

CANADA / JUDGMENT

S.E.H. v. S.D.H.

2022 BCSC 1937

COURT

Supreme Court of British Columbia

DECIDED

7 November 2022

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2022 BCSC 1937 S.E.H. v. S.D.H.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.E.H. v. S.D.H.,

2022 BCSC 1937

Date: 20221107

Docket: E45604

Registry: Penticton

Between:

S.E.H.

Claimant

And

S.D.H.

Respondent

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Claimant:

D.M. King

The Respondent, appearing in person:

S.D.H.

Place and Date of Trial:

Penticton, B.C.

September 13-16, 2022

Place and Date of Judgment:

Penticton, B.C.

November 7, 2022

Table of Contents

Introduction.. 3

Facts.. 3

Parties Positions and Agreements.. 7

Issues.. 9

Analysis.. 10

Parenting - Final Decision-Making Authority. 10

Legal Principles. 10

Discussion. 12

Family Property and Debts. 13

Legal Principles. 13

Discussion. 14

Pension Division. 29

Support 30

Incomes. 30

Child Support 31

Spousal Support 32

Costs.. 39

Orders.. 44

Introduction

- [1] In this family law case the parties began living in a marriage like relationship in October, 2010. The date of separation is disputed. It is either June 30, 2019 or November 13, 2019. There are two children of the relationship; T.H., 11 years of age, and R.H. 7 years of age. The pleadings raise issues of parenting, child and spousal support, and division of family property and debt. The parties have mostly agreed on the parenting issues and child support. The main issues relate to spousal support and division of family property and debt.

Facts

- [2] Before setting out my relevant findings of fact, I note that there was much evidence which was not relevant to the issues to be decided. In particular, there was evidence about the reasons for the relationship breakdown and the aftermath of the breakup. That evidence is not relevant to the issues I must decide and I will not comment on it.
- [3] The parties first met while in secondary school and then became re-acquainted in 2005 or 2006 in Vancouver. The claimant was a nurse at St. Paul's Hospital. The respondent was a car salesman, although it is unclear whether he was working in Kelowna or Vancouver at the time.
- [4] The parties began living together in October of 2010. At the start of the cohabitation, both parties owned real properties. The respondent owned a condominium in Port Coquitlam, which he later sold. The claimant owned a condominium on West 14th Avenue, Vancouver (the "West 14th property"), that she had purchased in 2007.
- [5] The parties initially lived together in the claimant's West 14th property.
- [6] In 2010 and subsequently, the respondent had multiple health setbacks. He was diagnosed with multiple sclerosis, a disease from which he continues to suffer. He also broke his leg, had appendicitis and was found to have a cancerous tumour. He also lost his job in Kelowna, which appears to have been a consequence of one or more of his health problems.
- [7] The respondent had a partial colectomy surgery in 2012 and was declared cancer free in 2017.
- [8] The claimant testified that she supported the respondent throughout the time he was ill by attending appointments with him and by looking after the children.
- [9] The parties' first child, T.H., was born March X, 2011. The claimant took one year of paid maternity leave after the birth of T.H.
- [10] In late 2012, the respondent sold his Port Coquitlam condominium. The proceeds from the sale of that property were used, in part, to pay off debt in the amount of approximately \$55,000 and, in part, for a down payment on a loft in the Gastown district of Vancouver (the "Gastown loft"), which the parties purchased jointly in 2013 for \$448,000.

- [11] Upon the purchase of the Gastown loft, the parties moved from the West 14th property into the Gastown loft.
- [12] The West 14th property was not sold when the parties moved to Gastown. Rather, it was rented to tenants and remains in the name of the claimant.
- [13] In 2013 or 2014 the respondent took up new employment with Guard.me Insurance as an insurance salesman. He was required to travel often for his work. He continued to work for Guard.me until 2019.
- [14] The parties' second child, R.H., was born October X, 2015. After the birth, the claimant again took paid maternity leave of one year and also used some of her vacation time. In total, she says she was off work for 14 months after the birth of R.H.
- [15] The parties were living beyond their means after moving into the Gastown loft and were falling behind financially. As a result, they sold the Gastown loft for \$775,000 in 2017. After payment of the outstanding mortgage and sales costs, the parties received approximately \$350,000 from the sale of the Gastown property. They used this money for several purposes: approximately \$124,000 was used as a down payment on a 4-plex at 7208-89th Street, Osoyoos (the "Osoyoos 4-plex"); a portion was used to pay off the debts the parties had accumulated; and the balance was used to purchase a camping trailer and truck.
- [16] The exact dates of the sale of the Gastown property and the purchase of the Osoyoos 4-plex were unclear from the testimonies of the parties. However, a letter from CIBC dated May 10, 2017, indicates that the purchase occurred on March 8, 2017, and at his examination for discovery, which was read into evidence at the trial, the respondent testified that the Osoyoos 4-plex was purchased three or four months after the Gastown loft was sold. This means the sale of the Gastown loft occurred in December 2016 or January 2017.
- [17] The Osoyoos 4-plex was purchased in the sole name of the respondent. It was purchased for \$450,000. The amount that was financed initially is not entirely clear. With a down payment of \$124,000 the amount to be financed would be roughly \$326,000. However, the CIBC letter dated May 10, 2017, indicates that the mortgage amount then owing was \$331,230 and that the remaining term of the mortgage was 24 years, nine months. Clearly, the amount financed was more than \$331,000, unless the parties failed to make all required mortgage payments. In any event, the exact amount is not material.
- [18] The Osoyoos 4-plex was not initially purchased as a family home but as an investment.
- [19] It is unclear on the evidence where in Vancouver the family was living after the sale of the Gastown loft. However, in the claimant's opening statement her counsel stated that the parties moved back into the West 14th property.
- [20] The events surrounding the summer of 2019 and the move of the family to Osoyoos are disputed and I will address that evidence in detail in the section of these reasons relating to the date of separation. For the purposes of the present narrative, it is sufficient to know that

at the end of June 2019 the respondent commenced living some of the time in the Osoyoos 4-plex and that the claimant and children moved to Osoyoos in late August 2019. They all lived together in suite D of the Osoyoos 4-plex until November of 2019 when the respondent and the children moved into suite C of the 4-plex.

- [21] Notwithstanding the move to Osoyoos, the claimant continued to work at St. Paul's hospital until September 2019. She eventually obtained a new position in Oliver, British Columbia as a nurse working in acute care. It was initially a temporary position working 0.75 of a full-time position but she was later given a permanent position working 0.61 of a full-time position. Importantly, the claimant did not testify whether this was more or less or the same as she worked at St. Paul's hospital or whether it was possible for her to work more hours. She merely testified that her part-time position works with child care scheduling.
- [22] In November of 2019, while the respondent was on a trip to Toronto, the claimant and the children moved into an empty suite in the Osoyoos 4-plex, suite C. The parties have not lived together since.
- [23] I pause here to note that the claimant obtained the assistance of R.M. and D.F. to help her move furniture into the suite she intended to occupy with the children. These individuals were subpoenaed by the respondent to testify at the trial. They had no relevant evidence to give other than they moved a couch and a dresser. In my view, there was absolutely no basis for subpoenaing these gentlemen and it was an abuse of the court's process for the respondent to have done so.
- [24] Since November 2019, the claimant and children have continued to live in suite C of the Osoyoos 4-plex, except when the children are visiting the respondent. The respondent continues to live in suite D of the Osoyoos 4-plex. The claimant testified that she continues to live in suite C for the simple reason that she cannot afford to move out. Her plan, however, is to find another residence for her and the children in Osoyoos.
- [25] In June of 2020, the respondent's employment with Guard.me was terminated effective immediately. In November of that same year he obtained full time employment with C&C Insurance Consultants as a senior account manager. His remuneration is comprised of a base salary of \$74,000 per year plus a commission bonus of 5%. The respondent testified in cross-examination that he hopes to get a raise when his employment review is held, which has not yet occurred.
- [26] The Line 150 incomes of the parties are set out in their income tax returns that are attached to their respective F8 Financial Statements. Their respective Line 150 incomes for the years 2019 to 2021 are:

Year

Claimant

Respondent

2021

\$76,459

\$75,907

2020

\$82,721

\$95,038

2019

\$61,222

\$84,913

[27] It is to be noted that the incomes of both parties are comprised of employment income and rental income. The claimant receives rental income in respect of the West 14th property and the respondent receives rental income from the Osoyoos 4-plex. For the 2021 tax year, the claimant's income was comprised of \$73,970 in employment income and net rental income of \$2,489.12. For the same year, the respondent's income was comprised of \$76,071 in employment income and a net loss on rental income of \$232.

Parties Positions and Agreements

[28] Many of the issues raised in the pleadings were resolved by the time of trial or during the course of the trial. Specifically, the parties are agreed that:

- a) The parties will remain the joint guardians of the children;
- b) The parties will share parenting of the children on a week-on week-off basis with the exception that in the summer they will each have a two-week block with the children;
- c) The s. 41 responsibilities under the Family Law Act, S.B.C. 2011, c. 25 [FLA] are to be shared; and
- d) The party with whom the children are not living in a particular week will have video communication with the children mid-week of that week.

[29] Two further issues that were resolved during the course of the trial related to whether recommended orthodontic treatments for T.H. were necessary and how the costs of T.H.'s participation in elite soccer should be shared. At the trial, in the course of his cross-examination, the respondent agreed to the orthodontic treatments and also agreed to a proposal by the claimant on the sharing of the costs associated with soccer.

[30] These agreements will be included in the orders that I make.

- [31] The parties are not agreed on what should happen if they are unable to agree on a decision involving the children. The claimant requests an order that she be given the right to make decisions when they cannot agree and that the respondent have leave to apply to the court for directions pursuant to s. 49 of the FLA. The respondent submits that, if they cannot agree on a decision, there ought to be a mediation before a justice counsellor.
- [32] Although both parties in their respective pleadings, claimed spousal and child support, at the hearing, the respondent made no submissions requesting spousal or child support and the claimant conceded that no spousal or child support could be ordered given there is to be shared parenting and the incomes of the parties are similar. The claimant nevertheless requests that the court make various declarations and orders in relation to both child and spousal support.
- [33] The main issue between the parties concerns the division of family property and debt. Although they mostly agree on what constitutes family property and that they should each retain the family property in their respective names, they disagree on the separation date and the value of excluded property. In relation to family debt, they disagree on what family debt has been proven and the treatment of interest payments made on family debt after separation. The claimant's submissions further suggested an unequal division of family property and debt was appropriate.
- [34] The parties further disagree on how the claimant's pension should be divided and on whether the claimant should be required to pay occupation rent.

Issues

- [35] The issues for determination are:
- a) Should the claimant be given final decision-making authority in relation to the parental responsibilities under s. 41 of the FLA?
 - b) How should family property and family debt be divided, which involves:
 - i. What is the date of separation?
 - ii. What is the family property and family debt, including:
 - (1) What portion of the value of the West 14th property is excluded?
 - (2) How should interest payments made on family debt post-separation be treated?
 - (3) Should the claimant be required to account for notional occupation rent?
 - iii. What is the compensation payment required to equalized family property and debt?
 - iv. Should there be an unequal division of family property and debt?
 - c) How should the claimant's pension be divided?

- d) What orders should be made in relation to child support?
- e) What, if any, orders should be made in relation to spousal support?

Analysis

Parenting - Final Decision-Making Authority

Legal Principles

[36] Pursuant to s.37 of the FLA, in making orders in relation to custody, guardianship, and parenting arrangements the only factor to be considered is the best interests of the child. Section 37(2) of the FLA sets out the specific factors that must be considered in assessing what is in the best interests of the child. These are:

- (a) the child's health and emotional well-being;
- (b) the child's views, unless it would be inappropriate to consider them;
- (c) the nature and strength of the relationships between the child and significant persons in the child's life;
- (d) the history of the child's care;
- (e) the child's need for stability, given the child's age and stage of development;
- (f) the ability of each person who is a guardian or seeks guardianship of the child, or who has or seeks parental responsibilities, parenting time or contact with the child, to exercise his or her responsibilities;
- (g) the impact of any family violence on the child's safety, security or well-being, whether the family violence is directed toward the child or another family member;
- (h) whether the actions of a person responsible for family violence indicate that the person may be impaired in his or her ability to care for the child and meet the child's needs;
- (i) the appropriateness of an arrangement that would require the child's guardians to cooperate on issues affecting the child, including whether requiring cooperation would increase any risks to the safety, security or well-being of the child or other family members;
- (j) any civil or criminal proceeding relevant to the child's safety, security or well-being.

[37] Pursuant to s. 37(3) of the FLA, an order is not in the best interests of the child unless it protects, to the greatest extent possible, the child's physical, psychological and emotional safety, security and well-being.

[38] Section 39 of the FLA provides that the parents of a child remain the guardians of the child after separation, subject to certain exceptions not applicable here.

[39] Section 40 of the FLA specifies that only guardians have parental responsibilities unless ordered otherwise.

40 (1) Only a guardian may have parental responsibilities and parenting time with respect to a child.

- (2) Unless an agreement or order allocates parental responsibilities differently, each child's guardian may exercise all parental responsibilities with respect to the child in consultation with the child's other guardians, unless consultation would be unreasonable or inappropriate in the circumstances.
- (3) Parental responsibilities may be allocated under an agreement or order such that they may be exercised by
 - (a) one or more guardians only, or
 - (b) each guardian acting separately or all guardians acting together.
- (4) In the making of parenting arrangements, no particular arrangement is presumed to be in the best interests of the child and without limiting that, the following must not be presumed:
 - (a) that parental responsibilities should be allocated equally among guardians;
 - (b) that parenting time should be shared equally among guardians;
 - (c) that decisions among guardians should be made separately or together.

[40] The parental responsibilities to be exercised by a guardian are listed in s.41 of the FLA, including the right to make decisions respecting the child, the right to give or withhold consent and the right to obtain information regarding the child from third parties. Section 42 of the FLA requires that guardians exercise these parental responsibilities in the best interests of the child.

Discussion

- [41] The parties are agreed that they shall each remain guardians of the children, which is the presumptive position pursuant to s. 39 of the FLA, and that they shall share the parental responsibilities under s. 41 of the FLA. They disagree on whether the claimant should have final decision-making authority when they are not in agreement.
- [42] The claimant submits that she ought to be given final decision-making authority in relation to decisions affecting the children because the respondent does not inform himself of the day to day needs of the children and does not understand those needs. The claimant points specifically to the need for T.H. to have orthodontic treatments and the respondent not agreeing to same.

- [43] The respondent made minimal submissions on who should have final decision-making authority except to say that issues should be mediated by a family justice counsellor.
- [44] Having heard both parties give their evidence, it is reasonably clear that they are both responsible and caring parents. Indeed, neither suggested the other was not a good parent. Further, since separation they have been able to agree on most issues affecting the children.
- [45] In relation to the failure to come to an agreement on the orthodontic treatments for T.H., the need for such treatments initially arose in 2017 when an orthodontist in Vancouver recommended that T.H. have her jaw expanded at a quoted cost of \$4,000. The dental work was not done at that time, although it is unclear why. Importantly, the claimant did not testify that it was the respondent who then refused to agree to such treatment. On August 17, 2022, T.H. had another assessment and it was again recommended that she have work done. This time the quote was for approximately \$7,800. The claimant testified that the respondent refused to contribute to the cost of the treatment. During his cross-examination, the respondent testified that he did not disagree with T.H. getting the treatment, rather he thought it was appropriate to await the outcome of this trial.
- [46] I do not find the respondent's position on the orthodontic treatments to be unreasonable or disclosing a lack of insight into the best interests of the children. The renewed recommendation for orthodontic work was made less than one month before this trial was to commence and there is no suggestion that there is any urgency to the required treatment or that a delay of one month would be detrimental.
- [47] The presumption under the FLA is that parental responsibilities are to be shared. I am not satisfied that the respondent fails to inform himself of the needs of the children or does not understand those needs. I am further not satisfied that it is in the best interests of the children to depart from the presumption of shared responsibilities by giving the claimant final decision-making authority.
- [48] I therefore decline to make the order requested by the claimant. However, the suggestion that the parties mediate disagreements with a family justice counsellor before resorting to the courts is reasonable. This is the order that I will make.

Family Property and Debts

Legal Principles

- [49] Part 5 of the FLA addresses "Property Division". Under s. 81 of the FLA, each spouse is entitled to a presumptive one-half undivided interest in each family asset as a tenant in common upon separation. However, the presumptive one-half undivided interest under s. 81(b) is "subject to an agreement or order that provides otherwise and except as set out in Part 5 and Part 6 [Pension Division]". Thus, the undivided one-half interest as a tenant in common to which a spouse is presumptively entitled upon separation is subject to an order for reapportionment under s. 95.

[50] Subject to the exceptions in s. 85, "family property" is all real and personal property owned by one or both spouses at the date of separation (s. 84(1)(a)) or acquired by one or both spouses after separation if it derives from (the disposition of) property encompassed by subsection 84(1)(a).

[51] Pursuant to s. 86 of the FLA, family debt includes all financial obligations incurred by a spouse both during the relationship and after separation if the post-separation debt was incurred to maintain family property.

86 Family debt includes all financial obligations incurred by a spouse

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

[52] Pursuant to s. 87 of the FLA, unless otherwise ordered, all family property and family debt is to be valued according to its fair market value at the date of the hearing respecting division of family property and debt. Because family property is valued at the hearing date, the parties presumptively share in any post-separation increases in value: *Jean Louis v. Jean Louis*, 2020 BCCA 220, at paras. 33-34.

Discussion

[53] The main issues revolve around family property and family debt.

[54] The parties disagree on some particular items of family property and debt and on the amount of the compensation payment.

[55] The claimant has calculated various compensation payments that she submits should be ordered to equalize family property and debt and has calculated a net amount said to be owing. More specifically, the claimant submits that:

- a) She is to make a compensation payment to the respondent in the amount of \$186,209.50, in respect of the West 4th property; and
- b) The respondent is to make compensation payments to her of \$245,704.50 comprised of,
 - i. \$183,862 in respect of the Osoyoos 4-plex,
 - ii. \$53,092.50 in respect servicing the family debt, and
 - iii. \$8,750 in respect of equalization of the vehicles.
- c) The net difference of \$59,495 is owing by the respondent to the claimant.

[56] The respondent provided no calculations in relation to the division of family property and debt. He merely submits that there should be equal division.

[57] Before I address the various property issues, I wish to make an observation as to the method used by the claimant. The claimant has calculated compensation payments for each item of property or group of properties. In my view, this is not the proper way to calculate the compensation payment to divide family property and debt. The method adopted by the claimant will sometimes result in the correct calculation but not always. The method adopted by the claimant risks conflating issues of property division with debt division and this risk has materialized in the plaintiff's calculations. She has included a debt in her calculation (the mortgage on the West 14th property) that is not a family debt.

Separation Date

[58] The claimant submits that the separation date was November 13, 2019, the date she and the children moved into suite D of the Osoyoos 4-plex. The respondent, on the other hand, submits the separation date was June 30, 2019, the date he says he moved to Osoyoos.

[59] The evidence of the separation date consisted of the viva voce evidence of the parties.

[60] The claimant testified that in 2019 the parties decided to move to Osoyoos. She testified that they were living beyond their means in Vancouver and lived in a small apartment. She said that the respondent was not happy and wanted out of Vancouver. She testified that they moved to Osoyoos in August of 2019 and that, upon moving, they initially stayed with her parents and then moved into one of the units in the Osoyoos 4-plex. The claimant testified that in November of 2019 she was told by the respondent that he was leaving the relationship. She then moved into another of the apartments in their Osoyoos 4-plex. At the time she moved into the other suite, the respondent was away on a business trip to Toronto.

[61] In cross-examination, the claimant was asked whether the respondent moved out in June, to which she replied "no". She was asked whether the respondent set up an apartment in Osoyoos in June, to which she replied that he was working on their Osoyoos 4-plex. When asked why she did not move with the respondent to Osoyoos in June, 2019, she replied that the respondent was not "moving" to Osoyoos but was going there to work on the Osoyoos 4-plex to get it ready. She further replied that T.H. was still in school and that they had a Whistler trip planned for later in June. She was asked whether, in relation to their move to Osoyoos, words were said to the effect that they were not moving together, to which she replied "no". She also testified in cross-examination to various things that the parties did together during the summer and early fall of 2019. These included a trip to Whistler, an event in October, having dinner together with her parents and sleeping together.

[62] The respondent testified that he was unhappy with his life with the claimant and that in late June 2019 he decided it was time to go. He testified that he moved into one of the suites of the Osoyoos 4-plex. He said that, shortly thereafter, the claimant advised him that she and the children were moving as well. He testified that he told her he was happy for them to move to Osoyoos but they would not move with him. He testified that he then assisted with the move of the claimant and the children to Osoyoos by returning to Vancouver to get their

personal effects which were then either put into storage or taken to the Osoyoos 4-plex. He testified that the claimant and children moved into the unit with him but says this was because they had no place else to go.

- [63] Importantly, the respondent did not deny that he and the claimant went on trips and attended dinners with her parents during the summer and early fall of 2019. He also did not deny that he and the claimant were sleeping together during this time frame, as the claimant testified. In fact, in cross-examination, the respondent admitted that in the fall of 2019 he went on a trip to Whistler with the claimant and he also admitted that they continued to sleep in the same bed and continued to be intimate.
- [64] Section 3(4) of the FLA provides that parties may be separated although living in the same residence and further provides a non-exhaustive list of factors that the court may consider as evidence of separation.
- (4) For the purposes of this Act,
- (a) spouses may be separated despite continuing to live in the same residence, and
- (b) the court may consider, as evidence of separation,
- (i) communication, by one spouse to the other spouse, of an intention to separate permanently, and
- (ii) an action, taken by a spouse, that demonstrates the spouse's intention to separate permanently.
- [65] In *Der Woon v Zadorozny*, 2020 BCCA 95, at paras. 9-10, Willcock J.A., writing for the Court of Appeal, addressed the factors to consider when the separation date is disputed.
- [9] There is no suggestion the chambers judge misdirected himself. The factors he considered closely mirror the factors enumerated in *Nearing v. Sauer*, 2015 BCSC 58 and applied in *C.P. v. K.W.A.*, 2018 BCSC 332. In *Nearing*, Fleming J. wrote:
- [56] 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 v. Sachdeva*, 2013 BCSC 313] 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.
- [10] I agree with that description of the focus of the court's analysis. The factor relied upon by the appellant, the contribution to household finances, is but one of the factors to be weighed and certainly would not overwhelm what is referred to in *Nearing* as the "generally accepted characteristics of marriage" which were considered by the chambers judge. As Groberman J.A., for this Court noted in *Weber v. Leclerc*, 2015 BCCA 492 at para. 25, "a checklist

approach is not appropriate" for addressing this question and the trial judge must look to "indicators of the sorts of behaviour that society, at a given point in time, associates with a marital relationship".

[Emphasis added.]

[66] Applying the generally accepted characteristics of a marriage or a cohabitation relationship, I am satisfied that the separation date is November 2019 and not June 2019. The respondent may have been unhappy in May and June of 2019 but, I accept the claimant's evidence that he did not communicate an intention to permanently separate in May or June of 2019. Moreover, he took no action demonstrating an intention to separate permanently. I again accept the claimant's evidence that he attended at the Osoyoos 4-plex over the summer to get it ready for their pending move to Osoyoos. Additionally, and importantly, it is undisputed that the parties went on a trip to Whistler together in the fall of 2019, attended dinners together with the claimant's parents, and continued to sleep in the same bed and to be intimate.

[67] I therefore find the separation date is November 13, 2019, the date the claimant moved into suite D of the Osoyoos 4-plex.

Family Property

[68] The family property consists of two real properties, various chattels and three Registered Education Savings Plans ("RESPs").

[69] The parties are agreed that the RESPs should be retained for the benefit of the children and not divided. They have a minor disagreement as to how the RESPs should be administered. The claimant submits that the RESPs should be consolidated into one account and held in the names of the parties as joint trustees whereas the respondent submits that they should each hold one RESP and the third should be invested in GICs. In my view, the RESPs should be consolidated and administered by the parties jointly, as suggested by the claimant. As they are both guardians of the children and share the parental responsibilities, it is appropriate that they also share the administration of the RESPs.

Real Properties

[70] The real properties are the West 14th property owned by the claimant and the Osoyoos 4-plex owned by the respondent.

[71] The West 14th property was purchased by the claimant on October 27, 2007, which is before the parties commenced their relationship. She purchased it for \$450,000. Two appraisals have been prepared for this property by Westech Appraisers; one addressing the value as of October 1, 2010, the date of the commencement of cohabitation, and the other addressing the current value. Ali Mirzaei of Westech Appraisers estimated the value to be \$350,000 as of October 1, 2010 and \$605,000 currently.

- [72] The respondent disputes the appraisal of the West 14th property. He says it should be \$20,000 more and referred to various documents he obtained showing sales of various units nearby the West 14th property.
- [73] The respondent is not an expert in real estate. His opinion on the value of the West 14th property and his critique of the appraisal report is expert evidence, inadmissible and of no value.
- [74] I accept the values of the West 14th property as contained in the reports of Ali Mirzaei, meaning, I accept that it had a value of \$350,000 as of October 1, 2010 and is currently valued at \$605,000.
- [75] The Osoyoos 4-plex was purchased by the respondent in May of 2017 for \$450,000. It is common ground that it was purchased initially as an investment property. The current value of this property is set out in the appraisal report of Paul Doucet of South Okanagan Appraisals dated August 23, 2022. He appraised the property at \$650,500. I accept this valuation.

Chattels

- [76] The parties mostly agree on the chattels and the values to be ascribed to those chattels. In particular, they agree on the following:

Chattel

Owner

Agreed Value

Big Foot Trailer

Respondent

\$4,000

1996 F250

Respondent

\$4,000

2009 BMW

Claimant

\$2,000

2018 Jeep Wrangler

Respondent

7,500

- [77] The only chattels not agreed are furnishings that the claimant removed from the family unit at the Osoyoos 4-plex or took from a storage unit and put into the unit she now occupies at the 4-plex. The respondent says that he should be credited \$7,500 for this furniture.
- [78] I decline to make any orders in relation to the household furnishings. First, although the claimant did move some furnishings into her unit at the Osoyoos 4-plex, it is clear that the respondent has retained other furnishings and household items. Additionally, neither party attempted to identify what furnishings the other had with any precision and neither led any evidence as to the value of the furnishings.

Excluded Property

- [79] The claimant claims an exclusion under s. 85(1)(a) of the FLA for the value of the West 14th property as of the date of the commencement of the relationship. Section 85(1)(a) provides:
- 85 (1) The following is excluded from family property:
- (a) property acquired by a spouse before the relationship between the spouses began;
- [80] The onus and burden of proving property is excluded is on the spouse making the claim: FLA, s. 85(2); Zhao v. Fang, 2022 BCCA 227, at para. 25.
- [81] The claimant has clearly discharged the onus on her proving the excluded property. It is clear that she owned the West 14th Avenue property prior to the relationship.
- [82] The claimant says the value of the exclusion is \$20,000. This is not correct. The claimant has arrived at this value by calculating the equity the claimant had in the property at the date of cohabitation (\$350,000 - \$330,021). By using the claimant's equity in the property, the claimant conflates issues of family property division with issues of family debt division. As addressed below, the mortgage on the West 14th property was incurred prior to the start of the relationship. It is not family debt and should not be included in a calculation of the value of the excluded property. The value of the West 14th property at the commencement of the relationship was assessed at \$350,000 as at October 1, 2010 by Ali Mirzael of Westech Appraisers. This is the amount that is excluded from family property.
- [83] It follows that the value of the West 14th property that comprises family property is \$255,000 (\$605,000 - \$350,000).
- [84] The total family property to be divided is therefore as follows:

Property

Owner

Value

W. 14th Avenue, Vancouver

Claimant

\$255,000

Osoyoos 4-plex

Respondent

\$650,500

Big Foot Trailer

Respondent

\$4,000

1996 F250

Respondent

\$4,000

2009 BMW

Claimant

\$2,000

2018 Jeep Wrangler

Respondent

7,500

Total

\$923,000

Occupation Rent

[85] The respondent submits that he is entitled to some value for the costs of housing the claimant rent free at the Osoyoos 4-plex. Although he did not frame this as a request for occupation rent, that is essentially what he is claiming.

[86] I decline to take into account any notional occupation rent. The Osoyoos 4-plex, although held in the name of the respondent, was family property. The claimant had as much right to continue to reside there as the respondent.

Family Debts

[87] The family debts comprise mortgages, lines of credit and credit card debts.

Mortgages

- [88] Both of the real properties are subject to mortgages. The West 14th property has a current amount outstanding of \$212,073. According to the respondent's most recent F8 financial statement, the Osoyoos property has a current amount outstanding of \$324,960. There are, however, two issues that arise; one in respect of each mortgage.
- [89] The first issue is in relation to the mortgage on the West 14th property. As I have indicated, the financial obligation represented by that mortgage was incurred by the claimant prior to the commencement of the relationship. Pursuant to s. 86 of the FLA, such a debt is prima facie not a family debt.
- [90] The second issue arises in connection with the mortgage on the Osoyoos 4-plex. Other than the statement in his F8 financial statement, the respondent has not provided any documentation supporting the amount claimed to be owing. The only documentation relating to this mortgage is the letter dated May 10, 2017 from CIBC indicating that the maturity date was March 18, 2022 and the balance due at maturity would be \$282,776. Obviously, the amount claimed as owing under the mortgage in the respondent's F8 financial statement of \$324,960 is significantly more than it should be if all payments had been made.
- [91] The respondent was cross-examined on this discrepancy. He agreed that the mortgage was about \$43,000 more than it should have been. He testified that he increased the indebtedness under the mortgage when the mortgage was renegotiated. He initially stated that the increase was due to his paying off debt. He later explained that part of the increase was to pay off \$26,000 owing under a line of credit (account ending 0738). He was not able to explain the remainder of the increase except to say that the money was used to service debt and for upkeep on buildings.
- [92] Based on the respondent's evidence in cross-examination, the principal amount of the mortgage on the Osoyoos 4-plex was increased when it was re-negotiated, which would have been around March of 2022. This increase is not family debt unless it was incurred to maintain family property. Given the respondent's vague evidence, I am not satisfied that the increase was incurred to maintain family property.
- [93] I thus need to determine the approximate amount of the mortgage as of the date of trial, if additional amounts had not been added to it. The time lapse between the maturity date of the mortgage and the commencement of the trial has been 26 weeks. During this period there would have been 13 mortgage payments of \$917.86, of which \$708.75 would have been on account of principal and interest and \$209.11 on account of property taxes. The total payments for principal and interest during the 26 weeks would have been \$9,213.75. The interest portion of those payments can be roughly calculated. The interest rate under the mortgage was 2.79%. If the amount owing was \$300,000, the total annual interest would be \$8,370. The bi-weekly interest would be approximately \$161. Accordingly, the approximate average amount of each payment going to pay down principal would be \$547 (\$708.75 -

\$161). The total amount of principal paid down during the 26-week period would be approximately \$7,120 (13 x \$547). Therefore, if additional amounts had not been added to the mortgage, the amount owing under the mortgage as of the trial would have been approximately \$275,000 (\$282,776 - \$7,120). This is the amount that is family debt and divisible between the parties.

Unsecured Debts

[94] The claimant lists the following unsecured debts in her most recent F8 with balances as at prior to separation:

- a) TD line of credit ending 3144 - \$9,990.35;
- b) TD Visa ending 2228 - 18,244.48;
- c) RBC Visa ending 5276 - \$15,653.33;
- d) RBC line of credit ending 5001 - \$23,999.05; and
- e) Visa Gold ending 0562 - \$13,909.01.

[95] The actual bank statements for the above accounts show the following balance at about November 13, 2019, the date of separation:

- a) TD line of credit ending 3144 - \$8,017;
- b) TD Visa ending 2228 - \$15,906;
- c) RBC Visa ending 5276 - \$14,652;
- d) RBC line of credit ending 5001 - \$23,965; and
- e) Visa Gold ending 0562 - \$6,331.

[96] As per the various account statements, all of the above debts are in the sole name of the claimant.

[97] The respondent lists the following unsecured debts in his most recent F8:

- a) RBC Travel Visa - \$411 noted as incurred post-separation;
- b) CIBC line of credit - \$6,360 noted as incurred pre-separation;
- c) CIBC Visa - \$19,320 noted as incurred pre-separation;
- d) Scotia Travel visa - \$1,091 noted as incurred pre-separation; and
- e) Personal Loan - \$2,000 noted as incurred September 15, 2001

[98] During his evidence, in response to questions I posed of him, the respondent advised that the amounts of these debts were as of the date of preparation of the F8 which was August 2022. I permitted him to obtain account statements for the various debts to show me the amounts at the alternative dates of separation and currently. In response to my request, the

respondent produced statements showing the CIBC line of credit had a balance of \$26,755 on November 21, 2019 and the CIBC Visa had a balance of \$19,410 as of November 17, 2019. No statements were produced in relation to the other debts listed in the respondent's F8.

- [99] I accept only that, as of the date of separation, the respondent owed \$26,755 on the CIBC line of credit and \$19,410 on the CIBC Visa. He has not proven that the other debts listed in his F8 financial statement were in existence as of the date of separation and, accordingly, they are not family debt.
- [100] Concerning the personal loan, he testified that this was a loan from a friend made in September of 2021 because he could not pay bills. He had no documentary evidence of this loan. This loan is not a family debt as it was incurred post- separation and was not incurred to maintain family property.

Interest on Family Debt

- [101] Family property and debt is to be valued as of the date of the hearing: FLA, s. 87. However, family debt is defined in s. 86 as all financial obligations incurred by a spouse either during the period of the relationship or after separation if incurred for the purpose of maintaining family property.
- [102] The issue here is whether interest in relation to financial obligations incurred during the relationship but paid after separation comprises family debt or should otherwise be accounted for.
- [103] The claimant submits that she should be given a credit of approximately \$25,000 for interest payments she made on family debt since separation.
- [104] I have not been provided with any authorities that directly address the issue, although I note that Justice Betton addressed such issues in *K.M.J v. J.H.D.N.*, 2014 BCSC 1895.
- [105] In my view, on a proper interpretation of ss. 86-87 of the FLA, payments of interest on family debt that are made by a party after separation are not generally to be taken into account. Section 86 defines family debt as including all financial obligations incurred by a spouse during the period of the relationship. Section 87 then provides that family debt is to be valued as of the date of the hearing. The legislature has recognized that the value of family debt can increase or decrease during the period between the date of separation and the date of trial. It is, however, only the value of family debt at the date of the trial that is to be apportioned between the parties. Interest payments actually made during this interval are, *prima facie*, not family debt. For such interest payments to be considered, resort must be had to ss. 87 or 95 of the FLA.
- [106] There is a significant evidentiary gap in the record concerning the values of the various consumer debts. In my view, it was incumbent on each party to provide, at least, the most current account statements for alleged family debt and the statements as of the date of separation. Further, to the extent there are issues regarding increases or decreases in the

value of a debt between the date of separation and the date of trial, the parties ought to have provided the intermediate statements. This has not been done with the result that it is not possible to properly assess increases or decreases in the value of family debts from the date of separation to the date of trial and whether such increases and decreases should be taken into account pursuant to either s. 87 or s. 95 of the FLA.

[107] I appreciate that the claimant has made interest payments on family debt and that, if she had not done so, the value of the family debt subject to division as of the trial date would have been larger. However, the same can be said of the payments made by the respondent who must have also made interest payments on the family debt that was in his name. Indeed, his evidence was that he increased the mortgage on the Osoyoos 4-plex to pay off some of the family debt. In the circumstances, on the evidence before me, which is insufficient, I am not satisfied that interest payments made by the claimant on family debt after separation should be taken into account.

[108] I find that the family debt is as set out in the below table.

Debt

Responsible party

Amount

W. 14th Ave Mortgage

Claimant

0

Osoyoos 4-plex Mortgage

Respondent

\$275,000

TD LOC ending 3144

Claimant

\$8,017

RBC LOC ending 5001

Claimant

\$23,965

TD visa ending 2228

Claimant

\$15,906.00

RBC visa ending 5276

Claimant

\$14,652.00

Visa Gold ending 0562

Claimant

\$6,331.00

CIBC ending 4738

Respondent

\$26,755.00

CIBC Visa

Respondent

\$19,410.00

Total

\$390,036

[109] Of the total family debt, the claimant is responsible for \$68,871 and the respondent is responsible for \$321,165.

Compensation Payment

[110] If family property and debt is divided equally, a compensation payment is required to be made by the respondent to the claimant in the amount of \$78,353. The calculation is as follows:

Claimant

Respondent

Assets

\$257,000

\$666,000

Debts

\$68,871

\$321,165

Assets less debts

\$188,129

\$344,835

Compensation Payment

\$78,353

(\$78,353)

Net position after compensation payment

\$266,482

\$266,482

Unequal Division

[111] In her notice of family claim, the claimant requested an unequal division of family property. However, the claimant's submissions were less than clear as to whether unequal division was being pursued. The claimant's submissions included statements such as the family debt should be apportioned such that she can "escape the debt trap she is in" but, there was no express reference to legal principles applicable to a claim for unequal division.

[112] In my view, it was incumbent on the claimant, who was represented by counsel, to properly advance a claim for unequal division of family property and debt if that was her intention. In any event, there appears to be no "significant unfairness" in an equal division of family property and debt. The compensation payment the claimant will receive will more than clear all of her consumer debts. She will also have sole title to her West 14th property, which is roughly equivalent to the value of the Osoyoos 4-plex that the respondent will retain. Moreover, the mortgage amount owing on the West 14th property is significantly less than the amount owing on the Osoyoos 4-plex.

Pension Division

[113] Pension division is addressed in Part 6 of the FLA. Section 111(1) of the FLA provides that pension benefits are to be divided in accordance with Part 6:

111 (1) If a spouse is entitled under Part 5 [Property Division] to an interest in benefits, the spouse's share of the benefits and the manner in which the spouse's entitlement to benefits is to be satisfied must be determined in accordance with this Part, unless an agreement or order provides otherwise.

[114] Section 129 of the FLA provides that the court may re-apportion pension benefits where prescribed circumstances are met.

129 The Supreme Court may reapportion to a spouse entitlement to all or part of a member's benefits under a plan for the purpose of providing the spouse with an independent source of income if

- (a) it is necessary, appropriate or convenient in the circumstances, and
- (b) the financial and property arrangements between the member and spouse to address the spouse's need to become or remain economically independent and self-sufficient would otherwise require an order
- (i) respecting spousal support, or
- (ii) requiring the member, after pension commencement, to pay the spouse a share of the benefits under the plan, or under another plan, as they are received.

[115] The claimant submits that it would be unfair if her pension benefits were to be divided with the respondent. I do not agree. As with the claim for unequal division of property, there is no unfairness in the claimant's pension benefits being shared. Both parties are gainfully employed in good jobs and in receipt of reasonable salaries. Both parties have title to real estate valued at in excess of \$600,000 and in which they have considerable equity. The claimant will not be burdened with consumer debt after the compensation payment is made.

[116] I am not satisfied that it is necessary, convenient or appropriate that the respondent be deprived of his share of the pension benefits. Nor is it necessary to reapportion the pension benefits to permit the claimant to become or remain economically independent and self-sufficient.

[117] Accordingly, the claimant's pension shall be divided in accordance with Part 6 of the FLA for the period from October 2010 to November 2019.

Support

[118] As I have indicated, given the respective incomes of the parties, it is conceded that currently neither party is required to pay support to the other. The claimant nevertheless requests various orders concerning both child and spousal support. The specific orders requested are:

- a) That no child support is currently payable, given the shared parenting regime and the parties' respective incomes under the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines];
- b) That the parties exchange their respective income tax returns, Notices of Assessment or Re-Assessment and employment T4 slips annually;
- c) That the respondent's obligation to pay child support is binding on his estate; and

- d) That the claimant is entitled to spousal support in the amount of \$1.00 per year, to be reviewed without the need to show a material change in circumstances.

Incomes

- [119] Pursuant to ss. 2(3) and 16 of the Guidelines and Chapter 6 of the Spousal Support Advisory Guidelines [SSAG], the income to be used to determine support payments is generally the line 150 total income from the spouse's most recent T1 General Income Tax Return, adjusted in accordance with Schedule III of the Guidelines. However, if the court is of the opinion that the income reported in the most recent T1 form is not the fairest determination of the spouse's income, the court may have regard to the spouse's income over the past three years and determine the amount that is fair and reasonable: Guidelines, s. 17.
- [120] I note that the claimant suggested there was a possibility that the respondent's income would increase based on his prior history of earnings and that there is to be a review of his current employment earnings. However, I do not accept that the respondent's past earnings with a different company in a different part of the insurance industry are reflective of what his income will be going forward. It is also speculative at this time whether the respondent will receive a material increase in income when the review is held. Additionally, in my view, there is an equal possibility the claimant's income will increase in the future. She is currently not working full time and there is no obvious reason why she cannot increase her working hours.
- [121] The income tax returns of the parties establish that their respective line 150 incomes from their most recent tax returns are \$76,459 for the claimant and \$75,907 for the respondent. Pursuant to the Guidelines, these are the amounts to be used for the determination of support payments.

Child Support

- [122] Pursuant to s. 147(1) of the FLA "[e]ach parent and guardian of a child has a duty to provide support for the child" subject to the exceptions in 147(1)(a) and (b), neither of which are relevant. In other words, both parties have an obligation to pay child support. However, given the incomes of the parties, and that there is shared parenting of the children, no child support is currently payable by either party to the other. An order to this effect will be made.
- [123] The claimant additionally requests an order that the respondent's child support obligations are binding on his estate. Such an order is permitted by ss. 170 and 171 of the FLA. However, in my view, it is premature to make any such order. The factors to be considered in making such an order are set out in para. 171(1). These factors are either not met or cannot be assessed at this time. The first factor is that the person receiving support has a significant need for such support. This factor is not met as the claimant is not receiving

support. Similarly, the third factor, that there are no other practical means to meet the support needs of the recipient, is not met as the recipient, the claimant currently has no support needs. The second factor is that the estate of the person paying child support is sufficient to pay support. This factor is not met as the respondent is not paying support and the sufficiency of his estate cannot be determined.

[124] Additionally, s. 171(3) expressly provides that an application can be made after death.

[125] In my opinion, an order under s. 170 of the FLA is best made if and when a future application is made to vary the child support.

Spousal Support

Legal principles

[126] Spousal support is addressed in ss. 160-165 of the FLA.

[127] The objectives of spousal support are set out in s. 161 of the FLA. They are to:

- recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- 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;
- relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[128] The factors to take into account when determining the amount and duration of spousal support are set out in s. 162 of the FLA.

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

[129] There are three grounds for entitlement to spousal support; compensatory, non-compensatory, and contractual.

[130] Compensatory support is intended to address economic advantages and disadvantages arising from the marriage. The nature and significance of compensatory spousal support is discussed in *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge], and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [Bracklow], and summarized in *Chutter v. Chutter*, 2008 BCCA 507, at paras. 50-53 [Chutter].

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420] at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success ([*Moge v. Moge*, [1992] 3 S.C.R. 813] at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

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

[51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in *Moge* at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added).

[52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

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.

[Emphasis added by Rowles J.A., internal citations omitted.]

[53] In *W. v. W.*, 2005 BCSC 1010 (CanLII), 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:

- [11] In British Columbia this comment in Moge has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.
- [12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide*.

[Emphasis added by Rowles J.A., citations omitted.]

- [131] Non-compensatory spousal support is grounded in the means and needs of the parties and was discussed in *Chutter* at paras. 54-55:
- [54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (*Bracklow*, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (*Bracklow*, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.
- [55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 1995 CanLII 2274 (BC CA), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

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

[Emphasis added.]

- [132] In assessing the "needs" of the recipient spouse, the standard of living enjoyed by the parties during the marriage must be considered as well as the standard of living of the payor spouse after the marriage (*Chutter*, para. 60).

[133] The third basis upon which entitlement to spousal support can be established is through a contractual arrangement between the parties. This ground of entitlement is of no relevance to the present matter and I shall not consider it further.

Discussion

[134] Although the claimant concedes that no spousal is currently payable, she nevertheless submits that she is entitled to an order of spousal support on both compensatory and non-compensatory grounds and requests an order of spousal support in the amount of \$1 per year, and the right to review the quantum without showing a material change in circumstances.

[135] I do not agree that the claimant is entitled to spousal support on either a compensatory or non-compensatory basis.

[136] In relation to the claim for compensatory support, the claimant refers me to three cases which she submits support her claim. The cases are: *M.T. v. C.J.B.*, 2015 BCSC 1852, *C.L.P. v. D.R.P.*, 2017 BCSC 432 and *K.M. v. S.W.*, 2014 BCSC 2240.

[137] In *M.T. v. C.J.B.*, the parties cohabited for three years. The claimant, an accountant, was at home with the child of the relationship for approximately 11 months after the child was born. Five of those months were post-separation. Justice Pearlman accepted that this was an economic disadvantage suffered by the claimant and the conferral of an economic advantage on the respondent. He awarded ongoing spousal support for a period of approximately 2.5 years.

[138] In *C.L.P. v. D.R.P.*, the parties cohabited for less than five years. The claimant had been employed for nine months and then went on maternity leave. She remained a stay-at-home parent thereafter. Justice DeWitt-Van Oosten, as she then was, ordered spousal support to be paid until the child of the relationship commenced kindergarten.

[139] In *K.M. v. S.W.*, the claimant left the workforce to become a stay-at-home parent. It appears that the claimant was out of the workforce for a period of five years. Justice Savage held that these circumstances gave rise to entitlement to spousal support on a compensatory basis.

[140] In my opinion, *C.L.P. v. D.R.P.* and *K.M. v. S.W.* are clearly distinguishable from the facts before me. The claimants in those cases left the workforce completely upon the birth of their children and became stay-at-home parents. That is not the case before me. The claimant here never left the workforce. She merely took maternity leaves.

- [141] M.T. v. C.J.B. is more like the matter before me but there are still substantial differences that make it distinguishable. The claimant in M.T. v. C.J.B. ceased her employment during the relationship to study full time for her CGA designation. She did not work for approximately 22 months and, by the time she had completed her studies, she was pregnant. She was able to secure employment for 10 weeks but was then off-work for 13 months, five of which were post-separation, because of the birth of the child.
- [142] In support of her claim for compensatory support, the claimant relies heavily on the fact that she was not working for in excess of two years because she took maternity leaves after the births of the children. In my view, this alone does not give rise to an entitlement to spousal support. The claimant received remuneration during her maternity leaves, including a top-up. Importantly, there is nothing to suggest that her career or earning potential suffered as a consequence of her taking maternity leave. She did not testify to any career advances or promotions that were missed or delayed because of the time she was on maternity leave. To the contrary, the evidence is that the claimant worked as a nurse prior to the commencement of the relationship, during the relationship and subsequent to the breakdown of the relationship. There is no evidence that her income or career suffered. Her employment income has generally increased. Her employment income was \$64,424 in 2017, \$59,817 in 2018, \$60,966 in 2019, \$82,721 in 2020 and \$73,970 in 2021. Her employment earnings for the current year as July 21, 2022 were in the amount of \$47,152, indicating that she is on track to earn approximately \$84,000 in employment income this year.
- [143] Moreover, the claimant has not proven that she works part-time as a consequence of the relationship or its breakdown. She did not testify that she worked full-time prior to the relationship. She did not testify that she changed from full-time to part-time because of the children. She did not testify that she changed from full-time to part-time upon moving to Osoyoos. She merely testified that her part-time position works with child care scheduling.
- [144] Thus, in my view, the evidence does not establish that the claimant has been economically disadvantaged because of the relationship or its breakdown.
- [145] I accept that an economic advantage conferred on the respondent can also justify entitlement to spousal support on a compensatory basis. I further accept that the respondent received such an economic advantage because the claimant took maternity leave which allowed him to be employed throughout. However, this economic advantage was for only a short period of time and its effects have not been long lasting. The respondent has not progressed in his career. In fact, he has recently had to change careers and makes less money than he did before. I appreciate that the claimant says this is just temporary, but, that is mere speculation.
- [146] I further appreciate that the claimant cared for the respondent while he had various health issues, but this is expected of a spouse and, again, there is nothing in the evidence to suggest that her career prospects or earning potential suffered as a result.

- [147] There is simply nothing in the evidence to indicate that the claimant has sacrificed her career or suffered an economic disadvantage because of the relationship or as a consequence of the breakdown of the relationship. Put differently, the evidence does not establish that the claimant has a lower earning potential or fewer future prospects because of the relationship, generally, or her time spent caring for the children, in particular.
- [148] In relation to the claim for spousal support on a non-compensatory basis, I am similarly of the view that such a claim has not been made out. The means and needs of the parties are similar.
- [149] The parties had roughly equivalent incomes in 2021. Moreover, for at least the current year, it appears the income of the claimant will exceed that of the respondent. As indicated, she is on-track to earn approximately \$84,000 in employment income this year and she is also receiving rental income from the West 14th property. Her total income this year will be approximately \$100,000. In contrast, although there is a possibility the income of the respondent will increase, that is speculative.
- [150] The needs of the parties are also similar. They each own real property with roughly similar values. The outstanding mortgages on those properties are not similar but the Osoyoos 4-plex has the higher mortgage, not the West 14th property owned by the claimant. The claimant does have a larger share of the consumer debt the parties accumulated during the relationship but the compensation payment I have ordered will more than cover this debt.
- [151] Therefore, I find that the claimant is not entitled to spousal support.

Costs

- [152] The costs of a family law proceeding are governed by Rule 16-1 of the Supreme Court Family Rules, B.C. Reg. 169/2009 [SCFR]. Pursuant to Rule 16-1(7), the costs of a proceeding must be awarded to the successful party "unless the court otherwise orders". The successful party is the party that is substantially successful: *Gold v. Gold*, 1993 CanLII 1248 (BC CA), at paras. 21-22.
- [153] There has been mixed success in this matter. The claimant was not successful on her claim for spousal support, in relation to final decision making authority on parenting issues or in relation to the division of her pension. However, the division of family property and debt was the most significant issue between the parties and the claimant was successful on this issue. She obtained a significant compensation payment.
- [154] In my opinion, although there has been mixed success, the claimant was substantially successful and is entitled to costs.
- [155] The claimant requests an order awarding her special costs.

- [156] Special costs are awarded where the conduct of a party is "reprehensible", a term that encompasses scandalous or outrageous conduct as well as milder forms of misconduct deserving of reproof or rebuke: *Garcia v. Crestbrook Forest Industries Ltd.*, 1994 CanLII 2570 (BC CA), at para. 17.
- [157] The claimant submits that the respondent's conduct throughout has been rude, inflammatory, insulting and derisive. Additionally, she submits that the respondent has consistently failed to comply with the SCFR, and with court orders. She also says the respondent has misused the subpoena process by requiring the attendance at trial of two third party witnesses who had no relevant evidence to give.
- [158] The claimant refers me to *MoreCorp Holdings Ltd. v. Island Tug & Barge Ltd.*, 2009 BCSC 1692 [MoreCorp], and *A.S.P v. N.N.J.*, 2013 BCSC 2377, in support of an award of special costs.
- [159] In *MoreCorp*, Justice Pitfield noted that a self-represented litigant must treat other litigants and their counsel in a professional manner and that failure to do so could justify an order for special costs. At paras. 36-37, he wrote:
- [36] Mr. Morris chose to represent the plaintiffs as he was entitled to do. As a result, he was both client and advocate. While it is apparent that he obtained some legal advice in relation to the plaintiffs' position, Mr. Morris remained the sole actor on the judicial stage and in that role, he assumed obligations to counsel for the opposing parties. Many of the emails Mr. Morris addressed or copied to Mr. McEwen were intemperate. Others, which I have not reproduced, were simply rude and should not be excused.
- [37] A litigant who represents himself rather than appearing by counsel, whether by choice or of necessity, must strive to separate his interests and emotions as a litigant from his obligations to opposing parties or counsel. However difficult the task may be, the self-represented litigant must treat other litigants and their counsel, if any, in the professional manner in which opposing counsel are expected to treat each other. While Mr. Morris's conduct was not advanced as a separate argument in favour of a special costs order, the defendants might appropriately have done so.
- [160] These comments were recently affirmed by Justice Forth in *Grosz v. Royal Trust Corporation of Canada*, 2021 BCSC 1313, at para. 164:
- [164] Although leeway should be given to self-represented litigants participating in the justice system, particularly in respect to the procedural requirements, this does not mean that they have a "licence to employ accusations of dishonesty as a feature of their rhetoric unless such allegations are firmly grounded in the evidence, are relevant to the proceedings, and are responsibly made": *The Owners, Strata Plan LMS3259 v. Sze Hang Holdings Inc.*, 2015 BCCA 424 at para. 11. There is an expectation that all participants in the justice system treat one another professionally, and that includes the self-represented litigant: *Morecorp Holdings Ltd. v. Island Tug & Barge Ltd.*, 2009 BCSC 1692 at para. 37.

- [161] In *A.S.P v. N.N.J.*, Justice Watchuk also ordered special costs against a self-represented litigant where his conduct was uncivil, rude, inflammatory, derisive, threatening, disrespectful and insulting in relation to both the other party and their counsel.
- [59] However, in the issue for the court on this application for special costs, the lack of civility is but the starting point. The conduct of the father has consistently been rude, inflammatory, derisive, threatening, and disrespectful and insulting of the mother, her counsel and the court process. It has not been situational or short-lived. It has been consistent over more than two years. It has included behaviour in the courtroom, and email communications to Scheduling as well as communication with counsel for the mother continuing after the written submissions on costs were filed.
- [60] Although there is an apology extended to Dr. Korpach, the father, in his Written Submissions, explains another reason for his behaviour. He says that this application for special costs is because of the relationship with the mother's counsel. He says that it has "comparatively little to do with the [mother]". He says: "The [father] simply detests [mother's counsel]". He is adamant that that will not change and expresses little or no regret or insight for or into his actions or words.
- [61] Notwithstanding the father's attempts to justify his feelings and thus his actions with regard to counsel for the mother, there is no justification for this behaviour in a court proceeding. A member of the Bar of British Columbia does not agree to abuse from the opposing party when he agrees to represent a client. The law firm of counsel for the mother was subject to nothing short of abuse in the email correspondence which has come to the attention of the court.
- [162] I agree with the claimant that the respondent's conduct has been reprehensible, is deserving of rebuke and that special costs are warranted. There are several factors justifying an award of special costs. First, the respondent's communications with the claimant and her counsel, Mr. King, are deserving of rebuke. Second, the respondent's failure to provide proper disclosure is deserving of rebuke. Finally, the respondent's conduct in issuing subpoenas to third parties is deserving of rebuke. I will address each of these factors.
- [163] The evidence includes several text messages involving the parties where the respondent is insulting and demeaning to the claimant and also includes multiple instances of correspondence involving Mr. King where the claimant is rude, insulting and unprofessional. The correspondence involving Mr. King includes:
- i. On November 4, 2020, the respondent accused Mr. King several times of perpetuating the friction between him and the claimant and of taking self-serving positions. He wrote "It is your professional aspiration to keep our friction level at the highest possible in order to ensure we cannot reach a mutual agreeable situation without copious legal expenses.";

- ii. On November 15, 2020, the respondent accused Mr. King of "using my children to further your interest with no regard to them or [the claimant] in obviously fragile mental state";
- iii. On September 17, 2021, the respondent wrote that he heard Mr. King was the most expensive lawyer in the Okanagan and suggested Mr. King was running up legal costs. He wrote "tisk, tisk, Mr. King it does appear you get paid by the hour. I wonder what 'forcing me to mediate' will cost your client?". He also complained that Mr. King's conduct during an examination for discovery involved disrespect and screaming and concluded "When I hear lawyer I used to think 'professional' until this experience".;
- iv. On September 20, 2021, in an email exchange between the respondent and Mr. King relating to requests given at the respondent's examination for discovery, the respondent notes that Mr. King had not provided a list of the requests and then writes "While this inconsistency is par for the course with you", suggesting incompetence on the part of Mr. King. Mr. King responded by advising the respondent that being self-represented did not give him licence to be rude and insulting.;
- v. On November 8, 2021, the respondent wrote to Mr. King the claimant and others stating "You're all perfect for each other, what a joke.";
- vi. On May 12, 2022, in an email to Mr. King and others, the respondent accuses Mr. King of yelling at him, belittling him and disrespecting him;
- vii. On May 24, 2022, in an email to Mr. King and copied to the claimant and to others in Mr. King's office, the respondent writes " the conduct of Mr. King and his office throughout this unnecessarily long drawn-out game you are all playing with my life and those of my children. Have a great day and keep up the good work all. Remember there is more to this than \$\$, there are little children being used ";
- viii. On August 23, 2022, the respondent wrote to Mr. King stating "you have done an excellent job of making this situation miserable ";
- ix. On September 7, 2022, the respondent once again questioned the motivations of Mr. King.

[164] Further conduct that justifies an award of special costs is in relation to the respondent's virtually complete failure to provide document disclosure. On October 8, 2020, an order was made requiring the parties to exchange lists of documents by November 30, 2020. The respondent did not comply with this order. At his examination for discovery on September 1, 2021, the respondent was asked to provide his list of documents but he failed to provide one as requested. On August 4, 2022, at a trial management conference, the respondent was again ordered to provide a list of documents within seven days. In response to the order made at the trial management conference, the respondent did prepare a document that is purported to be a list of documents but is not. It attached some specific documents that had been requested at his examination for discovery but is otherwise wholly deficient as a list of documents.

- [165] The respondent was cross-examined on his failure to provide a list of documents at the trial. When asked why he did not file his list of documents by November 30 2020, he replied that he did not know a list of documents was a court form. He was then reminded that he was asked for his list of documents at his examination for discovery on September 1, 2021, and again replied that he did not realize it was a required form. He also testified that he thought his form F8 financial statement was a list of documents.
- [166] I do not accept any of the excuses of the respondent for his failure to provide a list of documents. The respondent is an intelligent person. He could easily have ascertained what was required. Indeed, he had the claimant's list of documents which alerted him to the form required.
- [167] I find that the respondent simply chose to ignore the court orders requiring him to provide a list of documents and is in continuing breach of those orders.
- [168] The failure to disclose required information and assets has many times been described as the "cancer of family law litigation": *Michel v. Graydon*, 2020 SCC 24, at para. 33. This matter is particularly egregious as the respondent has simply and wholly failed to comply with his disclosure requirements and has flouted two court orders.
- [169] A final factor leading me to award special costs is the conduct of the respondent in serving subpoenas on R.M. and D.F. As I have indicated, these individuals had no relevant evidence to give and there was no basis for requiring their attendance at trial. The respondent's motives in serving subpoenas on them are questionable.
- [170] Accordingly, the claimant is awarded special costs of this proceeding, to be assessed.

Orders

[171] Consistent with the above reasons, I make the following orders:

- a) On consent, the parties shall be the guardians of the children under s.39(1) of the FLA.
- b) The parties will share equally all of the s. 41 parental responsibilities for the children under s. 40(2) of the FLA as follows:
 - i. Each party will have the obligation to advise the other of any matters of a significant nature affecting the children;
 - ii. Each party will have the obligation to discuss with the other any significant decisions that have to be made concerning the children, including significant decisions about their health (except emergency decisions), education, religious instruction and general welfare;
 - iii. The parties must discuss significant decisions with each other and must attempt to reach agreement on those decisions;

- iv. In the event that the parties cannot reach an agreement on a significant decision despite their best efforts, they must, first attempt to resolve the issue through mediation with a family justice counsellor and, if such mediation is unsuccessful, either may apply for directions pursuant to s. 49 of the FLA; and
- v. Each party will have the right to obtain information concerning the children directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party caregivers.
- c) On consent, the parties will share equally the parenting time of the children on a week-on week-off basis with the exchange to take place on Mondays, unless the parties otherwise agree or a court order provides otherwise;
- d) On consent, each party shall have one two-week block of parenting time with the children each summer;
- e) The RESP accounts are to be consolidated into one account which shall be jointly administered by the parties and used for the children's future post-secondary education. Any payments out from the RESP shall be counter-signed by both parties;
- f) To equalize family property and family debt, the respondent shall make a payment of \$78,353 to the claimant within 30 days of the date of this order;
- g) The claimant is to remain the sole owner of the West 14th property and is to be solely responsible for the mortgage on that property. The respondent has no right, title or interest in that property;
- h) The respondent is to remain the sole owner of the Osoyoos 4-plex and is to be solely responsible for the mortgage on that property. The claimant has no right, title or interest in that property except she may continue to reside there until December 31, 2022 and she may continue to maintain a certificate of pending litigation on the property until such time as the compensation payment ordered herein is paid;
- i) The claimant is entitled to sole ownership and possession of the 2009 BMW;
- j) The respondent is entitled to sole ownership and possession of the Big Foot trailer, the 1996 F250 and the 2018 Jeep Wrangler;
- k) The claimant's pension shall be divided in accordance with Part 6 of the FLA for the period from October 2010 to November 2019;
- l) The incomes of the parties for support purposes are \$76,459 for the claimant and \$75,907 for the respondent;
- m) Neither party is currently required to pay child support to the other;

- n) The Guidelines s. 7 special and extraordinary expenses, including the costs of orthodontic treatment for T.H., will be shared equally between the parties. The proportions shall be adjusted on June 1 of each year based on the line 150 incomes of the parties for the previous year;
 - o) The costs of the child, T.H., participating in a Kelowna based elite soccer program will be allocated as follows, unless the parties agree otherwise,
 - i. the parties will equally share the cost of registration and uniforms, and
 - ii. All costs associated with travel to and from practices and games, including fuel, meals and accommodation, will be borne by the respondent;
 - p) By June 1 of each year, each party is to provide the other party with their complete T1 General tax return for the previous year and with any notices of assessment or re-assessment;
 - q) Neither party is entitled to spousal support;
 - r) Pursuant to s. 222 of the FLA, the parties will
 - i. put the best interests of the children before their own interests,
 - ii. encourage the children to have a good relationship with the other parent and speak to the children about the other parent and that parent's partner in a positive and respectful manner, and
 - iii. make a real effort to maintain polite, respectful communications with each other, refraining from any negative or hostile criticism, communication or argument in front of the children;
 - s) Pursuant to s. 222 of the FLA, the parties will not
 - i. question the children about the other parent or time spent with the other parent beyond simple conversational questions,
 - ii. discuss with the children any inappropriate adult, court or legal matters, or
 - iii. blame, criticize or disparage the other parent to the children; and
 - t) The claimant is awarded special costs of this proceeding, to be assessed.
- [172] The parties have leave to speak to me should they require clarification of any of the above orders.

"Giaschi J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/22/19/2022BCSC1937.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/s-e-h-v-s-d-h-2022>

Prepared on 25 October 2026 · Esheria