
CANADA / JUDGMENT

S.T.C. v. D.J.B.

2019 BCSC 1967

COURT

Supreme Court of British Columbia

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2019 BCSC 1967 S.T.C. v. D.J.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.T.C. v. D.J.B.,

2019 BCSC 1967

Date: 20191115

Docket: E181408

Registry: Vancouver

Between:

S.T.C.

also known as S.T.B.

Claimant

And

D.J.B.

Respondent

Before: The Honourable Madam Justice Jackson

Reasons for Judgment

Counsel for the Claimant:

G. C. Laschuk

Appearing on his own behalf:

D.J.B.

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 15-18, 23-26, 29-30;

May 1-3, 2019

Place and Date of Judgment:

Vancouver, B.C.

November 15, 2019

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- [1] At the trial of this family law case the claimant, S.T.C. (the "Claimant"), was represented by counsel and the respondent, D.J.B. (the "Respondent"), was self-represented. The parties separated more than one year ago and both seek a divorce. There are two children of the marriage--a daughter S.M.B., who was 14 at the time of trial, and a son S.B., who was 11 at the time of trial (collectively, the "Children").
- [2] It was clear from the evidence that both parents love their children and want what is in their best interests. The parties agree it is in the best interests of the Children for both parents to continue to be their guardians. The issues for determination at trial were the remaining parenting arrangements and financial issues involving child support, spousal support, and division of family property and debt.

II. THE MARRIAGE AND SEPARATION

- [3] The parties first met at college in the early 90s. They reconnected several years later and began dating. After living together for about a year, they married on August 21, 1999. For a short time after the marriage, the couple lived in an apartment in Tsawwassen. Around 2001 they purchased their first home on 63 Avenue in North Delta (the "First House"). In 2010 the couple moved to a house on 48A Avenue in Ladner (the "Second House"). Then in 2012 they moved to London Drive in Delta (the "Family Residence").
- [4] The parties do not dispute they have been separated for more than a year; however, they differ as to the exact date of the separation. The Claimant testified that in early September of 2017, she began to talk to the Respondent about "moving on", saying it would be best for everyone. While she had raised the possibility of separation with the Respondent on previous occasions, this time she had decided in her own mind to pursue that action; however, the Claimant testified the Respondent did not take her comments seriously. Once she had made the decision to separate, the Claimant told some friends the couple was separating. In mid-November of 2017, the Claimant booked an appointment with a marriage counselor. In that meeting she conveyed to the Respondent her desire to separate. The

Claimant says the Respondent stormed out of the appointment, which she took as his understanding and internalizing the Claimant's decision to separate.

- [5] The Respondent's evidence is that he became aware the Claimant wanted to separate at the November 14, 2017 counseling session.
- [6] Both parties agree that, at least at the date of the counselling session, the parties separated and have not reconciled since.
- [7] While it may be the case that the Claimant had decided in her own mind to end her marriage, I accept the Respondent's evidence that it was on November 14, 2017 that the parties both made the final decision to, and did, separate. I will refer to this as the Date of Separation.
- [8] However, the parties continued to live separate and apart within the Family Residence after the Date of Separation. The parties decided not to tell the Children about the separation until after the Christmas holidays.
- [9] The couple physically separated on or about May 21, 2018.

III. HISTORY OF PROCEEDINGS

- [10] The Claimant filed her notice of family claim on May 23, 2018. The Respondent filed his response to family claim and his counterclaim on June 12, 2018. The Claimant responded to the counterclaim on July 4, 2018.
- [11] On June 13, 2018, Master Harper pronounced an interim order which included consent terms prohibiting both parties from discussing court proceedings connected with their separation and divorce to or in front of the Children, and from speaking in a derogatory manner about each other to or in front of the Children.
- [12] On July 10, 2018, on application by the Claimant, Master Muir ordered, among other things, the Respondent have no contact or communication with S.M.B. unless such contact was initiated by her; the Respondent attend and complete an anger management program; the Children reside with the Claimant on an interim basis; the Claimant have exclusive occupancy of the Family Residence and possession and use of the personal property stored at the Family Residence; the Claimant to pay all expenses related to the Family Residence until it is sold, subject to her ability to seek contribution from the Respondent after its sale; and the Claimant solely exercise all parental responsibilities for the Children. The Respondent was also ordered to pay the Claimant's costs and disbursements of the application in any event of the cause, in a total sum of \$4,500, from the proceeds of sale of the Family Residence.

- [13] On the same date, Master Muir pronounced a protection order under s. 183 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], which included terms restraining the Respondent from directly or indirectly communicating with the Claimant or S.B. or attending at the Family Residence.
- [14] On July 16, 2018, Justice Young pronounced an order at a judicial case conference, which, by consent, ordered that the Respondent have supervised parenting time upon an agreement being reached as to the identity of the supervisor, on an interim and without prejudice basis.
- [15] By a further consent order pronounced on July 19, 2018, the parties addressed a number of matters related to the family property, including listing the Family Residence for sale at a list price of \$1,250,000.
- [16] By way of a further consent order pronounced on February 5, 2019, the Respondent was given an entitlement to an interim distribution of family property from his RRSP account ending 8412 for the purposes of funding a portion of the cost of the s. 211 report; the Respondent undertook to pay child support in the amount of \$756 per month commencing on February 1, 2019; and granting the Respondent entitlement to contact the Children by way of face time twice a week at approximately 7:30 p.m., with the days of the week chosen by the Claimant and communicated through her counsel. In addition, the Respondent agreed to attend art therapy counselling sessions with the Children with the cost of the counselling to be paid by the Respondent. Further, the Claimant agreed to pay for the cost of S.M.B.'s cell phone and the parties agree to reduce the sale price of the Family Residence to \$1,088,000.

IV. DIVORCE

- [17] The evidence of both parties is they have been separated for more than one year. I find there has been no collusion, nor is there hope of reconciliation. Given my orders relating to the support of the Children, which are set out later on these reasons, I am satisfied that reasonable arrangements exist for the support of the Children. An order of divorce is granted and will take effect 31 days from today in accordance with s. 12 of the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3 [DA].

V. CARE OF AND TIME WITH THE CHILDREN

- [18] The parties relied on provisions of both the DA and FLA in advancing their respective claims for "custody" (DA, s. 16), "guardianship" (FLA, s. 51), "access" (DA, s. 16), and "parenting time" and "parental responsibilities" (FLA, s. 45).
- [19] Under the DA, "custody" is broadly understood as rights relating to the physical care and control of a child, as well as the decision-making authority over a child. It includes care, upbringing, and any other incident of custody: DA, s. 2(1); *Falvai v. Falvai*, 2008 BCCA 503 at para. 36.

- [20] The predecessor to the FLA was the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA]. The FRA used the terms custody, access, and guardianship to delineate three different but related concepts, with guardianship constituting "the full bundle of rights": *Anson v. Anson* (1987), 10 B.C.L.R. (2d) 357 (Co. Ct.), as cited in *Application to Change Guardianship: Wong and Yeung*, 2000 BCSC 1536 at paras. 7-14. See also *A.S.P. v. N.N.J.*, 2013 BCSC 120 at paras. 209-211.
- [21] Under the FLA, the label of "custody" was abandoned but the language of guardianship was retained. Under the FLA, only a guardian may have "parental responsibilities" and "parenting time" (FLA, s. 40). Based on this, in *A.A.A.M. v. British Columbia (Children and Family Development)*, 2015 BCCA 220 at para. 11, Justice Newbury found that guardianship "reverts to its previous meaning, referring to the full 'bundle of rights' of a parent, rather than the effective equivalent of custody".
- [22] Because the FLA is provincial legislation, there is potential for its provisions to be rendered inoperative by the federal DA pursuant to the doctrine of paramountcy. In this case, however, applying the relevant provisions of the FLA does not create an operational conflict with, nor frustrate the purpose of, the applicable provisions of the DA. Therefore, I will proceed to determine relief in relation to the Children under the FLA.
- [23] In making any order respecting guardianship or parenting arrangements (including parenting time and parental responsibilities), the parties and the court must only consider the best interests of the child: FLA, s. 37(1). Although not an exhaustive list, s. 37(2) of the FLA sets out a number of factors to consider when determining what is in the best interests of a child:
- (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.

[24] In assessing family violence as required by s. 37(2) (g) and (h), s. 38 also requires the court to consider certain factors:

(a) the nature and seriousness of the family violence;

(b) how recently the family violence occurred;

(c) the frequency of the family violence;

(d) whether any psychological or emotional abuse constitutes, or is evidence of, a pattern of coercive and controlling behaviour directed at a family member;

(e) whether the family violence was directed toward the child;

(f) whether the child was exposed to family violence that was not directed toward the child;

(g) the harm to the child's physical, psychological and emotional safety, security and well-being as a result of the family violence;

(h) any steps the person responsible for the family violence has taken to prevent further family violence from occurring;

(i) any other relevant matter.

[25] In addition to the evidence of the parties and several collateral witnesses, the Court was provided with report dated April 4, 2019, setting out the expert opinion of Dr. Michael F. Elterman, Ph.D., regarding the views and needs of the Children and the parties' ability and willingness to satisfy those needs (the "Elterman Report"). The Elterman Report was prepared in accordance with s. 211 of the FLA and was entered following a consent order on February 5, 2019.

A. Guardianship

[26] Section 39 of the FLA states:

39 (1) While a child's parents are living together and after the child's parents separate, each parent of the child is the child's guardian.

(2) Despite subsection (1), an agreement or order made after separation or when the parents are about to separate may provide that a parent is not the child's guardian.

...

[27] Neither party is seeking an order that the other parent be removed as the Children's guardian. Instead, both recognize the Children will benefit from the ongoing involvement of both parents in the Children's lives. They both believe it is in the best interests of the Children for both parents to continue to be joint guardians. I agree and I so order.

B. Parental Arrangements

[28] Parenting arrangements are arrangements respecting the allocation of "parenting time" or "parental responsibilities", or both: FLA, s. 1.

1. Parenting time

[29] Parenting time is the time a child is with a guardian, as allocated under an agreement or court order: FLA, s. 42(1). During parenting time, a guardian may exercise, subject to an agreement or order that provides otherwise, the parental responsibility of making day-to-day decisions affecting the child and having day-to-day care, control, and supervision of the child: FLA, s. 42(2).

2. Parental responsibilities

[30] Only a guardian can have "parental responsibilities" with respect to children of the marriage: FLA, s. 40(1). Parental responsibilities are defined in s. 41 of the FLA:

- (a) making day-to-day decisions affecting the child and having day-to-day care, control and supervision of the child;
- (b) making decisions respecting where the child will reside;
- (c) making decisions respecting with whom the child will live and associate;
- (d) making decisions respecting the child's education and participation in extracurricular activities, including the nature, extent and location;
- (e) making decisions respecting the child's cultural, linguistic, religious and spiritual upbringing and heritage, including, if the child is an aboriginal child, the child's aboriginal identity;
- (f) subject to section 17 of the Infants Act, giving, refusing or withdrawing consent to medical, dental and other health-related treatments for the child;
- (g) applying for a passport, licence, permit, benefit, privilege or other thing for the child;
- (h) giving, refusing or withdrawing consent for the child, if consent is required;
- (i) receiving and responding to any notice that a parent or guardian is entitled or required by law to receive;
- (j) requesting and receiving from third parties health, education or other information respecting the child;

- (k) subject to any applicable provincial legislation,
- (i) starting, defending, compromising or settling any proceeding relating to the child, and
- (ii) identifying, advancing and protecting the child's legal and financial interests;
- (l) exercising any other responsibilities reasonably necessary to nurture the child's development.

[31] 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: FLA, s. 40(2). However, parental responsibilities can be allocated by agreement or court order, such that they can be exercised only by a particular guardian (or guardians) or by each guardian acting separately or all guardians acting together: FLA, s. 40(3). There is no presumption that any particular allocation of parenting time or parental responsibilities is in the best interests of a child: FLA, s. 40(4). Each case turns on what is in the best interests of the children in the particular circumstances.

3. The parties' positions on parenting arrangements

[32] In her notice of family claim, the Claimant sought orders granting her custody of the Children under the DA, that the Children reside with her, and that she have the sole right to exercise all parental responsibilities with respect to the Children. No parenting time for the Respondent was proposed and no involvement of the Respondent in any parenting responsibilities was contemplated. However in her closing submissions, the Claimant argued she "ought to be awarded primary residence, the vast majority of parenting time and a decisive role in respect of parenting responsibilities".

[33] In his counterclaim, the Respondent sought orders that the parties have joint custody of the Children under the DA, and that they share equally in parental responsibilities and parenting time, as agreed to by the parties from time to time or determined by the court. However at the close of trial he proposed a type of "nesting" arrangement, whereby the parties would alternate living in the Family Residence, while the Children remained there every day, and that the parties share in all parental responsibilities, but that he be given the power to break any ties.

4. Credibility and Reliability

[34] At trial, there was significant disagreement between the parties about what parenting arrangement should be ordered. The evidence of the parties conflicted on a number of key points and cannot be reconciled. Therefore, it is necessary for me to undertake an assessment of the reliability and credibility of their evidence, bearing in mind those are related but distinct concepts. In *Bradshaw v. Stenner*, 2010 BCSC 1398, aff'd 2012 BCCA 296, Justice Dillon summarized the key elements of credibility assessment as follows:

- [186] Credibility involves an assessment of the trustworthiness of a witness' testimony based upon the veracity or sincerity of a witness and the accuracy of the evidence that the witness provides (*Raymond v. Bosanquet (Township)* (1919), 59 S.C.R. 452, 50 D.L.R. 560 (S.C.C.)). The art of assessment involves examination of various factors such as the ability and opportunity to observe events, the firmness of his memory, the ability to resist the influence of interest to modify his recollection, whether the witness' evidence harmonizes with independent evidence that has been accepted, whether the witness changes his testimony during direct and cross-examination, whether the witness' testimony seems unreasonable, impossible, or unlikely, whether a witness has a motive to lie, and the demeanour of a witness generally (*Wallace v. Davis*, [1926] 31 O.W.N. 202 (Ont.H.C.); *Farnya v. Chorny*, [1952] 2 D.L.R. 152 (B.C.C.A.) [*Farnya*]; *R. v. S.(R.D.)*, [1997] 3 S.C.R. 484 at para.128 (S.C.C.)). Ultimately, the validity of the evidence depends on whether the evidence is consistent with the probabilities affecting the case as a whole and shown to be in existence at the time (*Farnya* at para. 356).
- [187] It has been suggested that a methodology to adopt is to first consider the testimony of a witness on a 'stand alone' basis, followed by an analysis of whether the witness' story is inherently believable. Then, if the witness testimony has survived relatively intact, the testimony should be evaluated based upon the consistency with other witnesses and with documentary evidence. The testimony of non-party, disinterested witnesses may provide a reliable yardstick for comparison. Finally, the court should determine which version of events is the most consistent with the "preponderance of probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions" (*Overseas Investments (1986) Ltd. v. Cornwall Developments Ltd.* (1993), 12 Alta. L.R. (3d) 298 at para. 13 (Alta. Q.B.)). I have found this approach useful.
- [35] In my view, the approach outlined by Dillon J. is sound and provides a fair and efficient method by which to consider and assess the credibility and reliability of a witness' evidence.
- a) The Claimant's testimony
- [36] There were many instances where the Claimant downplayed the Respondent's involvement in various facets of the parties' joint life during the marriage. For example, the Claimant testified that throughout the marriage the Respondent had little involvement with the care of the Children and the tasks of everyday family life. However, during cross-examination she acknowledged the Respondent was involved in taking the Children to doctor appointments, assisted with meal preparation, shared in getting the Children to school, took the Children to various activities, and was involved in other tasks related to the Children's care, education, and development. I find the parties equally cared and provided for the needs of the Children during the marriage.
- [37] The Claimant also minimized the Respondent's help in relation to the Claimant's various health issues, but again on cross-examination acknowledged the Respondent had provided significant assistance in that regard.

- [38] The Claimant was also reluctant to concede facts which in my view she ought reasonably to have conceded. For example, she was reluctant to concede the Children look happy in a number of family photos taken during the marriage, and that open houses are a valuable tool when selling a house.
- [39] The Claimant's tone during cross-examination was often extremely angry and at times she appeared barely able to restrain herself. On numerous occasions I had to ask the Claimant to lower the volume of her voice. The Claimant's answers during cross-examination were frequently unresponsive or evasive.
- [40] There were also numerous internal inconsistencies in the Claimant's evidence. For example, the Claimant testified in direct examination she was unaware of the family finances during the marriage, and in particular the use of a line of credit to fund family expenses, and that the Respondent actively prevented her from becoming more involved and knowledgeable about the family finances. However, that evidence is inconsistent with the evidence she gave at her examination for discovery. In addition, although the date of when the Claimant's relationship with P.S., her new partner, began is not relevant for the purposes of determining any of the substantial legal issues, her credibility was adversely impacted by her inconsistent information with respect to when that relationship began. I note that in his report, not only does Dr. Elterman say the Claimant indicated the relationship started earlier than the date the Claimant testified to in Court, but that that information was corroborated by P.S. in his interview with Dr. Elterman.
- [41] In addition, some of the evidence given by the Claimant on what would have been important points was extremely vague. For example, according to the Claimant, the Respondent was in a constant state of anger, directed primarily towards her but also somewhat towards S.B. The Claimant testified that she felt the Respondent's behaviour moved beyond simply an emotional response towards one that was more "threatening" involving him getting "more into my physical space", and that she was afraid. However with the exception of one incident in May 2018 (the "May 2018 Incident") that preceded the Claimant leaving the Family Residence with the Children and which I will address later in these reasons, she did not provide specific examples of the Respondent's behaviour that she found threatening, and rather spoke in generalities.
- [42] I also find that in some respects the Claimant's actions were inconsistent with beliefs that she expressed at trial. For example, the Claimant testified that after the parties separated but were both living in the Family Residence, she became increasingly concerned about the Respondent's temper and believed the Children to be at risk if they were left alone with the Respondent. However, the Claimant nonetheless left the Children alone with the Respondent.
- [43] I also find the Claimant's evidence is inconsistent with other evidence which I accept. For example, the Claimant testified that on one occasion she experienced what she described as a medical emergency, and the Respondent put her life in jeopardy by refusing to call 911 and

by actively preventing her from accessing medical treatment. However, the Respondent's evidence was he took steps to help the Claimant get upstairs in order to relax and calm down. The evidence given by the Claimant's mother on this point supports the Respondent's version of events.

- [44] Another example where I find the Claimant's evidence to be inconsistent with other evidence I accept involves the May 2018 Incident. Both the Claimant and the Respondent gave evidence about the May 2018 Incident. The Claimant's evidence was it was an act of aggression and violence by the Respondent against the Claimant, and her only role was to attempt to defend herself. The Respondent's evidence was it was a joint emotional and physical confrontation. The Respondent's evidence was he sustained scratches and bruises as a result of the May 2018 Incident, which were documented in photographs. I find the May 2018 Incident was the result of both parties equally losing their tempers with each other and both being emotionally and physically combative.
- [45] However, the most significant piece of evidence which causes me to have concerns about the reliability of the Claimant's evidence also relates to the May 2018 Incident. In her direct evidence the Claimant testified the Respondent was violent towards her. However, in response to a question asked during cross-examination involving the same incident, she described the Respondent "attacking us", referring to herself and the Children. When asked by the Court, the Claimant clarified that at no time during the May 2018 Incident had the Respondent attacked, threatened, or verbally or physically assaulted either of the Children. I consider her careless and inaccurate description of the Respondent attacking the Children to be an acute example of her efforts to over exaggerate the Respondent's shortcomings in an effort to tailor the evidence to suit her narrative, and ultimately support the orders she seeks from this Court.

b) The Respondent's testimony

- [46] The Respondent's evidence was not without its flaws. For example, the Respondent was critical of the Claimant drinking around the Children and the potential dangers associated with various aspects of her prescription medications. However the evidence does not establish any reasonable basis for concern that the Claimant's drinking has ever put the Children's safety in jeopardy.
- [47] The Respondent was also very focused on minor errors in the Claimant's evidence, for example pointing out that the Claimant referred to people as "uncles" or "aunts", even though she had no biological relationship to them. Those errors were not important and the Respondent's decision to focus on them did not reflect well on him. Further, the Respondent was at times unwilling to acknowledge feelings of anger, disappointment, and frustration, even where such feelings would be a common and reasonable response. However, I do not equate his failure to make those admissions as evidence the Respondent has an "anger management problem". The evidence left me with the impression that the Respondent is deeply disappointed that his marriage has ended. He is frustrated and hurt about being

unable to see the Children for an extended period of time following the couple's physical separation in May 2018. Nonetheless, the Respondent was able to control and manage those feelings in the courtroom.

- [48] The Respondent was much more willing than the Claimant to acknowledge, without prompting, the value of what the Claimant brought to the Children's lives as their parent. The Respondent testified he believed he was highly competent in areas where he had strengths, and likewise the Claimant and the Claimant's mother were also highly competent in areas where they had strengths. Further, the Respondent candidly acknowledged that in the back of his mind he probably thinks the Claimant is trying to replace him in the Children's lives with P.S. His openness and these concessions are entitled to significant weight in assessing the overall reliability of the Respondent's evidence.

c) Conclusion on credibility and reliability

- [49] I find the Claimant was intentionally and unfairly critical of the Respondent's behaviour and of his involvement in the Children's lives. She did this in an effort to cast herself in the best light, to support her claim for full parenting time and exclusive parental decision-making authority. I find the Claimant tailored her evidence to suit her position and adversely affected her credibility and the reliability of her evidence by doing so.
- [50] Overall, I consider the Respondent's evidence to be more reliable than the Claimant's, and where their evidence conflicts I prefer the evidence of the Respondent.

5. Analysis

- [51] In addition to the Claimant's and Respondent's evidence, both parties called several collateral witnesses. The Elterman Report provides an additional source of information in the form of expert opinion evidence. I have considered all of the evidence in undertaking my analysis and in formulating my conclusions, and the absence of a specific reference to any particular piece of evidence should not be viewed as an indication that I did not consider it.

a) The Elterman Report

- [52] In preparation for his report, Dr. Elterman separately interviewed the Claimant, the Respondent, the Children, and P.S. All three adults also completed psychological tests. In addition, Dr. Elterman observed the Children interacting with each of the parents; with the Respondent in Dr. Elterman's office and with the Claimant at the Family Residence. Finally, Dr. Elterman asked both parties to provide him with the names of six collateral references, several of whom were contacted by Dr. Elterman.

- [53] The following observations were recorded in the Elterman Report, among others:

- psychological testing revealed both parties tended to portray themselves as being relatively free of common shortcomings to which most people would admit;

- the Respondent presented as a serious man who seemed easily irritated at times;
- the Respondent described his parental priorities as teaching the Children good judgment and life skills;
- the Respondent acknowledged he should give the Children more hugs and tell them more frequently that he loves them; and
- the Respondent's psychological testing related to aggression placed him within normal limits.

[54] The Elterman Report also included several observations made by the Children, including:

- when the Claimant is upset she is really upset because she likes to have control;
- both parents would tend to raise their voices as a means of discipline, but the Respondent gets mad more quickly and yells the most, but there were no real concerns about the his temper;
- the Claimant is the parent who hugs and kisses the most, but also takes things personally sometimes;
- since the separation, both parents are happier and more relaxed;
- the advice to both parents would be to loosen up; and
- the Claimant has said mean things about the Respondent in front of the Children and shares too much information with them, for example talking about the Respondent and the divorce and how the Claimant finds it frustrating.

[55] In addition, Dr. Elterman observed:

- P.S. felt the Claimant "can get too upset in front of [the Children] when things happen such as the lawyer calling";
- P.S. has a history of antisocial behaviour and possibly a history of alcohol dependence, and indicated to Dr. Elterman that alcohol had caused occasional problems in his life; and
- by the time the Children's observational visit with the Respondent ended, "both children were quite enthusiastic, talkative and relaxed with [the Respondent]. [S.B.] had relaxed by the end of the session to be smiling and quite nonverbally open with [the Respondent]."

[56] Dr. Elterman opined it is not likely there would be any physical violence between the Respondent and the Children. Dr. Elterman also opined "even when [the Respondent] would speak loudly, [the Claimant] would interpret this as anger" and "[t]he two adults in this case seemed to have a very different conception[s] concerning the expression of anger where she tends to be overly sensitive about provoking anger in others whereas he seems to not always be aware when he is reacting in a way that others might consider angry or an overt reaction."

[57] Dr. Elterman recommended the parties have joint guardianship of the Children.

[58] With respect to parenting time, Dr. Elterman recommended a shared schedule without supervision that accommodates the Respondent's work schedule and gradually re-introduces the Children into the Respondent's care. Dr. Elterman also recommended he conduct a review of the parenting time in order to see whether a further adjustment to parenting time should be made.

[59] Dr. Elterman went on to recommend "the parents have shared parenting responsibility but that should there be an impasse, that [the Claimant] have the final vote".

b) The Children's health and emotional well-being

[60] As the Claimant acknowledged in her closing submissions, both parties show concern for the health and emotional well-being of the Children. However, the Claimant argues she is best suited to provide for the Children's health and emotional well-being. In her submission, the fact that she has a history of providing for the Children's physical needs, her affectionate approach to parenting, and her arranging counselling for the Children all demonstrate that she should be given the majority of parenting time.

[61] I have already found that historically both parties were equally responsible for providing for the Children's physical and emotional needs. The Respondent acknowledged that he and the Claimant have different parenting styles. The Claimant is softer and not as strict or rule conscious, whereas he is more focused on giving guidance and encouraging compliance with rules. The Respondent acknowledged to Dr. Elterman that he could hug the Children and tell them he loved them more frequently. In my view, this shows considerable insight and bodes well for the Respondent doing so in the future.

[62] The Claimant also argued the Respondent was often angry and "threatening", and this supported a finding that less parenting time should be allocated to him. However, as required by a court order pronounced on July 10, 2018, the Respondent attended and successfully completed a one-day intensive anger management course at A1 Counselling and Anger Management Centre. In addition, he attended six counseling sessions with Pauline Carey, a registered clinical counsellor, who recorded the following observations in her November 21, 2018 report:

There was no evidence of [the Respondent] having anger management issues. On the contrary, he describes several instances of appropriate handling of potentially anger inducing situations. These included being falsely accused of harassment of his wife's friend at a local driving range. He also recounted an altercation over a parking spot while working in Whalley, which he handled very well.

[The Respondent] seems to have a well-developed ability to manage stress. Not only has he been able to perform well at work, to lead a balanced lifestyle including exercise and some social activity, but he has also been active in following up on the many legal issues inherent in this situation.

[63] Ms. Carey also noted:

Although [the Respondent's] competence as a parent was not the focus of this counselling, there were no indications that he is unable to parent effectively, and his love for his children was evident.

[64] In my view, a parent's willingness to facilitate a strong ongoing relationship with the other parent should be considered under the rubric of the Children's health and emotional well-being. The Respondent has demonstrated, through his evidence at trial and his actions, a willingness to do so. The same cannot be said of the Claimant, at least to the same degree.

[65] After the May 2018 Incident, police were called and attended to the Family Residence. The police told both parties to calm down and suggested one of them leave the Family Residence to allow for a "cooling down" period. Because the Respondent had nowhere else to go, the decision was made that the Claimant would leave and go to her mother's house. I accept the Respondent's evidence that after the Claimant left with the Children, he attempted to contact her by telephone but received no response. I also accept his evidence that he contacted the police after he heard nothing from the Claimant. The police attended at the Claimant's mother's home and advised her that the Respondent wanted to see his children. I also accept his evidence that eventually he received communications from the Claimant's previous lawyer letting him know the Children were safe. I also accept the Respondent's evidence that, had the Claimant contacted him to let him know additional items were needed from the Family Residence for the Children, he would have ensured those were made available for them.

[66] Although the Respondent had minimal contact with the Children between the May 2018 Incident and the close of the trial, this appears to be due to a number of factors. I am not satisfied this reflects adversely on either parent or demonstrates a lack of the Respondent's desire to see the Children.

[67] The Claimant discussed issues related to the separation from the Respondent, and her accompanying frustrations, with S.M.B. She also said mean things about the Respondent in front of the Children. This reflects either a lack of insight or a lack of intention to foster a strong relationship between the Children and the Respondent. The Claimant also told S.M.B. the Respondent was cutting off her cell phone, when the facts were that the Claimant had agreed to assume responsibility for payment of the cell phone in accordance with the consent order dated February 5, 2019, and that the change in phone numbers was needed to implement that change. This similarly evidences the Claimant's intention to thwart a positive and loving relationship between the Respondent and the Children.

[68] The Claimant's mother, B.C., also testified. She has been very involved in the Children's lives since they were born. She testified the Respondent has a difficult time showing affection, including with the Children. However, I was not left with the impression she thought the Respondent did not love or care for the Children. Her evidence was that the Children appeared happy in his care and she did not worry about their safety while they were with the

Respondent. She also testified she observed no physical mistreatment of the Children by the Respondent, although she did observe the Respondent speaking to their son about his weight and threatening the Children with the spatula. However, B.C. also acknowledged the Claimant has lost her temper on occasion.

- [69] The Claimant also called a close personal friend, A.A. A.A. testified that although the parents' style of interaction with the Children was different, with the Claimant being more demonstrative than the Respondent, the Children are healthy and loving with each other. In her view, this was because they learned it in a loving place. I take that to mean the environment created by both parents for their Children prior to the separation. She observed the Respondent to be more of an authoritative figure, often focused on safety first, with less focus on fun or being playful with the Children. She testified she never observed the Respondent to lose his temper, although she did observe that he could get quite animated in the course of conversations. She testified he could be "quite intense" at times, but people might just tell him to relax a bit and eventually he would.
- [70] As noted earlier in these reasons, at the time of the trial the Claimant was in a relationship with P.S. The Claimant's evidence was that she "plans to spend the rest of her life" with P.S. but that she has been very clear with him that "we need to settle the divorce before we talk about the next step". P.S. works for a company that is based on Vancouver Island, and he is required to travel there once or twice per month for a day or two each time. There is the prospect that P.S. will relocate to Vancouver Island in the future, where his family also resides. P.S. is estranged from his adult daughter.
- [71] Despite the fact that P.S. has a significant presence in the Children's lives by virtue of his presence in their home and the Claimant's intentions regarding her relationship with him, he was not called to give evidence at the trial. I find this concerning and in my view it reflects, at best, a lack of insight by the Claimant about how P.S.'s involvement is relevant to the Children's health and emotional well-being during parenting time with the Claimant.
- c) The Children's views
- [72] The Claimant acknowledges S.M.B. has indicated a desire to spend equal time with each parent, and given her age her views should be taken seriously. The Claimant further submits S.B. is more reluctant to spend time with the Respondent.
- [73] However, it is not surprising that S.T.B is reluctant to spend time with the Respondent after an extended period of time without any unsupervised contact with him. Further, the observations by Dr. Elterman and the parental supervision reports all reflect S.B. warms quickly to the Respondent after an initial period of awkwardness.
- d) The nature and strength of the relationships between the Children and significant people in their lives

- [74] The Claimant and the Respondent acknowledge the Children have a loving bond with both parents. I reiterate my concerns about not hearing from P.S. at trial.
- e) The Children's needs for stability
- [75] The Claimant submits that because the Children have always lived with her, stability is best achieved by her providing a home base for the Children. However, Children are resilient and I am not prepared to presume one parent should be given an increased share of parenting time simply because it represents a continuation of the status quo. As S.M.B. noted, while there will be a period of adjustment associated with the change to a shared parenting arrangement, that adjustment will be made.
- [76] At the time of trial, the Respondent was living in a one-bedroom apartment in Tsawwassen and the Claimant was living in the Family Residence with the Children and P.S. However, in an addendum to his report, Dr. Elterman indicated that he could not say what minimum accommodation was necessary for the Respondent to have parenting time with the Children because such a question would depend on the parents' budget, among other things.
- f) The ability of each party to exercise parenting time and parenting responsibilities
- [77] It is clear that the Claimant's current work situation, and in particular her ability to work from home three to four days a week, provides increased flexibility for her with respect to exercising parenting time. However, it is equally clear to me that the Respondent has demonstrated a commitment to exercising parenting time to the greatest degree possible that can be permitted by his employment situation. Further, he indicated that he has made requests of his employer which would further facilitate his exercise of a greater degree of parenting time. Although some coordination and planning may be needed, I am satisfied both parents have an equal ability to exercise parenting time and parental responsibilities.
- g) Family violence
- [78] Family violence is defined in s. 1 of the FLA to include the following:
- (a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,
- (b) sexual abuse of a family member,
- (c) attempts to physically or sexually abuse a family member,
- (d) psychological or emotional abuse of a family member, including
- (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,
- (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

(iii) stalking or following of the family member, and

(iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence;

[79] The evidence establishes the Respondent has threatened to hit his son with a spatula, as his parents had similarly done when he was a child. This is not an acceptable form of disciplinary action. As a result of the legal proceedings, including the involvement of Dr. Elterman, I am satisfied the Respondent is now aware of this and there will not be any further recurrences of that behaviour.

[80] While the Claimant argues S.B.'s well-being "has been affected by family violence to some degree", there is no evidence to support that claim. It is equally likely any anxiety S.B. experienced was related to the conflict between the Claimant and the Respondent during their marriage and during the time when they continued to live together in the Family Residence after the Date of Separation.

[81] Dr. Elterman did not see a need for the Respondent's parenting time to be supervised, and concluded it was unlikely the Respondent would commit an act of family violence against either of the Children. The Claimant indicated she trusts the Respondent will act appropriately in the future. In all of the circumstances, based on the evidence before me and the positions of the parties, I am satisfied the risk of family violence in the future is not a factor that weighs in favour of granting more parenting time or parental responsibilities to the Claimant than the Respondent.

h) The appropriateness of cooperative arrangements

[82] It was clear from the evidence before me at trial that the breakdown of the parties' relationship resulted in a hostile relationship. However, I am satisfied both parents wish to put the best interests of their Children first. I am less satisfied that before this trial, either parent recognized how their animosity for each other could affect their Children. That fact should now be very evident.

6. Conclusion on parenting arrangements

a) Parental responsibilities

[83] Although Dr. Elterman felt the parents should be given shared parenting responsibility, he also recommended the Claimant have the final vote in the case of an impasse. However, Dr. Elterman did not provide any analysis underlying why he favoured the Claimant is making that recommendation. I am concerned that by making one party a tiebreaker, it could be (wrongly) construed as an endorsement of some type of hierarchy of responsibility or entitlement with respect to decisions involving the Children.

[84] In my view there is no need for one parent to be the tiebreaker. Instead, I find it is in the best interests of the Children for both parties to equally exercise parental responsibilities in consultation with each other and I so order. If the parties find themselves at an impasse, I order they jointly retain the services of a registered parent coordinator or a professional family law mediator to assist them in reaching consensus. If that route is unsuccessful, either party can make an application to the court for determination.

b) Parenting time

[85] At the end of the trial, I made an interim order which included a parenting time schedule (the "Interim Parenting Time Schedule"). I did so because I was believed it was in the best interests of the Children not to delay their reintegration with the Respondent on an unsupervised basis. The Interim Parenting Time Schedule was as follows:

(i) On an interim basis beginning May 7, 2019, the Children will reside with the Claimant except as follows:

With respect to S.M.B.:

1. on those weeks when the Respondent is off work Tuesday, Wednesday and Thursday in a row, the Respondent shall have parenting time from Tuesday from after school (or beginning at 10:00 a.m. when school is not in session) until Thursday before school (or until 10:00 a.m. when school is not in session), with S.M.B. having the option of staying overnight;
2. on those weeks when the Respondent is off work on Monday (because it is a provincial statutory holiday), Tuesday and Wednesday in a row, the Respondent shall have parenting time from Monday at 10:00 a.m. until Wednesdays before school (or until 10:00 a.m. when school is not in session), with S.M.B. having the option of staying overnight; and
3. on those weeks when the Respondent is off work Friday, Saturday and Sunday in a row, the Respondent shall have parenting time beginning on Saturday at 10:00 a.m. until Sunday at 6:00 p.m. with S.M.B. staying overnight.

With respect to S.B.:

1. on those weeks when the Respondent is off work Tuesday, Wednesday and Thursday in a row, the Respondent shall have parenting time from Tuesday after school (or beginning at 10:00 a.m. when school is not in session) until Tuesday at 7:00 p.m., and from Wednesday after school (or beginning at 10:00 a.m. when school is not in session) until Wednesday at 7:00 p.m., with S.B. not having the option of staying overnight;
2. on those weeks when the Respondent is off work Monday (because it is a provincial statutory holiday), Tuesday and Wednesday in a row, the Respondent shall have parenting time from Monday at 10:00 a.m. until Monday at 7:00 p.m., and Tuesday after school (or beginning at 10:00 a.m. when school is not in session) until Tuesday at 7:00 p.m., with S.B. not having the option of staying overnight; and

3. on those weeks when the Respondent is off work Friday, Saturday and Sunday in a row, the Respondent shall have parenting time beginning on Saturday at 10:00 a.m. until Sundays at 6:00 p.m. with S.B. having the option of staying overnight.

(ii) The Interim Parenting Time Schedule is based on and requires the Children's activities, as set out in Exhibit 14, to be accommodated by the Claimant and the Respondent. This includes the trip to Osoyoos, but does not include the trip to Vancouver Island unless both the Claimant and the Respondent agree;

(iii) The parties are at liberty to alter the Interim Parenting Time Schedule by mutual consent, which consent must be given in advance and which must be evidenced in writing, whether in formal letters signed by both the Claimant and the Respondent, an exchange of text messages or emails between them, or some other mode that evidences their advance mutual agreement; and

(iv) With the consent of both parties, I order that despite the Interim Parenting Time Schedule, the Children will spend Father's Day with the Respondent if he is not working or, if he is working, a day in close proximity to Father's Day that is agreeable for both the Claimant and the Respondent. Similarly, I order that despite the Interim Parenting Time Schedule, the Children will spend Mother's Day with the Claimant.

[86] I am satisfied based on the evidence before me that the best interests of the Children are best served by a parenting arrangement that equally allocates parenting time. However, I am also not satisfied the nesting arrangement proposed by the Respondent is workable in this case. Such an arrangement requires a high degree of cooperation between the parents and needs to be well thought out and carefully planned. The Respondent's proposal was not sufficiently developed for me to conclude it was a viable option at this time. However, no alternate plan or schedule for an equal allocation of parenting time was proposed. I am mindful of the practical realities that the Respondent's work schedule is less flexible than the Claimant's and the transition to equal parenting time should be done in a manner that is consistent with the best interests of the Children. I hesitate to impose a schedule for achieving balanced parenting time.

[87] Accordingly, I order parenting time be allocated equally between the parties. I further order the Interim Parenting Time Schedule to be modified in order to achieve that equal allocation of parenting time within six months of the date of these reasons. I am hopeful the parties can work together, in the best interests of their Children, to agree on that schedule. However, if the parties find themselves unable to do so, they can jointly retain the services of a registered parent coordinator or a professional family law mediator to assist them. If that route is unsuccessful either party can apply for an order fixing the equal parenting time schedule.

C. Other Related Orders

[88] In addition, I make the orders below.

1. The Children's counseling

[89] The Children will continue their counselling sessions with Greg Daily until the parties agree otherwise or there is a further court order. Unless the parties agree otherwise, the counselling sessions will take place at a neutral location (which for greater clarity does not include the parties' residences or the residences of grandparents or extended family or friends). The Children will be driven to and from those counselling sessions by either parent, depending on which party is exercising parenting time at that time. Neither party will attend, or interfere with the Children's counselling sessions with Mr. Daily.

2. Discussions about legal proceedings

[90] Neither party will discuss past nor future legal proceedings or matters connected with their separation, divorce, or ancillary orders relating to the Children, with the Children or in front of the Children.

3. Respectful communications

[91] Neither party will speak in a derogatory manner about the other, the Children, the Children's grandmother, or P.S., to or in front of the Children.

4. Exclusive occupation of the family residence

[92] At the time of trial, the Family Residence continued to be listed for sale and the Claimant had interim exclusive occupancy. The Claimant is to continue to have exclusive occupancy of the Family Residence until it is sold or until further order of the court. The Respondent argues there should be some accounting attributable to the Claimant's, and later to P.S.'s, occupancy of the Family Residence. Counsel for the Claimant suggests that, if anything, a nominal amount of \$1,500 be attributed with respect to the benefit received by the Claimant and that no amount for the benefit P.S. received for living rent-free in the Family Residence be allocated. I will address this issue under the division of family property later in these reasons.

VI. FINANCIAL RELIEF

A. Child Support

[93] Child support orders can be made under the DA (s. 15.1) or the FLA (s. 147). If the Court makes a child support order under the FLA, the amount must be determined in accordance with the child support guidelines established by regulation under the FLA. These guidelines adopt, for all intents and purposes, the federal child support guidelines established by regulation under s. 26.1 of the DA: FLA, ss. 150(1) and 247; Family Law Act Regulation, B.C. Reg. 347/2012, ss. 8 and 9; Federal Child Support Guidelines, SOR/97-175 (the "Child Support Guidelines"). Again, applying the relevant provisions of the FLA in this case does not create an operational conflict with, or frustrate the purpose of, the applicable provisions of the DA. The doctrine of paramountcy is not triggered. I will determine child support under the FLA.

- [94] Subject to certain exceptions, each parent and guardian of a child has a duty to provide support for the child until they are no longer a child of the marriage: FLA, s. 147(1). The presumptive rule is the amount of child support ordered is the amount set out in the applicable table that forms part of the Child Support Guidelines, based on the number of children to whom the order relates, the income of the payor spouse against whom the order is sought, and the amount, if any, determined to be payable for special or extraordinary expenses: Child Support Guidelines, ss. 3(1) and 7.
- [95] In the event the court granted primary residence and the majority of parenting time to the Claimant, she sought an order providing child support for the Children until they are no longer children of the marriage, as that term is defined in s. 2(1) of the DA. In addition, she seeks retroactive child support from June 1, 2018 through to January 2019, being the period from when the Children were living exclusively with the Claimant to the date the Respondent began paying child support.
- [96] In the event the court granted equal parenting time to both parties, the Respondent sought child support for the Children until they are no longer children of the marriage.
- [97] As I have determined it is in the best interests of the Children for the parties to equally share parenting time going forward, I will consider the Respondent's prospective child support claim. Because the Claimant had exclusive parenting time from pronouncement of the court order on July 10, 2018, and the Respondent began paying child support in February 2019, I will also consider the Claimant's retroactive child support claim.
1. Prospective Child Support
- [98] Where at least 40% of parenting time is allocated to both spouses, s. 9 of the Child Support Guidelines direct that child support be determined by taking into account:
- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of the parenting arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [99] Section 9 of the Child Support Guidelines establishes a distinct and separate regime applicable in cases of shared custody and constitutes a complete code for doing so: *Contino v. Leonelli-Contino*, 2005 SCC 63 at para. 24; cited with approval in *B.P.E. v. A.E.*, 2016 BCCA 335 at paras. 21 and 22. *CAS v. ABS*, 2019 BCSC 948, provides a concise summary of the s. 9 analysis:
- [56] The leading case on s. 9 of the Guidelines is *Contino v. Leonelli-Contino*, 2005 SCC 63 (CanLII). The key principles from *Contino* are:
- The court must determine child support in accordance with the three listed factors in s. 9 once the 40% threshold is met;

- The court must emphasize flexibility and fairness to ensure the economic reality and particular circumstances of each family are properly accounted for;
- The three factors structure the exercise of the court's discretion but no factor prevails over the others;
- The weight given to each factor varies with the particular facts of each case;
- There is no presumption in favour of any particular award of child support, be that at, above or below the full Guidelines amount;
- The preferable starting point is to determine the straight set-off amount of child support that each party would pay to the other under the Guidelines;
- The court, however, has the discretion to modify the set-off amount where, considering the financial realities of the parents, it would lead to a significant variation in the standard of living experienced by the child as she moves from one household to the other;
- The court is to examine the budgets and actual expenditures of both parents in addressing the needs of the child, determine whether shared custody has resulted in increased costs globally and apportion these costs between the parents in accordance with their incomes;
- Keeping in mind the objectives of the Guidelines to ensure a fair standard of support for children and fair contributions from both parents, the court has broad discretion to analyse the resources and needs of both the parents and the child; and
- The court will look at the standard of living of the child in each household and the ability of each parent to absorb the costs associated with maintaining the appropriate standard of living in the circumstances.

a) The Applicable Table Amounts

[100] Accordingly, I must begin the s. 9 analysis by determining each spouse's income.

(1) The Claimant's Income

[101] The Claimant's income was not significantly disputed. The Claimant has worked for Telus for approximately 19 years. She is currently a program manager and earned \$88,000 last year, plus approximately \$13,000 in bonus employment income. I find her gross annual income to be \$101,000, or \$8,416.67 per month.

(2) The Respondent's Income

- [102] The Child Support Guidelines set out the approach to follow to determine a spouse's income: Child Support Guidelines, ss. 15-21. Subject to certain exceptions, a spouse's annual income is to be determined using the sources of income set out under the heading "Total Income" in the T1 General form issued by the Canada Revenue Agency and adjusted for certain expenses in accordance with Schedule III of the Child Support Guidelines: Child Support Guidelines, s. 16
- [103] At the time of trial the Respondent was earning approximately \$49,000 per year as a digital home technician with Telus. However, prior to his work at Telus, the Respondent worked for many years at a number of different businesses, but all in the area of real estate and its related banking, and had a historical income that ranged between \$60,000 and \$80,000 per year. The Claimant argues the Respondent has a history of unstable employment, a poor work ethic, and was a difficult employee, and as a result had trouble maintaining employment. She argues the Respondent is responsible for his own situation, including his current salary level, and that these facts disentitle him from spousal support. She argues the Respondent's situation is self-inflicted and therefore not a result of the marriage breakdown, although no cases supporting that proposition were cited. Relying on s. 19(1)(a) of the Child Support Guidelines, the Claimant argues an annual income of \$70,000 should be imputed to the Respondent on the basis he is under-employed.
- [104] It is not necessary for the court to find an intention to evade or minimize child support in order to find intentional underemployment or unemployment; all that is required is a finding that the spouse is not earning to their capacity: *Barker v. Barker*, 2005 BCCA 177 at para. 19, cited with approval in *Koch v. Koch*, 2012 BCCA 378 at para. 38.
- [105] In *Marquez v. Zapiola*, 2013 BCCA 433, the Court of Appeal articulated the test for imputing income on the basis of intentional underemployment or unemployment of the pay or spouse:
- [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).

- [106] The Claimant argues the evidence supports a finding that the Respondent failed to take reasonable steps to secure a job with a higher income, and that his age, relatively good health, education, skill, and work history demonstrate he has the capacity to earn a much higher income. The Claimant points out the Respondent admitted he believes he has the potential to earn higher income and is confident that he will be able to do so in the future.
- [107] The Respondent does not have a university degree, but he has a business management diploma and is in the process of pursuing an accounting designation. The Respondent's evidence was he has some ongoing back issues and has some type of disorder in his neck that requires chiropractic treatment, and as a result he needs to be careful about the type of work he does. However, I give this factor very little weight given the absence of any medical evidence and the fact that the Respondent has been able to maintain full-time employment at Telus for some time.
- [108] I acknowledge that both parties' evidence was that the Respondent's decision not to continue in the real estate and real estate-related banking industries, which are susceptible to cyclical economic downturns, was a joint decision. Both parties decided the Respondent should pursue employment at Telus because a national company with a long history and broad opportunities for advancement would result in greater employment stability. However, I agree with the Claimant that the Respondent's age, education, skills, health, work history, and work availability support the conclusion he has the capacity to earn the same level of income he previously did. I find the Respondent has the capacity to earn a greater income and is under-employed. I am exercising my discretion under s. 19(1)(a) of the Child Support Guidelines to impute an annual gross income of \$70,000 to him.
- [109] According to the relevant table, the child support payable for two children in BC where the guideline income is \$70,000 per year is \$1,086 per month. According to the relevant table, the child support payable for two children in BC where the guideline income is \$101,000 per year is \$1,535 per month. The difference is \$449. That set off amount payable by the Claimant to the Respondent forms the starting point for the analysis: *B.P.E.* at para. 34.

b) Increased Costs of the Parenting Arrangement

- [110] The second factor under the s. 9 analysis requires me to examine increased costs of the parenting arrangement. This typically requires the examination of the budgets and actual expenditures of both parents in addressing the needs of the children and to determine whether shared custody has in effect resulted in increased costs globally: Contino at para. 52.
- [111] The Claimant's evidence was her monthly expenses were \$10,577.26, which exceed her average monthly income of \$8,416.67. However, a significant portion of those expenses was the costs associated with the Claimant's monthly housing expenses related to the Family Residence, which currently exceed \$3,500 per month. The Family Residence is for sale and once it is sold the Claimant's may be able to reduce those housing costs. It can also be expected that the Claimant's costs for certain non-fixed expenditures associated with the household, such as food, will decrease with shared parenting arrangements, along with expenses she has incurred in the past for the Children, since those costs will now be shared with the Respondent.
- [112] By contrast, according to the Respondent's F8 financial statement filed in March 2019, his monthly expenses were \$5,196.94, of which \$756.00 was monthly child support. However, his monthly housing costs can be expected to increase (from \$1,070 per month) with the shared parenting arrangements in place, since his current apartment is only one bedroom and he indicated an intention to get a larger apartment to better serve the needs of the Children. Similarly, some of the Respondent's expenses, for things such as food and Children's clothing, will increase.
- [113] I also consider the levels of discretionary spending budgeted by each party. The Claimant budgeted more for those types of expenses than the Respondent.
- [114] I anticipate the costs associated with the exercise of parenting time and parental responsibilities will be equal for both of the parties.
- c) The Conditions, Means, Needs, and Other Circumstances of Each Spouse and of Any Child for whom Support is Sought
- [115] In my view, the disparity between the standards of living of the Children during parenting time warrants the set off amount being paid. The Claimant, by virtue of her higher level of income, has the ability to bear the increased costs of shared custody, even without considering the contribution P.S. may make to the household at some point.
- d) Conclusion on Prospective Child Support
- [116] After considering the amounts set out in the applicable tables for each parent, the increased costs of shared parenting arrangements and the conditions, means and other circumstances of each spouse and of the Children, I find child support in the set off amount is warranted. I order the Claimant to pay the Respondent \$449 per month in child support, on the 1st day of each month commencing January 1, 2020.

2. Retroactive Child Support

[117] A retroactive child support order is discretionary but not exceptional: *D.B.S. v. S.R.G.*, 2006 SCC 37 at paras. 94 and 97. In *D.B.S.*, the Court set out a number of factors to consider in determining whether it is appropriate to make an order for retroactive child support under the DA. These factors were approved by the Court of Appeal in *Sampley v. Burns*, 2018 BCCA 178 at para. 48, for retroactive orders made under s. 170(b) of the FLA, namely:

1. reasonable excuse for why support was not sought earlier;
2. conduct of the payor parent;
3. circumstances of the child; and
4. hardship occasioned by a retroactive award.

[118] In the Claimant's notice of family claim, she sought interim and ongoing child support for the Children. Therefore, from the outset the Respondent was "on notice" the Claimant was seeking a financial contribution for the costs associated with caring for the Children while they were in her exclusive interim care. I find there was no unreasonable delay by the Claimant in seeking child support.

[119] In *D.B.S.*, the Court emphasized an "expansive view" is to be taken with respect to what constitutes blameworthy conduct on the part of the payor parent, and characterized it as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support": *D.B.S.* at para. 106. Given that expansive understanding, my finding that the Respondent is underemployed is relevant.

[120] With respect to the third factor, I find there was some, but not a significant, change in the Children's standard of living between the Date of Separation and February 2019, when the Respondent began paying child support.

[121] Finally, I consider whether a retroactive award would result in hardship to the Respondent. In my view, given the availability of family property in the form of equity from the sale of the Family Residence to satisfy a retroactive award, the evidence does not establish such hardship would result.

[122] In all of the circumstances, I am satisfied the *D.B.S.* factors favour a retroactive award of child support and I exercise my discretion in favour of making such an award. I order the Respondent to pay retroactive child support in the lump-sum of \$8,688, calculated on the basis of the \$1,086 per month based on the Child Support Guidelines amount applicable to a British Columbia support payer with a guideline income of \$70,000 for two children, for each month from June 2018 through to and including January 2019.

[123] In making a child support order, the Child Support Guidelines also permit the court to order that medical and dental insurance coverage for Children be acquired or maintained where it is available through a parent's employer or otherwise: Child Support Guidelines, s. 6. I order the parties maintain adequate medical and dental insurance through their employer for the Children.

3. Section 7 Expenses

[124] The Claimant also seeks an order that the Respondent pay the Claimant for the Children's special or extraordinary expenses in accordance with s. 7 of the Child Support Guidelines, which reads as follows:

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

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

Definition of "extraordinary expenses"

(1.1) For the purposes of paragraphs (1)(d) and (f), the term extraordinary expenses means

- (a) expenses that exceed those that the spouse requesting an amount for the extraordinary expenses can reasonably cover, taking into account that spouse's income and the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate; or
- (b) where paragraph (a) is not applicable, expenses that the court considers are extraordinary taking into account

- (i) the amount of the expense in relation to the income of the spouse requesting the amount, including the amount that the spouse would receive under the applicable table or, where the court has determined that the table amount is inappropriate, the amount that the court has otherwise determined is appropriate,
- (ii) the nature and number of the educational programs and extracurricular activities,
- (iii) any special needs and talents of the child or children,
- (iv) the overall cost of the programs and activities, and
- (v) any other similar factor that the court considers relevant.

Sharing of expense

- (2) The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.
- [125] S.M.B. is involved in dance and required orthodontic treatment. S.B. plays soccer and ball hockey. The Claimant seeks an order that the Respondent contribute to the expenses associated with those services and activities, specifically for S.B. \$180 for ball hockey for the April to June 2019 season; \$335 for his summer 2018 soccer season; and \$219 for the summer 2018 soccer camp. With respect to S.M.B. the Claimant seeks the Respondent's contribution for the \$1,645 associated with S.M.B.'s dance registration for September 2018 through to June 2019. All these expenses were incurred solely by the Claimant.
- [126] Orthodontic care is an expense that would properly be the subject of an order related to s. 7 expenses. However, while the Claimant testified she paid \$110 per month for S.M.B.'s orthodontic care, the payment summary document indicates those "payments do not reflect insurance reimbursements". In addition, while the Claimant testified the costs were all incurred after separation, one of them was incurred prior to the Date of Separation as I have determined it, and seven of them were incurred while the parties were both still living in the Family Residence and their finances, insofar as paying household expenditures, continued to be mingled to some degree. For all these reasons, I am not satisfied on a balance of probabilities that these costs were incurred solely by the Claimant.
- [127] There was some evidence that S.M.B. may need further orthodontic care in the future; however, that was uncertain as at the date of trial. I make no order with respect to s. 7 expenses for orthodontic care for either of the Children.
- [128] Regular extracurricular activities do not qualify as special or extraordinary expenses: K.A.M.R. v. W.H.G., 2014 BCSC 103. The Respondent pointed out in his closing argument, S.M.B. is not a competitive dancer and S.B. plays recreational soccer and ball hockey. While it is open to the Respondent and the Claimant to agree between themselves to share the costs of those activities, and indeed it may be beneficial for the Children to have as little

disruption to their extracurricular lives as possible in this time of transition, I find these activities are not properly characterized as "extraordinary". I am not ordering any contribution by the Respondent for these past activities.

- [129] The Claimant also incurred costs associated with counselling for the Children, but is not seeking any contribution from the Respondent with respect to those past expenses. Although the Respondent is supportive of the Children's counselling, he expressed interest in looking for an alternative treatment provider who might be covered by the parties' extended health care insurance plan. This is reasonable provided it does not cause harm to the Children. Any change in the Children's counselling service provider must be undertaken in a manner that minimizes the potential for such harm. I have ordered that the Children continue their counselling sessions with Mr. Daily until the parties agree otherwise or there is a further court order.
- [130] I find the Children's counseling to be a special expense: Child Support Guidelines, s. 7(1)(c).
- [131] I order the parties to share the cost of any future s. 7 activities in proportion to their respective incomes. For those purposes, the Respondent's annual income is to be the higher of the \$70,000 per year or his actual guideline income. If the parties cannot agree whether a particular expense is special or extraordinary, I order they jointly retain the services of a registered parent coordinator or a professional family law mediator to assist them in reaching consensus. If that route is unsuccessful, either party can apply to the court for determination.

B. Spousal Support

- [132] Relying on both the DA and the FLA, in his counterclaim the Respondent seeks an order that the Claimant pay him spousal support. Consideration of a claim for spousal support takes place in two stages: first, the court must determine whether there is an entitlement to spousal support; if so, the inquiry turns to the appropriate quantum and duration of that award: *Bracklow v. Bracklow*, [1999] S.C.R. 420 at para. 50; FLA, s. 160.
- [133] Section 15.2 of the DA and ss. 161 and 162 of the FLA direct the same holistic approach be undertaken when considering whether there is an entitlement to spousal support. Both Acts require the court to consider the same factors and underlying objectives of spousal support in determining the appropriate quantum and duration for such an order. Since applying the relevant provisions of the FLA in this case does not create an operational conflict with, or frustrate the purpose of, the applicable provisions of the DA, I elect to determine spousal support under the FLA.
1. Entitlement to Spousal Support
- [134] As Justice Kelleher concisely articulated in *Doell v. Prentice*, 2018 BCSC 1115:

- [95] There are three bases for entitlement to spousal support: compensatory, non-compensatory, and contractual. See *Moge v. Moge*, [1992] 3 S.C.R. 813; *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420; and *Miglin v. Miglin*, 2003 SCC 24.
- [135] There is no agreement between the parties involving spousal support so only the compensatory and non-compensatory bases for entitlement must be considered.
- [136] In *Zacharias v. Zacharias*, 2015 BCCA 376, Justice Groberman succinctly described compensatory and non-compensatory entitlement in the context of the DA as follows:
- [26] Compensatory entitlement will arise where, as a result of the parties' roles during the marriage, one spouse has suffered economic disadvantage or has conferred economic advantages on the other. Most often, such entitlement will arise where one spouse has sacrificed career opportunities in order to take on more of the family's household or child-rearing responsibilities. Upon the dissolution of the marriage, the spouse who has given up opportunities may be entitled to spousal support, either to compensate for diminished earning capacity, or to share in the augmented earning capacity of the other spouse. The main goal of compensatory spousal support is to provide for an equitable sharing of the economic consequences of the marriage (see *Moge v. Moge*, [1992] 3 S.C.R. 813 at 858-66).
- [27] Non-compensatory support entitlement focuses on the needs of the spouses and on their respective means. It is based on the idea that spouses, by virtue of marriage, have some ongoing responsibility to care for one another. The degree to which non-compensatory principles will apply will depend on a close examination of not only the means and needs of the spouses, but also of the nature of the marital relationship and its duration (see *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, particularly at para. 53).
- [137] In seeking spousal support, the Respondent points to the disparity between his income and that of the Claimant. Even though I have imputed an income of \$70,000 to the Respondent, a disparity between the parties' respective annual incomes continues to exist. However, the Claimant argues mere disparity of incomes does not automatically lead to entitlement to spousal support.
- [138] Although there is evidence the Respondent accepted a position with greater stability but which paid less, he was unemployed when he accepted the position with Telus. There was no evidence that another higher paying position was open to the Respondent at that time, or that he turned down higher paying employment to accept the position with Telus. Accordingly, I find he did not sacrifice career opportunities to take on additional family or child-rearing responsibilities. On a consideration of the overall evidence, I am not satisfied the Respondent has established a compensatory entitlement to spousal support.
- [139] However, I am satisfied the Respondent has established entitlement to non-compensatory spousal support. As noted above, the Claimant's annual income is \$101,000, or \$8,416.67 per month. Even with an imputed income of \$70,000 per year, and taking into account the Respondent's receipt, and the Claimant's payment, of the child support I have ordered,

there is still a chasm of \$20,000 between their respective incomes. The financial demands of both parties will be roughly the same going forward, but the Claimant's income is higher. The Respondent's need is higher.

[140] While both parties' financial situation have been impacted by the breakdown of the marriage, the Respondent's standard of living has been more adversely impacted than the Claimant's. I find that the Respondent has established entitlement to non-compensatory spousal support. I now turn to consideration of the appropriate quantum and duration of that spousal support entitlement.

2. Quantum and duration of spousal support

[141] In *Zacharias*, Groberman J. (as he then was) made the following comments with respect to an award of spousal support:

[38] When a spouse establishes a basis for spousal support, a court making an initial order must consider a number of factors set out in the Divorce Act in fixing the amount and duration:

15.2(4) In making an order [for spousal support], the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.
- (6) An order [for spousal support] should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[39] These considerations are comprehensive, and take into account factors that would support both compensatory and non-compensatory support. It must be recognized, however, that while there may be more than one basis for a spouse's entitlement to support, the award is a single and indivisible one. It is not, as the chambers judge implied, made up of a "compensatory" component and a separate "non-compensatory" component. Rather, the whole of the award is available to address both compensatory and non-compensatory goals.

- [142] These considerations and objectives of spousal support are mirrored in ss. 161 and 162 of the FLA.
- [143] This was a long-term marriage. The parties were together for almost 20 years. I have found that throughout the marriage both parties equally contributed to the Children's care and maintenance of the household. Throughout their lengthy marriage, the parties benefited from the combined effect of their respective earnings. The result was an increase in their standard of living beyond what each could have afforded individually.
- [144] As noted earlier, I find the Respondent's decision to leave the real estate related industry and pursue more stable employment was a joint decision made by the parties during the marriage. It was a decision which they both felt would benefit the long-term strength and stability of the family. Some time is needed for the Respondent to be able to take whatever steps necessary, either within Telus or in some other organization, to re-establish himself in a position where he can earn a salary similar to what he was previously earning, and which I find he has the capacity to earn in the near future.
- [145] The Claimant provided me with several calculations performed using Divorcemate, a software program that interprets the Spousal Support Advisory Guidelines based on certain assumptions and principles, and which is often used to guide determinations of spousal support. According to additional Divorcemate calculations using a "with child support" formula, based on the incomes of the Claimant and the Respondent as I have found and imputed them to be respectively, for the two children of the marriage following an 18 year relationship, the range of periodic payments for spousal support payable by the Claimant to the Respondent for an indefinite (unspecified) period ranged from \$Nil (low) to \$478 (high).
- [146] In this case, it is appropriate to order spousal support at the higher end of the range, but for a short duration. The higher end of the range results in each party having the same percentage of net income after child support has been accounted for, or net disposable income ("NDI"), being 50%. In my view that is an important consideration. The low and mid-range periodic payments of spousal support would both result in the Claimant having a higher percentage of NDI available to her.
- [147] I find spousal support in the amount of \$478 will assist in relieving the greater economic hardship experienced by the Respondent as a result of the breakdown of the marriage. As for the duration of the spousal support order, I find one year is appropriate. That duration should enable the Respondent to re-establish himself as a higher income earner, while at the same time encouraging that he achieve self-sufficiency at a brisk pace. Further, I exercise my discretion in this case to order a lump-sum payment of the spousal support award to the Respondent. In my view, this is appropriate given the availability of family property, in the nature of equity from the sale of Family Residence, to satisfy the award. I find that a lump-sum award for the net present value, being \$3,811 according to the Divorcemate calculation, is the fairest outcome for both parties.

C. Division of Family Property and Family Debt

- [148] Subject to certain exceptions, upon separation spouses have a right to an undivided half interest in all family property as tenants in common, and are equally responsible for family debt: FLA, s. 81. Under s. 84 of the FLA, family property is defined as property that at least one spouse owns or has a beneficial interest in at the date of separation. In this case, I have found the Date of Separation was November 14, 2017. Family debt includes all financial obligations incurred by a spouse from the time the spouses' relationship began until the date of separation, and after separation if incurred for the purposes of maintaining family property: FLA, s. 86.
- [149] Relevant to the issues in this case, family property is the real and personal property owned by at least one of the parties, or in which at least one of the parties has a beneficial interest on the date of separation, but family property does not include excluded property: FLA, s. 84(1). Excluded property includes a settlement or award of damages to a spouse as compensation for injury or loss, unless the settlement or award represents compensation for loss to both spouses or lost income of a spouse: FLA, s. 85(1)(c). With the exception of pension income, the value of family property is to be based on its fair market value at the date of trial: FLA, s. 87.
- [150] Where the equal division of family property, family debt, or both, would be significantly unfair, the court may order an unequal division: FLA, s. 95 (1). When considering whether to make an order for the unequal division of family property, family debt, or both, s. 95(2) provides guidance by setting out a number of factors which the court may wish to consider, including:
- (a) the duration of the relationship between the spouses;
 - (b) the terms of any agreement between the spouses;
 - (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.

1. Positions of the parties

[151] Other than the Respondent's excluded property claim the parties were in agreement with respect to what property constitutes their family property and is to be divided.

[152] The Claimant is "generally prepared to accept an equal division of family property, 50-50, with some exceptions to ensure a fair result". Relying on s. 95(2)(f) and (i), the Claimant argues that in the final accounting, the following reapportionment is appropriate in order to avoid significant unfairness:

- a) legal costs of \$4,500 payable from the Respondent to the Claimant "in any event of the cause", as ordered by Master Muir;
- b) carrying costs of the Family Residence paid by the Claimant after May 2018;
- c) costs incurred by the Claimant after she and the Children were out of the Family Residence between May and July of 2018;
- d) no contribution from the Claimant towards the parties' joint Homeline Plan secured credit line (the "Joint LOC"), on the basis of what she argues was the post-separation increase of that family debt by the Respondent;
- e) arrears of child support; and
- f) arrears of s. 7 expenses.

[153] For his part, the Respondent also argues that in the final accounting some reapportionment of family property is appropriate in order to avoid significant unfairness. In particular, the Respondent asks that the Claimant's expenses in maintaining the Family Residence be set off by occupational rent for the period of time the Claimant, and for a time P.S., were living in the Family Residence while the Respondent was required to rent an apartment. In response to that argument, counsel for the Claimant suggested that, if anything, a nominal amount of \$1,500 should be assigned as the set off amount. In the Claimant's view no amount should be attributed to the benefit P.S. enjoyed by living in the Family Residence rent-free.

[154] The Respondent also argues that in the division of family property, he should receive a credit for 50% of a withdrawal made by the Claimant to her RRSP on November 14, 2017. The Respondent also seeks credit for household furniture the Claimant left outside and gave away after she had been given exclusive possession of the Family Residence and household effects in July 2018. Doing so was contrary to the court order prohibiting either party from disposing of family property.

[155] The Respondent also asserts an excluded property claim with respect to a settlement he received for improper medical treatment received following his cancer diagnosis. Initially the Respondent sought an exclusion in the amount of \$104,000, but in his closing submissions, the Respondent claims he used the settlement to purchase a 2003 Acura MDX, a Cervelo bicycle, as a partial down payment on the parties' Second House, landscaping costs for the Second House, as well as screens, blinds, and other household expenses, for a total of \$61,503.

2. The Respondent's Excluded Property Claim

[156] The spouse advancing the excluded property claim is responsible for demonstrating the property is excluded property: FLA, s. 85(2). As noted by the Claimant, while s. 85(1) of the FLA treats one spouse's personal injury settlements or awards of damages as excluded property, where the settlement or award, or part of it, represents compensation for that spouse's lost income, it does not qualify as excluded property. The onus is on the spouse seeking to exclude the settlement to show the settlement does not include lost income. If that is not established, no part of the settlement is excluded from family property: *Jackson v. Jackson*, 2015 BCSC 2114 at paras. 11 and 12

[157] In this case, the Respondent was unable to demonstrate that none of his settlement was attributable to lost income. Further, the Respondent did not provide documentary evidence to support a tracing of the settlement proceeds through to any particular purchase or expenditure. Instead, he relied on several receipts, which did not indicate a source of the funds used for the expenditure, and his oral testimony at trial. Where an excluded property claim depends on a party's oral evidence unsupported by any independent documentation, that evidence must be scrutinized for reliability and credibility: *Shih v. Shih*, 2017 BCCA 37 at para. 43. Based on the overall evidence, the Respondent did not establish that no part of the settlement proceeds related to loss of income. In addition, the Respondent's evidence about the expenditures he testified he used his settlement proceeds for was vague with respect to amounts and generally lacked precision. For all those reasons, I am not satisfied the Respondent established an excluded property claim.

3. Conclusion on division of family property and debt

[158] There are two mortgages secured against the Family Residence. The parties agree those mortgages constitute family debt and those debts will be extinguished using proceeds of sale of the Family Residence. However, there is also Joint LOC. As at the Date of Separation, the balance of the Joint LOC was \$5,853. At the time of trial, the balance on the Joint LOC

had increased to \$17,841. The Claimant argues the value of the Joint LOC as at the Date of Separation should be equally divided between the parties, but the Respondent should be responsible for 100% of the Joint LOC debt incurred post-separation because that debt was incurred exclusively by him without the consent of the Claimant.

- [159] As noted earlier in these reasons, after the Date of Separation the parties continued to live separate and apart in the Family Residence. The evidence establishes both parties continued to use the Joint LOC. The Joint LOC was used to pay the utilities of the Family Residence, an outstanding balance on the parties' joint Visa, and the Claimant's MasterCard bill. I find the increase in the Joint LOC up until May 2018 was the result of various expenses related to maintaining the Family Residence and extinguishing family debt.
- [160] While the Claimant testified that she did not consent to any of the expenditures, she had the ability to monitor the transactions and could have objected to them during the time both parties continued to live in the Family Residence; I am not satisfied she did so. The historical pattern of the parties' household expenditures involved the routine use of the Joint LOC to cover household bills. I find the balance of the Joint LOC as at May 18, 2018 constitutes family debt for which both parties are equally responsible. I find the Respondent was solely responsible for the increase in the Joint LOC after May 18, 2018. Therefore the balance of the Joint LOC as at May 18, 2018 will be paid from the proceeds of the sale of the Family Residence. The balance after May 18, 2018 will be paid solely by the Respondent.
- [161] After the Family Residence has been sold, and the two mortgages and Joint LOC secured by the Family Residence have been repaid, any equity remaining in the Family Residence will be divided equally between the parties (the "Respondent's Proceeds of Sale" and the "Claimant's Proceeds of Sale"), subject to the credits determined below.
- a) Credits sought by the Claimant
- [162] By a court order pronounced on July 10, 2018, the Respondent was ordered to pay the Claimant costs in the amount of \$4,500, in any event of the cause. Those costs will be deducted from the Respondent's Proceeds of Sale.
- [163] The Claimant is entitled to contribution from the Respondent for one half of the mortgage, property taxes, utilities, and insurance costs incurred by the Claimant from July 2018 in relation to the Family Residence. Those costs will be deducted from the Respondent's Proceeds of Sale.
- [164] The Claimant requests compensation for costs incurred when she says she and the Children were locked out of the Family Residence from May until July 2018. I accept the evidence of the Respondent that had the Claimant contacted him and asked for any items to be provided, he would have done so. The Respondent made several efforts to communicate with the Claimant after the May 2018 Incident, in order to determine whether the Children were safe and their needs were being met, but she was unresponsive. The Claimant did not

incur any out-of-pocket expenses associated with accommodation, as she and the Children stayed with the Claimant's mother until she was granted exclusive occupancy of the Family Residence in July 2018. Further, I do not view costs for items such as a new computer game system and new toys for the Children to be reasonable costs for which reimbursement would be recoverable in any event. Accordingly, I am not prepared to provide any credit to the Claimant for those costs.

[165] The retroactive child support award referred to earlier in these reasons will be paid from the Respondent's Proceeds of Sale.

[166] The amount of the debt incurred on the Joint LOC after May 18, 2018 will be paid from the Respondent's Proceeds of Sale.

b) Credits sought by the Respondent

[167] I turn to the Respondent's argument that he should receive credit for 50% of a withdrawal made by the Claimant from her RRSP on November 14, 2017. November 14, 2017 was the Date of Separation as I have determined it. The value of the Claimant's RRSP before the withdrawal, was property in which the Claimant had an interest as at the Date of Separation and therefore it constitutes family property. I am satisfied the Respondent is entitled to 50% of the November 14, 2017, withdrawal from the Claimant's RRSP account. This amount will be paid from the Claimant's Proceeds of Sale.

[168] With respect to the Respondent's request to be credited for household furniture, including a king-size bed purchased in 2016, some chairs, and other furniture, that the Claimant left outside to give away, I agree the Respondent should have some benefit associated with the dissipation of those assets. I find \$1,500 is a reasonable amount to compensate the Respondent for what the Claimant acknowledges was "an error in judgment" on her part. This amount will be paid from the Claimant's Proceeds of Sale.

[169] Further, I agree with the Respondent that he should be compensated for the period the Claimant had exclusive occupation of the Family Residence. The Respondent will be credited with \$1,000 per month in rent for every month the Claimant had exclusive occupation of the Family Residence. This amount will be paid from the Claimant's Proceeds of Sale.

[170] In the final accounting with respect to the equity in the Family Residence after the sale, the Claimant seeks some credit for occupational rent for the period the Claimant, and for a time P.S., was living in the Family Residence while he was required to rent alternative accommodations. In her concurring reasons for judgment in *Shen v. Tong*, 2013 BCCA 519, Justice D. Smith set out a number of potentially relevant factors to be considered in assessing a claim for occupational rent:

[194] A non-exhaustive list of potentially relevant factors in assessing a claim for occupation rent includes: (i) whether there has been ouster (although several authorities have indicated that this is not a requirement); (ii) whether children are residing with the occupying spouse; (iii)

whether the occupying spouse has made a claim for contribution from the non-occupying spouse for the expenses related to the premises; (iv) whether child and/or spousal support was being paid by the non-occupying spouse; (v) whether the occupying spouse increased the selling value of the property; (vi) the duration of the occupancy; and (vii) any other competing claims: *Oyama*; *Casey v. Casey*, 2013 SKCA 58 (CanLII), 417 Sask. R. 34; *Griffiths v. Zambosco* (2001), 2001 CanLII 24097 (ON CA), 54 O.R. (3d) 397 (C.A.); *J.A.H. v. R.H.*, 2005 BCSC 1713 (CanLII), [2005] B.C.J. No. 2667; *Donovan*; and *Carmichael v. Carmichael*, 2005 NSSC 318 (CanLII), 238 N.S.R. (2d) 195. The objective of an award for occupation rent is to do what is "just and equitable" between the parties, albeit within the parameters of s. 65(1) of the FRA: *Stasiewski v. Stasiewski*, 2007 BCCA 205 (CanLII), 67 B.C.L.R. (4th) 81 at para. 33.

- [171] While *Shen* was decided under the former FRA, *Smith J.A.*'s analysis has been cited with approval by the Court of Appeal in the context of the FLA: *Holland v. Holland*, 2017 BCCA 75, at paras. 22-23.
- [172] The Respondent was ousted from the Family Residence on application of the Claimant largely based on the Claimant's version of an incident in August, 2017 which I reject, and the May 2018 Incident which I have found was a mutual altercation in which both parties' emotions got the better of them. As a result, the Respondent incurred expenses associated with renting an apartment. The Children were residing with the Claimant in the Family Residence, and for the most part she was exclusively responsible for their care. The Claimant made a claim for, and I have granted, contribution from the Respondent for the expenses she incurred related to maintaining the Family Residence. The Respondent began paying child support six months after he was ordered to leave the Family Residence and the Claimant sought, and I have ordered, him to pay retroactive child support. Finally, the Claimant's new partner moved into the Family Residence while the Respondent was prohibited from living there. I find the Claimant's decision in that regard was, at best, insensitive to and disrespectful of the Respondent, however, I give that factor very little weight and it does not affect my overall conclusion.
- [173] In my view, it is appropriate to provide credit to the Respondent for occupational rent. The Respondent's rent between July 2018 and the time of trial ranged from \$1,045 - \$1,070 for an approximate total of \$10,000. I order a lump sum of \$7,500 be credited to the Respondent on the basis of occupational rent.
- [174] In addition, I find that the following constitutes family property and unless the parties agree otherwise, I order that it be divided as set out below:
- 2003 Acura MDX - this family property is currently held by the Respondent and at the Date of Separation was valued at \$5,000. The Respondent will keep the vehicle and compensate the Claimant for half its Date of Separation value, being \$2,500.
 - The Claimant and Respondent each have two savings and investment accounts in their own names. There was no evidence with respect to the balance of the two of them as at the Date of Separation. Within 45 days of these reasons, the Respondent will provide the Claimant with

documentation showing the balance of his RBC account and the Claimant's RBC Direct Investing account on the Date of Separation. The balance as at the Date of Separation of all four of those accounts is to be shared equally between the parties. The parties are entitled to retain their respective accounts in their own names. The Respondent will provide the Claimant with the password to any account in her name to which he has a sole access.

- The parties also have six joint savings and investment accounts (the "Joint Accounts"). There was no evidence with respect to the Date of Separation balance of two of them. Within 45 days of these reasons, the Respondent is to provide the Claimant with documentation showing the balance of the RBC savings account and the RBC day-to-day savings account as at the Date of Separation. With the exception of RBC Estate Account, which is to be retained by the Respondent to satisfy taxes and any associated costs arising from the administration of his late father's estate, the balances of Joint Accounts as at the Date of Separation are to be shared equally between the parties, following which they are to be closed.

- Both parties are in agreement that \$10,000 held in trust with the Claimant's counsel, which are monies impressed with a trust for the benefit of S.M.B., should be placed in a GIC with both parties being required signatories on that account;

- The Respondent's bicycle collection - I find this family property was valued at \$4,500 at the Date of Separation. The Respondent is to keep the bicycle collection and compensate the Claimant one half of its value.

- The Respondent's coin collection - the Claimant's evidence was this collection was worth \$1,000, whereas the Respondent testified its value was \$500. I find this family property was valued at \$750 at the Date of Separation. The Respondent is to keep the coin collection and compensate the Claimant for one half of its value.

- Jewelry - the parties differed as to the value of the jewelry. The Claimant's evidence was it was valued at \$1,500. The Respondent testified there were appraisals done in 2006; however, those appraisals were not in evidence. Based on the description of the jewelry, I find the value of the jewelry was \$3000 at the Date of Separation. The Claimant is to retain the jewelry and compensate the Respondent for one half of its value.

- Household tools, tool chest, and other household items - the parties will arrange for joint appraisal of the remaining household effects, with the Claimant keeping the household effects and compensating the Respondent for one half of the value remaining after payment of the costs of the appraisal. Given the evidence of both parties that the value of the household effects may not warrant the cost of an appraisal, the parties can alternatively agree on the division of the household effects as amongst themselves. If they are unable to do so, they can divide the household effects by each taking alternating picks of the household effects, with the Claimant having first choice given that her name appears first in the style of cause.

- The Respondent's Telus shares - are to be retained by the Respondent. Within 45 days of these reasons, the Respondent will provide documentation to the Claimant showing the value of the shares as at the Date of Separation and the Respondent is to compensate the Claimant for one half of their value at the Date of Separation.
- Pensions and RRSPs - the parties have several pensions and retirement annuities in their own names which are to be divided in accordance with Part 6 of the FLA.

D. Sole Conduct of Sale

[175] The Claimant sought an order that she be granted sole conduct of sale of the Family Residence, based on an allegation that the Respondent unreasonably refused to lower the listing price of the Family Residence and thereby interfering with its sale. I have found the Respondent did not unreasonably refuse to lower the listing price of the Family Residence. Further, the Claimant's evidence was that she wished to purchase the property. Accordingly, it would be a conflict of interest for her to also be granted sole conduct of sale of the Family Residence. Overall, I am not satisfied that an order for exclusive conduct of sale of the Family Residence is warranted in the circumstances, and I decline to make such an order.

VII. CONCLUSION

[176] In summary, for the reasons provided I make the following final orders under the DA:

- a) Subject to s. 12 of the DA, the Claimant, S.T.C., and the Respondent, S.J.B., who were married at Delta, British Columbia, Canada, on August 21, 1999, are divorced from each other, the divorce to take effect on the 31st day after November 15, 2019.

[177] For the reasons provided I make the following final orders under the FLA:

- b) The Claimant and Respondent in this action will continue to be joint guardians of the Children of the marriage, S.M.B. (born March 12, 2005) and S.B. (born March 5, 2008).
- c) Parenting time of the Children will be allocated equally between the parties. The Interim Parenting Time Schedule is to be modified in order to achieve that equal allocation of parenting time within six months of the date of these reasons. If, despite their best efforts, the parties are unable to agree on the specifics of that modification, they can either jointly retain the services of a registered parent coordinator or a professional family law mediator to assist them, or either party can apply for an order fixing the equal parenting time schedule. I seize myself with respect to any such application.
- d) Each guardian 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.
- e) Both guardians will exercise parental responsibilities in consultation with each other.

- f) The guardians have the obligation to try to reach agreement on decisions involving parental responsibilities.
- g) If the parties are unable to reach agreement respecting decisions involving parental responsibilities despite their best efforts, I order they jointly retain the services of a registered parent coordinator or a professional family law mediator to assist them in reaching consensus. If that route is unsuccessful, either party can apply to the court for determination.
- h) S.M.B. and S.B. will continue their counselling sessions with Mr. Daily until the parties agree otherwise or there is a further court order.
- i) The Claimant's gross annual income is \$101,000 (CDN).
- j) The Respondent is imputed to have a gross annual income of \$70,000 (CDN) (the "Respondent's Imputed Income").
- k) Where the parties jointly retain the services of a registered parent coordinator or a professional family law mediator pursuant to this order, I order the costs to be shared between the parties in proportion to their respective incomes, with the Respondent's income being the greater of Respondent's Imputed Income or his actual child support guideline income.
- l) Effective January 1, 2020, the Claimant will pay the Respondent \$449 CDN per month in child support for the two Children of the marriage, continuing on the first day of each and every month thereafter, for as long as the Children remain children of the marriage, or until further agreement of the parties or court order.
- m) The Claimant's claim for prospective child support and a retroactive contribution towards s. 7 expenses is dismissed.
- n) The Claimant's claims for retroactive child support is granted as set out earlier in these reasons.
- o) The parties will share the costs of s. 7 expenses, including the Children's counseling, in proportion to their respective annual incomes, with the Respondent's income being the greater of the Respondent's Imputed Income or his actual guideline income.
- p) For as long as the children are eligible to receive child support, the parties will exchange:
 - (i) copies of their respective income tax returns for the previous year, including all attachments, no later than June 1 each year; and
 - (ii) copies of any notice of assessment or reassessment provided to them by the Canada Revenue Agency, immediately upon receipt.
- q) The parties will maintain adequate medical and dental insurance for the Children through their respective employers.

- r) The Claimant will pay the Respondent \$478 per month in spousal support for a period of one year, payable in a lump sum in the amount of \$3811, which is to be deducted from the Claimant's Proceeds of Sale.
- s) The Family Residence will be sold and the two mortgages and the Joint LOC will be repaid from the proceeds of sale. The remainder of the proceeds of sale will be equally divided between the Claimant and Respondent, subject to the reapportionment credits ordered earlier in these reasons.
- t) The remaining family property will be divided as ordered earlier in these reasons.
- u) The Claimant will have exclusive occupancy of the Family Residence until it is sold.
- v) Neither party will discuss past nor future legal proceedings or matters connected with their separation, divorce, or ancillary orders relating to the Children with the Children or in front of the Children.
- w) Neither party will speak in a derogatory manner about the other, the Children, the Children's grandmother, or P.S. to or in front of the Children.

[178] With respect to costs, I find success was divided in this matter, and I would normally be inclined to order that each party bear their own costs. However, the Claimant asked for leave to make submissions on costs. If the parties cannot agree on costs, either of them can make arrangements to further address the issue of costs, providing they advise the Court of their intention to do so within 45 days of these reasons.

"Jackson J."

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