
CANADA / JUDGMENT

T.M.V. v. M.H.V.

2020 BCSC 78

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 78 T.M.V. v. M.H.V.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

T.M.V. v. M.H.V.,

2020 BCSC 78

Date: 20200121

Docket: E172311

Registry: Vancouver

Between:

T.M.V.

Claimant

And

M.H.V.

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for the Claimant:

P. Boles

Counsel for the Respondent:

D. Halkett

N. Mulholland

Place and Dates of Trial:

Vancouver, B.C.

December 10-14, 2018,

November 18-20 and 29, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 21, 2020

INTRODUCTION

- [1] The claimant, T.M.V., and the respondent, M.H.V., separated on August 1, 2016 after a 17-year marriage. The major issues in this trial were competing claims for spousal support and the claimant's assertion that proceeds from the sale of certain corporate shares are her excluded property.
- [2] The claimant is 45 and the respondent is 47. They have two daughters who are now 14 and 17. The parties agreed at some point after separation that the children would spend alternate weeks with each parent, although there is some dispute about the extent to which that arrangement has been followed. Neither party has paid child support since separation.
- [3] During the marriage, the parties purchased and renovated a series of houses that then produced rental income before being sold. The respondent did the renovation work on those properties while the claimant earned income as a sales representative for pharmaceutical or medical supply companies.

FAMILY PROPERTY

- [4] At the time of separation, the parties owned a not-yet-completed house on a view property in North Vancouver that was intended to become the family home (the "Family Home"). They also owned a rental property in Vancouver, a cabin in Porteau Cove on Howe Sound (the "Cabin"), and two lots in Mexico.
- [5] The three British Columbia properties have been sold, with sale proceeds placed in trust. After payment of capital gains tax and two interim distributions totalling \$1.3 million, approximately \$1.256 million remains to be divided. There is no evidence of the value of the Mexico properties and counsel agree they should be sold with the proceeds divided equally.

Excluded Property

- [6] The claimant's grandfather owned shares in Parkland Fuel Corporation, which he received in payment for the sale of his own business to that company in or about 2007. Following his death in 2011, his widow gave 15,000 shares to each of four grandchildren, including the claimant, who had not been actively involved in the business. Documents confirm that shares were transferred to the claimant and other family members in January 2012.
- [7] The claimant's father testified that he gave share certificates to the claimant after receiving them from his brother, who was executor of the estate. He said the respondent was not present when he delivered the certificates.
- [8] The respondent says the share certificates came with a card addressed to both him and the claimant. There is no other evidence of such a card. The claimant, her father, and her uncle all deny there was any card. The claimant's father and uncle both say their mother was not in the habit of sending cards on any occasion. The respondent admits he met the claimant's grandmother only once, although he says he spoke to her many times by telephone.
- [9] The shares were later sold for \$248,000. The claimant testified some of those funds were used to pay down a mortgage on a property the parties owned at the time. That property was later sold, with the funds used to help with building costs at the Family Home. The balance went to two lines of credit that were mostly associated with building the Cabin.
- [10] Section 84 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] defines family property to include property owned by at least one spouse at the date of separation, but s. 85 excludes certain kinds of property. The relevant portion of s. 85 is:
- 85 (1) The following is excluded from family property:
- ...
- (b) inheritances to a spouse;
- (b.1) gifts to a spouse from a third party
- ...
- (2) A spouse claiming that property is excluded property is responsible for demonstrating that the property is excluded property.
- [11] As pointed out by the Court of Appeal in *Venables v. Venables*, 2019 BCCA 281 at para. 92, the FLA does not expressly address the consequences of excluded property or property derived from it changing ownership during the relationship, as when it is transferred into joint ownership of the two spouses.
- [12] In *H.C.F. v. D.T.F.*, 2017 BCSC 1226, Justice Voith described the principle of tracing excluded property:

- [78] A further factor is relevant. Accompanying the excluded property provisions of the FLA is a "tracing" provision that takes into account the fact that property is often deployed in various ways over time. Paragraph 85(1)(a)-(f) of the FLA lists the items that constitute excluded property. Paragraph 85(1)(g) creates the "tracing" requirement. It reads, "[excluded family property is] property derived from property or the disposition of property referred to in any of paragraphs (a) to (f)" [emphasis added]. If property can be "traced" from excluded property, it remains excluded. If not, then it becomes divisible family property under the FLA. [Emphasis in original.]
- [13] In Venables, the Court concluded the intention of the spouse who transfers ownership is key:
- [95] What emerges from these authorities, of relevance to the current appeal, is that the intention of the spouse transferring ownership is key in determining whether the property transferred from one spouse to the other remains excluded property or becomes family property. If it is found that the spouse who transferred the property intended that the property be a gift to the other spouse, and there is no agreement that it is to remain excluded property, then it will become family property: V.J.F. at paras. 74-79; Namdarpour at para. 46.
- [14] Because s. 85(2) places the onus of proof on the party claiming exclusion, it follows that he or she must provide cogent evidence of his or her intention at the time the property or proceeds from its sale were transferred into joint ownership or used for a joint purpose.
- [15] The evidence is clear that the claimant received the shares as a gift from her family intended for her alone. They were clearly excluded property at the time and would continue to be excluded property if the claimant still held them or other property clearly derived from them. The question is whether the exclusion was lost when proceeds of the share sale were used to pay joint family debts associated with family property. Put another way, did the claimant intend to give half of the sale proceeds to the respondent?
- [16] In Namdarpour v. Vahman, 2019 BCCA 153, funds received by one spouse in settlement of a personal injury action (which would also be excluded property under s. 85) were deposited into a joint account. Funds were later withdrawn from the account for a down payment on a house. The Court of Appeal considered the extent to which the presumption of advancement applied to cases under the FLA. The Court defined the presumption:
- [25] The presumption of advancement is an evidentiary presumption whereby in certain circumstances a gratuitous transfer is presumed to be a gift. The presumption has been recognized to operate in the circumstances of a gratuitous transfer from a married husband to his wife and from a parent to his or her minor child: Pecore v. Pecore, 2007 SCC 17 at paras. 27-41; Kerr v. Baranow, 2011 SCC 10 at para. 20. It is most useful where evidence of the transferor's intention in making the transfer is unavailable or unpersuasive, especially where the transferor is deceased: Pecore at para. 23.

- [17] The Court held at para. 33 that although the presumption continues to apply under the FLA, it should not be overemphasized. The starting point should always be the transferor's intention:
- [35] The Supreme Court of Canada considered the presumption of advancement in *Pecore*, in the context of a contest between children over whether funds in a joint account should form part of an estate. The Court explained that regardless of the legal burden, the trial judge's role is to ascertain the transferor's actual intention. The presumption of advancement will determine the result only when evidence of the transferor's intent is unavailable or unpersuasive. ...
- [18] The Court then set out the required analysis to determine the transferor's intention:
- [40] These decisions emphasize that evidentiary presumptions operate only where the trial judge is unable to reach a conclusion about the transferor's actual intention at the time of transfer. In my view, the following principles can be discerned from the case law: (1) a conclusion about intention is only to be determined after consideration of "all the circumstances" of the case; (2) those circumstances include both direct evidence and, importantly, circumstantial evidence; (3) those circumstances include evidence that arose subsequent to a transfer if relevant to the transferor's intent at the time of transfer, although such evidence will be reviewed critically; and (4) only where a judge is unable to reach a conclusion about the transferor's actual intention will the evidentiary presumption operate.
- [19] On the facts of the case before it, the Court held there was evidence on which the trial judge could find that the spouse who received the settlement funds had a "donative intent" based on the way the joint account into which they were deposited was operated:
- [46] I am not suggesting that merely depositing funds to a joint account in any given case is alone persuasive evidence of donative intent. In this case, there was a pattern of activity in the use of the joint account, by both parties, with respect to excluded property, together with income-splitting on the use of the family asset purchased with the proceeds. In every case it is incumbent on the trial judge to ascertain the intention with which a transfer is made, using both the direct and circumstantial evidence available. The judge did this when he concluded there was donative intent.
- [20] *Namdarpour* was recently followed in *Wickstrom v. Ng*, 2019 BCSC 1685. In that case, one party had contributed more than the other to the purchase of the family home, using money he said had been given to him by a relative to use for his education. He argued his excess contribution was excluded property. Justice Armstrong found he did not meet the burden of establishing the exclusion:

[158] The evidence supports the claimant's assertion that the parties pooled their funds (albeit different amounts) to purchase the house in their joint names without an agreement or intention that their respective contributions would not be gifts. There was no agreement or actual confirmation by the claimant that the respondent intended to keep his money. Both parties put their funds into a jointly owned property that was intended to be their family home into the future.

...

[160] ... Overall, [the respondent] took no steps to keep these funds separate or document his intention to keep his contribution treated separately from the equity in the home.

[161] I find that the parties respective contributions were for the purposes of the marriage and, the respondent has not met the burden of proof of establishing there was no intention to make a gift: see *Pisarski v. Piesik*, 2019 BCCA 129 at para. 48. The proceeds of sale of the matrimonial home will be shared equally.

[21] Similarly, although the claimant in this case has met the burden of showing the shares were her separate property when they were received, she has given no evidence of any steps to keep the sale proceeds separate or to document an intention to treat them separately. I find the manner in which the funds were used to retire family debt is, in the absence of evidence to the contrary, evidence of donative intent at the time the funds were contributed.

[22] The claimant has failed to show any portion of the funds now held in trust from the sale of family property is her excluded property.

Withdrawals from Joint Accounts

[23] From the date of separation until substantial completion of the Family Home in April 2017, the claimant and respondent continued to pool their funds and operate joint bank accounts and joint lines of credit. The claimant says the respondent's withdrawals of money from those sources, after allowing for expenses related to the construction at the Family home, exceeded her own by \$48,285. She submits the respondent must account to her for half of that amount.

[24] The parties voluntarily continued their joint financial enterprise for eight months following separation. They each had access to joint funds and made no arrangement limiting access or requiring accounting from one another.

[25] More important, during this period the respondent was still working on completing a valuable piece of family property to the exclusion of earning income. The claimant remained employed at the time. Had the respondent not withdrawn those funds to meet his personal expenses, he would have a valid claim for retroactive spousal support for that period. In these circumstances, the claim for repayment must fail.

Conclusion on Family Property

- [26] I understand there are no remaining family debts, other than approximately \$6,250 the claimant owes or has had to pay pursuant to income tax re-assessments. The respondent agrees this is a family debt. If there are any further issues about family debt, the parties will have leave to speak to the matter. I also understand there is no issue about division of the claimant's pension and Registered Retirement Saving Plan.
- [27] After payment of any agreed upon family debts that remain outstanding, the funds remaining in trust from the sale of the three British Columbia properties will be divided equally between the parties, subject only to any amounts owing for spousal or child support, which are assessed below. The Mexico properties will be sold and the proceeds divided equally.

SPOUSAL SUPPORT

- [28] Each party seeks spousal support from the other. The considerations in making an order for spousal support and the objectives of such an order are set out in ss. 15.2(4) and (6) of the Divorce Act, R.S.C. 1985 (2nd Supp.), c. 3:
- (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.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
 - (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
 - (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [29] The well-established grounds for entitlement to spousal support were summarized by the Court of Appeal in *Chutter v. Chutter*, 2008 BCCA 507:

- [47] Based on the statutory provisions and the case authorities, the Supreme Court of Canada has identified three grounds for entitlement to spousal support: (1) compensatory support, which primarily relates to the first two objectives of the Divorce Act; (2) non-compensatory support, which primarily relates to the third and fourth objectives; and (3) contractual support (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 at paras. 15, 41-42, 44 R.F.L. (4th) 1).

The Claimant's Claim

- [30] During the marriage and since separation, the claimant has worked in pharmaceutical or medical supply sales for a series of companies. She was unemployed for about five months after her position was eliminated in the fall of 2018, but began work with her current employer in late January 2019.
- [31] Her current annual salary is \$115,000, with the possibility of a bonus of up to \$25,000. She is also working to obtain a masters degree, which she said most people now entering her field have and which she would likely need to advance to any position higher than her current one.
- [32] In 2017, her last full year with her previous employer, the claimant had employment income of a little more than \$136,000. In 2018, her income, including severance pay and employment insurance, was \$168,000. Her income for the 11 months she worked in 2019, including bonus, was \$118,000.
- [33] Although the claimant acknowledges her statutory obligation to "become and remain self-sufficient" and there is no doubt that she has done so, she seeks an award of \$50,000 in lump sum retroactive spousal support on compensatory grounds. She argues entitlement arises from the fact that she was the primary caregiver for the children, took maternity leave from her work when each child was born, and suffered post-partum depression. She says her child care responsibilities restricted the jobs she would otherwise have accepted or applied for and prevented her from upgrading her education as she is now doing.
- [34] There is no doubt a former spouse who is self-sufficient may still be entitled to spousal support as compensation for disadvantage resulting from the marriage or its breakup. However, this usually presumes and is based on a corresponding advantage obtained by the other spouse.
- [35] For example, in *Chutter*, the Court at para. 78 referred to *W. v. W.*, 2005 BCSC 1010, where Justice Martinson said:
- [78]
- [16] Therefore, in a typical case, the primary earner has three benefits: the benefit of a share of the assets; the benefit of having had children; and the benefit of a higher income earning ability because of full participation in the work force, substantially unencumbered by child care responsibilities. The secondary earner has two of these benefits: the benefit of a share of the assets accumulated; and the benefit of having had children. However, that spouse

often does not have the same income earning ability at the time of separation because of the role played in the marriage. It is that disadvantage, and the concurrent advantage to the other spouse, that can be addressed by a compensatory spousal support award. [Emphasis added in Chutter.]

- [36] At para. 53, the Court also referred with approval to Martinson J.'s statement in *W. v. W.* that after a long marriage, the result of an award of spousal support will likely be rough equivalency of standards of living.
- [37] On the facts before it in *Chutter*, the Court found the appellant was entitled to spousal support based on the impact the relationship had on her earning capacity:
- [82] ... The appellant's role in the marriage reflected the parties' joint decision that her career would be secondary to the respondent's and secondary to her role as wife and mother. As a consequence of their respective roles in the marriage, the appellant's earning capacity has been negatively affected, and conversely, the respondent's earning capacity has been enhanced. In cases such as this, the courts have recognized that the fact that the wife continues to earn a reasonable income post-separation does not disentitle her to spousal support. ...
- [38] In this case, the parties made a joint decision that the claimant's career would be, to some extent, limited by child care responsibilities. However, they also made a joint decision that the respondent would devote his time to renovating or building their investment and other properties rather than pursuing an outside career. The respondent currently has a much lower income than the claimant, although I impute further income to him below. Based on his imputed income and the claimant's actual income, there is or should be a rough equivalency in standards of living and no advantage to the respondent that corresponds to the claimant's deprivation.
- [39] The lump sum compensatory award the claimant seeks is comparable to an award for lost earning capacity in a personal injury case. I have been given no authority for the application of that approach to a retroactive award for spousal support in circumstances where no corresponding advantage to the other spouse has been shown.

The Respondent's Claim

- [40] The respondent seeks spousal support on both compensatory and non-compensatory grounds. Prior to the marriage, and from the time he was a teenager, the respondent worked with his father in a residential renovation business. Although he has experience in many aspects of construction work, he is not a certified journeyman in any specific trade and has never worked for any contractor other than his father.

- [41] He says that during the marriage, he built wealth for the family by renovating the investment properties and, later, building the Cabin and the Family Home. He has no post-secondary education and says he is no longer physically capable of the kind of heavy labour he has done all his adult life.
- [42] The respondent says the only outside income he earned during the marriage came from a small construction business he operated for a few months in 2012 and did fewer than ten small projects building sun decks or stairs.
- [43] Counsel for the respondent likens his position to that of a woman who gives up a career or educational opportunities to raise children and/or work in a family business, then is left with no marketable qualifications or experience at the end of a long marriage.
- [44] During the last years of the marriage, the respondent worked on building the Family Home on a previously undeveloped site. He did some site preparation work in 2013 and excavated the site in 2014, operating an excavator that had been bought for that purpose. He was still building the house at the time of separation and completed it, except for some finishing work in the basement, by April 2017. The respondent lived in the house until it was sold in November 2018, while the claimant lived in rented accommodation.
- [45] The respondent admits he made no real effort to look for employment for more than two years after he completed the Family Home. Even then, in the fall of 2019, he says his efforts consisted of informal inquiries through a job search website. He has produced no documentary evidence of those inquiries.
- [46] In October 2019, shortly before the trial resumed, the respondent began work as an estimator for a siding company owned by his niece's husband. He says he is paid \$30 an hour, or about \$50,000 a year, and is still on probation. He has not produced pay stubs or an employment contract. There is no evidence he applied for any other jobs before taking this one or that he compared the pay to what might have been available elsewhere.
- [47] The only income the respondent earned before taking his present job was \$14,250 that he and the claimant agreed he would be paid from family funds to finish the basement at the Family Home and an additional \$5,500 for repairing a deck for a friend of a friend. All of that work was done in or around the middle of 2017.
- [48] The respondent says he has only worked with his father and then on his and the claimant's properties, leaving him with limited ability to earn income because he has no employment history and no formal training or qualifications. He also says he is no longer physically capable of heavy construction work as a result of lower back and neck pain as well as reduced dexterity due to arthritis in his hands. The claimant says the respondent never complained during the marriage about any condition that prevented him from doing construction work.

- [49] The respondent relies on the opinion of Dr. Viem Nguyen, a physiatrist who examined him in June 2018. Dr. Nguyen's report quotes the respondent as saying he stopped construction work because of "progressively worsening neck and back pain".
- [50] Dr. Nguyen attributes much of this reported pain and resulting disability to cervical spondylosis (degenerative change in the neck with associated narrowing of the spinal canal). He says the condition is likely to worsen with age, but its progress can be slowed by avoiding overhead activities and repetitive neck movements. Dr. Nguyen concludes:

Based on his known cervical spondylosis at C3/4 with moderate narrowing of the neuroforaminal and spinal canals, combined with the moderate to severe degenerative changes involving his left hand and feet, it is unlikely he would be able to resume and tolerate the full scope of his prior work duties in construction.

Furthermore, as was already mentioned in this report, returning to his previous work would place him at increased risk for progression of his degenerative changes, which in the case of his cervical spine, would increase the risk for development of weakness, sensory loss, and paralysis involving his limbs.

As such, based on his identified diagnoses, he is likely to remain permanently disabled from his previous work in construction.

- [51] The difficulty with Dr. Nguyen's opinion is that it is largely based on the assumed presence of spondylosis, which was referred to in a radiologist's report of an MRI scan. Dr. Nguyen agreed on cross-examination that he did not review the scan and relied on the radiologist's report.
- [52] The interpretation of an MRI scan or x-ray and the identification of any condition revealed on it is a matter of expert opinion. Dr. Nguyen's opinion is therefore based on the expert opinion of the radiologist, which was not before the court. In *Firman v. Asadi*, 2018 BCSC 2437, Justice Verhoeven described the admissibility of imaging records:
- [30] With respect to the imaging records, that is MRI and X ray and so on, the main objection to the evidence is that the statements made in the records are not admissible as opinions. I accept the argument that in order to adduce the records as opinions, the requisite requirements of notice of opinion evidence under the Supreme Court Civil Rules is required, and that those prerequisites were not complied with in this case.
- [31] So those records are admissible for facts only, not for opinions. Therefore the fact that the imaging was done, or the fact that the plaintiff was sent for or chose to have a study done, then to the extent that such facts may be relevant to the issues in the case, they are admissible for that purpose, but not as expert opinion evidence.

- [53] It is common for medical experts to base their opinions on radiological findings that are reported in clinical records. In most cases, direct evidence from the radiologist is not required because those findings are not in issue. But where there is no agreement, the court can only accept the radiological diagnosis as true if there is a properly served expert report from the radiologist, whose attendance for cross-examination may be required. There was no such agreement or report in this case.
- [54] While it would have been preferable for claimant's counsel to make the absence of agreement clear before trial, the fact remains there is no admissible evidence of the existence of the condition that is fundamental to Dr. Nguyen's opinion. I therefore can give little weight to that opinion.
- [55] Dr. Nguyen did recommend treatment of the respondent's reported pain through intramuscular stimulation and trigger point injections, as well as a guided exercise program with a personal trainer or kinesiologist. In the year and a half since he saw Dr. Nguyen, the respondent has followed none of these recommendations.
- [56] That said, I accept that some three decades of construction-related work has probably left the respondent with some physical symptoms. Michael Kane, a physiotherapist who performed a functional capacity evaluation of the respondent in July 2018, says this is typical for aging construction workers, but stated:
- in the evaluator's experience, these individuals can remain productive whether directly as journeyman or, by assuming a lead hand or supervisory role. This latter designation takes advantage of their considerable experience while significantly reducing the physical demands.
- [57] In his testing, Mr. Kane said the respondent showed difficulties or potential limitations with sustained stooping or low level positions, arm activity above chest level, and lifting of weights from ground level, all of which are among the activities that may be required of a construction labourer. However, Mr. Kane said the respondent appears to believe he is more limited than the testing showed. He recommended that "some degree of caution be utilized when interpreting Mr. [V's] subjective reports."
- [58] Mr. Kane concluded that: " while Mr. [V]'s assertion that he cannot perform the types of work he has in the past is supportable, he is capable of gainful employment within his field of experience."
- [59] The claimant put forward a number of job postings she collected from websites for positions in construction management or sales, presumably on the assumption those were the kind of positions Mr. Kane alluded to. The annual salaries offered ranged from \$130,000 to \$170,000.

[60] The respondent said he has never worked in those kinds of supervisory positions and lacks some of the requisite skills. That evidence would have more weight if the respondent had given evidence of actually applying for such positions and being rejected. For more than a year after receiving the recommendation of his own expert, Mr. Kane, the respondent did nothing to look for the kind of work Mr. Kane suggested or to pursue any of the additional training that he speculates he would need.

[61] The respondent was also assessed by a psychologist, Dr. Wilbert Reimer, in July 2018. Dr. Reimer was accepted as qualified to give opinion evidence as a psychologist, but not as a vocational expert. However, he reports the respondent told him he would be interested in working in sales, including real estate, as a conservation officer, or as a financial advisor. Most of those jobs would likely require some further education or training, but again the respondent has done nothing to pursue that training or to obtain information about what training programs are available.

[62] The starting point for determining income under the Spousal Support Advisory Guidelines [SSAG] is the definition of income in the Federal Child Support Guidelines [FCSG]:
Namdarpour at para 120; Chutter at para. 111. The FCSG include s. 19(1)(a), which reads:

19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

(a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;

[63] In the context of child support, the principles to be applied in imputing income were described by Martinson J. in *Hanson v. Hanson*, [1999] B.C.J. 2532 (S.C.):

14 ...

1. There is a duty to seek employment in a case where a parent is healthy and there is no reason why the parent cannot work.
2. When imputing income on the basis of intentional under-employment, a court must consider what is reasonable under the circumstances. The age, education, experience, skills and health of the parent are factors to be considered in addition to such matters as availability of work, freedom to relocate and other obligations.
3. A parent's limited work experience and job skills do not justify a failure to pursue employment that does not require significant skills, or employment in which the necessary skills can be learned on the job. While this may mean that job availability will be at the lower end of the wage scale, courts have never sanctioned the refusal of a parent to take reasonable steps to support his or her children simply because the parent cannot obtain interesting or highly paid employment.

4. Persistence in unremunerative employment may entitle the court to impute income.
 5. A parent cannot be excused from his or her child support obligations in furtherance of unrealistic or unproductive career aspirations.
 6. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income.
- [64] I find it was reasonable for the respondent to not seek work and continue accessing joint funds until he finished building the Family Home at the end of March 2017. But the evidence is overwhelming that he has been intentionally unemployed or under-employed in the almost three years since then.
- [65] The respondent made no effort to look for work or to obtain any additional training or qualifications if he thought that was necessary. He has failed to prove he is physically disabled from working in construction. Although he lacks formal trade qualifications, the respondent has extensive experience in residential construction and I accept the evidence of his own expert, Mr. Kane, that supervisory positions are likely available to someone with his background.
- [66] I find that if the respondent had pursued supervisory positions in the construction field, he would likely have been successful, although he may have had to begin in lower paying positions and perhaps supplement supervisory work with more "hands on" jobs from time to time.
- [67] There is no specific evidence of what the respondent could earn in that kind of work. The claimant has provided evidence of supervisory jobs being advertised at salaries up to \$170,000, but that is not evidence the respondent would have been a suitable candidate for those specific jobs. However, the lack of evidence is largely due to the respondent's failure to seriously seek employment and he must bear the burden of that uncertainty.
- [68] I accept it may have taken the respondent some time to find employment and he may have had to begin in lower paid positions while perhaps also taking steps to obtain more formal qualification or training in specific areas.
- [69] The respondent recently began to work at a job paying \$50,000 a year. I find that if he had looked for work immediately after April 1, 2017, he would likely have been able to begin earning income in that range, with a gradual increase from that point. Had he done so, he would likely be earning an income equivalent to that of the claimant by now.
- [70] I therefore impute a current income to the respondent of \$115,000 a year, the same amount as the claimant's base wage. For the period from April 1, 2017 to January 1, 2020, I impute an average income of \$70,000 a year.

Conclusion on Spousal Support

- [71] The claimant's claim for retroactive spousal support is dismissed. The respondent is entitled to retroactive spousal support for the period from April 1, 2017 to January 1, 2020, based on his imputed average annual income of \$70,000 and the claimant's average annual income of \$121,000 during that period. That support will be at the low end of the SSAG range for those incomes, reflecting the fact that the respondent lived rent-free in the Family Home for more than half of the relevant period. I will leave it to counsel to perform the necessary SSAG calculations, with liberty to apply if they are unable to agree.
- [72] I have imputed a current income to the respondent of \$115,000. On that basis, I find that there is a rough equality in standard of living and the respondent is capable of being self-sufficient, with no ongoing disadvantage from the marriage or its breakup. His claim for ongoing spousal support is dismissed.

CHILD SUPPORT

- [73] The parties have agreed to equal sharing of parenting time. Section 9 of the FCSG reads:
- 9 Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [74] The claimant says the reality has been something less than equal sharing. She says she has kept detailed calendars on this point, showing which days both girls were with the respondent and which days one or the other of them was with him by herself.
- [75] The claimant prepared a summary for 2018 and 2019 showing that the two girls were together with the respondent less than 40% of the time--26% in 2018 and 36.7% in 2019. But when the times when only one of the girls was with the respondent are added, the 40% threshold in s. 9 was met in respect of both of them in 2018 and one of them in 2019.
- [76] Although I accept the claimant's summary as being generally accurate, such record-keeping is not necessarily determinative. In *Berry v. Hart*, 2003 BCCA 659, the Court of Appeal cautioned against strictly adding up time spent with each parent:
- [9] One must also ask, considering that this approach may satisfy only the law of unintended consequences, whether the minutiae of such record keeping really determines whether s. 9 of the Guidelines applies. Rarely can anything be measured with precision. Even science recognizes that all measurements are subject to a margin of error.

- [10] In my view the issue is a matter of judgment not amenable to simply a time accounting exercise. I consider that in determining whether the threshold level for application of s. 9 is met the question is whether the paying parent spends such a sizeable percentage of time with a child or children that, on any reasonable view of the evidence and considering the advantage that may accrue to a child in spending the occasional additional day, part day or hour with a parent, one can say reasonably that the 40 percent or more level is achieved. It follows, in my view, that a court may assess child-parent time as meeting the s. 9 criteria without a tight accounting. That assessment should be made by considering the broader context of the parenting arrangement. It perhaps bears mentioning, further, that simply finding that a parental regime comes within s. 9 does not compel an automatic reduction in child support. That determination must be made considering all of the criteria in ss. (a) to (c) of s. 9.
- [77] In view of the parties' stated intention to share parenting equally and the claimant's calculation showing that the respondent did have at least one of the children at least 40% of the time, I find this to be an appropriate case to apply the shared parenting approach in s. 9.
- [78] The starting point in those circumstances is the amount to be paid to the parent with the lower income, based on the difference between the two incomes. Although that is to be modified based on the factors set out in paras. (b) and (c) of s. 9, I have not been given evidence to properly make that analysis. The basic set off approach must therefore apply.
- [79] I have found that for the period from April 1, 2017 through December 2019, the claimant had an average annual income of \$121,000 and I have imputed an average income of \$70,000 to the respondent. That translates to \$795 a month or \$26,235 in retroactive child support owed by the claimant.
- [80] However, the respondent was also required to contribute to s. 7 expenses for the children during that period and did not do so. The older child participated in synchronized swimming at a high level before recently switching to competitive rowing, while the younger child plays basketball. Both children have required tutoring and there have been some dental expenses.
- [81] The claimant put forward evidence of expenses totalling \$37,360 to the end of 2018. I have been given no specific number for s. 7 expenses in 2019. The respondent did not take issue with any specific expenses at trial, based on his position that he had no income from which to contribute. At the close of trial, I was advised that counsel would attempt to agree on which expenses were properly payable under s. 7, and advise me accordingly, but it appears from subsequent correspondence that they were unable to reach complete agreement.

- [82] I find the respondent must contribute to s. 7 expenses for the period up to January 1, 2020 in proportion to his income--his income being the amount I have imputed for that period plus the retroactive spousal support. As I have left it to counsel to calculate the amount of retroactive spousal support, those calculation will also produce a total amount that can be compared to the claimant's average income of \$121,000 in order to determine the respondent's share.
- [83] For ongoing special expenses, the respondent will contribute half of the cost, based on my imputation of income roughly equal to that of the claimant. Generally speaking, those ongoing s. 7 expenses will include any reasonable continuing costs for recreational activities, tutoring, and medical or dental expenses, plus post-secondary education expenses beginning after the older daughter graduates from high school in June 2020.
- [84] They will not include the expenses the older daughter incurs in operating the car she was given by the claimant. The evidence is she was also given an older vehicle by the respondent's parents that she does not use. She has been given the responsibility of selling that vehicle and should be expected to do so, using the proceeds to meet her vehicle operating expenses.
- [85] If the parties remain unable to agree on what expenses are properly payable under s. 7 or on the proper amounts, they may apply to speak to the matter.
- [86] The parties have agreed to equal parenting time, although they recognize the children have reached the age when they will likely make their own decisions about where they will stay from time to time. As I have imputed income to the respondent roughly equal to that of the claimant, there will be no ongoing child support payable by either party.
- [87] For purposes of any further applications or proceedings, the above awards of spousal and child support are made pursuant to the Divorce Act. The parties will exchange income tax returns by June 1 of each year that either child remains a child of the marriage under the Divorce Act.

OTHER MATTERS

- [88] Both parties seek a divorce based on having lived separate and apart since August 1, 2016 and there will be a divorce order on the usual terms.
- [89] The respondent's counsel stated in argument that he is seeking reimbursement for certain storage costs he has incurred for storage of furniture from the Family Home. I recall no evidence on that issue and make no order about it.
- [90] As success has been divided, each party will bear his or her own costs.

"N. Smith J."

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