
CANADA / JUDGMENT

T.C. v. L.A.

2020 BCSC 1313

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1313 T.C. v. L.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.C. v. L.A.,

2020 BCSC 1313

Date: 20200904

Docket: E18165

Registry: Smithers

Between:

T.C.

Claimant

And

L.A.

Respondent

Before: The Honourable Mr Justice Crerar

Oral Reasons for Judgment

Counsel for Claimant:

Glenford Emerson Greene

Counsel for Respondent:

Lara Joan Branson

Place and Date of Trial:

Smithers, B.C.

August 31, 2020 -

September 4, 2020

Place and Date of Judgment:

Smithers, B.C.

September 4, 2020

I. introduction

- [1] While this family trial started with many issues in dispute, at the end of the day, the primary issues were spousal support and one item of property division.
- [2] As the parties live in a small community, in the interests of the privacy of the two children of the marriage, I have anonymized the parties with letters other than their initials, and avoided unnecessary details that might identify the children through their parents. I will refer to the parties generally as the father, the mother, the daughter, and the son.
- [3] The father is 48 years old. He has been a constable in the RCMP since March 2006.
- [4] The mother is 41 years old. She is a bookkeeper at an accounting firm. She also serves occasionally as a staff accountant and a payroll clerk.
- [5] The key dates are not in dispute. The parties began to live together in a marriage-like relationship on June 15, 2000. They were married on December 16, 2000. They separated on June 1, 2018. There were no periods of separation during their relationship.
- [6] Happily, the issues are relatively simple. As set out below, parenting issues and child support have been agreed upon. The parties are not burdened with considerable debt; nor do they have many assets. They have sold the family house, and the proceeds (\$201,348) are held in Mr Greene's trust account. They are ready for equal distribution to the two parties, subject to orders I will make with respect to property division, retroactive spousal support, and other payment orders.

II. PARENTING

- [7] The parties have two teenaged children: a 17-year-old daughter (born 2003), and a 13-year-old son (born 2007).

- [8] Both parties presented as caring individuals who recognize the importance of their children having an active and ongoing relationship with the other parent. Each praised the parenting of the other in their direct examinations. The mother called the father a "loving and fun Dad," who spent as much time as possible with his children, exposing them to the glorious outdoors of northern British Columbia. The father praised the mother's dedication, care, creativity, and energy in her roles as mother and teacher to the children.
- [9] Commendably, in the course of trial, they reached and signed a consent order with respect to their parenting relationship and duties going forward. The mother offered and agreed to have the children primarily reside with their father, with reasonable access to the children, based upon the children's preferences. The father, in turn, expressed his desire for a meaningful and active relationship between the children and the mother, and vowed to encourage that relationship. The parents will have joint guardianship and joint custody of the children, and will share equally in all of the s. 41 parental responsibilities for the children under s.40(2) of the Family Law Act, SBC 2011, c 25 ("FLA"). Neither party will move the residence of the children without consent of the other party or a court order. Finally, with respect to more specific matters of day-to-day parenting the parties agreed on a variation of the Joyce Model.
- [10] The parties are similarly in agreement on child support and special and extraordinary expenses.
- [11] The mother will pay the father \$700 per month in child support, commencing September 1, 2020, payable on the first day of every month, and continuing for so long as the children are "children of the marriage" as defined in the Divorce Act, RSC 1985, c 3.
- [12] Happily, the children have no significant special or extraordinary expenses. The parties agree that the mother and father will share the costs of special and extraordinary expenses in proportion to their respective incomes under the Federal Spousal Support Advisory Guidelines (the "SSAG"), as I will determine later in these reasons.

III. SPOUSAL SUPPORT

A. Positions of the parties

- [13] The mother argues that she is entitled to spousal support on the basis of both compensatory and non-compensatory (needs-based) models. While at first the mother sought spousal support for an indefinite duration, by the final day of trial, she changed her submission, seeking spousal support for 18 years: the maximum duration in the range suggested by SSAG (the low end of the suggested duration being nine years). As for quantum, she seeks mid-range spousal support of \$1,657 per month based on an income calculated for the father at \$135,624 (if the Court includes in his income the father's VA Pension, as defined, discussed, and determined below). Alternatively, she seeks high-range spousal support of \$1,122 per month, based on the actual income of \$100,853 (if the Court does not include the VA Pension). She usefully provides Divorcemate calculations based upon the SSAG for a range

of monthly payments.

- [14] The father's counsel initially took the position that the mother had disentitled herself from spousal support, based on certain actions that he said constituted a repudiation of the marriage. The father's counsel cited cases such as *Day v. Day*, 1995 CanLii 1669 (BCSC) and *Ungerer v. Ungerer*, 1998 CanLii 4394 (BCCA) as exceptions to the prohibition in the FLA, s.166 and the Divorce Act, s. 15.2, against consideration of spousal misconduct in the issue of spousal support. The father's counsel wished to call the daughter to testify against her mother in this regard. I ruled that such evidence was irrelevant and such inquiries impermissible, given the clear statutory language; the unequivocal statement in *Leskun v. Leskun*, 2006 SCC 25 at para. 20 that "[m]isconduct, as such, is off the table as a relevant consideration"; the fact that there was no allegation that the alleged actions had reduced the needs or means of either party; and the fact that parenting issues were no longer an issue in dispute: 2020 BCSC 1315.
- [15] With that argument out of the way, the father's counsel advised on the penultimate day of the trial that he recognized that the mother is entitled to spousal support, as guided by the SSAG. He argued that the award should be modest, and finite. He pointed to the presently small gap between the mother's income (\$44,425) and expenses (\$51,576), and conjectured that after the distribution of the house proceeds, she would be able to make ends meet. He noted that the mother was soon able to return to the workforce, and that she is not disabled. He encouraged the Court to award spousal support at the mid-point of the SSAG range, and at the low end of duration: nine years.

B. Legal principles

1. Introduction

- [16] The spousal support provisions are found in the FLA, ss. 160-165. Section 161 sets out the objectives of spousal support:
- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
 - (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [17] The Divorce Act sets out the objectives and the factors to be considered for spousal support, in near-identical terms, in s. 15.2.

2. Entitlement to support

- [18] In determining the quantum and duration of spousal support it is necessary to bear in mind the three models of spousal support described in *Bracklow v. Bracklow*, [1999] 1 SCR 420: compensatory, contractual, and non-contractual (needs-based). The first and the last are engaged in the present case.
- a) Compensatory spousal support
- [19] The Divorce Act, s.15.2(4) sets out factors for the court to consider that reflect the compensatory purpose of spousal support:
- (4) In making an order under subsection (1) or an interim order under subsection (2), 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.
- [20] *Moge v. Moge*, [1992] 3 SCR 813, and *Bracklow* set out the principles of compensatory spousal support. The appropriate measure of compensatory support is not assessed by doing a detailed accounting at the end of a marriage to determine what financial "losses" a spouse suffered as a result of expenditures made during the marriage (including the period of cohabitation). Instead, the Court must consider the statutory provisions governing support, the relevant authorities, and the SSAG.
- [21] The case law reinforces the importance of the marital standard of living in lengthy marriages. In *Chutter v. Chutter*, 2008 BCCA 507, the Court described the purpose and rationale underlying the compensatory grounds for spousal 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 not have been 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 wellbeing. In such situations, spousal support may be a way to compensate such economic disadvantage.

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

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

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

[Emphasis added, internal citations omitted.]

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

[11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims

[emphasis in original]

[22] A compensatory award should continue until compensation is achieved even if the spouse has achieved self-sufficiency: Chutter, at para. 79; Tedham v. Tedham, 2005 BCCA 502 at paras. 35-38, 50, 60; Morigeau v. Moorey, 2015 BCCA 160 at para. 37.

b) Non-contractual (needs-based) spousal support

[23] Needs-based support is "grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union." Upon marriage dissolution, it falls on the former partner to meet the needs of a disadvantaged spouse, rather than the state: Chutter at para. 54. "Need" alone may be sufficient to ground a claim for spousal support: Bracklow at para. 43.

[24] The term "need" indicates something more than basic necessities. As stated in Chutter at para. 55:

The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in Myers v. Myers (1995), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

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

[25] Likewise, economic self-sufficiency is a relative concept. As stated in Chutter at para. 56:

The Ontario Court of Appeal in Allaire v. Allaire (2003), 170 O.A.C. 72, 35 R.F.L. (5th) 256, held that self-sufficiency, a spousal support objective primarily related to non-compensatory support (Bracklow, at paras. 41-42), was a relative concept informed by the standard of living previously enjoyed by the parties:

[21] self-sufficiency is not a free-standing concept. It must be seen in the context of the standard of living previously enjoyed by the parties. Where, as here, the economic consequences of the marital relationship were to permanently reduce Ms. Allaire's income, it is inappropriate to consider Ms. Allaire's annual income of \$68,000 as "sufficient" without considering whether Mr. Allaire can financially assist her to live a lifestyle closer to what they shared as a couple.

[26] In the context of a long-term marriage involving a sharing of resources, the concept of "need" should take into account the relative standards of living of the spouses following the marriage breakdown: Yemchuk v. Yemchuk, 2005 BCCA 406 at paras. 41, 48-49.

3. The role of the Guidelines

[27] In Chutter, the Court of Appeal sets out the appropriate use of the SSAG:

- [99] The Guidelines were introduced in January 2005 as a draft proposal crafted by Professors Carol Rogerson and Rollie Thompson for the Department of Justice. The proposal was an attempt to bring some uniformity to the area of spousal support law. In July 2008, the Guidelines were released in their final form. The Guidelines are intended to reflect the state of the law, rather than to change it (Yemchuk, at para. 64; Fisher, at para. 98).
- [100] The Guidelines are advisory only; they are not legislated. Nevertheless, they have been endorsed by the courts in British Columbia as a "useful tool" in determining issues of quantum and duration of spousal support and have been deemed consistent with the law in British Columbia (Yemchuk, at para.64). In *Dunnigan v. Park*, 2007 BCCA 329, 38 R.F.L. (6th) 241, this Court reiterated that the Guidelines were properly to be used as "a guide to a range of awards, rather than as a set figure which must be applied or awarded" (para. 16). Similarly, in *Fisher*, the Ontario Court of Appeal endorsed the application of the Guidelines, and stated that "with experience, the Guidelines will become accepted as a reliable tool for the resolution of many cases" (para. 101).
- [28] In *Lightle v. Kotar*, 2014 BCCA 69 the Court further stated:
- [62] This Court described the appropriate role of the SSAG in *Redpath v. Redpath*, 2006 BCCA 338. Failure to refer to the SSAG may constitute a reversible error; however, substantial deviation from the range of outcomes established by the SSAG must be justified by special circumstances. While there is no necessity for a trial judge to set out the grounds for departure from the SSAG (*Beninger v. Beninger*, 2009 BCCA 458), where there is no apparent cause for doing so and reasons are not given, there is less justification for deference to the exercise of the trial judge's discretion. As Huddart J.A. noted in *Beninger v. Beninger*:
- [28] In my view, the appellant overstates the power of the Spousal Support Advisory Guidelines in her circumstances when she argues the chambers judge was required to apply them unless she justified not doing so. While it is preferable for a court to organize its analysis by reference to the Guidelines as well as the statutory requirements and authorities applying them, neither the Divorce Act nor the authorities require justification for deviation from them. The appellant's proposition does apply to the Child Support Guidelines because of the requirements in s. 17(6.1) and 17(6.3) of the Act to apply the Guidelines and to give reasons for deviating from them where deviation is permitted. Nowhere in the Divorce Act are there comparable provisions requiring compliance with the Spousal Support Advisory Guidelines or reasons for deviating from them. As their name indicates, they are advisory and without statutory effect. That said, they provide helpful advice and this Court has been clear that their advice must be taken seriously and that best practice would include an explanation of any deviation from them.
- [63] The practice of justifying departures from the SSAG was described as more of an obligation than a best practice by Smith J.A. in *Kerr v. Baranow*, 2009 BCCA 111, rev'd in part on other grounds 2011 SCC 10:

- [84] In calculating the amount and duration of spousal support, the jurisprudence requires an application of SSAG unless reasons are provided for why SSAG may not be appropriate: Yemchuk [Yemchuk v. Yemchuk, 2005 BCCA 406], Tedham [Tedham v. Tedham, 2005 BCCA 502].
- [29] Turning to the SSAG themselves, s.8.9 describes the familial situation closest to the present, where the higher income earner, the father, is also the primary custodian and provides the primary residence. This stands in contrast to the more typical scenario where the ex-spouse receiving support is also the primary caregiver of the children:

8.9 A Hybrid Formula for Spousal Support Paid by the Custodial Parent (The Custodial Payor Formula)

The basic formula for marriages with dependent children assumes that the higher income spouse pays both child and spousal support to the recipient parent, who also has sole custody or primary care of the children. The spousal support to be paid must then adjust for the payor's child support payments. The shared and split custody situations may change the math, but both still involve the higher income spouse paying both child and spousal support to the recipient.

A different formula is required where the higher income spouse paying spousal support is also the parent with sole custody or primary care of the children. Now spousal support and child support flow in opposite directions. the without child support formula does not apply, however, as it assumes no dependent children. While we could have left this situation as an exception, with no formulaic solution, it is common enough that we constructed a formula to guide outcomes in this situation.

We chose to start from the without child support formula for custodial payors. In this situation the recipient parent does not have the primary care of children and thus more closely resembles the single recipient in the without child support formula. The primary rationale for the payment of spousal support in these cases will be merger over time, rather than parental partnership. That said, a number of lower income recipient spouses in this situation will continue to play an important role in their children's lives and any formula must be able to adjust in such cases. The other advantage of the without child support formula is ease of calculation, but the formula will have to be modified to back out child support and to take into account tax implications.

Most of these cases will involve older children and longer marriages, where the husband is the higher-income payor and the parent with primary care. In many of these cases, the non-custodial wife may have a sizeable compensatory claim from her past role in child-rearing, which will be reflected in the range for spousal support, and the location of any amount within that range. In these cases involving older children and longer marriages, the children will cease to be children of the marriage within a few years and the wife will cross-over into the without child support formula, as is explained below in Chapter 14 on variation and review. In a subset of custodial payor cases, there will be illness or disability issues for the non-custodial spouses, many of which can be accommodated within the ranges or restructuring, but exceptions will be made in some cases, as discussed below in Chapter 12 below. There is a small minority of custodial payor cases

that involve young children, shorter marriages and husbands claiming spousal support from their wives.

Formula for Spousal Support Paid by Custodial Parent (The Custodial Payor Formula)

1. Reduce the payor spouse's Guidelines income by the grossed-up notional table amount for child support (plus a gross-up of any contributions to s. 7 expenses).
2. If the recipient spouse is paying child support, reduce the recipient's Guidelines income by the grossed-up amount of child support paid (table amount plus any s. 7 contributions).
3. Determine the adjusted gross income difference between the spouses and then quantum ranges from 1.5 percent to 2 percent for each year of marriage, up to a maximum of 50.
4. Duration ranges from .5 to 1 year of support for each year of marriage, with the same rules for indefinite (duration not specified) support as under the without child support formula.

[emphasis added]

C. Discussion and decision

1. Entitlement

- [30] The mother was a stay-at-home mother from 2003 to 2014. She not only provided primary care in the home, but also served as the teacher home-schooling the children in their elementary grades, as desired by both parents. Although the father earnestly and meaningfully contributed to domestic management, the mother was primarily responsible for the cooking, cleaning, laundry, grocery shopping, budgeting, and bill payment. She also played a vital and dynamic role in reducing and managing the family's expenses in an effort to keep family debt in check.
- [31] The challenging idiosyncrasies of the father's work as an RCMP officer, including irregular shift work, long and late shifts, long commutes, and travel, increased the burden on a stay-at-home mother. As a further idiosyncrasy, the family was forced to move and live in not fewer than eight towns as the father was posted at various locations around the province. These two factors made the home-schooling arrangement, on the mother's shoulders, even more important, in order to provide the children with stability and continuity. It also increased her domestic burden, as she was forced to oversee most of the moves, and re-establish eight new homes for her family.
- [32] None of this is to say that the father did not "carry his weight" around the house, to use his phrase, or play a profoundly meaningful role in the upbringing of the children. I accept his evidence in this regard, and accept from his evidence and his demeanour in the stand that he was a caring, loving father who spent every possible moment actively parenting. Indeed, the mother acknowledged that the father contributed greatly to parenting and to the household, as best as he could. But for the purposes of assessing spousal support, the

mother's role was a traditional one, as considered in the case law.

- [33] Even after the children stopped home-schooling, and the mother returned to work in 2014, she remained the primary domestic caregiver for the children and house, given the father's demanding work.
- [34] The combination of these facts make clear that it would have been difficult for the mother to pursue her own career. That said, while the mother would almost certainly have worked but for the couple having children, there was no evidence that she gave up a specific career or ambition by doing so. While she is bright and articulate, she does not have any post-secondary education apart from a few training courses. Her pre-marriage and early marriage jobs appear to have been relatively low-paying; she had to hold down several jobs at a given time. In contrast to the facts in certain other legal decisions, she cannot point to a specific lost or delayed career, professional designation, or income, due to the marriage or the children. This factor distinguishes the present case from the main cases relied upon by the mother, including *MS v MM*, 2015 BCSC 1599 and *MacColl v MacColl*, 2012 BCSC 643, where, incidentally the couples were older and married for longer.
- [35] Parenthetically, the father's situation also differs somewhat from the cases relied upon by the mother. There, the fathers enjoyed career advancement in lucrative fields that would continue to provide them with comfortable lifestyles and stable careers after the breakups of the marriages. Here, the father himself, now with primary care of the two children, will continue to live pay-cheque to pay-cheque. Given his injuries and his apparent job dissatisfaction, as set out below, his future comfort vis-à-vis his ex-wife is less certain than the fathers in the cases relied upon by the mother. Further, just as the couple decided that the mother would stay home, the decision for the father to pursue an RCMP career, with the attendant stresses emphasised by the mother in argument, was a joint decision, for their clear mutual economic benefit. The evidence indicates that the father, to some extent, was and is a reluctant police officer who has suffered physically and psychologically from his duties.
- [36] That said, since the breakup of the marriage, the mother has clearly suffered hardship. She has moved from the family house to an apartment above a downtown store. She has dropped from an effective family income of some \$180,000 to \$44,000. Her expenses considerably exceed her earnings, and she has incurred significant credit card and other debt. She has cut back on food, has lost weight, and subsists largely on oatmeal and other inexpensive foodstuffs. She is relying significantly on parental financial assistance. Her legal expenses are funded by a \$45,000 loan from her father. Her generous and unusual decision not to seek an order that hers be the primary residence for the children was motivated in part by her inability to incur further legal fees.
- [37] It is appropriate to order that the father pay the mother spousal support, based on both the compensatory and needs-based models.

2. Income and the VA Pension

[38] The parties are in agreement on their base incomes:

- a) In 2019 the mother earned \$44,425 from her employment as a bookkeeper.
- b) In 2019 the father earned \$100,853 from his employment as an RCMP constable.

[39] The main point of contention with respect to the calculation of income is whether it should include the father's monthly disability pension that he receives from Veterans Affairs Canada for physical and stress-related injuries incurred at work, pursuant to the Pension Act, RSC 1985, c. P-6, s. 21 (the "VA Pension"). The physical injuries each required an operation. Both physical and psychological injuries have lingering effects.

[40] The father has received this payment since March 2017. The VA Pension is a non-taxable monthly benefit payment, made up of an amount for the father (\$1,396), as well as lesser amounts on behalf of each child (\$181 and \$132); these will disappear when each child ceases to be a dependant. During the marriage, he also received an amount on behalf of the mother as a dependant (\$349); this amount has now ended, upon the father's report to Veterans Affairs Canada of the marital breakdown.

[41] The monthly payments are \$1,749.77 (formerly \$1,710.43). Annually, these total \$20,997.24. Counsel for the mother submits that the operative annual value is \$34,771, grossed up to reflect the fact that the payments are not taxed.

[42] The father, responsibly, used, and continues to use, these payments not for his own purposes or his own treatments, but to cover general family expenses and debts. During the marriage, the payments went into the joint account. He did not segregate these payments in an account nor save them for his own future use, therapeutic or otherwise.

[43] The mother argues that the VA Pension should be effectively considered family income, either expressly, or, alternatively, in the assessment of each spouse's needs and means after marital breakdown. She argues that it was always treated as a form of family income.

[44] The father argues that British Columbia jurisprudence has strongly and repeatedly confirmed that such payments constitute compensation for personal losses, rather than to provide income, and that they should not be considered as income in the spousal support inquiry. He cites *LF v. CGC*, 2014 BCSC 1069 and *Wells v. Campbell*, 2015 BCSC 3 to that effect.

[45] *Lozinski v. Lozinski*, 2017 BCCA 280 surveys the varying treatment by British Columbia and other courts as to whether income from a disability pension may be included as part of a party's income for the purpose of calculating spousal and child support.[1] Various trial courts in British Columbia, Alberta, and Saskatchewan have held that disability pension benefits should not be treated as income for the purposes of calculating support obligations: *Lozinski* at para. 26, and the cases cited therein. Other courts in different provinces have reached the opposite conclusion: *Lozinski* at para. 28.

- [46] Ultimately, the Court of Appeal declined to resolve the issue, as it was unnecessary to determine the issues and facts before it: para. 32. In other words, the pre-Lozinski British Columbia decisions on the issue remain good law.
- [47] The proposition that disability benefits are not to be treated as income finds its source in two separate decisions: *Manuge v. Canada*, 2012 FC 499, and *MK v. RAS*, 2004 BCSC 1798.
- [48] In *Manuge*, the Federal Court was called upon to interpret the meaning of the phrase "monthly income benefits" within an insurance contract. The Court concluded that disability benefits were not captured within this definition because such benefits "are not an indemnity for lost income. Rather, they represent compensation for impairments to the activities in daily living including loss of function and for reductions in the quality of life": para. 38.
- [49] *MK*, on similar logic, concluded that an annuity awarded for non-pecuniary loss was not "income" within the meaning of the Federal Child Support Guidelines, SOR/97-175, because it fulfilled a fundamentally different purpose than an award for lost income. As Wedge J stated at para. 32:

Our tort system is based on the premise that the only means, however imperfect, of compensating an injured plaintiff for loss of amenities of life or the enjoyment of life is monetary damages. We recognize that money can never fully compensate for loss of enjoyment of life, but our legal system does its best to find an equivalent in monetary terms. An award for non-pecuniary loss is thus intensely personal. It is not made in order to provide an income. It is designed to compensate for non-monetary losses.

- [50] Both *Manuge* and *MK* are distinguishable from the present case. *Manuge* was not a family case, but concerned contractual interpretation in an insurance context: *Ste-Marie v. Ste-Marie*, 2013 NBQB 375 at para. 92; *Darlington v. Moore*, 2013 NSSC 103. *MK*, meanwhile, concerned an annuity awarded for non-pecuniary loss, as opposed to monthly disability benefits per se.
- [51] That said, the logic underlying both *Manuge* and *MK* applies equally in this context. Moreover, absent one of the circumstances set out in *Hansard Spruce Mills*, [1954] 4 DLR 590 (BCSC), I am bound by previous decisions of this Court, which have found that disability pensions do not constitute income in this context: *LF; Wells*; *ALP v. ELG*, 2016 BCSC 2180. The argument that earlier decisions may have applied *Manuge* too broadly or did not expressly refer to the Veterans Affairs website documents explaining the purpose of a Veterans Affairs pension is insufficient for me to find the earlier decisions of this court per incuriam, and thus distinguishable. I conclude that the VA Pension is not income for the purpose of calculating support obligations.

[52] It does not follow, however, that the Court cannot consider such benefits in calculating the appropriate quantum of support. While disability benefits do not constitute "income" within the meaning of the Child Support Guidelines or the SSAG, the Court may nevertheless take them into account in assessing the means and ability to pay of a potential payor. As explained in *Rooker v. Rooker*, 2017 ABCA 87 at para. 9:

...Manuge cannot be used to determine whether VAC benefits should be included in income for the purposes of child and spousal support. Rather that determination must be made under the legislation governing its award, specifically the Divorce Act and the Federal Child Support Guidelines (the Guidelines). The question to be determined is whether these payments form part of the means and ability to pay of the payor, a fundamental consideration in determining entitlement to and quantum of spousal support. Similarly under s 1(a) of the Guidelines, one of the stated objectives is the requirement to establish a fair standard of support for children that ensures that they continue to benefit from the financial means of both spouses after separation. It is within that framework that the question must be asked and answered. VAC benefits seen through this lens are means from which support can be paid.

[emphasis added]

[53] The significance of a party's "means" as opposed to "income" differs depending on the circumstances.

[54] Where the parties are in a shared parenting arrangement, the court is required, under s. 9(c) of the Child Support Guidelines, to consider "the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought." This was the case in *Lozinski*, where the Court of Appeal concluded that the trial judge did not err in taking a disability pension into account in calculating the appropriate level of child support in the context of a shared parenting arrangement. *Lozinski* suggests that the receipt of disability benefits, and specifically a Veterans Affairs pension, may be a relevant circumstance in determining whether and in what amount to impute income to a party: para. 36.

[55] The legislation governing spousal support accords a broad significance to the parties' "means" as opposed to their "income." Under the Divorce Act, s. 15.2(4), the court is required to consider "the condition, means, needs and other circumstances of each spouse" in making a support order.

[56] This does not mean that disability benefits should be directly treated as income, wherever the governing legislation permits or requires the court to consider a party's means. Unlike "income", the assessment of a party's "means" is not a mathematical exercise. In this regard, the fact that disability benefits are not intended to replace lost income is a relevant consideration. As a result, the receipt of disability benefits may be accorded more or less significance, depending on all of the circumstances.

- [57] Where a party's "means" are relevant to the determination of support, the correct approach, or a correct approach, is set out in *Lozinski*. There, the trial judge fixed the quantum of child support at the mid-point between the amount corresponding to the payor's with-benefits income, and the amount without:
- [47] Like Mr. *Lozinski*, the judge characterized the VA Pension as disposable "income". However, he did not effectively treat it as income for Guidelines purposes when fixing child support. Had he done so, he would have based the award on the entire grossed-up amount of the VA Pension, but that is not how he proceeded. Rather, he examined the full factual context within which Mr. *Lozinski* receives and uses the VA Pension and, taking those facts into account, adopted Ms. *Lozinski*'s midpoint proposal. Given the breadth of his discretion, I see no error in this approach.
- [58] Similarly, the Court of Appeal endorsed, or at least found no error in, the trial judge's practical approach to the calculation of spousal support:
- [51] I also see no error in the judge's approach to determining the quantum of spousal support. After finding entitlement on both a compensatory and non-compensatory basis, he reviewed the SSAG ranges using the parties' Guidelines incomes, not including the VA Pension. Nevertheless, he recognized that, regardless of its purpose, Mr. *Lozinski*'s receipt of the VA Pension created an increased discrepancy in the parties' respective standards of living, which is a relevant factor for consideration. In my view, his choice to award spousal support at the higher end of the SSAG spectrum as a result was well within his discretion: *Redpath v. Redpath*, 2006 BCCA 338 at paras. 40-42. Given the broad definition of "means" in the case law, the judge was entitled to consider the VA Pension in determining the appropriate quantum of spousal support. I see no material error, serious misapprehension of evidence or error in law that would justify disturbing the spousal support award.
- [59] The parenting arrangement in the present case partly differs from that in *Lozinski*: while the present parents nominally have joint guardianship and joint custody of the children, and a shared parenting arrangement, the children will almost certainly spend most of their time with the father, at least for the immediate future. That arrangement may change over time, and both parties agree that it would be desirable for the children to spend more time with the mother. But, in contrast to the true shared parenting scenario that formed the exception in *Lozinski*, the father will be, for both of the children, the custodial payor, to use the term in the SSAG.
- [60] I acknowledge that the mother enjoyed and relied upon the additional funds represented by the VA Pension in the course of the marriage, and that an argument can be made that she should continue to receive some benefit, based on both compensatory and non-compensatory entitlement to spousal support.
- [61] In the end, however, I will exercise my discretion not to include the VA Pension directly in the father's income, or in directly fixing appropriate spousal support, except in one regard, as discussed below. The father should not be punished for his generous use of the VA

Pension for the benefit of the family rather than his own therapeutic uses. It is clearly tied to and designed to compensate him personally for his specific work injuries, regardless of actual use. Those physical and psychological injuries are ongoing and will likely be long-term. Finally, the fact that the father is the primary custodian, and will for practical purposes likely contribute more to the expenses of the children, inclines the Court to follow the tenor of the British Columbia cases pre-Lozinski and not include it to the credit of the mother and detriment of the injured father. Instead, I will consider the availability of those funds to the father in general terms, below, in the overall consideration of the appropriate quantum and duration of spousal support.

3. The father's potential career change

- [62] A final complication with respect to income is the father's future employment plans. The father said that he plans to leave the RCMP. He says that he reluctantly joined, in order to increase the family income. The moves and stress and other aspects of the job have negatively impacted himself and his family.
- [63] In early 2019 he started applying for other jobs, to no avail. Just last week he applied for a local job posting. He does not know the salary of that job. Nor does he know his prospects of receiving that position.
- [64] There are indications that although the father intends in good faith to change careers, this ambition was only expressed and pursued to any extent in the home stretch prior to trial. In his recent two-paragraph July 21, 2020 sworn financial statement, the father listed only one anticipated potential significant change. He said nothing of a potential career or salary change. The only anticipated change mentioned was the potential purchase of the home which he was renting. Further, the mother testified that the father did not express a serious intention or desire to change careers during the marriage. She identified the father's counsel's letter, just two weeks before trial, as the first overt expression of this intention.
- [65] This potential change in careers is too uncertain and tenuous at this point to affect calculation of the father's income or assessment of needs and means with respect to spousal support. While I do not encourage or hope for this outcome, if and when the father does change careers, it may constitute a material change of circumstances that may allow re-evaluation of spousal support at a future date.

4. Quantum and duration of spousal support

- [66] I turn to the quantum and length of spousal support. Again, counsel for the mother has presented helpful Divorcemate calculations based on the SSAG. Based on the father's actual income of \$100,853, as I have determined above, these yield a figure of spousal support of \$842 (low point) to \$982 (mid-point) to \$1,122 (high point) per month, for a duration of 9 to 18 years from the date of separation, all subject, as always, to future variation.

- [67] I have canvassed and recognized above the compensatory and economic relief objectives of support in this case.
- [68] The objectives of a clean break and independence are also important, and likely attainable in the present case.
- [69] The marriage-like relationship lasted some 18 years: not a short marriage, but not a particularly long one either, compared to marriages in the jurisprudence that lead to awards of permanent or lengthy spousal support.
- [70] The father is the primary custodian, and will likely remain so in the near future. This arrangement will assist the mother in seeking greater self-sufficiency and independence. Further, the two teenaged children will likely be to some extent independent within the next six to ten years, and the parents correspondingly more independent.
- [71] The mother is relatively young. While she only has a high school education, she is intelligent and articulate, with natural skill with numbers. In addition to her bookkeeping skills and experience, she also has some Internet skills, and has been a prolific blogger for many years. She was obviously a creative and proficient teacher. She was an energetic worker before the marriage, and during the early stages of the marriage, holding multiple and varied part-time jobs. She continues to work long hours when necessary. I am confident that she can and will achieve self-sufficiency either through further education, career advancement, a change of careers, or other means.
- [72] The case law and SSAG also point to spousal support for a specified rather than indefinite, period. The mother falls short of the so-called "rule of 65" that would suggest indefinite or permanent support: see *Domirti v. Domirti*, 2010 BCCA 472 at para. 43, *Cassidy v. McNeil*, 2010 ONCA 218 at para. 70, and SSAG, s. 7.5.3. That is, her age at time of separation (39) plus the years of the marriage-like relationship (18) equals 57 years.
- [73] In the circumstances, I order that the father pay the mother monthly spousal support for fourteen years, slightly longer than the time she was out of the workforce, and reflecting the rough number of years she was primarily focused on the children. In terms of duration, this is slightly longer than the mid-point of the SSAG spectrum of 9 to 18 years.
- [74] The payment amounts and schedule will be as follows:
- a) September 2020 - September 30, 2024: \$1,482 per month;
 - b) October 1, 2024 - September 30, 2034: \$982 per month.
- [75] The initial monthly payments reflect the high end of the SSAG based on an income of \$118,238 attributed to the father. In this, I am following the practical approach of the trial judge in *Lozinski*, who used the mid-point between the RCMP officer father's base income and that income supplemented with the VA Pension. This is to ease the mother's transition away from married life, wherein she enjoyed the benefits of that VA Pension as effective family income, while still recognizing the non-income status of the VA Pension under the

binding jurisprudence, and the fact that it is personal compensation directly attributable to the father's injuries. The second stage reflects the middle SSAG amount, based on the father's actual income of \$100,853.

- [76] This stepped schedule will, it is hoped, encourage self-sufficiency. At the same time it seeks to ease the burden of transition, and also recognize the mother's sacrifices in raising the children and not continuing work. The spousal support order is, as always, subject to review upon material changes in circumstances, such as illness of a party or a child, a new partner, loss of employment, and other significant changes in the lives or finances of either party that affects their ability or need for support.

IV. Retroactive spousal support

- [77] The mother seeks an order that the father pay her retroactive spousal support based on the Guideline income calculated for the father. As set out above, the father's income is \$100,853.
- [78] FLA, s. 170(b) allows the court to make retroactive spousal support orders. It provides, in part: "In an order respecting spousal support, the court may provide that spousal support be paid respecting any period of time before the date the application for the order is made".
- [79] DBS v. SRG, 2006 SCC 37 sets out the court's jurisdiction to order retroactive support. The enquiry is a holistic one, based on all circumstances. The primary factors in this analysis include: (1) delay in bringing the application; (2) the conduct of the payor; (3) the circumstances of the children; and (4) hardship: DBS at paras. 100-125, 133; Gil-Eldh v. Branyik, 2018 BCCA 98 at para. 10.
- [80] While DBS concerned retroactive child support, it also applies to applications for retroactive spousal support: Ducharme v. Rempel, 2016 BCCA 198 at para. 17.
- [81] The general rule is that the period of retroactive child support payments will reach back to the date of effective notice. Effective notice need not be a formal court application, but refers to any indication by the recipient parent that support should be paid or re-negotiated: DBS at paras. 118, 121.
- [82] The mother proposes the date of notice to be December 1, 2018, just before she filed the counterclaim seeking child and spousal support. I agree that this is an appropriate starting point, as she is also "rounding down" the end date for retroactive payments to the first day of the month, in a manner that benefits the father by two weeks. With an eye to the DBS factors, there was not excessive delay: the filing of a counterclaim is a typical time to raise a demand for spousal support.

- [83] I agree that it is appropriate for the father to pay retroactive spousal support, based upon the conclusions reached above with respect to support generally. These appropriately start after the breakdown of the marriage, and after the mother has provided notice that she is seeking support. The evidence is clear that the mother suffered considerably from the breakdown of the marriage, and the deprivation of support from her husband's RCMP income.
- [84] Accordingly, based on the SSAG and the father's income of \$100,853, as set out above, I order that the father pay the mother \$16,932 in retroactive spousal support for the period from December 1, 2018 to August 1, 2020. From that payment will be deducted the following amounts to the credit of the father:
- a) \$8,190 in retroactive child support owed by the mother to the father;
 - b) \$4,500 (50 per cent of the mortgage payments) solely paid by the father from December 2018 to May 2019; and
 - c) \$1,200 in costs awarded to the father by Punnett J on April 18, 2019 (with respect to the father's successful application to sell the family residence).
- [85] In short, the father will pay the mother \$3,042 in retroactive spousal support. I also agree and order that the retroactive spousal support payment will be made out of the father's half-share of the net proceeds of the sale of the family residence. I confirm that by this order and by those credits to the father, the mother has paid retroactive child support and no longer owes retroactive child support, and that she has paid the costs award and is no longer obliged to pay that amount to the father.
- [86] I further order that the lump sum payment of retroactive spousal support will neither be included in calculating the mother's income, nor be deducted in calculating the father's income for the year he paid it.

V. DIVISION OF PROPERTY

- [87] Counsel for the mother helpfully prepared a Scott Schedule setting out the proposed division of property, along with the contrary position of the father.
- [88] Again, the parties largely agreed on most of the assets, including the bank accounts (each keeps their own), debts (each responsible for their own), RESP (for the children), personal items including clothing, jewelry, and recreational property (each keeps their own), the CPP credits (to be divided equally), and the RCMP pension.
- [89] More specifically, the Canada Pension Plan credits will be divided equally. Either party may apply for the division of unadjusted pensionable earnings under the Canada Pension Plan after the first anniversary of their separation or on a divorce, whichever event occurs first: that is, immediately.

- [90] The father's RCMP pension will be divided equally, pursuant to Part Six of the FLA and the Pension Benefits Division Act, SC 1992, c 46, Sch II, for the period from March 20, 2006 (when he began working for the RCMP) to June 1, 2018 (the date of separation). The pension division is a complicated and important matter. I agree with the proposal of the mother that a pension lawyer, Colin Galinski, or another person agreed upon by the parties, or ordered by the Court, be retained to assist the parties with that issue. The parties will equally share the cost, including, up front, any required retainer. That exercise will occur within six months of these reasons, or within three months of the father leaving the RCMP, whichever occurs first, all subject to modification by the parties or court order.
- [91] The parties also agree that the net proceeds of the sale of the former family residence be divided equally between the parties.
- [92] That leaves two categories of assets to be divided: a remote recreational property, as well as a boat and two cars.

A. The recreational property

- [93] The father has a one-eighth interest in a family property owned by his mother and stepfather while alive. He shares that property with his siblings and other family members.
- [94] The parties agree that the property itself is excluded property, having been brought into the marriage by the father, and not being divisible in any case.
- [95] That said, its increase in value during the relationship is divisible family property: FLA, s. 84(2)(g); *AMD v. KRJ*, 2015 BCSC 1539 at para. 51; *McCarthy v McCarthy*, 2018 BCSC 1210 at para. 77.
- [96] The father argued that FLA, s. 84(2)(g) must be read in light of FLA, s.96(b)(ii):

Division of excluded property

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

- (b) it would be significantly unfair not to divide excluded property on consideration of
- (ii) a spouse's direct contribution to the preservation, maintenance, improvement, operation or management of excluded property.

- [97] There was some evidence adduced that the father made larger maintenance contributions to the recreational property than his relatives, but no particular evidence about his contribution relative to that of the mother, who also spent much time at the property during the marriage with the family.
- [98] In any case, I do not see FLA, s.96(b)(ii) as relevant. The mother is not seeking to divide the excluded property, or claim an interest in the property itself. She is simply seeking her half of the increase in value in the excluded property: a claim expressly contemplated in FLA, s. 84(2)(g). For the same reason, I do not give force to the father's further argument that the

mother cannot claim her share of the increase in value of real property that is held in joint tenancy: such an interpretation would not be consistent with the broad definition of property in FLA, s. 83 and 84, or the presumption of equal entitlement in FLA, s. 81.

- [99] Counsel for the father also argued that no value can be placed on the property: the father's primary right to the property is as a family member. He argued that it would be unfair for the wife to enjoy the increase in value of the property, when the father himself would not be able to sell the property and thereby enjoy the same increase in value. He also argued that an oral family arrangement or trust agreement of sorts may exist among the family members.
- [100] The best evidence before the Court is the 1999 land transfer document, confirmed in a 2020 land title search, that the father owns a one-eighth interest in the property, along with his sister, and that cousins and other family members own the remaining interest. The unparticularized and vague reference to a potential oral family agreement about real property does not displace the application of the plain wording of FLA, s. 84(2)(g). The mother is entitled to a half share in the increase in value of the father's interest in the property
- [101] What is the value of the property? The challenge is that its value has certainly dramatically increased from the start of the marriage-like relationship. In 2001 its assessed value was \$66,100.
- [102] No formal valuation has occurred, and no such evidence was adduced at trial.
- [103] The mother argues that the 2020 BC assessment value should be used: \$303,100.
- [104] Counsel for the father argues that the assessment figure does not reflect its true value. For contrary evidence, he points to a real estate listing for another recreational property on the same river, but considerably less remote than the property in question. That property is listed for \$284,500, considerably below its assessed value of \$354,500.
- [105] I do not find the real estate listing to be helpful. I do not have sufficient evidence to compare the listed property with the one before the Court, or conjecture why it was listed below assessment value. The property could suffer from an unknown infirmity despite its proximity to town; or the vendor may have been desperate to sell.
- [106] Absent other evidence, I agree that the BC assessment value is the appropriate figure to use, being the best and most relevant evidence before the Court. In this, I am guided by *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 60-61 and its application by Milman J in *AJE v TBW*, 2017 BCSC 1657:
- [142] For purposes of assessing values of the real property assets, I have relied on the evidence I have before me, which for the investment accounts consists of accounts statements and, with respect to the real property, consists, for the most part, of property assessments. While such assessments are not optimal evidence of market value, our courts have found

them to be admissible and of some use in determining the value of property in family cases, either where the parties agree on the value or where there is no other evidence available: see *Chung v. La*, 2011 BCSC 1547 at paras. 77-83; *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 60-61; *C.H.T. v. P.V.L.*, 2015 BCSC 419 at para. 126; *Lawrence v. Mulder*, 2015 BCSC 2223 at para. 95. In *Dosanjh*, the Court noted that:

- [60] While trial courts have, with some frequency, admitted property assessments as evidence of property value in family law cases, they have generally done so either with the agreement of the parties, or, alternatively, where no other evidence of value has been tendered (e.g. *Chung v. La*, 2011 BCSC 1547). Where proper expert evidence of value has been tendered, the courts have been reluctant to consider property assessments as evidence (see, for example, *Hall v. Mougan*, 2009 BCSC 645).
- [61] In family law cases, a court is often faced with having to assess the value of real property in a situation where neither side is clearly subject to any burden of proof. Rather, the court is simply required to estimate the value of property for the purpose of dividing a family asset. It is not surprising, in such situations, that a court may "grasp at straws" in an attempt to reach a just result. It is simply a matter of doing the best job possible with limited evidence.
- [107] In short, the increase in value of the father's one-eighth share is \$37,887.50, to be equally divided, after deduction of the father's interest in the initial excluded value of the property (\$8,262.50). Thus the father will pay the mother \$14,812.50, representing her half interest in the increase in value of the recreational property. Again, those funds will be paid to her out of the father's half-share of the net proceeds from the sale of the family residence.

B. The cars and boat

- [108] The parties are in agreement on the value and distribution and credits with respect to the two vehicles and the boat. The parties agree that they should each retain their primary vehicle: the father his truck (later traded in by him; valued at \$6,000), and the mother her 2006 VW Jetta (valued at \$2,000).
- [109] The parties also agree that the father will buy out the mother's interest in the boat. The net value of the boat is \$1,000, after paying off a \$13,000 loan from the proceeds of the sale of the house.
- [110] Again, the combined asset equalization payment of \$9,000 from the father to the mother will come from the father's half-share of the house sale proceeds.

VI. DIVorce

- [111] Both parties seek a divorce. The usual inquiries of the divorcing parties were made in examination. I grant the divorce on the usual terms.

VII. conclusion

- [112] The father and mother came off at trial as eminently reasonable and earnest people who, notwithstanding their past unhappiness, recognize each other's skills and love as parents. In their direct and cross examinations, nothing vicious was said about the other. The mother's proposal and concession, allowing the children to have primary residence with their father, was rare in family law, and laudable. As stated, they reached agreement on this potentially most acrimonious issue in the course of trial.
- [113] Given the reasonableness of the individuals, I express disappointment that this matter ever proceeded to the cost and aggravation of trial: with assistance and cooperation, these individuals, who are in no position to afford five days of trial, ought to have been able to resolve this in advance. Alternatively, given the lack of credibility conflicts, this matter could have been resolved on a two-day summary trial.
- [114] While the mother did not receive the full amount sought, she has generally been successful in this trial. Absent further submissions, and I do not encourage them, given the limited resources of the parties, she is entitled to costs of this litigation, on the ordinary scale.
- [115] On the main issue of spousal support, the statutory and well-established case law surveyed above would have made clear before trial that the mother, a stay-at-home mother, would be entitled to spousal support. Those authorities would also have made clear that an argument based on spousal misconduct would fail. The costs award also recognizes that she has made extraordinary concessions and considerably shortened this trial by allowing the children to stay at their father's house as the primary residence.
- [116] The terms of these reasons should be committed to an entered order as soon as possible, so that the parties may divide up the house sale proceeds, and proceed as best as they can with their independent lives. If for any reason the parties cannot agree upon the terms of the order they may schedule a teleconference hearing before me at 9 AM, on the earliest reasonable date. That said, I do not anticipate or encourage such a hearing, and I invite a costs submission if there is any unreasonable withholding of agreement by any party or counsel with respect to the terms of the order or otherwise.

"Crerar, J"

- [1] In Lozinski, the father was also an officer in the RCMP. The VA Pension was similar to that in this case. Each of Sergeant Lozinski and Ms. Lozinski earned approximately \$30,000 more than the parties in the present case. There were three children, of whom one predominantly lived with the father, with the other two spending equal time. The length of the marriage-like relationship was identical to the present: 18 years.

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