

CANADA / JUDGMENT

Verbonac v. Thompson

2025 BCSC 2364

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Supreme Court of British Columbia

DECIDED

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2025 BCSC 2364 Verbonac v. Thompson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Verbonac v. Thompson,

2025 BCSC 2364

Date: 20251201

Docket: E49981

Registry: New Westminster

Between:

Garth Stephen John Verbonac

Claimant

And

Jennifer Carla Thompson

Respondent

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Claimant:

K. Dhahan

A. Mihailovic

Counsel for the Respondent:

E. Witzman

Place and Dates of Hearing:

New Westminster, B.C.

August 6, 2025

Place and Date of Judgment:

New Westminster, B.C.

December 1, 2025

- [1] Following a 14-day trial in early 2024, I released reasons for judgment in January 2025 dismissing the bulk of the respondent's Counterclaim against the claimant, including her claim for spousal support, property division, and damages for arising from an alleged assault that took place on the day the parties physically separated, based upon my finding that the proceedings were commenced outside the two-year limitation period set out in s. 198(2) of the Family Law Act, S.B.C. 2011, c. 25 [FLA]. Further, I allowed the respondent's claim for retroactive child support and made orders respecting ongoing child support reflective of what I determined to be the claimant's income.
- [2] Throughout the over eight years of litigation, the claimant made various offers to settle the litigation. It is fair to say that each of those offers provided the respondent with a better result than what was achieved at trial.
- [3] At the conclusion of my reasons, I invited the parties to return before me to make submissions on the question of costs. In addition to the issue of costs, the claimant seeks repayment of a \$125,000 advance for anticipated litigation costs (the "Advance"), paid to the respondent in accordance with a February 23, 2024, order of Mr. Justice Majawa made pursuant to s. 89 of the FLA (the "February 2024 Order"), as well as all spousal support paid by him pursuant to a consent order made at a Judicial Case Conference in 2016 (the "JCC Order").
- [4] On that same date as the February 2024 Order, Majawa J. allowed an amendment to the claimant's pleadings which dramatically changed the outcome and focus of the litigation; the claimant pled a limitation defence, alleging the claims brought under the FLA were commenced beyond the limitation period for unmarried parties.
- [5] On August 6, 2025, I heard the parties' submissions. What follows are my reasons in respect of the matters raised: (i) costs; (ii) repayment of spousal support paid pursuant to the JCC Order; and (iii) the claimant's entitlement to a return of the Advance.

The Background

- [6] The reasons for judgment in this high conflict matrimonial proceeding are indexed at 2025 BCSC 96. The history of the litigation is described at paras. 14 through 27 of those reasons, as follows:
- [14] Each of the parties filed separate Notices of Family Claim ("NOFC") on December 8, 2015, shortly following the claimant's removal from the property. The proceeding commenced by the claimant has continued; the respondent's NOFC was, presumably, discontinued. The respondent's Response and Counterclaim was filed in January 2016. In it, as in her original NOFC, she alleged August 2013 as the date of separation.
- [15] The assets in issue, briefly summarized earlier, are all in the name of the claimant. They include the property, an alleged interest in a North Vancouver condominium registered primarily in the name of the claimant's daughter, savings, RRSPs and the claimant's interest in a personal services corporation through which he provides services to the clinic where he practices family medicine.
- [16] The respondent brought little by way of monetary value into the relationship and has little of value in her own name now.
- [17] Since the commencement of these proceedings and after the parties' physical separation from one another in 2015, Elizabeth Verbonac passed away and her joint interest in the property passed to the claimant.
- [18] By order of Justice Majawa, made February 23, 2024, the issues of property division and spousal support were bifurcated from the issue of parenting time so as to accommodate the earliest possible date on which the trial could begin so as to deal with outstanding financial claims.
- [19] Nine years have passed since the parties' physical separation. In that time, and during the respondent's occupancy, along with the children, the property has increased significantly in value.
- [20] Pursuant to an order made by consent at a JCC in early 2016, the claimant has paid support for the respondent and, initially, three children: Austin, Brooklyn and Kyle. Shortly after Austin reached 19, the claimant ceased paying support for all three children; the amount payable was adjusted to reflect two children. Save for this downward variation, the amount of support, despite the claimant's increased income, has not been revisited.
- [21] The support paid under the consent order from the JCC was \$1,384 monthly for the children and \$709 monthly for the respondent. The claimant's income, as set out in the order, was \$69,766.

- [22] In addition to the support paid to the respondent, the claimant has maintained the majority of expenses connected with maintaining the property, including property taxes, insurance (until recently) and various repairs. The total expenses paid, according to the claimant, exceed \$100,000. He has also paid extraordinary expenses for the children, including tuition, extracurricular activities and medical expenses which, according to the claimant's evidence, are in excess of \$150,000. The respondent did not dispute either assertion.
- [23] In the nine years since the commencement of the proceeding, the matter has been scheduled for trial on eight occasions. All have been adjourned; some at the instance of the respondent for want of legal assistance and some because of valuation/disclosure issues.
- [24] Each blames the other for the adjournments. The claimant notes the respondent, the two children of the relationship, together with Austin, continue to live rent free at the property. It is acknowledged by the respondent there is no scenario in which she could retain the property (assuming an interest in it) given its value now exceeds \$3 million. The excluded portion of the property is a contentious issue but, at a minimum, it is the 2006 purchase price of approximately \$1.2 million.
- [25] Since the commencement of the current proceeding, each has made substantive amendments to their pleadings. The claimant has remained steadfast in his position that the marriage-like relationship, which forms the basis for the respondent's entitlement to relief under the FLA, ended in December 2012; approximately three years before the commencement of this proceeding.
- [26] In his original NOFC, the claimant sought a determination of family property, an unequal division of the family property and parenting time with the children. As a result of an amendment sought and granted by Justice Majawa, the claimant now argues the respondent's claims are statute-barred pursuant to s. 198(2) of the FLA, given the proceedings were not commenced within two years of separation (regardless whether such occurred in December 2012 or August 2013).
- [27] At the commencement of the trial, the respondent was granted leave to amend her pleadings to allege the separation occurred November 22, 2015.
- [7] For the question of costs, it is important, in my view, that the claimant dramatically altered the focus of the litigation at a late date; the focus was changed from "how much" the respondent was entitled to by way of property division and spousal support to a question of whether she had any entitlement at all.
- [8] The litigation had been underway for over eight years before the amendment was sought. During that time, the usual pre-trial steps took place; document exchange, examinations for discovery, and the collection of expert reports, all premised on the assumption that the parties, although unmarried, were spouses within the meaning of the FLA.

- [9] Apart from financial issues, significant parenting issues arose. Expert reports were prepared in respect of allegations of parental alienation.
- [10] The matter was scheduled for trial on multiple occasions and adjourned for a variety of reasons. Both parties bear some "blame" for the adjournments.
- [11] The respondent, at various times throughout the litigation, was unrepresented. She sought and obtained adjournments to obtain counsel. Other adjournments were occasioned by the absence of financial information needed to value the claimant's personal corporation.
- [12] Allegations were made of late or incomplete disclosure by the claimant. I need not conclude whether they were of substance other than to point out it was only at trial, in April 2024, that there was a draft report as to the value of the claimant's personal corporation. Putting aside the changed focus of the trial as to the respondent's entitlement to share family property, it is difficult to see how the trial could have proceeded in the absence of this information.
- [13] The respondent testified at trial that she spent most of an inheritance received post-separation on legal fees. She repeated that assertion in an affidavit before at the costs hearing. The claimant has not challenged it.

The Limitation Defence

- [14] In their initial pleadings, both parties asserted a date of separation more than two years prior to the commencement of the Notice of Family Claim. Neither referenced s. 198(2) of the FLA which reads:

(2)A spouse may start a proceeding for an order under Part 5 [Property Division] to divide property or family debt, Part 6 [Pension Division] to divide a pension, or Part 7 [Child and Spousal Support] for spousal support, no later than 2 years after,

(a)in the case of spouses who were married, the date

(i)a judgment granting a divorce of the spouses is made, or

(ii)an order is made declaring the marriage of the spouses to be a nullity, or

(b)in the case of spouses who were living in a marriage-like relationship, the date the spouses separated.

- [15] Coincidentally, both parties commenced their claims the same day in December 2015.
- [16] The claimant alleged the parties separated in December 2012, while the respondent alleged August 2013.
- [17] There is no dispute that the parties physically separated on November 22, 2015, following a dispute which resulted in the claimant's removal by police from the former matrimonial home.

- [18] The claimant's Notice of Family Claim initially sought an unequal division of family property but, after the respondent filed a Response and Counterclaim, the claimant denied the respondent's entitlement to spousal support.
- [19] The respondent's pleadings were amended at least once to add the claimant's mother to the proceedings, given her joint ownership in the matrimonial home. There was no amendment sought as to the date of separation pleaded until the respondent was granted leave to amend her pleadings on the first day of trial in response to the February 2024 amendment granted by Majawa J.
- [20] Both parties had a number of different counsel throughout the course of the litigation.
- [21] In 2021, the respondent, through then counsel, served a Notice to Admit on the claimant asserting, for the first time, that the date of separation was not August 2013, but instead November 22, 2015, being the date the parties physically separated after an admitted altercation at the former family residence.
- [22] The claimant did not file a response to the Notice to Admit within the time limit provided under the Supreme Court Family Rules, B.C. Reg. 169/2009 and, accordingly, required an order to withdraw the deemed admission and to reassert his position that the parties' separation occurred in December 2012.
- [23] I pause to note the parties were unmarried, making the date of separation a crucial point once the limitation defence had been raised by the claimant.
- [24] The claimant was allowed to withdraw the deemed admission and to amend his pleadings on February 23, 2024, to raise the limitation period contained in s. 198(2) of the FLA. Additionally, a bifurcation of the issues was ordered between issues related to the children and the financial issues, allowing the trial could proceed on the scheduled April 2024 dates without further adjournment. The Advance was also ordered.
- [25] The claimant complied with the order and the Advance was made, allowing the respondent to pay counsel to represent her at the trial.
- [26] At the commencement of the trial in April 2024, I allowed the respondent's application to amend her pleadings to assert the same date of separation as set out in the notice to admit, being November 15, 2015, as the date of separation. The trial then proceeded to its conclusion in late August 2024.
- [27] Reasons were issued in January 2025. Those reasons dismissed substantially all of the respondent's Counterclaim, save for the recalculation of child support. That recalculation resulted in a payment to her by the claimant of approximately \$100,000. The claimant's application for occupational rent, repayment of expenses incurred by him maintaining the family residence for the respondent's approximate nine-year occupation of those premises post separation, as well as reimbursement for overpayment of s. 7 expenses were all dismissed.

Costs

- [28] On the basis of his acknowledged success at trial, the claimant seeks costs, repayment of approximately 9 years of spousal support paid under the JCC Order, and return of the Advance.
- [29] Costs are sought: firstly, as special costs; secondly, as double costs based upon delivery of a number of offers made by the claimant throughout the course of the litigation, all of which exceeded the respondent's eventual monetary compensation; or, alternatively, costs at Scale B cost.

Special Costs

- [30] The claim for special costs is founded upon my conclusion that the respondent's evidence, on some key matters, was unreliable.
- [31] In *D.M.F. v T.J.D.*, 2022 BCSC 731 at para. 17, Justice Lyster refused to award special costs against a party in a family law matter who provided unreliable evidence at trial:
- [17] Notwithstanding Mr. D.'s litigation conduct, I am not persuaded that an award of special costs is appropriate for the May 5-7, 2021 hearing. As in *El Issa v. Batista*, 2022 BCSC 643, some of the matters Ms. F. relies upon in support of her application for special costs go beyond that hearing, and they are not appropriately considered in connection with this application. The standard for an order for special costs is high, requiring conduct that is outrageous, scandalous, or reprehensible, as discussed in *Garcia v. Crestbrook Forest Industries Ltd. No. 2*, 1994 CanLii 2570 (BCCA) at para. 17. While Mr. D.'s conduct in providing unreliable and incredible evidence, and making what were found to be unsupported allegations of child abuse, has been improper, I am not persuaded that his conduct in this hearing, standing alone, is sufficient to meet the standard for special costs. In this regard, I have also taken into account the fact that I already ordered Mr. D. to pay Ms. F. \$2,500.00 for the benefit of the children.

[Emphasis added.]

- [32] Similarly, in *Athwal v. Walia*, 2021 BCSC 608 at para. 93, Justice Tammen refused to award special costs against a party whose evidence was found to be unreliable at trial:
- [93] The respondent is entitled to costs. I have considered the submissions made by the respondent that she should have special costs, and I decline to order them. I found the claimant to be an unreliable witness, and concluded that he lied during his testimony in this trial. However, the balance of his behaviour during this litigation was not the type of conduct that warrants judicial rebuke. Indeed, it was the sort of conduct one sees frequently in family law cases. Rejection of a party's evidence is not sufficient reason to order special costs.

[Emphasis added.]

[33] I was not referred to any authority which persuades me that findings on credibility/reliability should result in an award of special costs.

Double Costs

[34] As to the issue of double costs, the claimant correctly points out that all of the Offers to Settle he presented exceeded the respondent's recovery.

[35] The salient portions of Rule 11-1 of the Rules are set out below:

(4) The court may consider an offer to settle when exercising the court's discretion in relation to costs.

Cost options

(5) In a family law case in which an offer to settle has been made, the court may do one or more of the following:

- (a) deprive a party of any or all of the costs, including any or all of the disbursements, to which the party would otherwise be entitled in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- (b) award double costs of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle;
- (c) award to a party, in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle, costs to which the party would have been entitled had the offer not been made;
- (d) if the party who made the offer obtained a judgment as favourable as, or more favourable than, the terms of the offer, award to the party the party's costs in respect of all or some of the steps taken in the family law case after the date of delivery or service of the offer to settle.

Considerations of court

(6) In making an order under subrule (5), the court may consider the following:

- (a) whether the offer to settle was one that ought reasonably to have been accepted, either on the date that the offer to settle was delivered or served or on any later date;
- (b) the relationship between the terms of settlement offered and the final judgment of the court;
- (c) the relative financial circumstances of the parties;
- (d) any other factor the court considers appropriate.

[36] I note Rule 11-1 is discretionary.

- [37] While there is no doubt the judgment obtained by the claimant was more favourable than that proposed in the various offers made prior to February 2024, they were not, if you consider the status of the pleadings, specifically the absence of the limitation defence, offers that "ought reasonably to have been accepted."
- [38] The respondent's reasonable expectations as to the litigation's outcome were then based upon the amount of recovery - not whether she would recover at all.
- [39] The claimant's income was a live issue throughout the proceedings, given he only worked two to three days per week.
- [40] The claimant's personal corporation had not yet been valued as at the date of all offers made prior to amendment to the pleadings and the bifurcation of parenting issues from the highly contentious parenting issues.
- [41] Given the result the claimant obtained was premised on what, in effect, was a totally different proceeding than what had been the claimant's position prior to the 2024 amendment, it would be unreasonable to award the claimant double costs based on any of the pre-amendment offers.
- [42] Stated differently, on the claimant's pleadings until the 2024 amendment, coupled with the lack of valuation of the claimant's personal corporation, it was not unreasonable for the respondent to reject the offers made prior to February 2024.
- [43] On April 5, 2024, 10 days prior to the trial's commencement, the claimant made a further offer (the "April 2024 Offer"). The issue of the limitation clearly put into issue, for the first time, the respondent's personal entitlement to recovery under the FLA.
- [44] Again, there is no dispute the eventual award to the respondent was significantly below that offered her in the April 2024 Offer.
- [45] By the time the April 2024 Offer to Settle was received, the respondent, according to her testimony at trial and her sworn statement in her affidavit submitted at the costs hearing, had spent substantially the whole of her \$450,000 inheritance on the litigation. The offer, when totalled, was less than the respondent had invested in the litigation throughout the 8 prior years, where the only issue in respect of her claim under the FLA was the scope of her recovery.
- [46] Again, having gone "all in" on the litigation for 8 years, remembering the parties did not physically separate until November of 2015, I cannot conclude it was unreasonable to decline the Offer to Settle even in the face of the limitation defence.
- [47] Were I wrong in that conclusion, I refer back to Rule 11-1(6)(c) and (d), which provides I can consider:
- (c) the relative financial circumstances of the parties; and

(d) any other factor the court considers appropriate.

[48] Hence, even if I were to conclude the refusal was unreasonable, the respondent's current financial situation, as described in her August 1, 2025 affidavit, coupled with what I consider to be an egregious delay in raising the defence that resulted in the award, provide ample reason for me to exercise my discretion and deny the claimant double costs for the period following the April 2024 Offer.

Costs at Scale B

[49] I turn now to the claimant's alternative claim for costs at Scale B.

[50] As a general rule, the substantially successful party in litigation is entitled to the costs of the litigation: *Gold v. Gold*, [1993] B.C.J. No. 1792 (C.A.) at paras. 21-22. That rule, however, is not inviolate.

[51] In *S.A.M. v. J.A.M.*, 2017 BCSC 2348, commencing at para. 7, Justice Bernard noted the following governing legal principles:

[7] The governing legal principles are not in contention. They are as follows:

- (a) The costs of a family law case must be awarded to the successful party, unless the court otherwise orders (Rule 16-1(7)) of the Supreme Court Family Rules [Rules];
- (b) The "successful party" is the party who has achieved substantial success at the trial/hearing (*Fotheringham v. Fotheringham*, 2001 BCSC 1321; *Marquez v. Zapiola*, 2014 BCCA 35);
- (c) The court's discretion to "order otherwise" must be exercised judicially, bearing in mind a non-exhaustive list of factors that includes hardship, earning capacity, the purpose of the particular award, the conduct of the parties in relation to the litigation, and the importance of not upsetting the balance achieved by the court in relation to the substantive issues (*Gold v. Gold* (1993), 106 D.L.R. (4th) 452 (B.C.C.A.));
- (d) The party who asks the court to "order otherwise" bears the onus to persuade the court why it should do so (*S.D.W. v. C.W.W.*, 2006 BCSC 162);
- (e) Financial hardship, without more, is not a sufficient basis for the court to exercise its discretion to depart from the usual rule that successful parties are entitled to their costs (*S.D.W. v. C.W.W.*, *supra.*; *K.D.P. v. A.R.K aka R.K.*, 2012 BCSC 1025; *Brown v. Kucher*, 2016 BCSC 194);
- (f) Where an offer to settle a family case has been made, the court may award double costs for all or some of the steps taken after the date of delivery or service of the offer (Rule 11-1(5) of the Rules);
- (g) As a general rule, an award of double costs should be made against a party who did not accept an offer to settle that should, in all the circumstances, have been accepted (*Hartshorne v. Hartshorne*, 2011 BCCA 29); and,

- (h) In determining whether a double costs order should be made, the court may consider any factor the court considers appropriate, including whether the offer was one that ought reasonably to have been accepted upon receipt or at any later date, the relationship between the offer and the judgment, and the relative financial circumstances of the parties (Rule 11-1(6) of the Rules).
- [52] The respondent concedes that on balance, despite her success on various issues as described above and my comments which follow concerning dismissal of the claim for spousal support, the claimant has achieved substantial success in the litigation, given that the heart of the matter was the financial issues arising under the FLA. Those issues engaged the majority of court time and were, with the exception of the retroactive adjustment to child support payable to the respondent by the claimant and the denial of occupational rent, decided in favour of the claimant.
- [53] As per S.A.M., the Court retains the discretion to "order otherwise", but that discretion must be exercised judicially.
- [54] Here, the respondent says no costs should be awarded to the claimant because: (a) the respondent is in no position to pay costs given her financial position; (b) an award of costs would detrimentally impact the respondent's ability to provide for the parties' two children who, as at the date of the reasons for judgment, remain in the respondent's care; (c) while both children are approaching the age of majority, both are estranged from the claimant; and (d) the claimant's last-minute shift in position which, I agree, dramatically altered the trajectory of this litigation.
- [55] Up until the claimant altered his position in Summer 2023 to raise a limitation issue for the first time under s. 198(2) of the FLA, which was 7.5 years after the commencement of the Notice of Family Claim, the respondent reasonably expected to receive a considerable sum from the division of family assets and perhaps some further time-limited spousal support.
- [56] By the time the matter was raised, I accept from the evidence before me, both in the affidavit of the respondent and from the limited evidence given at trial, that the respondent was "all in" in this litigation. The respondent believed, as she was entitled to do, that the issues at trial, disregarding for the moment earning issues, were issues of quantum and not of entitlement. She has spent, according to her uncontradicted evidence, the bulk of a \$400,000 plus inheritance pursuing the claim.
- [57] The assets involved were substantial, including the claimant's interest in the former matrimonial home, his medical practice, and financial assets in his personal corporation. As determined by me at trial, the claimant's income was substantially more than was agreed to at the judicial case conference where only his T4 income was considered - not his corporate earnings or his capacity to work beyond the time he was actually spending as a medical practitioner.

- [58] Another factor I consider, as discussed below, is my error in dismissing the respondent's claim for spousal support based on my misinterpretation of the effects of s. 198(2) of the FLA.
- [59] According to S.A.M., the onus is on the party seeking to have the court exercise its discretion in costs to establish why the other party should be deprived of them. The respondent submits she has met that onus, pointing to both the hardship an order of costs will impose upon her (which I acknowledge would not, standing alone, warrant denial of costs) and, more significantly, the change in the claimant's position over eight years after the litigation had been commenced. The parties had proceeded on the basis that the issues at trial would be: (i) identification of the claimant's assets; (ii) a potential unequal division (in favour of the claimant) of assets found to be family property; and (iii) the quantum of support payable to the respondent, given the significant disparity in the parties' respective incomes and that the respondent, for the most part, played the role of homemaker and parent during the parties' cohabitation.
- [60] The respondent notes that the claimant took no steps to withdraw the deemed admission of the separation date of November 15, 2015, until almost two years after the Notice to Admit was served upon him.
- [61] For various reasons, the notice of application dated July 17, 2023, was not heard until February 23, 2024 - approximately one month in advance of the trial. The claimant has not challenged the respondent's assertion that she spent most, if not all, of her inheritance on legal fees to litigate this matter.
- [62] The respondent is 50 years old. Her economic future as a security guard is limited. Even assuming full-time employment, her income is unlikely to exceed \$45,000 annually.
- [63] Although it may not be a factor in the long term, the parties' children remain in her sole care. Brooklyn, the eldest child, has achieved the age of majority, but it is not clear whether she remains a child for support purposes or whether, at this time, she remains in the care of her mother. Kyle remains a minor and the financial hardship of a costs award would, at least indirectly, impact him.
- [64] I conclude, on the totality of the circumstances set out above, that this is a case where it is appropriate to make no order as to costs.

Repayment of Spousal Support

- [65] The claimant seeks repayment by the respondent of all spousal support paid to her since January 2016 or, in the alternative, repayment of support paid to her since the limitation defence was raised.

- [66] The claimant argues that I, having found no future entitlement based on the provisions of s. 198(2) of the FLA, ought to conclude it fair the support paid be returned. There is authority for the proposition that such action is within the jurisdiction of the court where the original order was made, as was done here, "without prejudice": *Lee v. Lee* 2013 BCSC 1227; *Rayner v. Doering* 2013 BCSC 759; *Moazzen-Ahmadi v. Ahmadi-Far* 2021 BCCA 1772.
- [67] However, as referenced above, my dismissal of the respondent's claim for spousal support based on the date of separation was ill-founded. Lost in the shuffle by counsel and myself is the limited scope of s. 198(2) of the FLA, which applies only to claims under Parts V and VI of the FLA and not to claims under Part VII of the FLA.
- [68] The definition of spouse in the FLA includes "former spouse", such that the respondent was not precluded from advancing a claim for spousal support regardless of the period of separation prior to commencement of the claim.
- [69] Practically, the error is of minor financial consequence because: (a) the relationship was between six years and seven years long; and (b) spousal support, even if ordered beyond the date upon which the claimant stopped paying, would have been time limited in any event.
- [70] While hindsight, given the acknowledged error, may appear self-serving, the likely endpoint of spousal support given the respective ages of the parties - the claimant being 74 years old - would have been little different than the nine years from January 2016 to January 2025.
- [71] As to the respondent's claim for retroactive support given my finding of a greater income than was used for determining spousal support, it is unlikely I would have awarded same given the respondent's rent-free occupation of the former matrimonial home for nine years.
- [72] There is also the matter of the Advance. Had an award for retroactive or prospective support been made, such award would be subject to set-off for the repayment of the Advance, which I shall deal with next.
- [73] In short, my error, while regrettable, has little by way of financial impact on the respondent's future finances.
- [74] The application for a return of the spousal support paid under the order of January 2016 is dismissed.

Repayment of the Advance

- [75] Finally, I turn to the Advance. The Advance ordered in the face of the amended pleadings to allow the respondent to retain legal counsel for trial as she was, by that time, without funds to secure counsel otherwise.
- [76] The respondent's counsel acknowledged, during submissions, that there is no principled reason he could advance for the retention by the respondent of the Advance, given it was an advance against her property claim, which was ultimately denied.

- [77] Acknowledging that requiring the respondent to repay the Advance will have the same impact upon her, for practical purposes, as ordering her to pay costs at whatever level, there is no basis at law nor is there a logical reason to deny the claimant repayment of the Advance. The Advance would have been repayable to him, or at least accounted for, in the division had the limitation defence not been successfully pleaded.
- [78] Accordingly, I order that the respondent repay the Advance to the claimant in the sum of \$125,000, together with any interest payable thereupon pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79, from the date it was advanced.
- [79] The respondent filed an affidavit disclosing her current financial situation which is, in short, unfavourable. She deposes to the fact that she has no assets and that, in addition to the Advance, she has spent almost the entirety of the inheritance she received from her mother, being approximately \$464,000, to fund the litigation.
- [80] In conclusion, her affidavit notes:
- If costs are awarded to the Claimant for this litigation, I will have no reasonable possibility of paying it back. I am not in a position to pay it back immediately and I suspect that I will not be able to pay it back over an extended period of time, as my earning potential and lack of employment will make it a practical impossibility.
- I expect that if a cost award is made, I will be forced to file for bankruptcy.
- [81] This order will likely have the result predicted by the respondent in her affidavit, being personal bankruptcy, but that in and of itself does not provide a basis for denial of "recovery" by the claimant.
- [82] While the sum owed him by the respondent might be offset against any future obligations I might have imposed had I allowed the claim for retroactive or ongoing spousal support, it cannot be offset against his ongoing child support obligations. Child support is the right of the child, not the parent.
- [83] As to the costs of this application, there has been this mixed success. Accordingly, I order that each party bear their own costs.

"Harvey J."

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