
CANADA / JUDGMENT

Squair v. Squair

2015 BCSC 2321

COURT

Supreme Court of British Columbia

DECIDED

10 December 2015

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2015 BCSC 2321 Squair v. Squair

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Squair v. Squair,

2015 BCSC 2321

Date: 20151210

Docket: E36951

Registry: New Westminster

Between:

Nancy Squair

Claimant

And

Ian Squair

Respondent

Corrected judgment: The text of this judgment was corrected at paragraph 104 where a change was made on January 14, 2016.

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

Counsel for the Claimant:

G. K. Thomas

R. Tretiak, Q.C.

Counsel for the Respondent, appearing in 2012 and March 2013 dates only:

C. Linde

Counsel for the Respondent, appearing August 8, 2014 only:

H. Mathison

Appearing on his own behalf at all other times:

The Respondent, I. Squair

Place and Date of Trial:

New Westminster, B.C.

October 9-11, 2012; March 26-28, September 25, 2013; February 3, March 27, April 17, August 8, 2014;

and April 7-10, 2015

Place and Date of Judgment:

New Westminster, B.C.

December 10, 2015

- [1] The claimant Ms. Squair, former spouse of the respondent Mr. Squair, seeks orders respecting guardianship and parenting of the parties' two children, retroactive and ongoing child support, a compensation order in lieu of spousal support, and division of assets.
- [2] The trial of this action took longer to complete, by many orders of magnitude, than anyone could have anticipated at the outset. As will be described in further detail below, after the first six hearing days the respondent lost his employment, and his mental health became precarious. This led to considerable delay in bringing the trial to a conclusion, and necessitated, to some extent, a reformulation of the positions that had been taken by the parties at commencement of the trial.

History of Proceedings

- [3] The trial of this action was originally scheduled for three days. It commenced on schedule on October 9, 2012. The claimant had filed a Notice of Application returnable on the first day of trial, seeking an order that the respondent's response and counterclaim be struck for his having failed to abide by a document production order made by Master Tokarek in March 2012, and having failed to produce documents and respond to information requests made at his July 2012 examination for discovery. The claimant did however receive at least some further document production by October 9th, and chose not to proceed with the application.

- [4] By the end of the scheduled three days, the claimant closed her case, having given her own evidence and been cross-examined, and having called an expert witness to provide actuarial evidence. The trial resumed on March 26, 2013, and in three further days the respondent put in his case.
- [5] During the claimant's opening statement, reference had been made to an expert opinion report from the respondent's general practitioner, Dr. Ocana, and I was advised that the claimant would be objecting to the report being tendered by the respondent, due to it only having been delivered the week prior to commencement of the trial. The respondent made no reference to this medical evidence in his case, and no report of Dr. Ocana was tendered.
- [6] On March 28, 2012 the trial was adjourned, with counsel to exchange written argument over the summer.
- [7] Counsel next appeared before me on September 23, 2013. I was advised that the claimant's argument had been delivered in early July, but no argument had yet been delivered by the respondent. Mr. Linde, counsel for the respondent, advised the Court that he had had no contact with his client between the last trial date and September 10, when Mr. Squair had attended at Mr. Linde's office. Mr. Squair then advised Mr. Linde that he had lost his job in May 2013, and had then suffered, in layman's terms, a complete nervous collapse. Mr. Linde stated that he had notified Mr. Squair of the September 23rd hearing date, and that he was currently taking steps to withdraw as counsel. I ordered that the respondent was to produce documents of the termination of his employment and of payment of the performance bonus he was to have received in May; and that he would have until November 6, 2013, to deliver his argument.
- [8] In October 2013 Mr. Squair attempted to obtain dates from Supreme Court Scheduling for an application to extend the November 6th deadline. By memorandum to the parties dated November 1, 2013, I relieved Mr. Squair of the obligation to produce a written argument, and I directed the claimant to obtain from Scheduling a date for a one-day hearing at which the parties were to present their closing submissions orally. Noting that the trial had commenced the previous October, I said that the trial must complete and there would be no further adjournments. I invited Mr. Squair to consider whether he wished to seek leave to re-open his case to describe his change in circumstances.
- [9] The trial resumed on February 3, 2014, with the respondent acting on his own behalf. Mr. Squair was given leave to re-open his case, and he testified, and was cross-examined, as to the changes in his circumstances that had transpired since the previous March.
- [10] Mr. Squair presented the court with an opinion letter from his general practitioner, Dr. Ocana, who had been treating him for depression, anxiety and Adult Attention Deficit Hyperactivity Disorder (ADHD). The letter, dated November 17, 2013, was stated to have been prepared for the purpose of supporting an application by Mr. Squair to extend the deadline for preparation of his final argument. Notice of this report had not been provided to the claimant until the preceding week. The report described treatment of Mr. Squair and

stated a diagnosis. It also gave a specific prognosis if his condition were untreated, coupled with a generalized statement that Dr. Ocana has seen many patients progress to full remission of symptoms and dramatic improvements in function, with integrated pharmacological/psychological treatment and with lifestyle management. There was no specific opinion stated as to Mr. Squair's employability. I allowed the report to go into evidence only as for the truth of factual matters stated therein, and not for the truth or accuracy of any opinion stated.

- [11] It emerged during his testimony that Mr. Squair had exhausted his liquid savings and had collapsed his all of his U.S.-based 401K retirement accounts, IRA's and pensions. Orders were made for Mr. Squair to provide further documentation and to provide signed authorizations directed to U.S. financial institutions and to his most recent former employer, and the trial was once again adjourned to allow for production of this financial information.
- [12] The parties next appeared before me on April 17, 2014. Mr. Squair was still self-represented. There had been delays in forwarding the necessary authorizations to the U.S. institutions. Further orders were made regarding Mr. Squair's rights to access his U.S. funds once they were transferred into Canadian bank accounts.
- [13] The next appearance was on August 8, 2014, at which point Mr. Squair had retained Ms. S. Jamal. At that time, Mr. Squair still had not taken the necessary steps to close his U.S. bank accounts the parties were still awaiting transfer of funds from the U.S. The trial was adjourned to December 17-19, 2014; the parties' cases were to be re-opened for the purpose of hearing updated evidence as to their financial position. The respondent was granted liberty to seek an expert report as to his medical condition, and to apply to amend his pleadings and to counterclaim to seek spousal support. The parties were each given leave to make payments out of the funds in respect of the retainers of their legal counsel.
- [14] A case management conference was held on November 7, 2014. I advised counsel that the trial would be unable to proceed in December, due to issues with my availability. A number of further orders were made concerning the parties' assets. There was no discussion of any application for amendment of the respondent's pleadings, and no discussion of expert evidence being obtained.
- [15] In my absence, a further interim order was made by Mr. Justice Groves on February 10, 2015, respecting transfer of the U.S. assets. Mr. Squair was ordered to make his best efforts to complete an accounting as required by my previous orders of August 8 and November 7, 2014, within a further one month.
- [16] The trial recommenced on April 7, 2015. In the interim, Ms. Jamal had gone off the record, and Mr. Squair again began acting on his own behalf. On March 27, 2015, less than two weeks before the scheduled recommencement of trial, Mr. Squair had applied to the court for leave to file a further expert opinion from Dr. Ocana concerning his medical condition. That report had been obtained in early October 2014, but no notice had been given until mid-March 2015, and the claimant opposed the application on the basis of late delivery. I held

that the report would not be admitted.

- [17] The trial finally concluded on April 10, 2015. The parties provided updated information as to their financial circumstances; Dr. Ocana testified as to factual matters concerning Mr. Squair's medical treatment; and Mr. Squair provided further evidence as to his mental status. Mr. Squair was cross-examined at length as to his compliance, or non-compliance, with orders made by the Court concerning the transfer of the U.S. funds. Judgment has been reserved to this date.

Background

- [18] The claimant was born June 15, 1962; she is now 53 years old. She obtained a Master's Degree in rhetoric and composition from San Diego State in 1995. She is now employed as an instructor with Douglas College.
- [19] Mr. Squair, born April 6, 1964, is now 49 years old. He holds a Bachelor's Degree in mining engineering. He has worked in that field since 1991, for different mining companies in the western U.S. and Canada.
- [20] The parties met in December 1989 and commenced a long-distance relationship; he was in school in Edmonton, Alberta, she was in school in San Diego. They were married in December 1991, and Ms. Squair moved to join her husband in Tucson, Arizona, where he was working at a copper mine owned by Magna Copper (later BHP Billiton). Ms. Squair continued her studies; she was one credit short of her Master's, but had been admitted into the Ph.D. program at the University of Arizona. She completed the course work and exams required for her Ph.D. in early 1997. She continued to work towards completion of her dissertation.
- [21] The parties moved to Oracle, Arizona in July 1995.
- [22] In the summer of 1997 Mr. Squair turned down a job with the Ekati Mine in the Northwest Territories. I accept his evidence that the reason for this decision was Ms. Squair's reluctance to move there.
- [23] In September 1997 their first child, Callum - now age 18 - was born.
- [24] In 1998 Mr. Squair began employment with Cyprus Amax, and the family moved to be closer to his employment - to Mesa, Arizona - in April 1999, and then to Globe, Arizona in September 1999. That same month the parties' second son, Graham, was born; he is now 16 years old.
- [25] Ms. Squair continued, intermittently, to work on her Ph.D. I accept her evidence that her work required ongoing access to specialized texts, and that this was complicated by the distance between their home and the campus. Her work was also interrupted by child caring considerations and by her own medical issues. Eventually she withdrew from the Ph.D. program.

- [26] In April 2001 the family relocated to Snohomish, Washington, as Ms. Squair wanted to be close to her ailing grandmother. Mr. Squair took a job with a gravel pit operation. I accept his evidence that this job's requirements were outside the skillset he had developed and was a step backwards in his career. I also accept that taking this position was a sacrifice he made so that Ms. Squair's desire to relocate to that area could be realized.
- [27] Mr. Squair was laid off at the end of September 2001. The family moved to Terrebonne, Oregon in November 2001 where a member of Ms. Squair's family provided them with low-cost rent. Mr. Squair remained unemployed until May 2002, when he obtained employment with a coal mining operation near Gillette, Wyoming. The family moved there, and in August of that year Ms. Squair began teaching English at a community college.
- [28] The parties separated in September 2003, but reconciled in July 2005. They were both unhappy in Gillette, and discussed a move to Denver, Colorado. Mr. Squair obtained employment in Denver in March 2006; Ms. Squair initially stayed in Gillette with the children so they could finish the school year; they reunited in Denver in July 2006.
- [29] Mr. Squair moved to Vancouver, BC in August 2007 to work with a new employer on a copper-gold mining project. Ms. Squair, with the children, relocated to Powell River, BC in September, so she could be close to her ailing mother. In January 2008, the family moved together into a rented residence in Burnaby, BC, and in August 2008 Ms. Squair began teaching, on a contract basis, at Douglas College.
- [30] Mr. Squair was laid off in January 2009. He found a position with a new employer in Kamloops, and moved there in February, living in company housing.
- [31] The parties were again having marital difficulties about this time, having had a major falling-out in January or February, and in April 2009 they discussed separation.
- [32] In mid-July 2009 Mr. Squair was fired from his job for failure to perform. The job had been too challenging for him, given that it was an underground mine and his background was in open-pit. He was unable to handle many of the stressors in the workplace, and was also stressed because he believed his marriage had failed. Following his termination he became severely depressed. He mailed information about his bank accounts, and the registration papers for his truck, to Ms. Squair, and he drove into the wilderness in the Cariboo, where he attempted suicide. He returned to the Lower Mainland in late July, initially living with his brother, and eventually renting a room in a house in east Vancouver. He began medical treatment for depression, initially being prescribed Bupropion (generic Wellbutrin). By the late spring, approximately, his dosage was up to 450 mg/day.
- [33] Ms. Squair filed a child support claim in Provincial Court, and Mr. Squair began making child support payments in September 2009.

- [34] By the summer of 2010 Mr. Squair felt able to work again, and found a position with Barrick in Elko, Nevada. He continued to seek medical treatment for depression and anxiety, and in late 2010 or early 2011 a physician in Elko supplemented his Bupropion with Sertraline (generic Zoloft). At the time of trial he was continuing to take both Bupropion (450 mg/day) and Sertraline (100 mg/day).
- [35] The present proceedings were commenced by Ms. Squair in December 2010.
- [36] A s.57 declaration under the Family Relations Act, R.S.B.C. 1996, c. 128, was made by way of a consent order entered into at a Judicial Case Conference on August 11, 2011.
- [37] I accept Mr. Squair's testimony that from approximately August 2011, when the Judicial Case Conference was held, and continuing for approximately a year and a half, he effectively gave up on many normal activities of daily living. He testified that he had neither the energy nor the inclination to look after himself properly: he didn't change his sheets, didn't do the dishes, garbage piled up, and he slept a lot. His work performance was affected, and near the end of 2011 he had a formal performance review with his employer; it resulted in him being given a 'personal improvement plan', requiring that he make deadlines, attend meetings on time, and increase his productivity.
- [38] In August 2012, a physician based in West Vancouver - Dr. Ocana - diagnosed Mr. Squair as suffering from ADD or ADHD (I use these terms interchangeably, and differences in those two diagnoses being immaterial for the present purposes). He was prescribed Concerta, which he continues to take at a dosage of 90 mg/day. He has continued to be seen by Dr. Ocana, although infrequently, with many of their sessions - while Mr. Squair was in Nevada - being conducted over the internet.
- [39] In his testimony during the March 2013 phase of this trial, Mr. Squair described the impact of his ADD. The main characteristic has been poor organizational skills; he described his filing system as always having been non-existent. His train of thought can get disconnected: "The ideas are in my brain, but I don't know how to articulate it". This symptom impacted his work, at least indirectly, and he testified it also affected his conduct in the present litigation, for example in responding to document requests (i.e. of the type referred to in the aforementioned Notice of Application that had been returnable on the first day of trial). It was compounded by his anxiety and depression which, he testified, impede his ability to take conceptual knowledge and translate it into what he needed to do to fulfill his obligations. He gave an example of how on the night of March 26th his ADD and his mental state had interfered with his efforts to prepare for continuation of his testimony. Examined by his counsel Mr. Linde, he said [and these are my notes]:

My brain last night got into a side conversation and I got distracted from doing tasks you'd given me. That's an ADD function. The anxiety exacerbates things, it balloons out of control and turns into cognitive paralysis.

However, he noted that he felt his mental health had improved.

- [40] I accept this testimony of Mr. Squair.
- [41] In early December 2012 Mr. Squair was told by his employer to go on short-term disability for his condition, or face termination. He did go on disability, and returned to work on February 25, 2013, when his performance was again formally reviewed. He was again given a written performance improvement plan. In the week prior to the March 2013 resumption of the trial, Mr. Squair was again warned by his supervisor that he was slipping back into his old habits.
- [42] Mr. Squair was fired on May 6, 2013.
- [43] As he had no income and no savings, he decided unilaterally to collapse his U.S. retirement funds. He agreed, under cross-examination, that he told no one that he had done so, up until the trial resumed on February 3, 2014. He encroached on that capital to meet his living expenses.
- [44] He testified as to his firing having triggered a further downward spiral into depression, to the point that, as he reported to Dr. Ocana in October 2013 (truthfully, I find), he was again experiencing "severe difficulty with even some of the most basic cognitive tasks of daily living". The stress caused by his job loss was compounded by the stress of having had to relocate from Nevada immediately upon his termination, and resettle in the Lower Mainland. He gave further testimony as to the difficulties his mental state had posed in the succeeding months in responding to outstanding document requests, responding appropriately to court orders concerning the U.S. funds, and dealing with his legal counsel.
- [45] Ms. Squair continues her employment as an English instructor with Douglas College. She has had a full-time, permanent position since August 2010. Douglas College does not have tenured positions.
- [46] Ms. Squair's employment income was \$84,000 in 2013 and \$90,000 in 2014.

Parenting Issues

- [47] Shared joint guardianship of the children was agreed to and incorporated into the August 11, 2011 JCC consent order issued by Master MacNaughton. As provided in s. 251(1) of the Family Law Act, S.B.C. 2011, c. 25, the terms of that order will remain in force.
- [48] Ms. Squair testified in the April 2015 phase of the trial as to the current parenting arrangements. The parties' two sons still live with her. They 'negotiate' their time with Mr. Squair; either Mr. Squair's father - the boys' grandfather - will contact them and invite them for family gatherings, or Mr. Squair will contact them directly and arrange to see them. Both boys have cell phones they use for this purpose. Typically, they have not seen him more than once a month, and there have been times when several months have passed without the boys seeing him (although Ms. Squair did not say whether or to what extent there was telephone contact during those periods). Their times with him have been spent seeing an afternoon matinee, or having a meal together, or being together at a family event at the

grandfather's house in White Rock. They have had no overnight visits with their father.

- [49] Ms. Squair typically communicates with Mr. Squair as to matters concerning the boys through emails. She acknowledged that she sometimes fails to keep him in the loop; he often does not respond, and consequently she has fallen out of the habit of communicating with him. She noted that the boys moderate this to some extent by maintaining contact with their father.
- [50] I have no evidence as to the views of the children, except what might be inferred from the frequency of contact. It stands to reason that at the ages of 18 and 16, the boys are capable of arranging for further time with their father if that is what they desire.
- [51] Mr. Squair seeks an order for equal parenting time, on a week-on, week-off basis. Acknowledging the principle of maximizing contact as encoded in the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and acknowledging the genuineness of Mr. Squair's desire to play a more active role in their sons' lives, I simply do not think this is practical. Again, the boys are at an age where their own desires will dictate where they live, without regard to the provisions of any court order. Further, Mr. Squair has persuaded me that his depression, anxiety and ADD have caused, in addition to periods when he has barely been able to care for himself, continuing cognitive and, on a functional level, organizational challenges that lead to real concern as to his ability to parent effectively. Mr. Squair's relationship with the boys must continue to evolve organically out of the needs, desires and abilities of the father and children at particular times, without the artificiality of a court order. Through no fault of his own - I say so recognizing the challenges posed by his mental health issues - his relationship with his boys has not been ideal. The onus will be on him to attempt to initiate greater contact, hopefully with the result of strengthening their bonds.
- [52] I order that Mr. Squair shall have reasonably generous access to the boys so long as they live with their mother, on such terms and with such frequency as Mr. Squair and his boys are able to agree upon. Each party will advise the other, with no less than ten days advance notice, of any plans to travel with the children outside the Lower Mainland.
- [53] Mr. Squair has also sought an order as to scheduling regular telephone calls with the boys. Again, given the evidence that both boys have cell phones, and that Mr. Squair communicates with them directly, such an order would appear to be superfluous.

Child Support

Basic Child Support

- [54] The claimant's position is that the respondent has been and continues to be employable - that if he marshaled his considerable intelligence and abilities, he would be able to find meaningful employment. It is submitted that there is no expert opinion evidence that his employability is compromised; that his "tight, sophisticated" examination-in-chief of Dr. Ocana belies his alleged cognitive deficiencies and compromised organizational skills; and

that his contentious and evasive manner under cross-examination, and what the claimant suggests were exaggerations made by him to Dr. Ocana as to his financial position, should lead the Court to an adverse finding as to his credibility.

- [55] Accordingly, the claimant seeks a finding that the respondent is intentionally under-employed, and asks for an imputation of income. In the claimant's initial written submissions of July 2013 (drafted prior to counsel learning of Mr. Squair's dismissal from Barrick), it was submitted that the respondent's Guidelines income for 2013, based on his 2012 earnings, would be \$132,570 (made up of base salary, short-term incentive payments, and deferred long-term incentive payments); and, that his then-current income-earning ability was at a level of not less than \$100,000 per year. The claimant's final submissions suggested the respondent's income be imputed at \$50,000 for the years 2014 and 2015.
- [56] As to the respondent's current income, and his income since his termination, I have no hesitation - notwithstanding the lack of any medical opinion evidence - in finding that, on a balance of probabilities, the plaintiff has been and, up to the conclusion of the evidence, continued to be functionally disabled. I am led to this conclusion by several indicia: the evidence of the plaintiff's work history, including his having gone on temporary disability in late 2012, and his termination in May 2013; his history of medical treatment including his ongoing use of prescription medication; his own description of how his depression, anxiety and ADD manifested in the workplace and in his activities of daily living; his evidence as to his difficulties complying with the court orders concerning the U.S. funds; and, not the least, his demeanour while in court.
- [57] Contrary to the claimant's submission, I did not find Mr. Squair's manner on his examination-in-chief of Dr. Ocana to belie his disability. The questioning was tight and focused, mostly following a simple chronology; it was also relatively brief. There were many other points in time during the proceedings when Mr. Squair was clearly agitated or overwhelmed.
- [58] When under cross-examination, Mr. Squair's answers were often extremely pedantic and exacting, sometimes to the point of evasiveness. There were times when he could have come across as being flippant or glib. I did not, however, have the impression that this was due to any dishonesty on Mr. Squair's part, nor any attempt to mislead or to disrupt the proceedings. Nor do I find that Mr. Squair was not taking the proceedings seriously. To the contrary, I conclude that at least most of the time he presented as obstructionist, he was in fact attempting to be precise, and - with some wariness on his part - to answer questions in a manner he genuinely thought to be fair and appropriate. When the difficulties with his answers were pointed out to him, he was apologetic - sincerely, I believe - and attempted to modify his approach. He clearly did not enjoy the adversarial process. I further found Mr. Squair to have been so disorganized and his thought process so - for want of a better word - peculiar, that it seemed understandable he would not be trusted by an employer with any significant degree of responsibility.

[59] Finally, I find that his description to Dr. Ocana of his dire financial condition, without mention of his assets, was not meant to mislead, but rather was a true reflection of what - with limited assets, no income, and a questionable future - he perceived his situation to be.

[60] I decline to impute any income to Mr. Squair. I find Mr. Squair's income since his termination, for Guidelines child support purposes, has been zero. He has been living off his capital, and in the circumstances he has been under no obligation to support the children through sharing that capital.

[61] With respect to retroactive child support, I make the following findings:

2009

[62] In July 2009, prior to his suicide attempt, Mr. Squair sent a lump sum of \$7,100 to Ms. Squair for the coming months; this was more than double the average monthly sum he had previously provided to Ms. Squair for expenses. The claimant submits that as he commenced paying only \$600 per month in September, as against a Guidelines amount of \$1,096 per month (based on his actual 2009 earnings), there was a cumulative shortfall by the end of 2009 amounting to \$1,984. I agree with this analysis. I find that any shortfall in the monthly payments during the latter half of 2009 was more than made up for by the excess payment Mr. Squair had made.

2010

[63] I find no basis to the claimant's submissions that income ought to be imputed to Mr. Squair for the period January - July 2010. Mr. Squair's actual earnings for the calendar year, as set out in his U.S. tax return, were US\$67,833; the Canadian equivalent after applying the prevailing exchange rate was C\$69,747. Under the prevailing tables, the Guidelines child support was \$1,049 per month, or \$12,588 for the calendar year. Mr. Squair actually paid \$10,168. The shortfall of \$2,420 is due as retroactive support for that year.

2011

[64] The respondent's actual income for 2010 was \$108,207, producing a child support obligation at the then-current tables of \$1,549. The claimant submits that Mr. Squair's income ought to be increased by \$7,000 to reflect the long term incentive payment he earned that year; however, that entitlement did not vest that year and would not vest before his employment was terminated. The difference between the amount paid by Mr. Squair of \$16,284 and his obligation of \$18,588 is \$2,304, and that amount is due as retroactive support for 2011.

2012

[65] In 2012 Mr. Squair received employment income of \$94,321 to December 3, 2012. Thereafter, he received disability benefits of a further \$8,059 for the month of December. These amounts total \$102,380. (The exchange rate is taken to have been at par on average during the year.). The monthly child support obligation was \$1,475, or \$17,700 per year. The difference between that figure and the \$16,218 paid by Mr. Squair is \$1,482, and that amount is due as retroactive support for 2012.

2013

[66] Mr. Squair's actual income for 2013 was earned up to the date of his termination, May 6, 2013. The total income was US\$51,606, or C\$53,154. This actual annual income figure yields a monthly child support obligation of \$806, or, for the calendar year, of \$9,672.

[67] The respondent seeks to have his child support obligation for that year terminated as of the date of his dismissal; however, if that were to be done, the child support obligation for the period up to May 6th would have to be based on the annualized value of the \$53,154 earned in the first four months of the year, leading to a proportionately higher support obligation.

[68] Mr. Squair actually paid \$808 in 2013, and an additional \$687 in 2014 (when no support was owing), for a total of \$1,495. I credit his 2014 payment against the amount owed for 2013, and I assess his retroactive child support obligation for 2013 to be \$8,177.

Summary

[69] Mr. Squair will pay to Ms. Squair retroactive child support totalling \$14,383.

[70] No ongoing child support is owed at this time.

[71] Mr. Squair has an ongoing obligation to seek medical care for his psychological conditions, and to follow all recommended treatment.

[72] He will have an ongoing obligation to inform Ms. Squair promptly in the event he obtains employment, and to recommence payment of child support at the prevailing rate.

[73] Mr. Squair's ability to earn income will be reviewable as of October 1, 2016. Commencing six months prior thereto, Ms. Squair shall have the right to demand of Mr. Squair a medical report opining as to Mr. Squair's fitness for employment, and Mr. Squair will have the obligation to take all required steps to obtain such a report from his treating physician, at his expense, and will deliver a copy to Ms. Squair forthwith upon receipt. Upon the claimant filing an application for review, Mr. Squair will be obliged to provide an affidavit stating full particulars of his medical condition, including any diagnosis and prognosis he has been given by his physicians, and his treatment; full particulars of any application made by him for disability benefits, and details of any receipt of such benefits; and full particulars of his efforts made to obtain employment, with details as to job searches, job applications, vocational counselling and retraining.

Section 7 Expenses

- [74] As a term of the Judicial Case Conference consent order, Mr. Squair agreed to pay \$1,500 for retroactive tutoring and unspecified special expenses. In his evidence, Mr. Squair initially maintained that he has paid some of that amount; however, he had no records to support his position. I accept the claimant's evidence that the amount remains unpaid.
- [75] The JCC order was explicitly made without prejudice to the claimant's right and entitlement to seek interest from the date of the debt to the date of payment. That interest claim was not pursued at trial.
- [76] The claimant now seeks contribution from the respondent towards further extraordinary expenses in the amount of \$1,608. The respondent's only objection to these amounts, in his cross-examination, was in respect of his ability to pay at that time. I find Mr. Squair liable to pay a proportionate share of that amount, being 58%, for a total of \$933.
- [77] Adding that amount to the \$1,500 previously ordered, the respondent shall pay the claimant \$2433 in respect of retroactive Section 7 expenses.

Spousal Support and Claim for Re-apportionment of U.S. Social Security

- [78] The claimant's pleadings initially sought spousal support in the amount of \$500 per month, for a period of 24 months.
- [79] The claimant resiled from this position in closing submissions, and instead approached the spousal support as a justification for ordering a compensation payment reflecting the claimant's entitlement to a share of the respondent's U.S. Social Security.
- [80] U.S. Social Security benefits are a family asset. They are also an "extraprovincial plan" within the meaning of Part 6 of the Family Relations Act. Section 77(1) of that Act provided for a spouse obtaining a proportionate share of the plan benefits. Subsections 77(3) and (4) provided:
- (3) Subject to subsection (4), subsection (1) does not apply if the plan, or legislation establishing or regulating the plan, provides an alternative method of satisfying the interest of the spouse in the pension.
- (4) If, having regard to the principles that apply to pension division under this Part, the alternative method under subsection (3) would operate unfairly, the Supreme Court may order the spouse's share in the pension be satisfied under subsection (1).
- [81] Mr. Squair has U.S. Social Security credits as a result of his years of employment in the U.S. during the marriage. Mr. Squair's evidence, however - uncontradicted by the claimant's actuarial expert - is that at retirement age, a spouse in the position of Ms. Squair, having no or minimal U.S. credits of her own, would be entitled to a derivative benefit equal to 50% of the full retirement amount payable to her spouse. Ms. Squair's evidence is that her four years of employment when the family lived in Wyoming did not give her sufficient credits

under the U.S. system to earn Social Security benefits of her own. Therefore, the proper approach to division of family assets would appear to require assessment of the actuarial present value of both Mr. Squair's benefit, and Ms. Squair's derivative spousal benefit, with each being entitled to a one-half share of the sum of those two values.

- [82] As there is no method by which a Canadian court can compel an equal division of future U.S. social security benefits, the proper approach would require a compensation payment to be made.
- [83] The claimant, however, submits she should be awarded one-half the present value of Mr. Squair's U.S. Social Security entitlement, without accounting for the 50% entitlement she would have at retirement age.
- [84] Actuarial evidence was tendered in support of the claimant's claim for this sum, which put the actuarial present value of Mr. Squair's expected Social Security benefits, before taxes, at \$102,000. The before-tax value of Ms. Squair's one-half share would be \$51,000. The claimant's actuarial expert witness suggested that a fair after-tax value would be \$44,000, based on a British Columbia tax rate of 13%.
- [85] The claimant's expert witness characterized the 13% taxation figure as an "approximation". No accounting was made for the possibility of the marginal rate being considerably higher than that stated rate, to reflect other retirement income being earned. Neither was any opinion offered as to the possibility of deductions at source by U.S. tax authorities; as to whether any U.S. taxation would be in addition to rather than as an alternative to Canadian taxes; nor as to what the U.S. tax rate would likely be.
- [86] Assuming that the actuarial value of Ms. Squair's derivative 50% Social Security benefit would be calculated on the same basis as Mr. Squair's benefit (a doubtful proposition, given the difference in age and gender), the parties' total benefits would have a present value of \$153,000; Ms. Squair would be entitled to one-half that amount, or \$76,500. However, she would retain her right to her 50% derivative benefit, and therefore equalization would require her to be compensated by only an additional \$25,500. Again, that is a before-tax amount; a more realistic approach to tax calculations would, in my view, suggest a marginal rate in the range of 25%, leaving Ms. Squair with an equalization claim of perhaps only approximately \$19,125. Again, this would not account for any U.S. tax exposure.
- [87] The justification for this claim is said to lie in the claimant's purported entitlement to spousal support on a compensatory basis. The claimant submits that she was disadvantaged in the marriage for having to forego her Ph.D. studies in order to raise the children, and in order to follow the respondent around as he changed jobs and the family recurrently relocated to locations from which she could not conveniently pursue the necessary research.
- [88] I do not find there is a strong compensatory claim on the facts of this case. I am unable to determine, on the evidence, what the likelihood is that Ms. Squair would have completed her Ph.D. absent the sacrifices she says were made on behalf of the family; there is no

evidence from her academic supervisor or any other knowledgeable person as to the viability of the thesis she was pursuing or the quality of the written product she was able to produce. Moreover, there is simply no evidence that the demand for teachers with doctorate-level degrees in rhetoric and composition is such that Ms. Squair would likely have been able to pursue a more lucrative career path than that which she is presently on. In the circumstances, I decline to make a compensatory order re-apportioning the U.S. Social Security entitlement.

[89] The apportionment of the Social Security benefits as a whole is addressed below.

Asset Division

[90] The parties were, at the commencement of the trial, in agreement that they should each retain to the exclusion of the other any unregistered assets in their names. The claimant resiled from that position in final argument, again on the grounds of a purported shortfall in the assets available to satisfy her claims. As set out below, I find there to be no such shortfall. There is a rough equivalence between the value of the parties' unregistered assets, and I order that each is to keep their own.

[91] Further, Mr. Squair makes no claim to an inheritance obtained by Ms. Squair.

[92] The total U.S. dollar amount remaining from Mr. Squair's collapsed registered U.S. retirement funds that was ultimately transferred into Canada was US\$152,912.43, or C\$190,070.15. As noted above, orders of the Court permitted payments to be made out of this fund towards the parties' retainer of counsel, and an additional sum was paid out to Mr. Squair as a living allowance. There were additional small amounts paid to the parties in equal shares. The remaining balance of \$139,070.15 was paid into court.

[93] Those collapsed funds included Mr. Squair's Barrick pension. The value of that pension to February 29, 2012 was \$20,212. Assuming that a proportionate share of that pension entitlement accumulated during the first 13 months approximately of his employment with Barrick, up to the date of the s. 57 declaration, I assess the share of that pension to be treated as a family asset at \$13,839.

[94] Had the funds not been collapsed by Mr. Squair, the best evidence available (the dates of the statement records disclosing each fund's value differed from account to account) suggests that their total value, exclusive of the Barrick pension, would have been US\$179,660. Adding back into that the aforesaid portion of Mr. Squair's Barrick pension yields the sum of \$193,499. At the exchange rate used when the monies were transferred, \$1.243, this would have yielded a notional sum in Canadian dollars of \$240,519, in which Ms. Squair claims a half-interest.

[95] Mr. Squair has additional registered funds that he did not collapse following his termination from Barrick. These consist of a BHP pension which he admitted was valued at \$66,000 as of March 2012, and a Manulife RRSP in the amount of \$12,000.

[96] Ms. Squair has registered assets consisting of a TIAA CREF retirement fund in the amount of \$76,891, a Fidelity Investment Account in the amount of \$9,032, and Douglas College pension contributions in the amount of \$12,507.

[97] The total value of the assets in which Ms. Squair has a claim to a half-interest are therefore:

a)

Mr. Squair's collapsed registered funds:

\$240,519

b)

Mr. Squair's BHP pension:

\$ 66,000

c)

Mr. Squair's Manulife RSP:

\$ 12,000

d)

Ms. Squair's TIAA CREF fund:

\$ 76,891

e)

Ms. Squair's Fidelity account:

\$ 9,032

f)

Ms. Squair's Douglas College pension:

\$ 12,507

Total:

\$416,949

[98] Ms. Squair's one-half interest in this sum is \$208,475.

[99] To that sum must be added an amount for equalization of Mr. Squair's U.S. Social Security entitlement, inclusive of Ms. Squair's derivative entitlement. I do not conclude, on the evidence, that the derivative entitlement to which Ms. Squair would be entitled under U.S. Social Security legislation would fairly address the presumptive 50% entitlement she has under British Columbia law. As outlined above, I would assess the amount of \$19,125 as being an appropriate adjustment, if having regard only to the possibility of Canadian taxes;

given the additional risk of U.S. taxes, I find that an appropriate adjustment is the sum of \$15,000. This brings the total of Ms. Squair's share of the family assets to \$223,475.

[100] From that amount, she has already received the sum of \$25,000 towards the retainer of her legal counsel, leaving her having a claim against the assets, of \$198,475.

[101] By way of equalization, Ms. Squair will retain her TIAA CREF fund, the Fidelity account and the Douglas College pension, all with a value of \$98,430.

[102] The balance owed to her of \$100,045 will be paid out of the funds currently held in court.

Costs

[103] The parties have made written submissions in respect of the appropriate costs order that should follow. The parties are given leave to make further submissions as to costs, should they so desire, in light of the findings set out above. Any further submissions of the claimant are to be delivered to the respondent, and to the Court as an attachment to an email message addressed to New Westminster Supreme Court Scheduling, within 30 days of the date of these reasons. The respondent will have 30 days following delivery of the claimant's submission to respond. There will be no right of reply. The parties should not expect that any extensions of these deadlines will be granted.

Conclusion

[104] Out of the funds currently held in court in the amount of \$139,070, Ms. Squair is to be paid \$14,383 in respect of the retroactive basic child support owed by Mr. Squair, \$2,433 in respect of retroactive special and extraordinary expenses, and a further \$100,045 as her share of the parties' unregistered assets, for a total of \$116,861. The balance of \$22,209 is to remain in court pending determination of costs.

[105] The order respecting guardianship and parenting of the children will incorporate the terms outlined above. In addition, the parties may by consent include any further terms they believe to be necessary corollaries to the terms I have stated; if there is disagreement as to same, the parties may apply for further directions.

[106] All remaining claims are dismissed.

"A. Saunders J."

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Prepared on 30 October 2026 · Esheria