. Heard*, 2014 ONCA 196, at para. 35, the Ontario Court of Appeal noted that factors such as credibility and lifestyle, may support a trial judge's decision to impute income to the husband. In that case, the trial judge had regard to the vacations and expensive vehicles driven by the husband, as well as his failure to report disclose his income to the CRA as being evidence of deceit and fraud. See also *Dhaliwal v. Dhaliwal*, at para. 59.
- [179] Turning first to the expense anomalies, the respondent provided a satisfactory explanation as to why his insurance premiums had increased from the \$1,431 in 2014, to \$10,321 in 2015, and \$16,265 in 2016. He says that this increase in insurance fees was due to a \$10,000 deductible that had to be paid by virtue of him being successfully sued for missing a limitation date for a client.
- [180] Regarding bad debts, though they are higher in the three year period following separation, as compared to the five years prior to separation, the income tax returns reveal that even prior to 2013, Mr. L. had years with significantly high debts. Without more information, I am unable to conclude that the bad debt write-offs were improperly claimed.
- [181] Mr. L was also able to explain the reason for the higher travel expense in 2016 (he took their daughter SLSL with him to Vancouver while he attended a training course and she attended a concert). I also accept his explanation that a change in accounting practices caused what appears to be the higher telephone and utility expenses in 2015 and 2016; these are more consistent with the figures for 2009 and 2010, which were recorded by his more experienced assistant who left his employment in 2011. Finally, the changed accounting practices also explain the discrepancy in the reporting of client expenses subsequent to 2013. In previous years, the client expense category appears to have been split up into individualized categories such as court filing fees, witness fees, etc. However, in 2014, the expenses appear to be recorded under the client expenses category as one bulk entry. In 2015 and 2016, they seem to have been moved again, appear to now be reported in the recoverable expenses category.
- [182] I agree with the claimant that there is an inconsistency between the respondent's lifestyle, and his reported income. Despite claiming financial impecuniosity as being the basis for his inability to pay spousal support, the respondent has done little to alter his lifestyle to reflect his current income levels.
- [183] The respondent's 2017 Financial Statement reports an annual income of \$40,000, and expenses of \$115,504. Bearing in mind that the parties had two teenage children still living at home in 2013 when the respondent reported earnings of \$115,000 and claimed \$145,985 in annual expenses, the 2017 figures suggest that the respondent did not curb his expenditures to align them with what he says was his financial reality for the 2014 to 2016 years. This was also evident in his testimony at trial.

- [184] In 2017, the respondent traded in his 2007 GM Suburban truck for a brand-new GMC Yukon XL which was bought through financing, and cost \$67,589.45 before the trade in value was applied. Though he stated he "needed a new vehicle", there was no evidence of any urgency such that the vehicle had to be purchased in the 2017 year. Nor was there any satisfactory explanation as to why the respondent could not purchase a less expensive vehicle that was within his means. Under cross-examination, the respondent stubbornly refused to acknowledge that the purchase of this GMC Yukon XL vehicle was inconsistent with his reported income.
- [185] As a further example, the respondent continued making charitable donations in 2014 to 2016 that were significantly higher than those he had made prior to 2012. The donations made after 2014 exceeded \$3,600 per year, whereas prior to 2012, they averaged approximately \$1,200. Again, the respondent's explanation was less than satisfactory. The evidence shows that the respondent does not view his support obligations as having priority over discretionary spending on himself or for purposes that he deems more important.
- [186] The claimant also argues that the respondent's lack of financial disclosure ought to result in the making of adverse findings.
- [187] Rule 5-1(4) and 5-1(9) of the Supreme Court Family Rules, requires that a party to a family law proceeding involving child support for spousal support must provide a complete Financial Statement along with the parties "applicable income documents". The "applicable income documents" are defined under Rule 5-1(1) and include copies of all income tax returns for the 3 most recent taxation years, every notice of income tax assessment or reassessment issued to that person for the three most recent taxation years. In addition,
- (g) If the person is self-employed, the following information must be supplied for the 3 most recent taxation years:
- (i) the financial statements of the person's business or professional practice, other than a partnership;
- (ii) a statement showing a breakdown of all salaries, wages, management fees or other payments for benefits paid to, or on behalf of, persons or corporations with whom the person does not deal at arm's length
- [188] Failure to provide this financial disclosure entitles the court to draw an adverse inference under s. 213(2)(b) of the FLA, such that the court may attribute income to that person in an amount that the court considers appropriate, and make an order based on the inference: See *Armstrong v. Armstrong*, 2012 BCCA 166, paras. 46-48.
- [189] Prior to the trial, the claimant made several requests of Mr. L for his financial statements and other financial information for his professional practice. By the trial date, Mr. L had not disclosed this information, and on August 18, 2017, I issued an order requiring Mr. L to disclose financial information, namely source documents for his income tax returns, general ledger and trial balance statements. Though these were to have been produced by

September 8, 2017, due in large part to the toxic communication style between the parties, I had to issue a further order on October 6, 2017, allowing the claimant to inspect the source documents at the respondent's home. As a consequence, the trial could not continue as scheduled, and was adjourned to a later date.

- [190] While Mr. L. did ultimately provide financial disclosure, there was remaining at trial, a significant lack of evidence with respect to his 2017 income. The figures in Table 2 suggest that his income started increasing in 2017, and appears to be well on its way to returning to his pre-separation income levels. However, Mr. L has provided no reliable evidence for this court to be able to extrapolate his income from his 2017 income statement. Mr. L testified that the expense figures set out in that income statement did not include various expenses, and as such could not be relied upon to reflect his actual income to date.
- [191] I also did not find Mr. L to be entirely forthright in his testimony with respect to his financial situation. He tended to overstate his financial difficulties. For example, he testified that his income had gone down since 2012 when in fact, as can be seen in Table 2, his second highest earnings since 2006 were in 2013 (the highest being in 2012).
- [192] Mr. L has the added challenge of explaining why he under-reported his income in his 2013 Financial Statement. The figures in table 2 reveal that Mr. L's net business income as reported in his 2013 Financial Statement does not accord with his actual earnings in either 2012 or 2013. While Mr. L appears to have based his gross business income figures on his 2012 income tax returns, the net business income figures are inconsistent with the net income he received in that taxation year. Indeed, not only did Mr. L underreport his income in his 2013 Financial Statement, he also failed to attach his 2012 income tax returns, which would have revealed that his earnings were significantly higher than the \$115,000 income that he reported for that year.
- [193] For his part, Mr. L. urges me to make adverse findings of credibility as against Ms. H. saying that she has also been non-compliant with financial disclosure. However he does not ask me to impute income to her. As noted elsewhere, Ms. H.'s Financial Statement was grossly inadequate, as was her financial disclosure, raising concerns as to her credibility in financial matters.
- [194] As regards Mr. L. however, the situation is more serious. The various concerns with his evidence lead me to conclude that this case is appropriate for imputing income to Mr. L.
- [195] For the years 2014-2017, I am imputing an income of \$75,000 to Mr. L. This is lower than the income that Mr. L. was earning in the three years prior to separation, however, I do not believe that it is fair to impute an income at the 2012 and 2013 levels, when Mr. L.'s income peaked. Given the volatile nature of the respondent's professional practice, I have imputed an income which matches with the lowest historical net earnings Mr. L. experienced prior to the parties' separation, ie. those from the 2010 year (see Table 2). The gross business income for 2010 of \$206,222 is also in line with Mr. L.'s anticipated gross business income for the 2017 year (\$204,000) and will more than adequately address any expenses that he did

not claim prior to the completion of the 2017 Income Statement.

[196] Mr. L.'s income for support purposes from 2018 onwards will be based on his actual earnings as evidenced by his income tax returns for the year prior.

Amount

[197] Neither party addressed the Spousal Support Advisory Guidelines ["Guidelines"], nor did they provide me with any Guidelines based calculations for either spousal support or child support. Rather they both used the \$1,500/month Interim Separation Agreement, made on a without prejudice basis, as the reference point for payment of retroactive spousal support.

[198] While not binding, the Guidelines do provide a "useful tool" for determining amount and duration of spousal support: *Yemchuk v. Yemchuk*, 2005 BCCA 406, para. 64. The court in *McEachern*, noted as follows (at para. 64):

As has been stated by this Court on prior occasions, the Advisory Guidelines are simply guidelines; they are not law. The formulas need not be slavishly adhered to by judges, who must always have regard to the particular facts before them. Those facts may disclose valid reasons why the Advisory Guidelines are not of particular assistance in a given case, or why an award may justifiably be greater or less than that set out in the applicable formula.

[199] The Interim Separation Agreement does not stipulate what guideline income was being used for calculation of interim spousal support of \$1,500 per month. However, using \$150,000 for Mr. L.'s income, and \$63,000 for Ms. H.'s income, the "without child support formula" yields a spousal support payment of \$1,508/month in all ranges. This is almost identical to the amount the parties agreed to in their Interim Spousal Agreement and is also consistent with the parties' incomes in 2013. The \$1,500/month spousal support payment also falls within the ranges in the "with child support formula" which yields a low of \$842/month, mid of \$1,317/month, and high of \$1,792/month.

[200] Based on the amounts suggested by the Guidelines, the spousal support agreed to by the parties in the Interim Separation Agreement, is fair for the period October 1, 2013 to September 1, 2015, and ought not to be disturbed. For that same period, child support will be calculated using the incomes of the parties that are consistent with their 2013 earnings, ie. \$150,000 for Mr. L. and \$63,000 for Ms. H.

[201] Although Mr. L. argues that he has paid \$36,000 in spousal support between October 1, 2013 and September 1, 2015, that is inaccurate. As noted at Table 1, Ms. H. reported \$34,500 in spousal support. This number is consistent with 23 payments having been made between October 1, 2013 and September 1, 2015.

- [202] I do not agree that the Interim Separation Agreement should continue beyond September 1, 2015. The intention of the parties was that they would not be bound by the agreement, and were free to argue for different outcomes at trial. I am satisfied that based on the evidence, the incomes used to calculate spousal support in the agreement will generate an unfair outcome from September 2015 onwards, as they are not reflective of the parties earnings in subsequent years.
- [203] Thus, Mr. L.'s request to have the Interim Separation Agreement terminate effective September 1, 2015, is allowed. Spousal support for the period after September 1, 2015, is calculated using Mr. H.'s imputed income of \$75,000/year, and Ms. H.'s actual income as set out at Table 3. The resulting amounts are also contained at Table 3 and will not be repeated here.
- [204] Spousal support for the period August 1, 2018, onwards, is to be calculated based on Mr. L.'s income for the 2017 year; and for each year thereafter in which spousal support is payable, spousal support will be adjusted effective July 1, based on Mr. L.'s income for the prior year.

Duration

- [205] The Guidelines suggest a period of support of indefinite duration in this case. In *Fisher*, the court recognized that "age is a strong indicator of an individual's ability to become self-sufficient." (para. 107)
- [206] The duration of the compensatory award is determined not by when the spouse achieves economic self sufficiency, but rather when compensation is achieved: *Chutter* at para. 79; *Tedham v. Tedham*, 2005 BCCA 502 at para. 60; *Morigeau v. Moorey*, 2015 BCCA 160 at para. 37.
- [207] Balancing the parties' circumstances to determine if spousal support should be indefinite or for a fixed term, requires a review of: the length of time that they cohabitated; their ages; their incomes and prospective incomes; the effects of equalization; the stages they are at in their careers; contributions made to the marital standard of living; participation in childcare and household responsibilities; ages of their children; and their reasonable expectations. Also relevant are the claimant's need for transitional support and her claim for compensatory support: *Fisher v. Fisher*, para. 84.
- [208] Based on the above circumstances, I find that spousal support should be set for an indefinite period. Payment of such support may be reviewed annually, commencing July 1, 2019.
- [209] As long as spousal support is payable, the parties are to exchange income information by July 1st of each year. This information is to include filed Income Tax Returns, and notices of assessment or reassessment from the CRA, within 14 days of receipt.

Retroactive Support

[210] In *Gil-Eldh v. Branyik*, 2018 BCCA 98, paras. 22 to 25, the court discussed the principles of retroactive awards, as enunciated in *D.B.S. v.S.R.G.*, 2006 SCC 37. Based on those principles, and having regard to the fact that Mr. L.'s obligation to pay spousal support pursuant to the Interim Separation Agreement remained owing pending agreement or court order, a retroactive spousal support award is appropriate in this case.

H. CHILD SUPPORT

[211] As with most of the claims made in this proceeding, the claim for child support was not properly articulated nor properly defended. The claimant's Amended Notice of Family Claim seeks child support pursuant to the Federal Child Support Guidelines, S.O.R./97-175 [CSG], for all three children. The claimant also seeks special or ordinary expenses in accordance with s. 7, for the children's post secondary education, extracurricular activities, and travel during high school. The specifics of what is being sought by the claimant, are set out more fully at p. 9 of the Amended Notice of Family Claim, as follows:

SAL: post secondary education expenses retroactive to October 1, 2013 through until May 17, 2016, at which time SAL graduated from Mount Allison University, New Brunswick.

SKL: child support sought from October 1, 2013, to September 1, 2014. Education related expenses for post secondary education at the University of Victoria until graduation in April 2018.

SLSL: child support from October 1, 2013, onwards, for as long as she remains a dependent and/or full-time university student. Reimbursement for expenses related to her grade 10 extracurricular trip to Europe and a planned trip to New York in 2018.

[212] In his Amended Counterclaim, the respondent seeks child support with respect to SLSL, based on the CSG. His amended counterclaim does not seek reimbursement for s. 7 expenses, although the respondent did revise his position at trial, after the claimant revised her position and sought reimbursement for s. 7 expenses which the respondent did not previously have notice of.

[213] Though it was sought in his Amended Counterclaim, the respondent did not argue for child support at trial. In fact, Mr. L opposed any orders for child support, stating that no child support order should be made with respect to SLSL, as she spends equal time at both parents' homes, and both parents' incomes are "very close". He does not address why he believes that there should be no order made for child support with respect to the two older children.

1. Legal Framework

[214] The first issue I must decide is whether the children are or were, children of the marriage, during the periods of time for which support is being sought.

[215] The court can make an order for child support under the DA only if the child in question comes within the definition of a "child of the marriage" in s. 2(1) and (2) of the Act:

2. (1) child of the marriage means a child of two spouses or former spouses who, at the material time,
 - (a) is under the age of majority and who has not withdrawn from their charge, or
 - (b) is the age of majority or over and under their charge but unable, by reason of illness, disability or other cause, to withdraw from their charge or to obtain the necessities of life .

[216] The age of majority is that of the province in which the child resides (in British Columbia, 19 years old): DA s. 2(1).

[217] Thus, a child can remain a child of the marriage even if they are over the age of majority, so long as it is established that they are not able to withdraw from their parents' charge, or obtain the necessities of life. The parent who alleges an adult child remains a child of the marriage bears the burden of proof on a balance of probabilities: *Classen v. Anima*, 2011 BCSC 868.

[218] Similarly, a child who is under the age of majority will no longer be a child of the marriage if that child has withdrawn from their parents' charge.

[219] Enrollment in post-secondary education can be a valid reason for continued support. The issue raised for the court is whether the child's educational pursuits are reasonable, and if so, whether it is appropriate for the parents to finance the child's education (*Nordeen v. Nordeen*, 2013 BCCA 178).

[220] Master Joyce (as he then was) set out eight factors in *Farden v. Farden* (1993), 48 R.F.L. (3d) 60 (B.C.S.C. Chambers), which are helpful in determining whether a child's educational pursuits justify retaining the status of child of the marriage:

- (1) whether the child is in fact enrolled in a course of studies and whether it is a full-time or part-time course of studies;
- (2) whether or not the child has applied for or is eligible for student loans or other financial assistance;
- (3) the career plans of the child, i.e. whether the child has some reasonable and appropriate plan or is simply going to college because there is nothing better to do;
- (4) the ability of the child to contribute to his own support through part-time employment;
- (5) the age of the child;
- (6) the child's past academic performance, whether the child is demonstrating success in the chosen course of studies;

- (7) what plans the parents made for the education of their children, particularly where those plans were made during cohabitation;
- (8) at least in the case of a mature child who has reached the age of majority, whether or not the child has unilaterally terminated a relationship from the parent from whom support is sought.

[221] The Farden factors do not establish a minimum requirement for discharging the burden of proof. Rather, as noted by the Court of Appeal in *Darlington v. Darlington* (1997), 32 R.F.L. (4th) 406 (B.C.C.A.), at paras. 14-15, the Farden factors are a non-exhaustive list which trial judges have found useful in examining the question of status. The applicant is not required to lead evidence on each of these factors to discharge the burden of proof on this issue.

[222] In *Darlington* the court dealt with an appeal of a chambers decision finding that the parties' 19-year-old daughter, was a child of the marriage within the meaning of the DA. The mother made a declaration in her affidavit that the daughter was attending post-secondary education, living with the mother, and dependent on the mother. The father argued that there was insufficient evidence for the chambers judge to make the finding that the daughter continued to be a child of the marriage. Notably, the father did not seek leave to cross-examine the mother on her affidavit, or to question the daughter as to her circumstances. In upholding the chambers judge's finding, the court stated as follows (para. 16):

In the present case Mrs. Darlington made the essential averment that Debra is dependent on her by reason of her full time studies and that as a result of the dependency Debra is living at home. It may have been preferable for Mrs. Darlington to have elaborated on the dependency and provided greater detail of Debra's financial circumstances, but in my opinion she supplied sufficient facts for the judge to reach his conclusion. Had Mr. Darlington wanted a more extensive inquiry he could have sought leave to cross-examine Mrs. Darlington on her affidavit or probed the matter more deeply by other methods available under the Rules of Court. In not doing so, he took the risk that his argument on the sufficiency of evidence on dependency would fail.

[223] The court may look into the reasonableness of the educational program of the child, coupled with the resources of the parents, before determining that continued support should be paid (*Jonasson v. Jonasson* (1998), 37 R.F.L. (4th) 266 (B.C.S.C.)).

[224] Support obligations may continue beyond the first degree. The student's eligibility for financial assistance does not necessarily mean a cut off of child support (*Neufeld v. Neufeld*, 2005 BCCA 7). In *Neufeld*, the intention of the parties regarding their child's second post-secondary degree in medicine was a relevant consideration. The court held that the child continued to qualify for child support as a child of the marriage. See also *De Beck v. De Beck*, 2012 BCCA 465.

[225] Relief from a portion of child support payments may be granted to a payor parent for periods during which a child of the marriage takes a break from post-secondary schooling, lives at home, and works part time: *Sherlock v. Sherlock* (1998), 36 R.F.L. (4th) 301 (B.C.S.C.). Likewise, a child pursuing post-secondary education, living with a friend, working part-time, and receiving student loan income may not qualify as a "child of the marriage" during that period. That said, as noted in *Hartshorne v. Hartshorne*, 2010 BCCA 327 at para. 77, such child "may return to that status for a variety of reasons At such a time, an adult child may again be entitled to child support."

2. Analysis

[226] At the date of trial, SAL was 23 years old and had just finished her Bachelor of Arts degree. She currently lives in Vermont. She wants to be a lawyer. Although her closing arguments sought "child support...for all three children of the marriage while dependents", in her Amended Notice of Family Claim, Ms. H. only seeks reimbursement for s. 7 expenses with respect to SAL.

[227] SKL is in her final year of her Bachelor of Arts program at the University of Victoria. She was 21 at the time of trial. She also wants to be a lawyer. The claimant seeks child support for the period from October 1, 2013, to September 1, 2014, while she was still living at home.

[228] SLSL graduated from high school on June 30, 2017. She is 18 years old. She is taking a gap year, in order to work full time to save money for school. During her gap year, she will be sharing her time equally between both parents' homes. She plans to travel and to be an actor. The claimant seeks child support from October 1, 2013, onwards, for as long as she remains a dependent and/or full-time university student.

[229] The above is the totality of the evidence that the court was provided with respect to the children's financial situation, living arrangements, or educational pursuits.

[230] I am satisfied on the evidence before me that SAL continued to remain a child of the marriage until May 2016. During that time, she was enrolled in University full-time, and was dependent upon her parents for her education related expenses, through to the completion of her Bachelor of Arts Degree, which she completed successfully in May 2016. As no child support is being sought in relation to her, I am not making such order. However, the claimant does seek s. 7 expenses. That claim will be addressed in the next section.

[231] With respect to SKL, I am also satisfied that SKL continues to remain a child of the marriage through until the completion of her Bachelor of Arts degree, which will occur in April 2018. Although she may well continue to remain a child of the marriage beyond that time, no such order was sought. The parties did not provide me with any evidence as to SKL's living arrangements from October 2013 to September 2014. I have based my assumption that parenting time was shared equally, in light of the close relationship that both parents have

with their children, and the living arrangements with respect to SLSL.

- [232] SLSL continued to be a child of the marriage until June 2017 when she graduated from high school. During that time, she split her residence equally between both her parents.
- [233] From July 1, 2017 onwards, the evidence before this court is that SLSL is taking a gap year while working full time and living at home in a shared parenting arrangement. SLSL will continue to remain a child of the marriage until she reaches the age of majority in July 2018. As such, no child support is payable beyond that date. At that time, depending upon her plans she may be able to reinstate herself as a child of the marriage. There is no evidence before me as to her educational plans, and as such I will not make determinations with respect to her status beyond July 2018.
- [234] The following table sets out the child support calculations based on an equal shared custody arrangement, and allowing for the operation of the Interim Separation Agreement for the time period October 1, 2013, to September 1, 2015. Due to the imprecise nature of the evidence provided to me, the child support calculations for the period October 1, 2013 to September 1, 2015, are also imprecise.
- [235] The calculation inputs for Table 3 recognize that Ms. H. was in receipt of \$1,500/month in spousal support payments. However, given that Mr. H.'s income dropped in 2014, I have used the low end of the child support amounts yielded using this methodology. This results in a combined spousal support and child support payment of \$1,913/month, for two children, from which I have subtracted the spousal support received, to get the net figure of monthly child support owing of \$413/month. For the one child formula, the total amount is \$1,726, from which \$1,500 is subtracted, yielding a net monthly payment owing of \$226/month.
- [236] Calculations after September 2015, are based on the previous year's income of each spouse, as is typically done in calculating support payments (*J.(K.M.) v. N. (J.H.D.)*, at para. 114), with the exception that the income used from Mr. L. is his imputed amount. I have used the mid range yielded by these calculations.

Table 3 Child Support Payable

SCENARIO

DATES

CLAMANT INCOME

RESPONDENT INCOME

*Imputed

Spousal Support Owing

Child Support Owing

Total Owing

2 children

Oct - Dec 2013 (3 mos)

63,000

150,000

1500/mo

= 4,500

413/mo

= 1,239

2 children

Jan - Sept 2014 (9 mos)

63,000

150,000

1500/mo

=13,500

413/mo

= 3,717

1 child

Oct - Dec 2014 (3 mos)

63,000

150,000

1500/mo

= 4,500

226/mo

= 678

1 child

Jan - Aug 2015 (8 mos)

63,000

150,000

1500/mo

= 12,000

226/mo

= 1,808

1 child

Sept - Dec 2015 (4 mos)

42,776

75,000*

261/mo

= 1,044

311/mo

= 1,244

1 child

Jan - Dec 2016 (12mos)

47,906

75,000*

53/mo

= 636

263/mo

= 3,156

1 child

Jan - Dec 2017 (12mos)

53,793

75,000*

0

211/mo

= 2,532

1 child

Jan - July 2018 (7 mos)

53,223

75,000*

0

216/mo

= 1,512

Calculation includes prospective amounts

Total Support Payable

36,180

15,886

52,066

Less Amounts paid

34,500

0

34,500

Net Amount Owing

1,680

15,886

17,566

[237] As is evident from Table 3, a majority of the child support claimed by Ms. H. relates to retroactive amounts. The respondent did not raise or address any considerations that affect the making of retroactive child support or spousal support awards. These were explained by the court in D.B.S., supra, and S.(L.) v. P.(E.), 1999, BCCA 393.

[238] In Kerr v. Baranow, [2011] 1 S.C.R. 269, the court noted that because child support is the right of the child, blameworthy factors are not as important in determining the appropriateness of retroactive child support orders (para. 208).

[239] I do not find that there is unexplained delay on the part of Ms. H, such that it would disentitle her from receiving retroactive child support.

- [240] I also note that while there was no existing child support order, it should have been apparent to Mr. L. (as a family lawyer) that child support obligations would arise on separation, given the substantial income disparity between the spouses. However, he has maintained a position through to trial, that child support is not payable because the children reside in a shared parenting arrangement, contrary to s. 9 of the CSG.
- [241] The existence of financial challenges on the part of the payor spouse do not justify a refusal to pay child support, or for the court to decline to make a retroactive order: *J.(K.M.) v. N. (J.H.D.)*, 2014 BCSC 1895, at para. 121.
- [242] Having regard to the authorities and the facts of this case, I am of the view that the circumstances in this case warrant the making of a retroactive child support order in the amounts set out in Table 3. Thus, the total amount of child support and spousal support owing by Mr. L. to Ms. H., on a retroactive and prospective basis, is \$17,566.

I. SECTION 7 EXPENSES

- [243] In addition to the claim for child support, the claimant has advanced a claim for reimbursement from the respondent, various child related expenses from 2014 onwards. Section 7 of the CSG sets out the methodology by which certain child related expenses can be claimed by either spouse.

7 (1) In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

- (a) child care expenses incurred as a result of the custodial parent's employment, illness, disability or education or training for employment;
- (b) that portion of the medical and dental insurance premiums attributable to the child;
- (c) health-related expenses that exceed insurance reimbursement by at least \$100 annually, including orthodontic treatment, professional counselling provided by a psychologist, social worker, psychiatrist or any other person, physiotherapy, occupational therapy, speech therapy and prescription drugs, hearing aids, glasses and contact lenses;
- (d) extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs;
- (e) expenses for post-secondary education; and
- (f) extraordinary expenses for extracurricular activities.

- [244] Ms. H. seeks reimbursement of expenses under categories (d), (e), and (f).

- [245] Though Mr. L. acknowledges that Ms. H did pay for many child related expenses post-separation, he argues that he has borne a significantly larger portion of the s. 7 expenses, and as such, no monies are payable to Ms. H. However, he is not seeking reimbursement, but rather simply a setoff.
- [246] Following their separation, the parties had an arrangement whereby s. 7 expenses were shared such that Mr. L paid for 70% of the expenses incurred, whereas Ms. H paid for 30%. This was consistent with a proportionate share calculated using the 2013 income of the parties. I do not have any evidence as to how long this agreement was in existence, but both parties contend that despite the agreement to split the expenses, the other spouse failed to reimburse the paying spouse. At some point, the agreement appears to have collapsed.
- [247] Mr. L produced documentary evidence, such as copies of returned checks and credit card statements to prove his expenses. In contrast, none of the expenses claimed by Ms. H. were corroborated with receipts or other admissible evidence. Rather, Ms. H relied on emails and spreadsheets created by herself as evidencing the existence of these liabilities. These were not admissible for the truth of their contents, and as such Ms. H has failed to prove her claim. However, even if they were admitted for the truth of the contents, I am satisfied that the expenses have been shared equitably and fairly by the parties since separation.
- [248] Going forward, special or extraordinary expenses are to be shared proportionately based on the parties' incomes which are set in accordance with this decision. This includes all expenses incurred from August 1, 2017, onwards.
- [249] Commencing from August 1, 2017, the parties are entitled to set off their share of section 7 expenses, as against any contributions that they make to the children's RESP's.
- [250] The claimant's Form F8 Financial Statement ("Financial Statement") is silent on the existence of any RESP's. However, in his April 2013 Financial Statement, the respondent discloses the existence of three RESP's as follows:
- NEI investments RESP established in 1995, and now totaling \$15,967.26
 - Credential Direct RESP established in 2011 and now totaling \$12,811.51
 - BVCU RESP established in 1998 and now totaling \$21,703.83
- [251] In his May 2017 Financial Statement, the respondent discloses the following RESP's:
- Credential Direct RESP established in 2011 and now totaling \$20,635.41
 - BVCU RESP established in 1998 and now totaling \$28,004.11

- [252] Based on the date on which each of the RESP's were established, and their respective status as at May 2017, one can reasonably conclude that the NEI investments RESP was held for and used for the benefit of SAL. It is also evident that contributions were made to SKL's and SLSL's RESP's post-separation, however, I have no evidence as to who made those contributions or in what amounts.
- [253] The claimant has not challenged the accuracy of the RESP holdings disclosed by the respondent. Though the respondent controls the distribution of these funds, neither party has sought any orders with respect to these funds, and I do not deem it necessary to do so. I am satisfied that the respondent, who presumably controls the distribution of these funds, will use these monies for the benefit of the children's education.

J. DIVORCE

- [254] I am satisfied on the evidence and record before me that a divorce order should be granted pursuant to section 8(1) of the DA. The requisite criteria for granting a divorce have been satisfied. Proper service of these proceedings has taken place. Both parties have testified that they wish to be divorced; there is no chance of reconciliation; and there has been no collusion.
- [255] The Claimant, S.A.H., and the Respondent, I.B.L., who were married at Kelowna, British Columbia, on September 29, 1990, are divorced from each other. In accordance with s. 12(1) of the DA the divorce is to take effect on the 31st day after the date of this order.

K. ADDITIONAL ORDERS MADE

- [256] At the conclusion of the proceeding, the respondent sought anonymization of the proceedings. The claimant opposed the request citing public policy reasons grounded in the open court concept. The court may grant anonymization through statutory authority or exercise of its inherent jurisdiction. Section 206(b) of the FLA, permits the court to make an order prohibiting publication of the identity of a party or child where publication would have an "adverse effect" or cause "undue hardship".
- [257] In deciding whether to anonymize proceedings, the court balances the public interest in having an open court, against privacy interests of the litigant and/or the need to protect the integrity and fairness of judicial proceedings. I am satisfied that these proceedings ought to be anonymized. However, I will not accede to the respondent's request that aliases be used when anonymizing. In my view, anonymization in the usual manner will adequately address the respondent's concerns (note need to anonymize the city names that will be sufficient).
- [258] Pursuant to s. 206(b) of the FLA, these proceedings are to be anonymized in the event of publication.

L. COSTS

[259] Success has been divided on the various issues raised by the parties. As such, each party should bear their own costs of the action. Should a party wish to make submissions on this point, they may prepare written submissions up to a maximum of five pages in length, for the court's consideration. These should be submitted through Supreme Court scheduling within 30 days of these reasons for judgment.

"Shergill J."

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