

CANADA / JUDGMENT

S.M.W. v. J.M.B.W.

2024 BCSC 2064

COURT

Supreme Court of British Columbia

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2024 BCSC 2064 S.M.W. v. J.M.B.W.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.M.W. v. J.M.B.W.,

2024 BCSC 2064

Date: 20241114

Docket: E4894

Registry: Courtenay

Between:

S.M.W.

Claimant

And

J.M.B.W.

Respondent

Before: The Honourable Mr. Justice Verhoeven

Reasons for Judgment

Counsel for the Claimant:

A. Kashikar

Counsel for the Respondent:

L. Atkinson

Place and Dates of Trial:

Courtenay, B.C.

October 9-11, 15 and 16, 2024

Place and Date of Judgment:

Courtenay, B.C.

November 14, 2024

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I. Introduction

- [1] The major issue in this family law case relates to the division of family property, and in particular, the division of the proceeds of sale of the parties' former family home.
- [2] The parties agree that they separated on or about April 27, 2022. They sold their family home shortly thereafter, with the sale completing on July 14, 2022. They each received \$291,192.09, representing 50% of the net sale proceeds.
- [3] The claimant brought these proceedings about a year later, on August 2, 2023. She claims that the sale proceeds should not have been equally divided, because most of the purchase price for the home was provided as a gift or inheritance to her, when it was purchased in February 2016.

- [4] She argues that rather than the equal division that actually occurred, she ought to have been credited with the \$264,377.38 that she received from the family trust used for the down payment. She contends that the respondent received \$132,188.60 more from the proceeds of sale than he ought to have. She claims for this amount, as excluded property, or on an unequal division.
- [5] Other issues include the claim of the plaintiff for repayment of \$35,000 that she paid to the respondent in February 2023, during a period of reconciliation, as well as child support and spousal support matters.

II. Background

- [6] The claimant was born in 1988 and is 36 years of age. The respondent was born in 1990 and is 34 years of age. The claimant is from New Zealand. She met the respondent in late 2009 when they were both working at a restaurant at the Mount Washington ski resort. The claimant was in Canada on a working holiday visa. She was working as a bus girl, and the respondent was working as a cook. They began residing together in a marriage-like relationship at Mount Washington as of April 2010. When the ski season ended, they resided for a time at Lloydminster, Alberta, (or Saskatchewan) where the respondent was from, and where his family resides. The claimant then returned to New Zealand. The respondent joined her there in late 2010.
- [7] The couple resided in Whanganui, New Zealand for two years. The claimant worked in a glass-blowing studio, while also studying glass production and design at a post-secondary institution, the Universal College of Learning ("UCOL"). She completed two years of a three-year program and obtained a "Certificate in Glass".
- [8] The respondent is a high school graduate. While in New Zealand, he worked as a cook, full-time. During their second year in New Zealand, he studied culinary arts at UCOL. He did not testify that he obtained any formal accreditation as a chef, so I infer that he did not.
- [9] The couple returned to Alberta in 2013. The claimant planned to enroll at the Alberta College of Art and Design, in order to obtain a Bachelor of Fine Arts degree. However, she became pregnant, and so she did not enroll or continue her studies. They resided briefly in High River. The claimant worked part time as a glass blower's assistant. The respondent worked as a cook. The High River flood of June 2013 forced them to leave High River. They moved to the Comox Valley, where their first child, a son, was born in September 2013. They have resided in the Courtenay/Comox area since then.
- [10] The couple's second son was born in September 2015. Therefore, their two sons are now 11 and nine years of age.
- [11] The parties were married in July 2015, at Mount Washington, Courtenay.

- [12] During the marriage, the respondent worked full time as a restaurant cook or chef. At the time of their separation in April 2022, he was earning approximately \$60,000 per annum, as a chef. The claimant was primarily responsible for looking after the children. She also made and sold some glass art. Other than that, she was not employed outside the home, until approximately April 2021, when she worked for a retail chocolate business in Courtenay, as a chocolatier. This work ended in approximately April 2022, around the time of their separation.
- [13] The family home was purchased February 1, 2016. It was located on Valley View Drive, in Courtenay. The purchase price was \$371,000. Title was in the claimant's name alone. The claimant borrowed \$96,000 from the Toronto Dominion Bank on a mortgage. The remaining funds required to complete, \$264,377.38, came from her parents, in New Zealand, by way of a family trust. The trust advanced \$294,015 to the claimant. Of the funds advanced to the claimant, about \$30,000 was used for other expenses, including renovations to the house.
- [14] The claimant explained that the title was put in her name alone, at the time, because the respondent did not have adequate credit. She was able to qualify for the mortgage financing due to the large down payment used to buy the home. At the time of the purchase, the claimant was not working, and the respondent was working as a chef at a Courtenay restaurant earning, the claimant thought, about \$21 or \$22 per hour.
- [15] From 2013 to 2020, the claimant's parents paid her \$2,000 per month. She used the money from her parents to subsidize family living expenses. She had a falling out with her parents in 2020, and the monthly payments ended. She later went to work at the chocolate business.
- [16] In December 2021, the home was refinanced with a larger mortgage. The incomes of both parties were required to qualify for the new larger mortgage. For the purpose of the refinancing, the claimant transferred the title from her name alone into joint tenancy. The original mortgage borrowing of about \$96,000 had been reduced to about \$85,000 by that time. The title was transferred effective December 21, 2021. When the house was sold in July 2022, the mortgage balance on the new Toronto Dominion Bank mortgage that was placed was \$181,494.54. Thus, the additional borrowing was approximately \$100,000, as the respondent testified.
- [17] In late March or early April 2022, the claimant suddenly announced to the respondent that she wanted a separation. Soon thereafter they decided to sell the home. They continued to reside together in the home, in separate parts of the house, until the sale completed on July 14, 2022. On the sale, they equally divided the net proceeds of sale. They agreed to pay some personal debts (lines of credit, and credit cards) out of their respective shares. The home was sold for \$792,000. Each party received payment of \$291,192.09.
- [18] The parties had little in the way of assets other than the house, at the time it was sold in July 2022. They each had a vehicle, and the claimant had some glass blowing equipment.

- [19] The respondent contends that the sale of the home in July 2022 reflected an agreement between the parties to divide their property and debt equally, within the meaning of s. 92 or 93 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [20] Shortly after the sale of the home, the parties began a process of reconciliation, culminating in resumed cohabitation effective mid-February 2023. However, they separated again at the end of April 2023. This time, the separation was instigated by the respondent.
- [21] The claimant's notice of family claim ("NOFC") filed August 2, 2023, states that the parties separated April 28, 2023. The respondent's response to family claim and counterclaim states that the parties separated April 27, 2022. At trial, the claimant concedes that the separation occurred on or about April 27, 2022.
- [22] Thus, they agree that s. 83(1) of the FLA, is not applicable, and that they remained separated, notwithstanding their reconciliation. In addition, the respondent relies on s. 83(2) of the FLA, which is as follows:

Nothing in this Part affects a division of property under an agreement or order in a circumstance where, after the agreement or order was made, spouses live together and then separate again.

- [23] Unfortunately, very little from the proceeds of sale remains. As agreed, the parties each used some of the proceeds to pay some personal debts. The claimant spent \$30,000 when she traded in her Mazda and bought a pick-up truck. She spent \$40,000 on glass-blowing equipment. During the reconciliation, the claimant paid the respondent \$35,000, which she claims. According to the most recent financial statements of the parties, the claimant has no financial assets and owes more than \$10,000 on a credit card.
- [24] The respondent also spent a large portion of the money he received from the sale. He has remaining financial assets of about \$129,000.
- [25] The respondent lost his job as a chef at a local restaurant at the end of December 2023, when the restaurant ceased operations. His only work in 2024 has been as an on-call, relief postal employee with Canada Post. He delivers mail as a relief rural suburban mail carrier ("RSMC"). He has no guaranteed amount of work. His income has been minimal. His year-to-date earnings to July 20, 2024, were \$6,377. He hopes to obtain a permanent relief position. In his most recent financial statement, he indicates that a permanent relief position would guarantee him a minimum of four hours work each day. At trial, he testified that in that position, he would expect to earn \$48,000 per annum, or more.
- [26] At trial, in mid-October 2024, he testified that his year-to-date earnings as a postal employee were \$15,000. He contends that the sum of \$48,000 should be used for purposes of child support and spousal support.

- [27] The claimant began having mental health issues at the age of 16. She testified that she has struggled with mental health challenges on and off since that time. In the early years, she mostly suffered from depression. Beginning in approximately 2017, she began to suffer from manic episodes. She attributes her mental health issues in part at least to sexual abuse she suffered as a child at the hands of her two older brothers, particularly the eldest brother.
- [28] Her mental health condition was not adequately treated until she was referred to a psychiatrist after attending the hospital emergency department in October 2022. There is no expert opinion report in evidence, but the clinical records of the psychiatrist who treated her indicate diagnoses of bipolar 1, bipolar disorder, post-traumatic stress disorder, and borderline personality traits. The records indicate that she was prescribed a number of psychiatric medications. In general, the records indicate that her condition improved over the course of time, with treatment. There are no records in evidence after June 2023.
- [29] Since separating from the respondent for the second time in April 2023, the claimant has qualified for provincial disability benefits, through the persons with disability ("PWD") program. She receives approximately \$15,000 in PWD benefits annually, and hopes to earn up to \$15,000 in addition, which is the maximum she can earn while remaining in receipt of PWD benefits. She worked part time in a plant nursery until August 2024.
- [30] Very soon after the second separation of the parties in April 2023, the claimant re-established her relationship with her parents in New Zealand. Her parents subsidize her rent as needed. The supplements vary from zero to \$500 per month. In addition, she operates a small business as a glass blowing artist. However, the business is not profitable.
- [31] The plaintiff testified that her mood has been stable for about two years, as of the date of trial, in October 2024. She continues to take approximately five prescribed medications daily.
- [32] At the Judicial Case Conference (JCC) on November 21, 2023 (which, as it happens, I presided over) the parties agreed to equal shared parenting, which the parties had been doing since August 2023. Currently they share parenting on a week on/week off schedule.
- [33] By consent, I made an order for divorce on October 16, 2024, the final day of the trial.

III. Issues

[34] The issues to be decided are as follows:

1. Are the 2023 FLA amendments applicable to these proceedings?
2. What is the effect of the transfer of the property in December 2021?
3. Did the parties agree to divide their property and debt equally?
4. If so, should the agreement be set aside as being unconscionable?
5. Should the family property and debt be divided unequally pursuant to s. 95?

6. The claimant's claim for re-payment of \$35,000 from the respondent.
7. Child support and spousal support determinations.

IV. Analysis

1. Are the 2023 FLA amendments applicable to these proceedings?

[35] In order to analyze the effect of the December 2021 transfer of the title, and the respondent's asserted agreement in 2022 to divide the property and debt equally, it is first necessary to determine whether the May 2023 amendments to the FLA apply.

[36] The FLA was amended by the Family Law Amendment Act, S.B.C. 2023, c. 12 ("FLAA"), the material portions of which came into force on May 11, 2023, thus, just after the parties separated for the second time.

[37] The FLAA added s. 81.1 to the FLA:

81.1 (1) The rule of law applying a presumption of advancement must not be applied in questions respecting the ownership of property as between spouses.

(2) The rule of law applying a presumption of resulting trust must not be applied in questions respecting the ownership of property as between spouses.

[38] The FLAA amended the definition of excluded property, by adding s. 85(3):

(3) If property is excluded from family property under subsection (1), the exclusion applies despite any transfer of legal or beneficial ownership of the property from a spouse to the other spouse.

[39] Section 96 was repealed and replaced with the following:

Division of excluded property

96 The Supreme Court must not order a division of excluded property unless

- (a) family property or family debt located outside British Columbia cannot practically be divided, or
- (b) it would be significantly unfair not to divide excluded property on consideration of the duration of the relationship between the spouses and one or more of the following factors:
 - (i) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of the excluded property;
 - (ii) the terms of any agreement between the spouses respecting the excluded property, other than an agreement described in section 93 (1) [setting aside agreements respecting property division], including but not limited to terms respecting the transfer of the excluded property;

(iii) if the Supreme Court makes a determination under section 95 (1) [unequal division by order] respecting significant unfairness, the extent to which the significant unfairness cannot be addressed by an unequal division of family property or family debt, or both.

[40] Subsection (4) of s. 97 was repealed and the following substituted:

- (4) Nothing in this section permits the Supreme Court to divide excluded property unless
- (a) division is permitted under section 96 [division of excluded property],

[41] However, s. 24 of the FLAA provided that s. 81.1 and the amendments to ss. 85 and 96 do not apply to "pre-existing proceedings", as defined:

Transition - pre-existing proceedings

24 (1) In this section, "pre-existing proceeding" means

- (a) a proceeding, under the Family Law Act, respecting property division that was started before the date on which this Act receives Royal Assent, or
 - (b) a proceeding, under the Family Law Act, to set aside or replace an agreement respecting property division that was made before the date on which this Act receives Royal Assent.
- (2) Unless the spouses agree otherwise,
- (a) section 81.1 of the Family Law Act, as enacted by this Act, does not apply respecting a pre-existing proceeding, and
 - (b) sections 85 and 96 of the Family Law Act, as those sections read immediately before the date on which this Act receives Royal Assent, continue to apply respecting a pre-existing proceeding.

[42] As these proceedings were started after the FLAA received Royal Assent on May 11, 2023, s. 24(1)(a) has no application. However, s. 24(1)(b) applies if this action is a "a proceeding, under the Family Law Act, to set aside or replace an agreement respecting property division that was made" before May 11, 2023.

[43] The claimant's NOFC claims exclusions from family property for the net proceeds of sale of the property in the amount of approximately \$580,000, as well as her glass blowing equipment, worth approximately \$70,000. She also claims unequal division of the family property based upon the exclusion of her initial contributions to the family property, and, further, an order for the division of property based on the principles of unjust enrichment, constructive or resulting trust, or quantum meruit. In context, these claims clearly refer to the proceeds of sale of the home received in July 2022.

- [44] In answer to the claimant's property division claims, the respondent's Counterclaim seeks equal division of family property and debt, and asserts that "the parties have already divided their family property and debt equally". Thus, he pleads an agreement of the parties to this effect. His Response to Family Claim is similar.
- [45] The assertions of the parties at trial are consistent with their pleadings. At trial, as noted, the major issue was whether the parties made an enforceable agreement to equally divide their property and debt, and in particular the proceeds of sale of the home, in 2022. The respondent asserted that they had made such an agreement, and the claimant asserted that they had not. The claimant also asserted that if an enforceable agreement was made, then it should be set aside as unconscionable under the common law of contract, or, in the further alternative, should be set aside under s. 93(5) of the FLA.
- [46] The words "set aside or replace" found in s. 24(1)(a) of the FLAA track the language of s. 93(5) of the FLA, and the words "agreement respecting property division" tracks the language of both of ss. 92 and 93 of the FLA, upon which the respondent relies. Therefore, based upon the pleadings of the parties, as well as their positions at trial, I conclude that this is a "pre-existing proceeding" within the meaning of s. 24 of the FLAA, and therefore the relevant amendments to the FLA set out in the FLAA do not apply.
2. What is the effect of the transfer of the property in December 2021?
- [47] As noted, when the family home was sold on July 14, 2022, the title was in joint tenancy, as a result of the refinancing and transfer of title that occurred in December 2021.
- [48] Irrespective of the state of the title, the burden lies with the claimant to establish that her contribution to the purchase of the property in 2016 is excluded property pursuant to s. 85: s. 85(2); *Pisarski v. Piesik*, 2019 BCCA 129, at paras. 22, 24.
- [49] As s. 85(3) of the present FLA does not apply, her claim requires consideration of her intention at the time of the transfer. If she intended to make a gift of the property to the marriage, then the exclusion is lost: *V.J.F. v. S.K.W.*, 2016 BCCA 186, at para. 74; *Venables v. Venables*, 2019 BCCA 281, at paras. 94-95.
- [50] If there is insufficient evidence of the actual intention of the transferor, then the common law presumptions come into play: *V.J.F.* at para. 77; *Namdarpour v. Vahman*, 2019 BCCA 153; *Pisarski*, at paras. 47-48.
- [51] As explained in *Pisarski*, the presumption differs, based upon whether the transfer is from husband to wife, or wife to husband:
- [41] A presumption of advancement applies where the grantor, in making a gratuitous transfer in certain relationships (from a parent to a minor child, or from husband to wife), intended to make a gift: *Kerr v. Baranow*, 2011 SCC 10 at para. 20. On the other hand, a presumption of resulting trust governs gratuitous transfers from a wife to her husband: *Kerr* at para. 20; *Pecore v. Pecore*, 2007 SCC 17 at paras. 27-28. Both are evidentiary presumptions.

- [42] While submitting there is "some question" as to whether the judge applied the presumption of advancement, the appellant contends the judge did apply this presumption to her contribution to the purchase of the Fulton Property, and did so incorrectly. She says the judge's reference to a "gift" in para. 48 of his reasons must relate to her contribution to that purchase as there was no other transaction to which the term "gift" would apply.
- [52] As noted, the claimant's NOFC refers to a resulting trust.
- [53] Based upon the discussion of these presumptions in the Supreme Court of Canada's decision in *Pecore v. Pecore*, 2007 SCC 17, at paras. 31-33, there is reason to doubt whether the difference in the presumptions as between husbands and wives ought to continue in the modern era. However, as I conclude that I need not have regard to the presumption of resulting trust in this case, I need not consider that question.
- [54] As the Supreme Court of Canada observed in *Pecore*, at para. 23, common law presumptions may remain especially useful in cases where direct evidence of the transferor is unavailable, such as in estate disputes: at para. 23. In this case, direct evidence of the intention of the transferor is available, since the claimant is available to testify, and did so.
- [55] Although the evidence is somewhat sparse in some areas, on the direct and circumstantial evidence available, I conclude that, on a balance of probabilities, the claimant intended to make a gift of the property to the marriage. My reasons are as follows:
1. The fact that the title was in the claimant's name only might be evidence that, when the property was purchased in 2016, the claimant intended to preserve her exclusive interest in the down payment. However, the evidence does not support that conclusion. The claimant testified that the reason the title was put in her name alone was that the respondent did not have adequate credit. She gave no other reason. Why this should have prevented the respondent from being on the title is not clear to me, but the fact is that this was the only evidence of the claimant on this point. The respondent testified to the same effect; namely, that to his understanding, the only reason he was not on title in 2016 was because he did not qualify for credit at that time. (As noted, the purchase was partly funded by a mortgage in the amount of \$96,000).
 2. In 2016 the claimant received \$294,015 from the family trust. \$264,377.38 was used for the down payment. The remaining amount of about \$30,000 was used for renovations to the property or other expenses (the details are lacking). The remaining amount was used for family purposes and was therefore clearly gifted to the marriage. She also received \$2,000 per month from her parents, which she used to subsidize family living expenses. The claimed exclusion is for the \$264,377 that was used for the down payment for the property, but there is nothing in the evidence to support any distinction between this money and the other monies the claimant received from the trust or from her parents, other than the fact that the title was in the claimant's name alone.

3. There is no persuasive evidence that the claimant or her parents intended to preserve the down payment as the property of the claimant at the time the home was purchased. The parties did not discuss the matter. The respondent had a good relationship with the claimant's parents, having spent considerable time with them when the parties lived in New Zealand for two years. They did not tell the respondent that the gift was intended to benefit the claimant alone or seek his acknowledgement to this effect. (They did not testify at the trial).
4. Although when they divided the proceeds of sale of the home they recognized some separate debt obligations, the parties generally pooled their finances throughout the marriage. The claimant used the monthly subsidy from her parents for general household and family expense purposes. The respondent was the only income earner. His income went to pay for household and family expenses. Although there is no detailed evidence of the family spending, I infer that the household expenses paid from pooled monies included the expenses relating to the home, such as the mortgage, taxes, utilities, and so on.
5. As the parties both testified, the transfer was for the purpose of refinancing the property in order to take on a new, larger mortgage. The mortgage debt was increased by approximately \$100,000. The claimant did not qualify for the increased borrowing, without the respondent also becoming a borrower. In this respect the transfer to the respondent was not entirely gratuitous, as he became a borrower on the new, larger mortgage.
6. The parties did not discuss the claimant's contribution of the down payment for the house at the time of the transfer. The transaction was a joint decision of the parties. The claimant wanted to refinance the property in order to build a glass studio on the property. Although there are no documents in evidence establishing with certainty what the extra borrowing was spent on, the parties generally agree that the money was used for various purposes. The claimant testified that \$23,000 was used to build the glass-blowing studio on the property. The respondent suggested the amount was \$40,000. Thus, some of the money borrowed was spent on what became a joint asset. They agree that they paid off some personal debts. It is possible some of the money was used to buy computer equipment for the respondent. What is clear is that the refinancing and the transfer was as a result of joint decisions of the parties. Also, there was no issue between them at the time regarding the claimant's contribution of the down payment for the property.
7. In general, the claimant took no steps, in 2016, or 2021, to preserve the exclusion. Although it seems more than likely that she was unaware of the law relating to excluded property under the FLA, this does not change the fact that the absence of any steps being taken to preserve the contribution as separate property is some evidence of her intention to gift the property to the marriage: V.J.F. , at para. 78; Pisarski, at para. 32; Brazinski v. Brazinski, 2023 BCCA 359, at para. 73.

8. The claimant was not experiencing a manic episode at the time of the transfer. The parties were not experiencing marital problems at the time. The fact that the parties separated only a few months later cannot change the analysis of the claimant's intentions at the time of the transfer.
 9. The subsequent conduct of the claimant in agreeing to divide the proceeds of sale equally is consistent with her decision to gift the property to the marriage. When the property was sold, the claimant did not assert that she ought to have a larger share in view of her contribution to the purchase of the property. The parties did not discuss this. I accept that the claimant's thinking was compromised by a manic episode during mid 2022 when the parties sold the home. However, she understood the transaction. Therefore, notwithstanding her mental health condition at the time, I still place some weight on her subsequent conduct in agreeing to divide the proceeds of sale equally, to indicate that she did not intend to preserve the down payment to herself when the property was transferred.
 10. At trial, in cross-examination, the claimant testified that in transferring the property she felt that she had to "appease" the respondent. She added that they were in a loving relationship, and she wanted to make the respondent happy. In re-examination she said that she felt that there would be a breakdown in the relationship if she did not transfer the title. However, she did not testify that the respondent pressured her in any way, and there is nothing in the evidence to suggest that he did. The claimant's evidence amounts to an assertion that she had unstated reservations about transferring the property. However, she did not convey any such concerns to the respondent at the time. I conclude that the claimant was unconcerned about benefiting the respondent at the time of the transaction. I reject the claimant's evidence that she was reluctant to transfer the property at the time. In my view her testimony in this respect is an after-the-fact interpretation, in light of subsequent events, including her claims in this lawsuit.
- [56] In summary, I conclude that the title to the property was in the claimant's name alone when the property was purchased, essentially for the practical reason relating to the respondent's inability to qualify for the mortgage, and did not indicate that the claimant intended to protect her down payment. Further, when the claimant transferred the property into joint tenancy in December 2021, the claimant intended to gift the property to the marriage. Therefore, the presumption of resulting trust is rebutted.
3. Did the parties agree to divide their property and debt equally?
- [57] Given my conclusion that the claimant's claim for exclusion was lost when she transferred the home into joint tenancy in December 2021, this issue becomes less significant to the result. However, as I have said, the sale of the home with equal division of the sale proceeds has some bearing on the claimant's intention with respect to the transfer of the title. The agreement of the parties is also relevant to issues of significant unfairness and unequal division pursuant to s. 95, with particular reference to s. 95(2)(b): "the terms of any agreement between the spouses, other than an agreement described in section 93(1)".

- [58] As noted in February or March 2022, the claimant began experiencing another manic episode. She testified that she became confused about her sexual identity, in believing that she was gay. Although her evidence is vague, she developed a relationship or interest in a female co-worker. When the respondent was offered work as head baker with her employer, she suddenly announced that she wanted to separate. The respondent was shocked. For some time, he tried to salvage the relationship but was not successful.
- [59] The parties decided to sell the home. In early April 2022, the claimant contacted Mr. Horsfall, the same real estate agent that the parties had relied on when she bought the home in 2016, about selling it. At their request he prepared a market evaluation in mid April 2022. They listed the home for sale through Mr. Horsfall in late May 2022. The property market was strong, and it sold quickly. The claimant met with the agent at least once. He did not notice anything unusual about her behaviour, at any time. He noted that the parties both seemed sad, as he expected. They were living on separate floors in the home. He testified that the parties did a very good job in preparing the property for sale. This supports the claimant's evidence that she was able to focus on preparing the property for sale, despite her manic state.
- [60] On July 12, 2022, the parties attended at a law firm and signed the conveyancing documents, including an Authority to Pay document, indicating that the net proceeds of sale (that is, after payment of the mortgage and the law firm's fees) would be divided equally. The conveyancing lawyer, Mr. Schaffrick, was present when they signed the Authority to Pay, but did not witness their signatures on the document itself.
- [61] The respondent argues that the Authority to Pay signed by both parties in the presence of a lawyer constitutes an agreement respecting the division of property and debt within the meaning of s. 93 of the FLA.
- [62] However, s. 93(1) applies if the spouses "have a written agreement respecting division of property and debt, with the signature of each spouse witnessed by at least one other person." Mr. Schaffrick did not witness their signatures, nor did anybody else.
- [63] Subsections 93(2) and (6) add:
- (2) For the purposes of subsection (1), the same person may witness each signature.
- (6) Despite subsection (1), the Supreme Court may apply this section to an unwitnessed written agreement if the court is satisfied it would be appropriate to do so in all of the circumstances.
- [64] I do not accept that the Authority to Pay constitutes a written agreement respecting division of property and debt within the meaning of s. 93 of the FLA. It is, however, evidence of an oral agreement to this effect, within the scope of s. 92.
- [65] Sections 93(1) and (2) expressly require a level of formality in relation to the agreement and the manner of its execution.

- [66] Mr. Schaffrick was present when the document was signed as a conveyancing lawyer, only. He certainly was not acting for the parties in relation to family law matters and gave no advice in that respect. The fact that the lawyer probably saw the parties sign the document is insufficient to comply with the statute. As I interpret the statute, the witnessing required must be indicated on the document, in the usual way. Typically, of course, this is accomplished by having the witness sign the document, as a witness, as is common with formal legal documents.
- [67] On its face, the Authority to Pay does not purport to be an agreement to divide property and debt for family law purposes. It deals only with the sale of the home, and the associated debt, being the mortgage. The document does not address the parties' other property or debt.
- [68] Although section 93(6) allows the court to apply s. 93 even if the agreement is unwitnessed, the court must first find that the agreement is an agreement within the meaning of the section.
- [69] However, spouses may make an enforceable oral agreement to divide property and debt pursuant to s. 92. Such oral agreements must be challenged under s. 95(2) of the FLA, rather than s. 93: *Storey v. Terry*, 2019 BCSC 674, at paras. 51-52; *aff'd* 2020 BCCA 30; *Voitchovsky v. Gibson*, 2022 BCSC 355, at para. 37, *aff'd* 2022 BCCA 428 [Voitchovsky CA]. Section 92 does not require that the agreement expressly address separation in order to be an enforceable agreement: *Voitchovsky CA*, at para. 44.
- [70] In *B.S.W. v. W.F.W.*, 2023 BCSC 1925, I stated:
- [88] The test for a binding and enforceable agreement is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract": *Voitchovsky v. Gibson*, 2022 BCCA 428, at para. 32 [Voitchovsky CA].
- [89] The determination of the outward manifestation of the parties' intentions is contextual and takes into account the parties' communications as well as their conduct before and after the agreement is made. The parties must have reached consensus on the essential terms of their agreement and failure to reach this "meeting of the minds" means the agreement will fail for lack of certainty. This inquiry is an objective one, such that the subjective state of mind and personal knowledge of the parties is not relevant. The question is not what the parties subjectively had in mind, but whether their conduct was such that a reasonable person would conclude that they intended to be bound. In analyzing this conduct, courts can consider the surrounding circumstances: *Voitchovsky CA*, paras. 33-34
- [71] I conclude that the parties made an oral agreement to divide their property and debt equally, within the meaning of s. 92.

- [72] There can be no doubt that the parties agreed to sell the home and to divide the proceeds equally. They jointly retained Mr. Horsfall to sell the property on their behalf. To do this, they would both have had to sign a listing agreement and sign the contract of purchase and sale. Additionally, they signed the Authority to Pay, which is a clear outward manifestation of their agreement to divide the net proceeds of sale equally.
- [73] They also agreed to pay their separate debts (lines of credit, and credit card debts) with their respective proceeds of sale. Their conduct in carrying out the terms of the agreement both as to the home and their other debts is further evidence of the existence of their agreement. Both parties relied on the agreement in spending or allocating their shares without reference to each other.
- [74] The claimant argues that, as the parties did not discuss or agree that in entering into the agreement the claimant was relinquishing her claim for exclusion of property under s. 85 of the FLA, they did not agree as to all the essential terms of the agreement. A variation of this argument is that the agreement should be set aside on the ground of mutual mistake, as neither of the parties understood how the agreement would potentially affect the claimant's claim for exclusion.
- [75] I do not accept these arguments. The essential terms of the agreement were simply that the property would be sold, and the net proceeds divided equally. Also, that the parties would pay their respective separate debts out of their shares of the proceeds of sale of the home. Leaving aside issues of voidability of the contract on common law grounds such as misrepresentation or unconscionability, and while I appreciate that separation agreements require special treatment, contract law does not normally require that the contracting parties understand much less agree as to the collateral legal consequences of a contract in order for it to be enforceable. Certainly, the statute does not require that an agreement under s. 92 include agreement as to its legal consequences. In *Voitchosvky CA* the Court held that the agreement need not even be made in contemplation of separation.
- [76] There were no vague or missing terms to the agreement. There was no mutual mistake about the agreement. The terms of the agreement were in fact carried out. The claimant questioned the validity of the agreement only more than a year later, when she brought this action.
- [77] In summary, I conclude that, subject to the claimant's argument that the agreement should set aside as unconscionable, the parties entered into an agreement, partly oral and partly written, to divide their property and debt under s. 92 of the FLA.
4. Should the agreement be set aside as being unconscionable?
- [78] In the alternative, the claimant argues that the agreement should be set aside on the ground of unconscionability.
- [79] The claimant argues that:

1. Her mental health condition rendered her vulnerable at the material time;
2. She is unsophisticated, and the negotiation was not free of informational and psychological exploitation;
3. Neither party understood the nature or consequences of the agreement, (insofar as it affected the claimant's claim for exclusion of property); and
4. She had no professional advice.

[80] The claimant relies on *Rick v. Brandsema*, 2009 SCC 10.

[81] In *Rick*, the Supreme Court of Canada summarized the findings of the trial judge, as follows:

[2] After a long and difficult marriage, the parties in this case negotiated and signed a separation agreement. Based on the test outlined by this Court in *Miglin v. Miglin*, 2003 SCC 24, [2003] 1 S.C.R. 303, the trial judge determined that the agreement was unconscionable because the negotiation process was severely flawed and the resulting settlement deviated substantially from the objectives of the governing legislation. He found that the wife was mentally unstable at the time the agreement was negotiated and executed, and that the husband took advantage of this "very significant" vulnerability by agreeing to a bargain he knew was based on misleading financial information, due in part to his own deliberate non-disclosure.

[31] The trial judge in this case concluded that the wife's "perception of reality" was "very significantly" affected by an "unhealthy condition of the mind" and that she was a "deeply troubled person". He found that her mental instability was not only manifest at the time of separation, but also persisted throughout the negotiation, execution and implementation of the separation agreement. This led him to conclude that the husband, by accepting a settlement offer he knew was based on misleading financial information, knowingly exploited his wife's mental instability at the time the agreement was negotiated and executed.

[53] The trial judge found that the agreement was unconscionable for a number of reasons. It represented a significant departure from the relevant legislative objectives and from the parties' undisputed intention to have an equal division of assets, resulting in an amount for the wife that was \$649,680 less than her presumptive entitlement under the Family Relations Act. He also found that by accepting a settlement amount that he alone knew was based on the misleading financial information he had provided at the very outset of negotiations, the husband had taken advantage of a mental instability of which he was "well aware". This was "compounded" by the husband's complete non-disclosure of the \$233,000 he had temporarily advanced to the wife's brother and had drawn on the parties' joint account. Finally, the trial judge concluded that the "presumptive equality" of the deal was further undermined "by the implementation of a plan to avoid the very tax consequences that were initially presented to support a reduction in his initial estimate of the value of the company" (para. 117).

- [82] The Court accepted the findings of the trial judge and relied on them in the Court's analysis of the issues: Rick at para. 34.
- [83] Unlike Rick, in this case, I do not conclude that the respondent exploited the claimant in relation to the agreement. There was no lack of disclosure. The finances of the parties were very simple and straightforward. Neither party had legal or professional advice. It cannot be said that the respondent misled the claimant or knowingly took advantage of the claimant's vulnerability or lack of accurate information.
- [84] As noted, I accept that the claimant was suffering from mental health issues at the material time, and that she was in the midst of a prolonged manic episode. On her evidence at trial, this is what led her to demand the separation. The respondent testified that the claimant's mental state varied over time, but in his assessment her condition was much worse in the past than it was in early and mid 2022. On the evidence as a whole, I am not able to conclude that the respondent knowingly took advantage of her condition in order to secure an unfair agreement.
- [85] Neither party knew how the agreement to divide the proceeds could affect the claimant's potential claim for excluded property. They simply never discussed this. Neither is financially sophisticated. Their levels of education are similar.
- [86] It was not unreasonable for the respondent to believe that equal division of the assets of the parties was consistent with the law, following a 12-year relationship, and in view of the fact that the home was in joint tenancy.
- [87] The claimant testified that the respondent was "adamant" that the proceeds of sale be divided equally. This description suggests that the respondent pressured her into agreeing to equal division. However, the topic of the claimant's gift or inheritance from the family trust was not discussed between them, at all, at any time. I do not accept that the respondent pressured the claimant into agreeing to equal division of their property.
- [88] The agreement was not made in haste. On the evidence, the parties decided to sell the home almost immediately once the respondent reluctantly accepted the claimant's demand for a separation, which was in early April 2022. The home was listed for sale in late May, and the sale was finalized in mid-July 2022. Thus, the agreement to divide their property and debt equally came together and was finalized over a period of more than three months.
- [89] It cannot be said that the agreement was substantially at variance from the objectives of the governing legislation, at the time it was made. The agreement was made in 2022, before the enactment of the legislative changes in the FLAA on May 11, 2023. As noted, prior to those amendments, the claimant's claim for exclusion was liable to be defeated if the court concluded that she intended to gift the property to the marriage.
- [90] In summary, I reject the claimant's argument that the agreement was unconscionable.
5. Should the family property and debt be divided unequally pursuant to s. 95?

[91] The claimant argues that if she lost the exclusion relating to the down payment, the property should be unequally divided in her favour. She argues:

1. She gave up her claim for excluded property;
2. Her contribution to the family finances exceeded his, due to the money she received from the trust and from her parents;
3. During the marriage the respondent was free to develop a career as a chef, while she was a stay-at-home mother; and
4. She is unlikely to receive substantial spousal support from the respondent.

[92] Section 95 of the FLA provides:

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

- (a) equally divide family property or family debt, or both, or
 - (b) divide family property as required under Part 6 [Pension Division].
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses, other than an agreement described in section 93(1) [setting aside agreements respecting property division];
 - (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;

- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
 - (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [93] The test for finding "significant unfairness" of equal division is high. In *Singh v. Singh*, 2020 BCCA 21, Justice Garson, for the Court, stated:
- [134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczewska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.
- [94] Similarly, in *Voitchovsky CA*, the Court summarized as follows:
- [59] The significant unfairness threshold required to depart from an equal division of property under the FLA is high (*V.J.F. v. S.K.W.*, 2016 BCCA 186; *He*, at para. 19). "Significant" has been defined as "extensive or important enough to merit attention" and to justify an unequal distribution, it is necessary "to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)" (*Jaszczewska v. Kostanski*, 2016 BCCA 286, at para. 41 [*Jaszczewska*], citing *Remm v. Remm*, 2014 BCSC 1552, at para. 44).
- [95] In *Hannon v. Hopson*, 2022 BCCA 314, Justice Butler (for the Court), considered the appellant's argument that the trial judge erred in failing to order unequal division, where the trial judge had found that the appellant's claim for exclusion of settlement funds failed, because he had gifted the money to the marriage.
- [96] Justice Butler recognized that formerly-excluded property can be considered when looking at the contributions made by the spouses to the acquisition and maintenance of family property; however, where a spouse has contributed formerly-excluded property, that contribution is not given additional weight relative to other financial contributions: at para. 77. He summarized as follows:
- [84] To summarize my conclusion on this argument, it is the nature and extent of a spouse's contribution of formerly-excluded property, considered in light of all of the relevant circumstances (along with the specified factors under s. 95(2)), that is relevant to a decision as to whether it would be significantly unfair to divide family property equally. The fact that formerly-excluded property became family property does not, by itself, mean that it would

be unfair, let alone significantly unfair, to divide family property equally. Rather, as with any kind of contribution to the family property and finances, a judge must consider the extent of the spouse's contribution of formerly-excluded property in light of the relevant circumstances and factors to decide whether equal division would result in significant unfairness.

- [97] Cases in which unequal contribution was found to reach the significantly unfair threshold have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: *Khan v. Gilbert*, 2019 BCCA 80 at para. 32.
- [98] In this case, I am not persuaded that equal division of the property and debt of the parties is significantly unfair. Looking at all of the circumstances, in the context of the factors set out in s. 95(2), I cannot conclude that equal division would create a "real sense of injustice that would permeate the result": *Singh* at para. 134.
- [99] The claimant's strongest argument for unequal division is based upon her contribution of the down payment to the home, and my conclusion that her claim for exclusion of the down payment fails.
- [100] In this respect, I note that by agreement the parties divided their property and debt roughly equally in 2022. In fact, the claimant may have had some greater share, as she kept her glass blowing equipment. The value of the equipment at the time of separation is not clear to me, however. The home was their only substantial asset. The claimant was well aware that she had contributed the down payment for the purchase of the home in 2016. She did not contest the agreement for equal division until about a year later, after the second separation of the parties. She spent virtually all of her share of the sale proceeds, before the parties reconciled, and more than a year prior to bringing these proceedings.
- [101] The respondent has also spent money, relying on the agreement. It appears that he has not been frugal, either. He has only about \$129,000 in cash remaining, at present. The claimant now claims \$132,188.60 as the amount by which he unfairly benefitted. It would not be fair to require the respondent to pay the amount he has left or any substantial part of it, contrary to the agreement of the parties, upon which he reasonably relied. The agreement of the parties is a relevant consideration under s. 95(2)(b).
- [102] The fact that the claimant gifted the property to the marriage at a time when she was mentally stable, and the relationship was sound cannot be overlooked.
- [103] Undoubtedly the parties both benefited greatly by the very generous support of the claimant's parents. But the respondent worked full time during the marriage, and contributed what he could to the family expenses. There is no evidence of blameworthy financial conduct on his part during the marriage. Leaving aside the factor of the claimant's down payment, in other respects there is in this case no "marked, prolonged, and intentional or unexplained disparities in contribution to family burdens": *Khan* at para. 32.

[104] In relation to this issue, I place no weight on the fact the claimant's parents also subsidized the family by regular payments of \$2,000 per month, over several years. Quite rightly, the claimant made no claim for exclusion of these funds, which were used to support the family as a whole during the material times.

[105] In respect of the claimant's other argument, the respondent has not developed a lucrative career as a chef. His most recent job paid him a salary of approximately \$60,000. He lost that job. He has not looked for work as a chef since then. He has chosen to abandon that career. However, as I will explain, in my view he should be capable of earning this amount in future.

[106] The claimant is now receiving disability payments and can earn limited income, in addition. The respondent agrees that the claimant is entitled to spousal support. The respondent is only 34 years of age and is in good health. In summary, I see no reason why the compensatory and non-compensatory objectives of spousal support cannot be met in this case.

6. The claimant's claim for re-payment of \$35,000

[107] In February 2023, during the period of resumed cohabitation, the claimant transferred \$35,000 to the respondent. The respondent concedes that this amount was held by him on the claimant's behalf.

[108] The respondent concedes that he is liable for repayment of these funds. However, he contends that he should receive a set-off for 50% of the total rent he paid during the period of reconciliation in 2023. He moved out of the shared apartment as of May 2023, but continued to pay rent on the apartment that the claimant continued to live in for the months of May to July 2023, as well as his own rent for the same period. He claims a set-off of \$7,568.

[109] I am not persuaded that the claimant should be liable for payment of rent during the three-month period of resumed cohabitation from February to March 2023. At that time the parties were economically joined. I see no basis for the respondent's claim.

[110] However, the respondent is liable for payment of child support for the months of May to July 2023, during which he paid the full amount of the claimant's rent. In fairness, he should receive a credit for one-half of the claimant's rent for this period. The evidence is less than clear, but the rent appears to have been \$1,850 per month, approximately. Therefore, the respondent should be credited with \$2,775. The net amount payable to the claimant is therefore \$32,225.

[111] In the result, other than the payment of \$32,225 from the respondent to the claimant, no further order for division of property and debt is required, as the parties already divided their property and debt in 2022.

7. Child Support

[112] The income of the parties has been as follows:

Year

Claimant

Respondent

2021

\$5,908

\$43,938

2022

\$14,296

\$45,095

2023

\$27,251

\$56,053

[113] The claimant's income for 2021 was reduced by a business loss of \$3,481 in relation to her glass business. In 2023 she qualified for PWD benefits, following the separation.

[114] The respondent's income for 2022 and 2023 includes some interest and investment income, which I infer is related to the money he received from the sale of the home. His interest and investment income in 2023 was \$4,198.

[115] The claimant resigned from her work as a chocolatier in May 2022, due to stress. This was around the time of the first separation. Since then, she has worked as a glass artist, and worked part time as a gardener at a nursery, for about 18 months, to the end of August 2024. She resigned from that job, as a result of an issue of some kind with a co-worker. At trial, she testified that she is looking for work and hopes to obtain employment soon. She can earn up to \$15,000 and receives \$15,000 in PWD benefits. She estimates that her annual income will be approximately \$30,000, therefore.

[116] There is no evidence as to how her PWD benefits are calculated. To the extent, if any, that a portion of the PWD benefits are attributable to the children, then her income for child support purposes must be reduced accordingly, pursuant to Section 4 of Schedule III to the Federal Child Support Guidelines [the Guidelines]: R.J.C. v. F.H.W.C., 2015 BCSC 578, at para. 238.

[117] The respondent's salary at the restaurant was \$58,000 per annum. When that restaurant closed at the end of December 2023, he was offered work in the replacement restaurant, at a lower salary of \$45,000 - 48,000. The former restaurant was more up-scale. The replacement is more casual. He declined the offer. He decided to seek employment outside of the

restaurant industry. Working as a chef requires evening and weekend work hours, which he says is incompatible with his parenting obligations. He testified that he has looked for other work, but found nothing suitable. As a result, his only employment has been as a casual, on-call relief mail carrier. As noted, he hopes to obtain a permanent relief position, in which he would expect to earn \$48,000 per annum, or more. As a relief mail carrier, he works from 6 a.m. to 2 p.m., when work is available. He can return home in the morning to take his two children to school and can pick them up from school in the afternoon.

- [118] The claimant contends that the respondent is capable of earning \$60,000 per annum, similar to the amount he previously earned as a chef. The respondent concedes that income should be imputed to him. He contends that his income should be imputed at \$48,000 per year.
- [119] The principles relating to imputation of income were reviewed by Justice Griffin, in *Zilic v. Zilic*, 2021 BCCA 107:
- [19] The imputation of income is discretionary. The burden is on the party seeking to establish that income should be imputed. The broad governing test is reasonableness, having regard to the parties' actual capacity to earn income in light of all of their relevant circumstances, including age, education, health (physical and mental), work history, and work availability (which also takes into account child care responsibilities).
- [20] As explained in *Marquez v. Zapiola*, 2013 BCCA 433:
- [36] For the purposes of both child and spousal support, there is a broad judicial discretion to impute income to either or both spouses. However, the party seeking to have income imputed to the other spouse has the burden of establishing an evidentiary basis for such a finding.
- [37] The test for imputing income for intentional under-employment or unemployment is one of reasonableness, having regard to the parties' capacity to earn income in light of their age, education, health, work history and work availability. A spouse's capacity to earn income will include that person's ability to work or to be trained to work. See *Van Gool v. Van Gool* (1998), 113 B.C.A.C. 200, 44 R.F.L. (4th) 314 at paras. 28-31, *Barker v. Barker*, 2005 BCCA 177, 45 B.C.L.R. (4th) 43 at para. 19, and *McCaffrey v. Paleolog*, 2011 BCCA 378, 24 B.C.L.R. (5th) 62 at para. 46.
- [38] Although the legal foundation for awarding spousal support is different from that of child support (see *Kerr v. Baranow*, 2011 SCC 10, [2011] 1 S.C.R. 269 at para. 208), the test for imputing income for the purpose of fixing the quantum of support is similar. Again, the test is one of reasonableness, having regard to the same factors to be considered in imputing income for child support. However, the concept of "needs" for non-compensatory support also includes a consideration of the marital standard of living: *Myers v. Myers* (1995), 65 B.C.A.C. 226, 17 R.F.L. (4th) 298 at para. 10, *Moge* at 870, *Bracklow* at para. 36. "Means" has been interpreted to include all capital and other sources of income (*Leskun v. Leskun*, [2006]

1 S.C.R. 920 at para. 29).

- [120] In my view, the respondent should be capable of earning \$60,000 per annum. In the last nine months, he has worked very little. He has prioritized his parenting responsibilities and wishes to continue to do so. This is laudable to a degree, but as a practical matter, he must balance this goal against his obligation to earn a reasonable income to support the children. He has parenting duties only half of the time. The children are nine and 11 years old, so they are nearing the age when they have a degree of independence.
- [121] He turned down restaurant work that would have paid him \$45,000-48,000, working in a lower end restaurant. He has a great deal of experience as a cook or chef, but has avoided restaurant work, due to the schedules required. This is a choice which he may not have the luxury of making. I am not satisfied that he could not have found other work in the restaurant industry paying him the amount he previously earned, \$58,000. His work as a mail carrier has limited hours and is convenient for him. He has not seriously pursued other career alternatives. He testified that he has applied for 30 or more jobs but has attended no interviews. He has avoided shift work. I am not persuaded that he has applied himself fully to finding other remunerative work and earning income since losing his job as a chef.
- [122] As noted, the respondent is 34 years of age, and is therefore young enough to pursue other work opportunities that could pay more, possibly with some re-training or further education. The practical reality is that the children are substantially dependant on his income. The claimant's earning capacity is very limited. The claimant's parents are not obliged to continue to subsidize the claimant's income, and there is no evidence as to their willingness or ability to do so.
- [123] I therefore impute an annual income of \$60,000 to the respondent. I impute an income of \$30,000 to the claimant, consistent with her own assessment of this. However, her Guidelines income is subject to downward adjustment in accordance with s. 4 of Schedule III of the Guidelines, as noted above. I will leave this to the parties to work out, if possible.
- [124] Although the parties separated at the end of April 2022, they continued to reside in the same residence until it was sold in July 2022. Shared equal parenting began in August 2023.
- [125] Retroactive child support is to be calculated as follows:
1. July 2022 through January 2023, claimant sole parent. 2022 and 2023 income of the respondent, as set out above;
 2. Reconciliation and co-habitation, February through April 2023. No child support payable;
 3. May to July 2023: claimant sole parent;
 4. August to December 2023: shared parenting;
 5. Incomes of the parties, as set out above, for 2023;

6. For 2024, shared parenting, imputed incomes as set out above;
 7. Deduction for actual child support payments made by the respondent; and
 8. Child support payments for shared parenting to be set-off pursuant to s. 9(a) of the Guidelines (in accordance with the submissions of both parties).
- [126] Future child support is to be paid at the 2024 incomes of the parties. The parties will exchange income information at least annually, by no later than June 15 of each year. Child support will be varied by an agreement of the parties, or failing that, by the court, on an application under s. 17 of the Divorce Act.
- [127] The JCC order provides that child support is to be paid on the 15th of each month. If the parties agree, child support and spousal support payments will continue to be paid on the 15th of each month. Otherwise, support payments will be made on the first of each month.
- [128] There are no currently identified s. 7 extraordinary or special expenses. Section 7 expenses will be shared in proportion to the income of the parties. Section 7 expenses are those defined by the Guidelines, but for clarity, the following particular terms apply:
1. Health related expenses (such as medical or dental expenses) not covered by insurance, exceeding \$100 annually are special expenses; and
 2. Claims for the expense of extra-curricular activities to be shared as extraordinary expenses under s. 7 shall be as agreed upon by the parties, or, failing agreement, as determined by the court.
- [129] The respondent maintains Registered Education Savings Plans (RESP) for the benefit of the children. His most recent financial statement indicates that he holds \$37,613 (combined) for the benefit of the children. He continues to make regular monthly contributions of \$100 to the plans. The claimant submits that I should order that the RESP accounts be jointly administered. The respondent made no submission on this point.
- [130] In *B.S.W. v. W.F.W.*, 2023 BCSC 1925, I stated:
- [142] The claimant holds RESPs for the children valued at \$57,000. RESPs are the property of the subscriber until the subscriber directs payment to a beneficiary: *Vetrici v. Vetrici*, 2015 BCCA 146, at para. 37. However, circumstances may show that the parties established a trust: *Labatte v. Labatte*, 2022 ONSC 4787, at paras. 50-56.
- [143] The parties made no submissions as to division or control of the RESPs. I infer that the parties agree that the RESPs should be maintained by the claimant for the benefit of the children. In such circumstances, several courts have ordered the subscriber to hold the funds in trust for the benefit of the children: *K.L.T. v. F.M.*, 2021 BCSC 1688; *Healey v. Healey*, 2022 BCSC 2072; *T.M. v. C.V.M.*, 2022 BCSC 1783. I make the same order in this case; that is, a declaration that the claimant holds the RESP funds in trust for the benefit of the children.

[131] I order that the existing RESP accounts are held by the respondent in trust for the benefit of the children. I make no further order at this time in relation to control of the accounts.

8. Spousal Support

[132] The respondent concedes entitlement to spousal support. However, on his calculations, which reflect his submissions as to the incomes of the parties, he contends that no support is payable, at the mid-range under Spousal Support Advisory Guidelines [SSAG]. The claimant contends that spousal support should be at the high end of the range, and this results in payment to her of \$198 per month. Her calculation assumes shared parenting, and incomes of \$27,251 for her, and \$60,000 for the respondent. In this calculation, net disposable income (NDI) is equal (50% each).

[133] Section 9 of the SSAGs discuss various factors that may affect the appropriate range of spousal support. Further helpful discussion of the topic is found in the Spousal Support Advisory Guidelines: The Revised User's Guide (Ottawa: Department of Justice, 2016) [RUG] at section 9. The RUG emphasizes that the mid-range is not to be treated as the default outcome. Location within the ranges must be determined on a case-by-case basis. Consideration of the RUG may be helpful as part of the analysis: *Roeske v. Roeske*, 2023 BCCA 358, at paras. 77-79.

[134] The claimant's compensatory claim is not strong. Although she might have continued her education in fine arts if the parties did not have children, I question whether she would have done so, or whether this would have resulted in a remunerative career. She did not conclude the full educational program at UCOL. She gave no evidence concerning specific career goals that might have resulted in a good income. As noted, the respondent's career has not benefitted much if at all resulting from the claimant's contribution.

[135] However, the claimant's needs-based claim is strong. She has a very limited ability to earn income, and no property to fall back on. The respondent has the ability to increase his income, with more effort, and perhaps, some re-training.

[136] The children are still relatively young. Parenting is shared equally. Spousal support leading to roughly equal sharing of NDI is desirable, for their benefit, so as to minimize disparities in living standards between the two households.

[137] At the stated incomes, child support is payable by the respondent in the amount of \$447 per month. Spousal support ranges from zero to \$144. In all of the circumstances, spousal support should be paid at the high end of the range, thus, \$144.

[138] In view of the length of the marriage, and the ages of the children, the duration of spousal support is indefinite, that is, unspecified. Duration will ultimately be decided by the court on an application under s.17 of the Divorce Act, failing agreement of the parties.

V. Conclusion and Ancillary Orders

[139] Orders are made consistent with these reasons.

[140] The parties agree on continuation of joint guardianship and shared parenting responsibilities under the FLA. They agree on the continuation of equal shared parenting on a week on/week off schedule. The parties may amend the parenting schedule by mutual agreement.

[141] The parties are at liberty to apply, if necessary, only to address any specific matters not addressed in these reasons, and costs. Any application must be filed within 60 days of the release of these reasons.

[142] As to costs, subject to submissions, including the effect of any formal offers to settle pursuant to Rule 11 - 1, my preliminary view is that there should be no costs to either party. The respondent succeeded on the exclusion issue, which was the major issue at trial, but there was a degree of mixed success. The respondent is required to repay the money advanced to him, and the claimant succeeded in relation to income imputation. More significantly, however, the claimant has no means to pay costs, and an order for payment of costs would upset the financial balance between the parties, which could be detrimental to the children.

"Verhoeven J."

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