

CANADA / JUDGMENT

Segura v. Segura

2020 BCSC 650

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 650 Segura v. Segura

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Segura v. Segura,

2020 BCSC 650

Date: 20200428

Docket: E36085

Registry: New Westminster

Between:

Sondra Sheleen Agnus Segura

Claimant

And

Jaime Giovanni Sermenio Segura

Respondent

Before: The Honourable Mr. Justice Schultes

Reasons for Judgment

Counsel for the Claimant:

M. Katsionis

Counsel for the Respondent:

P. Mann

Place and Date of Trial:

New Westminster, B.C.

March 4-6, 8, 2019;

December 12, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 28, 2020

Introduction

- [1] This trial dealt with the financial consequences of the end of the relationship between the claimant Sondra Segura and the respondent Jaime Segura. The questions that need to be resolved are:
- The date on which they began to cohabit before their marriage, the length of time for which they separated during that premarital cohabitation period, and the date of their final separation after getting married;
 - Ms. Segura's entitlement to retroactive child support, prospective and retroactive s. 7 expenses, and retroactive and ongoing spousal support; and
 - The extent of the equalization payment to which Ms. Segura is entitled in the division of family property, to reflect the greater amount of post-separation property expenses that she has assumed.
- [2] Other required orders, including with respect to parenting the remaining children of the marriage, will be made by consent.
- [3] An unusual feature of this case is the approximately 10-year period between the parties' final separation and the trial. Ms. Segura filed a notice of family claim in 2010 and Mr. Segura provided a response and counterclaim shortly afterwards. Despite this, no interim applications were brought to the stage of an actual hearing in furtherance of these claims.
- [4] Because they were filed before the Family Law Act came into force, the applicable property division regime is under its predecessor, the Family Relations Act: see s. 252(b) of the FLA. (The other orders that are being sought are corollary relief under the Divorce Act.)
- [5] The parties' counsel made extensive efforts to reach a settlement, including during the first day set aside for trial. Although those efforts did not succeed, the disputed issues were narrowed considerably and the trial became very focused. The detailed documents that Ms. Segura prepared, totalling up her relevant expenses and Mr. Segura's contributions during the post-separation period, were accepted by him as an accurate basis for dealing with the disputed issues, subject to his legal arguments on their application and some additional

credits he claimed for payments that he had made. In addition, only a small portion of the voluminous documents that had been prepared for trial actually had to be referred to in the parties' testimony.

General Background

- [6] All of my references to ages and dollar figures are as they were described at the time of trial.
- [7] The parties were both 48 years old at that point. After at least four years in a marriage-like relationship, they married in 2000. Although the final separation date is disputed, on either version of events it was no later than 2009. They were divorced in 2017.
- [8] They have three children together, who were then 22, 17 and 14 years old. The oldest was working at that time and was no longer living at home or dependent on them for support. The middle child was in grade 12 and was planning on taking a post-secondary program.
- [9] Ms. Segura spent 27 years working for a bank, most recently as a financial service manager. Her position was eventually eliminated, and she received the last severance payment in January of 2019. By the time she testified, she was receiving employment insurance benefits. As a result, her most recent financial statement described her annual income, leaving aside child support, as \$16,128. Her income in 2018, as shown in her T4 slip, was \$46,597.72, which consisted entirely of severance payments. However, she agreed on cross-examination that she also made RRSP withdrawals in 2018 totalling \$30,045, which she required in order to meet expenses, so it should be considered additional non-recurring income for that year. In 2017 her income was \$59,383 and in 2016, \$49,115.
- [10] She has had serious health problems. In 2011 she was diagnosed with unrelated cancers in two different parts of her body. Both required surgery. More recently, she has been diagnosed with depression.
- [11] Mr. Segura is an industrial bricklayer, whose position requires him to travel for extended periods to construction sites, both within Canada and throughout the Americas. His income, although quite substantial in most years, has fluctuated since separation, which he attributed to economic conditions in the industries that his company services. His most recent financial statement described his annual income for support purposes as \$129,971. It was estimated to be \$128,000 in 2018, slightly higher in 2017 but only \$72,748 in 2016, his lowest in the post-separation period.
- [12] Ms. Segura was the primary caregiver for the children, both before and after separation. There is no dispute that Mr. Segura's work-related travel has significantly affected the amount of time he has spent with the children over the years.

- [13] He has paid child support since separation, but he agrees that during that period he has paid less overall than the table amount under the Federal Child Support Guidelines for his income and the number of children of the marriage at the time. This is despite having overpaid substantially in 2010. Although he does not agree that it should be the subject of a retroactive award, he accepts that the total shortfall is \$41,549.58.
- [14] After initially maintaining joint finances after separation, he began depositing his paycheques in his own account and transferring payments for child support and other contributions to the parties' joint account in 2010. Ms. Segura's records deal with their incomes and respective financial contributions from 2010 onwards.
- [15] The most important family property consists of two houses in North Delta. The house on 119A Avenue, which was the family residence before separation, was purchased in 2002, and the one on 81A Avenue, which was intended as an investment, in 2008. The investment property is divided into legal upstairs and downstairs suites, both of which were originally rented out. Ms. Segura managed both properties until 2014.
- [16] She and the children have continued living in the family residence. She has paid the mortgage and all related costs on that home since separation. The total amount she had paid was \$185,867. Mr. Segura had paid \$60,907 himself towards the mortgage on the investment property, the balance of which has been subsidized by the rent paid by tenants. They agree that when the amounts spent on maintaining the two family properties are added together and then divided equally, Ms. Segura had spent \$62,480 more than he had. As I will discuss, he argues that this figure should be lowered, based on some credits that he claims.
- [17] He has been living in one of the suites in the investment property since 2011. Until 2014, he paid Ms. Segura the difference between the rent paid by that tenant and the mortgage and related costs for the house. Since 2014 he has been paying the mortgage and utilities directly and collecting the rent from the tenant himself. Ms. Segura continued to pay the property insurance on that home.
- [18] The parties each intend to keep the house they are currently living in as part of the property division. They agreed, based on appraisals carried out in the fall of 2018, that the values of these properties are \$890,000 for the family residence and \$870,000 for the investment property. They have agreed to share equally in the cost of those appraisals, as well as the cost of an unsuccessful mediation.
- [19] Both properties have mortgages on them - \$281,491.07 on the family residence and \$268,604.68 on the investment property. There is also a \$50,000 line of credit on the family residence, for which they agree they are jointly responsible. Another line of credit for pre-separation expenses, of \$64,000, was absorbed into the mortgage of the family residence when it was refinanced, by agreement.
- [20] In terms of unsecured post-separation debt, Ms. Segura has a credit card and personal line of credit balance of just over \$39,000. Mr. Segura's equivalent debt is just over \$13,000.

- [21] Although he was very critical of her financial management in his evidence, Mr. Segura has agreed to share equally in certain additional expenses that Ms. Segura incurred while managing their joint bank account after separation, consisting of banking fees, interest payments and overdraft repayments. Her evidence was that she incurred these costs because of the unpredictable times at which he would transfer child support payments to the joint family account. He will also compensate her for a loan for his RRSPs that she covered.
- [22] In her evidence, Ms. Segura referred to currently being in an intimate relationship, but she and that partner live separately and it was not suggested that the relationship is marriage-like or has any bearing on her financial situation. Mr. Segura has remarried and currently supports his spouse, who is not able to work due to her health condition. He has put forward that financial obligation as a relevant factor on the question of paying retroactive support.

Interim Orders

[23] On December 12, 2019, after I had reserved judgment in the trial, Ms. Segura made a further application. Her purpose was to alleviate the ongoing financial pressures on her, in light of the amount time that had passed since the trial had concluded. Mr. Segura's position was that it was preferable to await the reasons for judgement and the resulting amounts to be awarded. I concluded that it was appropriate to make the interim orders being sought, which were without prejudice to my ultimate consideration of the parties' positions at trial. Those orders were that:

- Mr. Segura was to pay child support of \$1910 per month, in two installments of \$955, on the 1st and 15th of each month;
- He was to pay spousal support of \$1078 on the 1st of each month;
- He was to pay Ms. Segura \$650 per month, which was half the rent from the investment property; and
- He was to assume responsibility for the mortgage insurance on the investment property, and reimburse Ms. Segura for the \$1075.73 that she had spent for that purpose since the trial began.

Costs of this application were deferred to the trial decision.

Consent Orders

- [24] As I have mentioned, the parties have been able to agree on several orders as part of the trial. Accordingly, I will order that:

- Mr. Segura will pay child support for the two remaining children of the marriage of \$1910 per month, to be paid in two installments of \$955 each, on the 1st and 15th of each month. The amount of child support payable will be reviewed and adjusted on June 1st of each year, in accordance with his income at that time. (Note: the second oldest child was still a child of the marriage at the time of trial and it was common ground that she would remain so after turning 18 because of her impending post-secondary studies, which both parents are in favour of.)
- The parties will share any expenses of the children pursuant to s. 7 of the Guidelines that they have agreed to in advance, in proportion their respective incomes. The exception to the requirement of advance agreement will be medical and dental expenses for the children that exceed any available insurance coverage. A parent who has extended health benefits for the children will maintain the children under those benefits for as long as possible.
- The framework for guardianship of the children will be that:
 1. the parents are the joint guardians of the estate of the children;
 2. in the event of the death of either parent, the remaining parent will be the sole guardian of the person of the children;
 3. the parent who has the primary responsibility for the day to day care of the children (Ms. Segura) will have the obligation to advise the other parent of any matters of a significant nature affecting the children;
 4. the parent who has primary care of the child will have the obligation to discuss with the other parent any significant decisions which have to be made concerning the children, including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of the children;
 5. the parent who does not have primary care of the children will have the obligation to discuss these issues with the other parent and each parent will have the obligation to try to reach agreement on these major decisions;
 6. in the event that the parents cannot reach agreement with respect to any major decision despite their best efforts, the parent with the primary care of the children will have the right to make the decision and the other parent will have the right to seek a review of any decision which he or she considers contrary to the best interest of the children; and,
 7. each parent 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 care givers.
- To accommodate Mr. Segura's extended absences due to work, Ms. Segura will have the authority to sign passport applications or other travel authorizations on behalf of the children, as well as any documents relating to their education or medical/dental care.

- Ms. Segura will administer any existing Registered Education Savings Plans for use in the children's post-secondary education, and will advise Mr. Segura each year of the amounts used for that purpose. If any balance remains after the children have completed their education it will be divided equally between the parties.
- Ms. Segura will retain the family residence and Mr. Segura will retain the investment property. They will each be responsible for the mortgage attached to the property that they are retaining. Each party will cooperate in removing the other from the title and mortgage of the property that they are retaining.
- The parties will be equally responsible for paying out the \$50,000 line of credit (CIBC #937), after which it will be closed.
- Mr. Segura will pay Ms. Segura \$3174.54, representing half of the post-separation banking fees and overdraft payments incurred by Ms. Segura, and \$2670.61, representing a loan for his Registered Retirement Savings Plan that was covered by her.
- The parties' respective pensions for the period of the marriage will be equally divided.

Disputed Issues

Chronology of Cohabitation

- [25] This issue needs to be resolved because the length of cohabitation, including any marriage like-relationship that preceded the marriage, is a factor informing the duration of spousal support under the Divorce Act.

Evidence

- [26] Ms. Segura testified that she and Mr. Segura began living together in January of 1991. She was able to give that date because "to the best of [her] memory" she was 20 years old when she moved out of her family's home to live with him. She rejected the suggestion in cross-examination that it was actually the following January. When confronted with the assertion in her notice of family claim that they began living in a marriage-like relationship in January 1992, she explained that she "did not get too deep into" what year it was or how old she was at the time she filed it. She maintained that she knows (now, I infer), that she was 20.
- [27] Once again "to the best of [her] memory", they separated in January 1994, for about six months, and then reconciled sometime in the summer. When they resumed their relationship they lived together in Burnaby, but Mr. Segura was "travelling a lot and working out of town" - she recalled Vancouver Island specifically. She visited him there.

- [28] She rejected the suggestion that they did not resume living together until 1996. She had a relationship with someone else while they were separated. In response to the suggestion that they both had different relationships and partners between their initial breakup and the time that their first child was conceived she said, "I'm sure he did have different partners". But once they resumed living together she believed that they were "solely with each other" (although she added that "it became apparent that we were not").
- [29] During the period of their separation, she lived in an apartment on Carson Street in Burnaby. She said that Mr. Segura spent time at his parents' house in Richmond and at her apartment. She did not think of him as living with his parents, only using their home as a mailing address.
- [30] She agreed with the suggestion that in 1996 (the year that he claims they resumed cohabiting) they moved together into a different residence in Burnaby.
- [31] Mr. Segura testified that they began living together "in 91-92, I can't recall the date", then described it as "in late '92 or something like that". They lived in an apartment near Edmonds Street in Burnaby. A milestone that assists him is a stabbing that he suffered in 1993, from which he nearly died. He said that they had begun to live together before it occurred. Their relationship ended after it - Ms. Segura "pretty much moved out". When the date of January 1994 was suggested for the breakup, he said, "That brings a recollection, yes". In cross-examination he clarified that the relationship ended at the end of 1993 and that she moved out on January 1, 1994. He kept the same apartment after she left, because he had a lease.
- [32] When it was put to him that they reconciled after six months apart, he said, "I can't recollect it". He denied this suggestion more adamantly in cross-examination, gratuitously adding that, when she left, Ms. Segura withdrew several thousand dollars from his account and took almost all of the furnishings.
- [33] That summer he spent three months in 100 Mile House learning his trade, and then did jobs in locations such as Prince George and Alberta. He added in cross-examination that Ms. Segura actually drove him up to 100 Mile House, even though their relationship was over by then. He mentioned returning from these out of town jobs to an empty apartment "for a few months". However, in cross-examination he agreed that he actually had two roommates in that period, who moved in after she left. In response to the suggestion from her counsel that he stored his belongings at her new apartment and stayed with her whenever he returned to town from working, he advised that he had no belongings left except for his clothes and, once again gratuitously, added his belief that Ms. Segura had actually begun a sexual relationship with one of his roommates.
- [34] His parents had moved to Richmond by this time and he used their new home as his mailing address, because this was in the era before direct deposit and his paycheques had to be mailed to him. He also stayed there at times.

- [35] He testified that next he went to Port Alice on Vancouver Island to work on the reconstruction of a pulp mill. This was also in 1994. He was based there for the job for two years and was in a relationship with a different person while he was there. He may have spoken to Ms. Segura in the intervening period but did not "reconnect" with her until 1996. He agreed that his response to family claim had not asserted this lengthy period of separation.
- [36] He then described coming back to the lower mainland for a short period. His purpose was to attend trade school in Surrey, which he was required to do during the winter months each year as part of his apprenticeship. During this period he also took a trip to the country of his birth. The trip took place over the Christmas break at the end of 1995. He and Ms. Segura, who had heard that he was in town, became intimate again when he returned from the trip. After he went back to Vancouver Island to work, she informed him that she was pregnant. Although he was in shock at this news, she told him that the child was his and he "had no objection", so he ended his relationship on Vancouver Island and returned. They moved in together in another apartment in Burnaby.
- [37] It is common ground that their oldest child was born in October of 1996.
- [38] As a general proposition, Mr. Segura conceded in cross-examination on this issue that he is not good with exact dates and that some of the dates he has described could be "a little bit off".

Discussion

- [39] Fact finding on this issue is inhibited by the amount of time that has passed since the relevant events and the lack of any objective evidence, such as contemporaneous documents, that would more reliably anchor the parties' general recollections. It is also hard to attach much weight to Mr. Segura's version of the events following the initial breakup, including the unintended pregnancy leading to their reconciliation, because it was never put to Ms. Segura for her response. The only real certainty is that, in view of their child's birthdate, she certainly became pregnant in early 1996.
- [40] The larger problem however, is that even if I were to prefer her version, there is an absence of evidence from either party that would permit me to find that in the period before their initial breakup they were cohabiting in a marriage-like relationship, beyond simply sharing an apartment while being romantically involved. Again, assuming that they resumed a relationship at an earlier point than Mr. Segura admits, Ms. Segura's reference to her ultimately mistaken view that they had a monogamous relationship after they had apparently reconciled raises further concerns on this question. It is really only in 1996, when she agreed that they moved into a new apartment together, and we know from her child's birthdate that her pregnancy was in progress, that I can infer that there was a mutual ongoing commitment of a marriage-like nature, amounting to cohabitation. I therefore fix the date of cohabitation as January 1996.

- [41] This conclusion makes it unnecessary to consider whether Ms. Segura is precluded from relying on a cohabitation date before 1992, the date asserted in her notice of family claim, or Mr. Segura is precluded from asserting a period of separation after 1994, in the absence of an amendment to their pleadings to add those assertions.

The Date of Final Separation

- [42] Ms. Segura's claim for retroactive spousal support begins in 2010, by which time the parties were unquestionably separated, so the date is not as significant to that issue. The duration of the marriage and of the time since separation are relevant considerations in the FLA's property division regime, however.
- [43] Her position is that the separation occurred in April 2009. She disagreed with the suggestion that it was in June 2008, shortly after they bought the investment property. Mr. Segura was working in Peru and she was "keeping house", at that point, and as far as she knew they were not separated. She explained that he "came home, did regular duties in the house, and we had a regular married life relationship at that time." When asked if she had emailed him in June 2008 saying that the relationship had ended, she responded that she was sure she had said that many times, "or that it was going to end and I was going to a lawyer." She accepted the suggestion that the relationship was "toxic at both ends" at this stage - she was frustrated with the lack of money and being left on her own.
- [44] Mr. Segura initially testified that it was "pretty hard" to state the separation date, but it had "started" in 2008 because of the amount of emails he was receiving from Ms. Segura. The issue of money was causing friction between them. He then said that they had separated in 2008 but that he did not know the date within that year. He was cross-examined on the fact that his response to family claim accepted the April 2009 separation date in the notice of family claim as correct. He then said that he agreed with that date "because it's there" (by which I took him to mean it was in the pleadings).
- [45] Even if Mr. Segura did not, as it appears, effectively adopt Ms. Segura's position on the separation date during cross-examination, the evidence falls well short of establishing, in 2008, a physical separation between the parties, coupled with the intention of at least one of them to live separate and part, as the Divorce Act requires: see *Nearing v. Sauer*, 2015 BCSC 58 at para. 54. The references to acrimonious communications and threats to end the relationship are not sufficient. I accept the April 2009 separation date, by which point its necessary elements seem clearly to have been present.

Retroactive Child Support

Principles

- [46] I think that the evidence led and positions taken under this heading will make more sense in the context of the governing principles.

- [47] The decision of the Supreme Court of Canada in *D.B.S. v. S.R.G.*, [2006] 2 S.C.R. 231, dealing with four cases that raised retroactive child support issues, sets out the framework for determining whether such an order should be made.
- [48] The important overall concept is that the obligation to provide child support increases with the payor parent's income, regardless of the existence of any court order or agreement (para.48). While this is a freestanding obligation, its enforceability will arise only upon an application by the recipient parent (para. 56). It will not always be possible to enforce the obligation once the relevant time period has passed (para.95).
- [49] A parent who pays diligently pursuant to an existing order will be presumed to be acting reasonably, and considerable weight should be given to support agreements between parents, although of course an existing order or agreement does not absolve payor parents from adjusting the amount of support as circumstances change. On the other hand, when there is no support agreement in place, then in the absence of hardship or an ad hoc sharing of expenses with the recipient parent it would be unreasonable for the payor to believe they are fulfilling their obligations (paras. 74, 78, 86).
- [50] The exercise of the discretion to make a retroactive award is to be based on a consideration of all the circumstances, in light of four general considerations, none of which is determinative in itself. (They are equally applicable to applications under the Divorce Act and provincial legislation, although the Court stressed that it is open to the provinces to create alternative regimes for such applications.)
- [51] Before setting out these considerations, the Court emphasized that retroactive awards "need not be seen as exceptional."
- [52] The first question is whether there is a reasonable excuse for why support was not sought earlier. This is necessary because a delay in seeking support is not presumptively justifiable. Reasonable excuses can include "justifiable fears that the payor parent would react vindictively to the application to the detriment of the family", or "where the recipient parent lacked the financial or emotional means to bring an application, or was given inadequate legal advice". In contrast, a reasonable excuse will likely not be found where they "knew higher child support payments were warranted, but decided arbitrarily not to apply" (para.101).
- [53] The next consideration is the conduct of the payor parent, in particular whether there has been any blameworthy conduct. Courts are encouraged to "take an expansive view of what constitutes blameworthy conduct", which was characterized as "anything that privileges the payor parent's own interests over his/her children's right to an appropriate amount of support." In this respect, ignoring support obligations that the payor is aware of can be as blameworthy as actively avoiding them. When determining whether the payor reasonably believed that they were meeting their obligations, useful objective indicators will be the extent of the gap between what was being paid and what was required under the Guidelines, including the payor's adherence to any existing order. Conversely, positive conduct by the

payor can militate against a retroactive award, such as contributing "expenses beyond his/her statutory obligations" (paras.106-109).

- [54] The circumstances of the child should also be considered, both currently and as they were at the time the support should have been paid. Relevant considerations include any hardship that the children endured as a result of a deficiency in child support, or whether the child has nevertheless still received the benefits that would have resulted from support in the correct amount. Notably, "hardship suffered by other family members (like recipient parents forced to make additional sacrifices) are irrelevant in determining whether retroactive support should be owed to the child" (paras. 110-113).
- [55] The last factor is any hardship to the payor parent that would be accused by a retroactive award. Courts should be attentive to the possibility that the payor's current income may be less than when the support obligation that is to be enforced arose, and the payor may now have new dependents to support who would be harmed by a disruption of the payor's financial affairs. But while courts should try to structure retroactive awards to minimize hardship, "it will not always be possible to avoid hardship", and it will be "much less of a concern where it is the product of his/her own blameworthy conduct" (paras.115-116).
- [56] Once it is determined that a retroactive award is appropriate, the question becomes the amount to be awarded.
- [57] This will be guided firstly by the date of retroactivity. The general rule is that this will be the date of effective notice, which means "any indication by the recipient parent that child support should be paid, or if it already is, that the current amount of child support needs to be re-negotiated". Rather than any formal application, "all that is required is that the topic be broached." Generally, a retroactive order should not go back more than three years from the date of effective notice. However, where there has been blameworthy conduct on the part of the payor, it may be appropriate to move the date of retroactivity back to the point when the circumstances changed materially. Even when there has been effective notice "a prolonged period of inactivity" by the recipient parent after it has been given may weigh in favour of the payor's reasonable interest in certainty with respect to their support obligations - in other words, against a retroactive award. (paras. 118,121, 123-4).
- [58] While the amount awarded must follow the Guidelines, the court can still tailor it to the circumstances of the case and avoid unfairness by (1) considering the applicability of undue hardship pursuant to s.10 of the Guidelines; or (2) altering the period covered by the award, despite the date of effective notice. For example, "where a court finds that there has been an unreasonable delay after effective notice was given, it may be appropriate to exclude this period of unreasonable delay from the calculation of the award." Most importantly, [u]nless the statutory scheme clearly directs another outcome, a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case." (paras.127, 129-30).

[59] In addition to the general principles established by D.B.S., there is another feature of it that arises on our facts, because the oldest of the parties' children is no longer a "child of the marriage" within the Divorce Act's definition. D.B.S. held that when one is dealing with an application for retroactive child support as an initial order pursuant to s. 15.1 of the Divorce Act, the child involved must still meet the definition of child of the marriage at the time the application is made. As the Court explained:

89 An adult, i.e., one who is over the age of majority and is not dependent, is not the type of person for whom Parliament envisioned child support orders being made. This is true, whether or not this adult should have received greater amounts of child support earlier in his/her life. Child support is for children of the marriage, not adults who used to have that status.

(Courts in British Columbia have confirmed that this passage precludes initial applications in such decisions as *de Rooy v. Bergstrom*, 2010 BCCA 5 and *Crepnjak v. Crepnjak*, 2011 BCCA 177).

[60] In contrast, in *Henry v. Henry*, one of the decisions dealt with in D.B.S., a variation of an existing order, to now require that retroactive support was to be paid for a child who had since become an adult, was upheld, because the recipient had served the payor with a notice under the court rules requiring him to disclose his current income before the child's status had changed. This service was sufficient to give the court jurisdiction to make a retroactive order (para.150). The operation of this principle has been described in subsequent cases as the "Henry exception".

[61] Aside from the availability of that exception, the question of whether there can be a retroactive variation of an existing child support order after the child has become an adult had been the subject of uncertainty and conflicting decisions across Canada. This appeared to have been resolved in British Columbia when the majority of the five-judge panel in *Dring v. Gheyle*, 2018 BCCA 435 concluded that:

97 In my respectful opinion the court does not have jurisdiction to make a statutory retroactive award unless at the date of the application the child retains the status of a child, or there has been a prior application which brings the matter under the "Henry exception". The answer to the jurisdiction question is the same regardless of whether the application is an original application or for a variation of an existing order. There is no juridical or rational reason to distinguish the two situations This conclusion is consistent with D.B.S. and *Hartshorne* [*v. Hartshorne*, 2010 BCCA 327]. While a five judge division is not bound to follow *Hartshorne*, D.B.S. is binding on this Court.

[62] The majority in *Dring* concluded that the exception in the *Henry* case in D.B.S. had been applied solely because a court notice had been served on the payor while the child still met the definition. It was not because there was an existing order that the recipient was seeking to vary, as opposed to making an application for an original order.

- [63] In reaching this conclusion, the majority declined to adopt the reasoning of the Ontario Court of Appeal in *Colucci v. Colucci*, 2017 ONCA 892, who had held that D.B.S. had not foreclosed a court's ability to vary an order to require retroactive support for a former child of the marriage, and that it was permissible in those circumstances to hear an application for such a variation.
- [64] Our Court of Appeal then applied *Dring* in *Graydon v. Michel*, 2018 BCCA 449. At para. 29 the Court expressed *Dring's* ratio as "the Family Law Act did not confer jurisdiction on a judge to retroactively vary child support orders where the formal legal procedure triggering jurisdiction to vary is first commenced after the subject of the order has ceased to be a child under the statutory definition".
- [65] Then, on November 19, 2019, the Supreme Court of Canada reversed *Graydon*, thus impliedly overturning *Dring*. However, the Court did so only in a brief oral judgment ([2019] S.C.J. No. 102) with the Chief Justice indicating that "reasons [are] to follow". Those reasons have not yet been released. (The Court has also granted leave to appeal in *Colucci*, but that appeal has not been heard yet.)
- [66] Although the analysis is hampered somewhat by the absence of reasons, given how explicitly *Graydon* expressed its ratio, there is no other reasonable inference than that, by overturning it, the Supreme Court of Canada has held that there is still jurisdiction to vary an existing order to provide retroactive child support, even after the child in question no longer meets the statutory definition. In the absence of reasons, one cannot determine whether the Court did so in the manner described in *Colucci* or on some other basis.
- [67] However, that reversal does not support the further inference that the Court also intended to alter D.B.S.'s conclusion about the unavailability of such applications in relation to an initial order. Such an inference does not obviously flow from the outcome of the appeal. While the Supreme Court of Canada is not bound by its previous decisions, it tends to depart from them quite sparingly, and it is difficult to see how D.B.S.'s explicit language on this point could be avoided otherwise. Thus, I feel comfortable finding that that particular aspect of D.B.S. remains undisturbed.

Evidence

- [68] As I have said, Mr. Segura accepts Ms. Segura's records of the amount of child support that he paid her each year, from 2010 onwards, and the differences from the table amounts that he should have paid at any particular point.
- [69] The notice of family claim that was filed in 2010 included a claim for child support. Ms. Segura explained the delay in bringing the issue of child support forward after that. She was initially advised that the least expensive approach was to obtain a divorce but deal with the other relief by means of a separation agreement. She did not have the money to go to court so she took that advice. After a judicial case conference was held she pursued a separation agreement, but it was hard to get Mr. Segura to agree and his travel also inhibited that

process. She changed lawyers then ultimately tried to file a child support application herself, but ended up not completing the correct "paperwork". She was advised by a duty counsel that while it is possible to be self-represented, if there are properties involved it is better to have a lawyer. Yet another lawyer echoed the original advice that she had received, advising that unless one has a lot of money it is better to pursue a separation agreement. Feeling that she had no other option, she kept requesting that Mr. Segura enter into an agreement. They exchanged offers but there were long delays between receiving his positions. Finally, she retained her current counsel and preceded to trial, after a previous lawyer she had retained failed to move the case forward.

- [70] When she was asked on cross-examination why she had not made an application for support at the point that Mr. Segura applied for a divorce, she said that she had instructed her counsel of that time that she did not want to agree to the divorce until she had a court order for support. She was advised by the lawyer that a judge would be likely to rule in Mr. Segura's favour (that is, grant a divorce) because of the length of the separation, and she would then be liable for costs, so she wound up agreeing to the divorce and continuing to push for the separation agreement.
- [71] Her overall position is that she has been doing her best to "get this solved", within her means and to the best of her ability, for the last 10 years.
- [72] Although she was not asked about it, since it is part of the court record I think it is appropriate to include, as part of the factual background, the reference in the submissions of Mr. Segura's counsel to an application that Ms. Segura filed on September 20, 2018. It sought, among other things, retroactive spousal support. It did not proceed when the parties agreed to pursue a mediation instead. (Although nothing turns on it, to complete the history of applications, the court record indicates that in 2016 she obtained an order from a master vesting the investment property in her and Mr. Segura as joint tenants.)
- [73] With respect to Mr. Segura's conduct, Ms. Segura referred to examples of extensive email communications she has had with him over the years, in which she repeatedly advised him that he was short on his child support and requested additional payment. These include detailed breakdowns of the support amounts that were payable in relation to his income at that time, as well as the other family expenses to which he was to be contributing. She also referred in some emails to relevant elements of the settlement agreement that was then under discussion.
- [74] Ms. Segura was certainly quite forceful in her email requests at times, including typing some messages in all capital letters, and in one demand telling him to "stop being an asshole" and make the required payment. But as the documents revealed, a number of Mr. Segura's responses went beyond that level of emotion, and descended into the realm of verbal abuse, featuring profanity-laced diatribes from him.

- [75] Although it was not on the issue of child support, it is illustrative of the tone of his post-separation communications with her that when she emailed him to advise him of her cancer diagnosis and to ask that he come home, his first response was to utter profanities at her and accuse her of lying about her condition, before going on in subsequent emails to minimize the seriousness of what she was facing.
- [76] He stopped responding to her emails completely in 2017.
- [77] Ms. Segura testified that she would be readily able to utilize a retroactive payment for the children's benefit, for example by setting aside money for their post-secondary studies, in addition to the RESPs they have available. She also said she would pay off debt that she accumulated from having to carry the children's expenses for so long, and would purchase herself a car, since she does not currently have one (I took this to represent a repayment to herself of money previously used for the children that she should have received as child support).
- [78] For his part, Mr. Segura emphasized that he never deliberately withheld support, and that he was short in his payments because of the "roller coaster" of trying to balance his earnings with the well-being of the family. He was unable to plan for work slowdowns because he did not know when his employer would direct them to occur. As a result, there were times when he would have no money to eat, but would pay Ms. Segura what he could, including in one case by cashing in an RRSP. His credit card debt would be "through the roof", and he was not able to collect employment insurance, he said. At times he would pay Ms. Segura out of his savings.
- [79] He thought that some kind of "flat rate" system to even out such fluctuations would be beneficial in the future. He stressed as an overall point that he is "not a deadbeat dad."
- [80] In terms of unofficial support, he has bought electronic devices and clothes for the children, given them cash and has taken them for meals. He did not have any receipts for these contributions "because it's [for] a kid". (Ms. Segura testified that he sometimes bought clothes for the children, but not often.)
- [81] In contrast to this position, in cross-examination Mr. Segura maintained his general theme that Ms. Segura had managed the finances poorly after separation, and said that he did not pay more child support because "it was not well spent on the kids' well-being". He heard indirectly that the kids were fine but the money he was paying "was being spent somewhere else". He agreed, however, that he was aware from her emails that she was struggling financially and that she had explained why she needed the support payments on time. More generally, he accepted that her credit card debt was the result of insufficient support.
- [82] He agreed that when he is travelling for work his food and accommodation are covered by his employer. (This was not put forward by Ms. Segura's counsel in support of adding such benefits to Mr. Segura's income, but rather to show that it should have increased his available income for other purposes.)

- [83] As to the circumstances of the children, Ms. Segura described them as being "short-changed" because she had to devote child support funds to covering basic household expenses. The shortfall in support made it difficult for them to continue in their extra-circular activities. In one case, their daughter had to withdraw from a dance program because the registration cost was required in advance and Mr. Segura would not provide his share of it. It was also stressful for them when services were disconnected, she said.
- [84] Mr. Segura was prepared to admit that the children would have benefited from additional support and would still benefit. He did not agree however, that the family did not have the same quality of life that they had when he and Ms. Segura were together.
- [85] Finally, Mr. Segura explained that having to make a large retroactive child support payment at this point would cause significant difficulties for him. Because of the rate at which his income is taxed and the amount of child support he is responsible for, he has not accumulated any savings and, as I mentioned previously, his wife is currently unable to work due to a health issue. She was not a high wage earner even when she was employed. His counsel noted, as an additional consideration, that a key requirement of the parties' agreement that each will keep one of the houses is that they can qualify to assume their respective mortgages. An order for a large retroactive payment might jeopardize Mr. Segura's ability to do so, particularly in light of the more stringent recent government rules for mortgage qualification.

Discussion

- [86] As a threshold issue, Mr. Segura's counsel relies on Dring for the proposition that there is no jurisdiction in this case to make a retroactive order in relation to the oldest child, who is no longer a child of the marriage. It is common ground that he ceased to meet that definition in October of 2015. Counsel submits that when one recalculates the retroactive entitlement to exclude that child, the shortfall becomes insignificant - \$301.18.
- [87] As I have explained, although Dring has clearly been reversed on the availability of a retroactive variation of an order in respect of an adult child, its reliance on the explicit language in D.B.S. to preclude applications for initial orders likely remains undisturbed. As the relief sought in this case would amount to an initial order, I have no jurisdiction to award retroactive support in relation to the oldest child.
- [88] In the event that my prediction of the breadth of the Supreme Court of Canada's reasons in Graydon proves to be incorrect, I will go on to apply the D.B.S. factors.
- [89] The delay of approximately 10 years between the separation and this matter being brought to trial is very lengthy, and deserves careful examination. However, it is important to bear in mind that effective notice was given in the form of the relief sought in the 2010 notice of family claim, so this case is not about the unfairness of reaching back before effective notice, as is frequently seen in retroactive support applications. It is rather whether it can be said that there has been "a prolonged period of inactivity" by Ms. Segura, so that Mr. Segura,

despite having received notice of a request for support, has an interest in the certainty of his support obligations that should prevail over that notice.

- [90] I conclude that her failure to bring a court application cannot be characterized as the kind of inactivity envisioned in D.B.S. As the evidence indicates, she was engaged throughout this period in an ongoing process of seeking to have Mr. Segura increase his payments to the table amount, on which he engaged with her until 2017. On a parallel track, there was a JCC and repeated efforts to conclude a separation agreement that dealt with child support. The 2018 application did not proceed only because a mediation was pursued instead to resolve that very issue, among others. These efforts must be distinguished from simply failing to pursue the issue at all, which courts have understandably been reluctant to condone in the absence of a compelling explanation (see the summary of cases in *Brown v. Kucher*, 2015 BCSC 1258, at para. 40; *aff'd* 2016 BCCA 267; leave to appeal to SCC refused [2016] S.C.C.A. No. 381).
- [91] While she should probably have concluded at some point in this process that she was not going to obtain the payments she sought without a court order, her financial difficulties and the advice she received from more than one lawyer to pursue an agreement (neither of which there is any reason to doubt) offer an explanation for her failure to do so that I find is reasonable in all of the circumstances.
- [92] In my opinion, Ms. Segura's failure to move the issue of child support to a conclusive stage can also be partly explained by some blameworthy conduct on Mr. Segura's part. His role in the endlessly protracted separation agreement negotiations, his hostile and at times obscene responses to her requests, as well as his general uncooperativeness on this topic despite paying some support, left her no alternative but the expense of an application, which she was understandably reluctant to take on. More importantly, he admitted on cross-examination that the amount he paid was driven by his personal views about how she was spending the money, rather than the erratic nature of his pay as he suggested in direct, or any misapprehension about the nature of his obligations. He certainly did not describe being lulled into a mistaken belief that nothing more was required. Nor do his vague references to his own purchases for the children serve to counterbalance this blameworthy conduct in any meaningful way.
- [93] While I am satisfied that the children's essential needs were always met, it was not disputed that they missed out on extra-curricular activities due to a lack of funds and had some of the support that was paid diverted by Ms. Segura to meet shelter costs. Further, there remains a basis on which retroactive support would continue to benefit them, in their post-secondary studies. Deserving as she may be in a moral sense however, Ms. Segura's use of such funds to reimburse herself for earlier expenditures on the children would not be a proper basis to order them now.

- [94] Finally, I can see no meaningful hardship to Mr. Segura from a retroactive award, even in the amount that is being sought. His current income is at the higher end of the range that it has encompassed during the retroactive period, so there is no unfairness in holding him responsible based on his income at the times the obligation arose. Further, while he now supports a spouse who is currently unable to work and he lists expenses in his financial statement that exceed his monthly income, he has relatively little debt besides his mortgage and it is not clear why at his income level he has no savings. He has also had various kinds of notice that he was underpaying his child support, in the form of the notice of family claim, Ms. Segura's regular emails, the ongoing efforts to negotiate a separation agreement, and the filed 2018 application, so it is also not clear why he never made provision for the possibility of being required to pay it.
- [95] Balancing these various factors and giving them their appropriate weight, I conclude that an award of child support for the two children who remain children of the marriage should be made, retroactive to January 1, 2010, the date sought by Ms. Segura. If her counsel agrees with the calculations by Mr. Segura's counsel of the amounts that would have been payable for two children instead of three, the amount to be paid will be \$301.18. If they are unable to agree, there can be a reference to the registrar to recalculate the amount.
- [96] Had the oldest child been eligible, I would, for the reasons I have set out, have awarded the full amount by which table amounts exceeded the support paid, as sought by Ms. Segura.

Retroactive s. 7 Expenses

- [97] The D.B.S. principles also apply to retroactive s.7 expenses, with the difference that unlike child support, the payor will not necessarily know the amounts required at their particular income, unless the recipient parent provides details of the expenses: *Semancik v. Saunders*, 2011 BCCA 264, at para.57.
- [98] To that end, Ms. Segura, provided receipts for a variety of expenses, including school fees and extra-curricular activities. The total amount claimed is \$1,936.09.
- [99] Mr. Segura disputes this award, based on the length of time that has passed since most of the expenses were incurred, the nominal amounts involved and the absence of any indication that the expenses went beyond the expected coverage of regular child support. Specifically, his counsel referred to decisions that have declined to find that routine school expenses exceed the ambit of such support (for example, *E.A.L. v. H.M.G.*, 2010 BCSC 892, at para. 18).
- [100] These expenses would fall under s.7 (1)(d), "extraordinary expenses for primary or secondary school education or for any other educational programs that meet the child's particular needs" and (f), "extraordinary expenses for extracurricular activities". Sub-section (1.1) sets out the approach for determining whether such expenses should be ordered. If the expense exceeds the amount that the recipient spouse can reasonably cover, taking into account their income and the amount of child support they would receive under

the applicable table, it is deemed to be extraordinary and the court considers the criteria under s.(1):

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

[101] If the expense does not exceed the recipient spouse's ability to cover, the court proceeds to ss.(b) and considers that spouse's income and amount of support received as well as:

- (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.

[102] The difficulty I have is that there is no evidence beyond Ms. Segura's summaries of the shortfall of the table amount of child support from year to year and its effects, and her review of the receipts themselves in her testimony, that would indicate whether at any particular time these expenses exceeded her ability to cover them, based on her income and the support that should have been paid. Given the shortfall of child support that existed, and the amounts of the expenses she has claimed, I would tend to infer that such expenses could have been covered by a combination of her income and that support. More importantly, there was also no evidence that would allow me to apply the criteria in ss. (b) to these expenses, to determine whether payment should be ordered. In the absence of such evidence, as it was expressed in *Thomas v. Thomas*, 2000 BCSC 585, at para. 24, "I cannot accept that the simple fact of the expense being incurred automatically demonstrates its necessity or its reasonableness."

[103] As a result, I am unable to make any award under this heading, and it is not necessary to engage in the D.B.S. analysis on the issue of retroactivity.

Property Division

[104] As I mentioned, the parties have agreed that they will each retain one of the properties for themselves. Their dispute relates only to their respective degrees of responsibility for maintaining the properties after separation.

[105] Unlike the FLA, the Family Relations Act did not have a provision apportioning responsibility for such costs as family debt. Instead, a debt incurred for family purposes was taken into account when dealing with the reapportionment of family property pursuant to s. 65 (for example: *Olson v. Olson*, 1995 CanLII 1447 (BCSC) and *Watts v. Watts*, 1996 CanLII 2492 (BCSC)). The parts of s.65 that are relevant in this case provided:

65. (1) If the provisions for division of property between spouses under section 56 [equal division of family property] would be unfair having regard to
- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56 be divided into shares fixed by the court.

[emphasis added]

[106] Mr. Segura does not dispute that an equal division of family property in this case would be unfair within the meaning of s.65, in light of Ms. Segura's greater contribution to the mortgages and related payments. He does argue however, that the amount of compensation she receives should be reduced from the \$62,480 that she claims by the amount of certain credits that are due to him.

[107] First of all, the property she will receive has more equity in it, because of its appraised value and the amount owing on the mortgage. Equalizing that equity would involve a credit to him of \$3,512.81. Second, her share of the home appraisals and the mediation is \$3,895.66. Finally, it is common ground that if he ever sells the investment property it will be subject to capitals gains tax for the period in which it was occupied only by renters (May 2008 to December 2011). He is prepared to indemnify her from responsibility for tax liability in the future, if he receives a credit in the property division. Conceding that it provides rough justice at best, his counsel suggests that \$10,000 would be an appropriate amount to address this issue. Together, these credits to him would result in him providing a compensation payment of \$45,071.69 to her.

[108] His position on the maintenance expenses claimed by Ms. Segura for the family residence is that he has paid more towards the upkeep of the investment property since 2014 than his share of the maintenance expenses on the family residence. He provided receipts for his expenses for the years 2014-2017, which total \$7,859.70. Despite this, he is content not to claim those expenses in the reapportionment process, presumably on the basis that she is also not compensated for the ones she claims. He also takes the position, as described in his evidence, that he assisted with maintenance to the family residence from time to time.

[109] Dealing with the most straightforward of these credits, Ms. Segura has agreed to share equally in the cost of the appraisals and the mediation, so that deduction is appropriate.

[110] I would not deduct a further credit to equalize the amount of equity in the respective family properties. By seeking to retain the investment property, Mr. Segura must be taken to have preferred its specific attributes over a dollar-for-dollar assessment and equalization of the family property as a whole. I also find, pursuant to s. 65(f), that a reduction in the equalization to Ms. Segura on this basis would not be consistent with her pressing need to become economically independent and self-sufficient, in light of the evidence of her health and her current employment situation. Therefore, I decline to deduct this credit.

[111] On the question of the potential capital gains tax on the investment property, I will refer to the helpful summary on the principles in *P.T. v. K.T.*, 2017 BCSC 520:

15 In *Stein v. Stein*, 2008 SCC 35 at para. 8, the Supreme Court of Canada held that the Family Relations Act, R.S.B.C. 1996, c. 128, (the "FRA") did not preclude an order dividing a future liability that could not be valued at the time of trial, for the purposes of equalizing matrimonial property. This rule ensures that the distribution of family assets between spouses is fair.

16 *Stein* has not been interpreted, however, to require trial courts to divide future contingent liabilities between spouses. The distinction between speculative and determinate contingent future liabilities both informs and governs whether a court will divide such liabilities between the parties. In *Ouellette v. Ouellette*, 2012 BCCA 145 at paras. 29, 31-32, decided under the current Family Law Act, S.B.C. 2011, c. 25, the British Columbia Court of Appeal reviewed a number of relevant authorities and confirmed that future contingent tax liabilities need not necessarily be taken into account where "it is not known when, if ever, the asset would be sold" or where those costs are "hypothetical and speculative"; see paras. 28 and 32.

17 The clearest historical antecedent of this principle is *McPherson v. McPherson* (1988), 48 D.L.R. (4th) 577 (Ont. C.A.), where the court said:

20 The cases appear to turn on their own facts and, if I might hazard a broad distinction, an allowance should be made in the case where there is evidence that the disposition will involve a sale or transfer of property that attract tax consequences, and it should not be made in the case where it is not clear when, if ever, a sale or transfer of property will be made and thus the tax consequences of such an occurrence are so speculative that they can safely be ignored.

18 Accordingly, if an asset must be sold in order to effect the division of assets and tax consequences will arise, those tax consequences should be accounted for in the division of assets; see *Laxton v. Coglon*, 2008 BCCA 414 at para. 52; and *Cochrane v. Cochrane*, 2013 BCSC 2114 at para. 38.

19 *Mohajeriko v. Gandomi*, 2009 BCSC 393, is perhaps the most analogous decision to the facts before me. In that case, the court considered the allocation of latent capital gains taxes for the purposes of property equalization; see paras. 121-127. The defendant's accountant calculated that the capital gains tax on the subject property would amount to \$37,750.00. The court, at para. 122, distinguished the case before it from *Stein* on the basis that there was no evidence that the defendant had any intention to sell the property, and therefore, any prospect of a capital gains tax

was, at best, speculative.

[112] Applying these principles, Mr. Segura's situation clearly falls into the category of a speculative prospect of a sale and resulting capital gains expense. Unlike some of the cases referred to in P.T., a sale is not required in this case for a division of assets as part of the judgment. It is quite the opposite - his retention of the property is one of the key agreed-upon features of the division. In those circumstances, it would not be appropriate to provide him with a credit against a mere future possibility.

[113] The receipts provided by him show that an equal sharing of the maintenance expenses would slightly exceed his equal share of the expenses incurred by Ms. Segura. Given that relative balance, I will follow the suggestion of his counsel and make no order with respect to the repayment of maintenance expenses.

[114] Mr. Segura will therefore make a compensation payment to Ms. Segura for property division of \$58,584.34.

Prospective and Retroactive Spousal Support

Principles

[115] Section 15.2(4) of the Divorce Act provides that:

- (4) In making an order under subsection (1) [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.

[116] The objectives of a spousal support order, as set out in ss. (6) are to:

- (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.

[117] The two main bases of entitlement to spousal support are compensatory, which addresses the first two objectives under ss. (6); and non-compensatory, or needs-based, which addresses the second two. The principles governing these basis were set out by the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 SCR 813, and *Bracklow v. Bracklow*, [1999] 1 SCR 420. These principles were helpfully summarized in *Chutter v. Chutter*, 2008 BCCA 507.

[118] Dealing first with compensatory support:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would have been [sic] suffered otherwise (*Bracklow*, at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success (*Moge*, at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

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

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

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

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

[119] Chutter explained non-compensatory support as follows:

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

[120] For the sake of convenience, I will refer to a summary of some of the authorities dealing with the needs of the claiming spouse that I provided in *Vidican v. Dinu*, 2020 BCSC 178:

86 When considering the needs of a spouse for the purposes of non-compensatory support, the question goes beyond their ability to meet expenses. One must consider the marital standard of living and that spouse's post-separation standard: *Marquez v. Zapiola*, 2013 BCCA 433 (B.C. C.A.) at para.34. It is important to note however, that a mere disparity in the spouse's incomes is not sufficient to create entitlement (*Lee v. Lee*, 2014 BCCA 383 (B.C. C.A.) at para.60). Instead "there must at least be some evidence of how the applicant's lifestyle has been diminished and, even then, other factors may have to be considered": *Madruga v. Madruga*, 2015 BCSC 1605 (B.C. S.C.).

87 As to the objective of promoting self-sufficiency, the frequently-cited decision in *Tedham v. Tedham*, 2005 BCCA 502 (B.C. C.A.) is helpful:

[33]...As already stated, however, s.152(6) (d) of the Act does not require self-sufficiency, but simply seeks to promote self-sufficiency "in so far as practicable". In determining what is practicable, regard must be had to all of the circumstances, including the age and gender of the spouse, her/his skills and education, or lack thereof, the opportunities for retraining, and the realistic prospect of the spouse being able to find not just a job, but one which enables her/him to become self-sufficient, which may be quite a different matter.

[121] A potential issue in the determination of entitlement to spousal support is the conduct of the parties. As summarized in *Vidican*:

88 While a.15.2(5) prohibits the court from taking into consideration any spousal misconduct, the consequences of such conduct on relevant matters such as the other spouse's ability to earn income is still an appropriate factor: *Leskun v. Leskun*, [2006] 1 S.C.R. 920 (S.C.C.) at para. 21. (Section 166 of the FLA is a legislative reflection of this principle, allowing consideration of misconduct that "arbitrarily or unreasonably...causes, prolongs or aggravates the need for spousal support...")

[122] The correct approach to applications for retroactive spousal support was summarized in *Gil-Eldh v. Branyik*, 2018 BCCA 98:

- [36] The principles in D.B.S. also apply in the context of retroactive awards for spousal support, considered in light of the different legal principles and objectives that underpin spousal support as compared with child support. This was explained by Cromwell J. for the court in *Kerr v Baranow* [[2011] 1 S.C.R. 269] at paras. 208-209:
- [208] Spousal support has a different legal foundation than child support. A parent-child relationship is a fiduciary relationship of presumed dependency and the obligation of both parents to support the child arises at birth. In that sense, the entitlement to child support is "automatic" and both parents must put their child's interests ahead of their own in negotiating and litigating child support. Child support is the right of the child, not of the parent seeking support on the child's behalf, and the basic amount of child support under the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp), (as well as many provincial child support statutes) now depends on the income of the payor and not on a highly discretionary balancing of means and needs. These aspects of child support reduce somewhat the strength of concerns about lack of notice and lack of diligence in seeking child support. With respect to notice, the payor parent is or should be aware of the obligation to provide support commensurate with his or her income. As for delay, the right to support is the child's and therefore it is the child's, not the other parent's position that is prejudiced by lack of diligence on the part of the parent seeking child support: see D.B.S., at paras. 36-39, 47-48, 59, 80 and 100-104. In contrast, there is no presumptive entitlement to spousal support and, unlike child support, the spouse is in general not under any legal obligation to look out for the separated spouse's legal interests. Thus, concerns about notice, delay and misconduct generally carry more weight in relation to claims for spousal support: see, e.g., M. L. Gordon, "Blame Over: Retroactive Child and Spousal Support in the Post-Guideline Era" (2004-2005), 23 C.F.L.Q. 243, at pp. 281 and 291-92.
- [209] Where, as here, the payor's complaint is that support could have been sought earlier, but was not, there are two underlying interests at stake. The first relates to the certainty of the payor's legal obligations; the possibility of an order that reaches back into the past makes it more difficult to plan one's affairs and a sizeable "retroactive" award for which the payor did not plan may impose financial hardship. The second concerns placing proper incentives on the applicant to proceed with his or her claims promptly (see D.B.S., at paras. 100-103).
- [37] As Cromwell J. explained (at para. 212), the focus of concern about conduct of the payor should be on "conduct broadly relevant to the support obligation" which would include, for example, failing to make appropriate disclosure; the circumstances of the spouse seeking support should relate to his or her needs at the time support should have been paid and at present; and hardship involves the risk that a retroactive award will not be fashioned with regard to what the payor can currently afford. He also confirmed that the need for flexibility and a "holistic" approach is also appropriate when dealing with spousal support.

[123] In addition to the general issue of delay in seeking support, a further issue in this case is that Ms. Segura's earning ability has potentially been affected by events that occurred some time after separation. In *Fyfe v. Jouppien*, 2011 ONSC 5462, at para. 54, some useful general principles were distilled from the decisions that have applied *Moge* and *Bracklow* to this issue:

- a. The starting point for analyzing non-compensatory support claims based on need arising post separation is whether there is evidence during the period prior to separation to rebut the presumption of mutuality and interdependence arising from the marriage relationship itself. Where there is no evidence to rebut this presumption, it may be reasonable to expect that the parties will support each other for a reasonable period of time in the event of need that does not exist at the time of separation but that arises at a later date.
- b. The existence of mutuality and interdependence prior to separation is not, however, a determinative factor favouring a spousal support obligation in the event of need arising post separation. As the Supreme Court of Canada stated in *Moge* and *Bracklow*, all of the objectives underlying a spousal support order must be considered, including the objective of promoting self sufficiency within a reasonable period of time. The question that must be determined is whether, taking into account all of the circumstances of the particular case, it is reasonable on an objective analysis to expect the parties to continue to be "safety nets" for each other in the event of post separation need, and if so, for how long.
- c. The passage of time may be an important consideration, particularly where the parties both take steps post separation to unravel their interdependencies and to effect a clean break from each other. In these circumstances, the mutual obligation of support arising from the marriage itself may wane with the passage of time, and the objective of promoting self sufficiency within a reasonable time frame may come more to the forefront of the analysis. This would include an expectation that former spouses implement plans for their own care in the event of possible disability in the future.
- d. On the other hand, the passage of time may be given less weight in the analysis of entitlement if, despite the passage of a number of years, the parties have not effected a clean break, and their relationship continues to be characterized by mutuality and interdependence. In such circumstances, an objective analysis of the situation may lead to the conclusion that the expectation of mutual support and dependency arising from the marriage relationship has continued.

[Emphasis added]

Evidence

- [124] Ms. Segura testified that at times during the marriage she worked only part-time. Specifically in reference to their third child she said that after he was born it did not make sense to work full-time. More generally she said that because of Mr. Segura's work travel it was difficult to work full-time because of the extensive nature of the children's needs.
- [125] She also said that Mr. Segura wanted her to quit her job, saying that he earned enough to support the family, but she wanted to keep working to preserve her employment-related benefits.
- [126] Outside of school hours, the children attended daycare at a nearby Boys and Girls Club. It charged parents who were late for pick up by the minute. She had to schedule her work around the children as a result. Although her employer expected her to stay late at times there was no one else to pick them up.
- [127] Dealing with the effect of her family responsibilities on her career prospects, she explained that her employer expected those seeking a promotion to put in a lot of additional time, and it would not have been feasible to raise her child care responsibilities with the employer in that context. In her view she would have been setting herself up for failure to seek promotions, so she did not do so. She would of course have earned a higher salary in more responsible positions.
- [128] As far as her future employment prospects, in addition to her high school education, Ms. Segura attended college but did not complete her program because she ran out of money. As of the time she testified she had been seeing a career counsellor, who was helping her update her resume. She had sent out 32 job applications by that point, not just in the banking industry, but also for positions in other businesses and in government. She had also broadened her search to include positions such as administrative assistant.
- [129] As I have said, Mr. Segura did not deny that Ms. Segura was the primary caregiver of the children during the marriage, or that his work travel, which at one point involved a consecutive period of six months away, "took a toll on the children", especially the youngest child. However, as far as he was aware, Ms. Segura only ever worked full time, and he denied ever having invited her to give up her job.

Discussion

- [130] Mr. Segura's counsel submits that it is questionable whether the requirements of a compensatory or a needs-based claim have been satisfied here. The income reported by Ms. Segura since 2010 certainly indicates full-time employment, he notes, despite the ages of the children in those years, and she was able to accumulate a significant post-separation RRSP, which she has been able to draw on more recently. (Her counsel points out that the RRSP was made up of shares from her employer bank, and the increase in its value resulted from an increase in the value of the shares, not from her deposits into it.)

[131] Regardless of whether there is any entitlement, counsel submits that serious concerns should arise from the lengthy delay by Ms. Segura in seeking spousal support. In addition to the passage from Kerr that I have cited, he refers to cases from this jurisdiction in which delays in seeking support weighed against a support order:

- Halliday v. Halliday, 2016 BCSC 2036: Despite the fact that the applicant had suffered from chronic fatigue throughout the relevant period, the Court found that there was no reason that she could not have applied for spousal support as soon as the payor left the family residence, noting that she "was not being held at ransom" by the payor during that period. As a result, support was made retroactive only to the point that she filed a notice of intention to proceed with her court action and demanded support from the payor.

- Vik v. Vik, 2018 BCSC 611: the Court found that it would be unfair to the payor to order spousal support retroactive to the recipient's initial court actions, which were filed five years before the trial and had not sought spousal support. Instead support was made retroactive only to the previous year, when the recipient had finally made a court application that included such a request.

- Lee v. Lee, 2011 BCSC 286: an unexplained delay of eight years between seeking spousal support in a counterclaim (under the previous court rules) and making the application for it that was before the Court was found to disentitle the would-be recipient spouse from receiving any retroactive award.

[132] As Chutter makes clear, it is not necessary to pigeonhole support into strictly a compensatory or a non-compensatory basis, and many claims will involve elements of both. Citing Bracklow, the Court explained that the goal is to "[apply] the relevant factors and strik[e] the balance that best achieves justice in the particular case" (para.49).

[133] As it turns out however, I am satisfied that both bases are fully satisfied on the evidence here.

[134] Despite Mr. Segura's inability to recall Ms. Segura working part-time, her uncontradicted evidence is that her sole responsibility for caring for the children, including working around their child care requirements, affected both her existing positions and her ability to seek more responsible and higher paying ones. Of equal importance, without her complete responsibility for child care and the financial management of the household, Mr. Segura could not have pursued the lengthy assignments elsewhere in the world that have led him to the high earning capacity that he now enjoys. It is therefore clear that economic disadvantages have been incurred by her and economic advantages were conferred on him as a result of their respective roles within the marriage.

[135] It is also clear that having been let go from employment that has lasted virtually her entire working life, having come to the end of her severance payments and now having to seek a new position with equivalent earning power with only the skills and experience gained in her former position to draw on (as opposed to, for example, having a skilled trade), she is

legitimately in need of support. It is hard to see how she could have furthered her self-sufficiency after separation other than by continuing in the job she already had, and its termination was not of her doing.

- [136] Even at the time of separation, the withdrawal of Mr. Segura from their joint financial enterprise would have left her in a deficient situation that would clearly have justified needs-based support.
- [137] I also find that this is a situation in which the joint support of the children and their joint ownership and management of the family properties means that the parties' relationship remains sufficiently intertwined, despite the years that have passed since separation, and that an expectation of mutual support and dependency based on the marriage remains in place.
- [138] Accordingly, I find that there is an entitlement on Ms. Segura's part to ongoing spousal support. Her counsel concedes that the factors under the Spousal Support Advisory Guidelines at the parties' respective incomes that would militate in favour of an award at the higher end of the range are not present here, so the award will be at the mid-range. The amount of \$908 per month that was awarded at the interim application was based on a cohabitation date of 1994, so if the date I have found of January 1996 makes any difference to that amount under the SSAGs, I will ask counsel to perform the necessary recalculations and adjust it accordingly. If they are unable to agree there can of course be a reference to the registrar.
- [139] On the question of duration, Ms. Segura takes the reasonable position that it should only be paid until the youngest child reaches the age of majority, which will be on April 20, 2022. I will order it for that duration, which makes it unnecessary to determine if a review period to monitor her efforts towards self-sufficiency is required.
- [140] Turning to retroactive spousal support, it seems certain, given the contents of the notice of family claim, that the ongoing discussions seeking a separation agreement must have included the issue of spousal support. To that extent, there was not a "prolonged period of inactivity" as envisioned in D.B.S., and Mr. Segura could not reasonably have held the belief that Ms. Segura no longer wished to receive spousal support. His surly and unhelpful manner of communicating with her on child support and other household issues was certainly a deterrent to negotiation and is legitimately weighed in the analysis as blameworthy conduct on his part.
- [141] However, unlike child support, there is no evidence that spousal support was being specifically requested by Ms. Segura in its ongoing required amounts (or being partially paid by him) over the years, so her failure to move forward with a court application to claim it until this trial raises more of a concern. As envisioned in Kerr, his interests in being certain of his legal obligations and being able to integrate those obligations with his current financial situation are more compelling than they were for child support. Further, while I accept that Ms. Segura was genuinely acting on legal advice that it would be more

economical to resolve the issue by agreement, I think there nonetheless should have come a point at which she reasonably recognized that she needed to either go to court or abandon the claim.

[142] At the end of the day, balancing her delay in seeking spousal support against her clear entitlement to it from the time of separation onwards and the other factors that militate in favour of a retroactive award, particularly the reasonableness of pursuing a negotiated settlement up to a certain point, I conclude that her delay lengthened the amount of time that should reasonably have been required to resolve her claim by approximately 50%. Support at the mid-level under the SSAGs for the incomes involved would have led to a total of \$79,846, so I award her \$39,223 in retroactive spousal support.

Costs

[143] In the absence of further submissions, my tentative view is that success on the important matters in issue has been roughly evenly divided and that the parties should each bear their own costs. Each party prevailed on one of the retroactive support issues, Mr. Segura did so on the potentially less significant issue of retroactive s. 7 expenses, and Ms. Segura received a compensation payment that is close to the mid-point of their respective positions. However, if either party disagrees with that view, or there are other matters affecting costs that should be considered, they should feel free to make submissions on the issue. Given the current restrictions on court applications, it would be preferable if any such submissions were provided in writing.

"Schultes J."

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