

CANADA / JUDGMENT

W.A.K. v. C.R.A.M.

2024 BCSC 2009

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2024 BCSC 2009 W.A.K. v. C.R.A.M.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

W.A.K. v. C.R.A.M.,

2024 BCSC 2009

Date: 20241101

Docket: E232497

Registry: Vancouver

Between:

W.A.K.

Claimant

And

C.R.A.M.

Respondent

Corrected Judgment: These Reasons for Judgment have been amended to anonymise the parties and others for publication purposes on January 7, 2025.

Before: The Honourable Mr. Justice Milman

Reasons for Judgment

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Place and Dates of Hearing:

Vancouver, B.C.

September 23-25, 2024

Place and Date of Judgment:

Vancouver, B.C.

November 1, 2024

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I. Introduction

- [1] This is a high-conflict family law action that is scheduled to go to trial for 24 days commencing on June 23, 2025. Among the issues to be addressed at the trial are parenting, division of assets and debts, child support and spousal support. In the meantime, the parties have brought competing applications seeking interim relief of various kinds.
- [2] The parties are currently in their mid-50s. They were married on September 9, 2000 and separated on August 1, 2022, when the claimant mother moved out of the family home. They have three teenaged children.

- [3] The parties are very wealthy. The claimant is a lawyer who holds a senior executive position with a successful, publicly traded, copper mining company. The respondent father is an otolaryngologist. The family assets to be divided are said by the respondent to be worth at least \$21 million, not including another \$13 million or more in assets that the claimant claims as her excluded property.
- [4] For the first two years after the separation, the children continued to reside in the family home with the respondent. However, in September 2024, the oldest child, J., moved away to begin his first semester at a university in Atlantic Canada. The two younger children, a daughter, C., and a son, A., are twins. C. left the family home in June 2024 to reside with the claimant in a three-bedroom apartment in Olympic Village that the claimant is currently renting. Only A. still remains with the respondent in the family home.
- [5] On October 11, 2024, following the hearing of the applications before me, C. was admitted into hospital due to symptoms associated with an eating disorder. She was discharged 12 days later, on October 23, 2024, with a strict recovery plan that will keep her at home and out of school for at least the next two months and perhaps longer. She has expressed a preference to be cared for exclusively by her mother, and to reside primarily with her during that time.
- [6] The parties have agreed on an interim parenting schedule that will see them sharing parenting time on a week on/week off basis, subject to C.'s stated preference. They have also agreed that the claimant will pay the respondent an interim advance of family property in her possession, to assist him in paying legal fees in connection with this action.
- [7] What remains in dispute are the following issues:
- a) which of the parties should have exclusive occupancy of the family home pending trial (both parties seek that relief for themselves); and
 - b) the amount of interim child and spousal support that the claimant should have to pay the respondent (the parties disagree, in particular, about the claimant's Guidelines income, whether the respondent has demonstrated entitlement to spousal support, and whether the order for interim support should include a retroactive component).
- [8] In the discussion that follows, I will address each of those questions in turn.

II. Discussion

A. Exclusive Occupancy

- [9] Both parties seek an order for exclusive occupancy of the family home.

- [10] The test to be applied in deciding whether to grant an order for exclusive occupancy was set out in *Evans v. Mahtoy*, 2015 BCSC 2141. First, the applicant must show that shared use is a practical impossibility; and second, that the balance of convenience favours the applicant as the preferred occupant. Significant weight must be attached to the best interests of the children: *Bateman v. Bateman*, 2013 BCSC 2026.
- [11] The respondent says he should retain exclusive occupancy because that has been the status quo for more than two years since separation. According to him, the claimant focused primarily on advancing her career during the marriage and was often absent from the home for work and business trips, leaving him as the primary caregiver for the children. However, he acknowledges that the parties had two full-time nannies providing care for the children 12 hours a day, seven days a week, and that the claimant's mother also assisted with child care.
- [12] In any event, the respondent says that, since the parties separated, the claimant has shown little interest in returning to reside in the family home, at least until very recently, and then only in response to his application for exclusive occupancy. Instead, he says, she has shown up arbitrarily at the family home and then acted inappropriately while there, such as by disabling the security cameras he had installed, removing personal effects, looking through his belongings and purchasing the same Christmas gift that he had planned to give to one of the children. He complains that she rented a two-bedroom apartment for herself that was unsuitable for the children and only recently rented a three-bedroom apartment when C. moved in with her.
- [13] The respondent argues further that the children have become accustomed to the current arrangement and that it would be unduly disruptive to change it now, only nine months before the trial begins. Moreover, he says it would be more equitable to allow him to remain in possession of the family home because the claimant has taken exclusive possession of the parties' recreational home in Whistler (the "Whistler Property"), valued at approximately \$4.6 million, which she claims as her excluded property (the parties' interest in the family home is valued at approximately \$5.75 million). He argues that because the claimant earns far more than he does, and has greater access to family and excluded assets, she is in a much better financial position than he is to rent her own separate accommodation, as she has been doing since separation.
- [14] The claimant disputes many of the respondent's factual assertions. She denies that the respondent was the primary caregiver for the children during the marriage. According to her, the parties shared parenting responsibilities more or less equally. She says that she took maternity leaves when the children were born - one year following the birth of J. and one and a half years following the birth of the twins.
- [15] She says she first suggested nesting shortly after leaving the family home but the respondent refused to consider it, thereby putting his own needs ahead of those of the children. She accuses him of selfishly using the children to advance his financial goals in this litigation.

She says the children have complained to her that the respondent is a quick-tempered, intimidating and neglectful parent who is often absent from the home, for as much as a week at a time. In an effort to substantiate that latter allegation, the claimant hired a private investigator to follow the respondent over a three-month period. The resulting report suggests that on 39 nights during that period, the respondent left the children alone in the home to be with his new partner. The respondent disputes the conclusions in the report, but acknowledges having been away from home for several evenings, and overnight on 12 occasions, during that period.

- [16] According to the claimant, the children are uncomfortable residing with the respondent. They resent his installation of security cameras inside the home. As a result of the distress his behaviour has caused, she says, C. refuses to see him and has developed an eating disorder. She argues that the twins should not be separated as they are now but they can remain together, at least on alternate weeks, if she is given exclusive occupancy.
- [17] In addition, the claimant says that she should also be given exclusive occupancy because she is more likely to retain the family home after the trial, given the extent and strength of her excluded property claim. That claim is based in part on the terms of a prenuptial agreement that the parties appear to have signed before the marriage, although the agreement itself has not been found. According to the claimant, it permits her to retain not only her excluded property, but also any increase in its value. Perhaps in recognition of that fact, she says, the respondent has expressed no intention to remain in the family home after the trial and has therefore not been maintaining it properly.
- [18] During the hearing, I asked counsel to arrange for the children to be given the opportunity to convey to me in writing their preferences as to where they will be residing, and with whom, pending the outcome of the trial. Only C. responded with an expression of her preferences in that regard. She has resided exclusively with the claimant since June 2024 and does not want that to change. She does not want her father involved in her care, at least for now, but is willing to see him eventually, on her terms and when she is ready. She does not want to alternate between her parents' homes and would like to spend more time with A. She says that her "best case scenario" would see her returning to the family home to reside there with A. under her mother's care, although she says that she would also be happy to remain with her mother in the apartment in Olympic Village, even if that means that A. could not reside there for want of sufficient room for all three of them.
- [19] In their supplementary submissions delivered after C.'s hospitalisation and receipt of her stated preferences, both parties continued to seek exclusive occupancy of the family home for themselves.
- [20] The claimant no longer seeks a nesting arrangement in the alternative, as she did during the hearing. According to her, C.'s recovery must take priority and can best be supported in the familiar environment of her childhood home, where C. can spend time with A. (and J., when he returns to Vancouver for the holidays), have guests over and enjoy the outdoor space that

is lacking at the apartment where she and C. currently reside. That apartment is too small, she says, and will leave C. confined to her bedroom, particularly with members of the support team attending regularly.

- [21] In his supplemental submissions, the respondent has reiterated his view that the status quo should be maintained. He says that the claimant will be focused primarily on C. and unable to care for A. if all three of them were residing together in the family home. Moreover, if the claimant were granted exclusive occupancy, he says, the effect would be to create further disruption in the children's lives. He says that he cannot move out immediately but must find suitable accommodation capable of housing himself and all three children. In addition, he says that granting him exclusive occupancy will encourage C. to return to the home and begin repairing their relationship. He believes that C. will be less likely to want to visit him if he is forced to move into a new residence now.
- [22] I am satisfied that the test for exclusive occupancy has been met. It is common ground that cohabitation is now impracticable. Further, I agree with the claimant that C.'s recovery must be given priority. If the claimant is given exclusive occupancy, then C. will benefit from the advantages that the claimant has identified and the twins can reside there together again, at least intermittently, on alternate weeks.
- [23] Although I am unable to decide on the record before me which of the parties will ultimately retain the family home after the trial, I disagree with the respondent's submission that granting him exclusive occupancy carries with it the advantage of preserving the status quo that has been in place during the period of over two years that has elapsed since the separation. In fact, only A. continues to reside with the respondent in the family home at this time. The present arrangement has not proved to be a particularly propitious one for this family, given what has occurred. I am not prepared to assume, as the respondent urges, that the boys' reticence to me can be taken as an implied preference for the current arrangement.
- [24] I appreciate that granting the claimant exclusive occupancy will substantially increase the financial burden on the respondent, because now he, rather than the claimant, must find and pay for new accommodation. However, that new burden can be ameliorated through an award of interim spousal support, given my findings below as to the means available to the claimant, and the fact that she will now be relieved of the obligation to rent accommodation for herself.
- [25] The unfairness of having the claimant retain exclusive possession of both the Whistler Property and the family home can be addressed by making provision in the order for the respondent to vacation at the Whistler Property at reasonable intervals, as the claimant has proposed.

- [26] Accordingly, I am granting the claimant exclusive occupancy of the family home with effect from December 1, 2024 until judgment is pronounced at the conclusion of the trial. The respondent will have until November 30 to vacate the family home.
- [27] In addition, the respondent may elect to vacation at the Whistler Property for a period of up to seven contiguous days over the winter break and two weekends per month between now and the conclusion of the trial. He may exercise that option by notifying the claimant at least 30 days in advance of the days he has chosen, and the claimant will arrange for the respondent to have access to the Whistler Property on those days.

B. Support

i. The Claimant's Income

- [28] The parties have presented wildly divergent estimates of the claimant's current income. Her financial situation is unusual not only because of the amount she earns, but also because of the manner in which she earns it. The situation is complicated further by the steep rise in her employment income in the last four years, a phenomenon attributable mainly to the growth in the share price of the copper mining company that employs her, which rose from \$2.38 at the end of 2020 to over \$11 currently. In addition, her extended family is also very wealthy and tends to share that wealth with her. She has, at least until recently, received additional income from a family trust, a family-owned corporation and gifts from family members.
- [29] In her own Form 8 Financial Statement, she deposed that her income for support purposes was \$1,208,723. In a management circular issued by her employer, her income was stated to be \$1,442,391. Nevertheless, she now argues that the correct figure is \$808,506, reflecting her 2023 earnings as follows:
- a) base salary (\$451,568);
 - b) other compensation or benefits (\$76,506); and
 - c) an annual bonus (\$280,385).
- [30] However, she also participates in a long-term incentive plan, through which she receives the equivalent of 150% of her salary in the form of company securities that are issued to her over time, as follows:
- a) 50% in the form of "performance share units" that vest after three years;
 - b) 25% in the form of "restricted share units", one third of which vests on each of the three ensuing anniversary dates of their issuance; and
 - c) 25% in form of stock options, one third of which vests on each of the three ensuing anniversary dates of their issuance, but which expire after five years.

- [31] After accounting for all of that, her reported line 15000 income for 2023 was \$5,847.683. The difference between that figure and those declared by management reflects the steep rise in the share price that has been taking place between the time the securities are earned and when they vest.
- [32] The respondent argues, on that basis, that her income for support purposes must be at least \$6,708,671 (i.e., the 2023 line 15000 amount grossed up to account for the favourable tax treatment of dividends and capital gains, as the Guidelines require).
- [33] In addition, the respondent asserts that the following amounts should also be included in her income, raising it to a level above \$13 million:
- a) 366,555 stock options that she has recently exercised at \$0.70 per share;
 - b) her 20% share of the annual distribution from a family trust (\$202,235), which is now being withheld from her by the terms of the trust deed while this action is underway;
 - c) income from a family-owned corporation; and
 - d) gifts from the family, averaging \$594,627 per year in previous years.
- [34] The respondent relies on *Haley v. Haley*, 2022 BCSC 1945, for the proposition that stock-based remuneration should be treated as income in the year that the securities vest, rather than when they are sold.
- [35] Finally, the respondent urges me to draw an adverse inference against the claimant because of her failure to provide complete financial disclosure in respect of these other alleged sources of income.
- [36] The claimant responds that her financial disclosure has been thorough, particularly when viewed in the context of the extensive demands for production of documents that the respondent has made in anticipation of the hearing of these applications.
- [37] The claimant argues that the stock-based compensation she receives under the long-term investment plan should be treated as family assets subject to division at trial, rather than income to be shared with the respondent now. She says she has no access to such income until the shares are sold, and that to require her to sell the shares now in order to pay support would force her to deplete her capital prematurely and thereby incur an unnecessary tax burden. Such an order would overshoot the mark, she says, because she has only recently begun receiving stock-based compensation at this level, whereas the family is historically accustomed to a lifestyle and spending patterns commensurate with her earnings from her base salary and bonuses alone.
- [38] In support of that latter submission, the claimant engaged a consultant to analyse those historic spending patterns. The figures collected by the consultant suggest that the family spent approximately \$400,000 per year prior to separation, although the respondent disputes that total and suggests the true figure is closer to \$833,455. The claimant argues that even if

the respondent is correct about that, he should be able to maintain the same lifestyle with an annual budget of \$1.4 million, after accounting for tax. Such a budget happens to align with the parties' combined historical incomes, which ranged from \$1 - 1.3 million in the last three years of the relationship.

- [39] In any event, the claimant says, the issue should more properly be left to be resolved at the trial, rather than on this interlocutory application. She cites *Tomas v. De Batz De Trenquelleon*, 2024 BCSC 180, *H.C.F. v. D.T.F.*, 2017 BCSC 1226 and *Crossley v. Vorell*, 2021 BCSC 2484, for the proposition that stock-based compensation of this kind may be treated as assets or income, but not both. She notes that the cases in which such a determination was made, such as *H.C.F.*, *Haley* and *Crossley*, were decided after a trial, rather than on an interlocutory application such as this.
- [40] With respect to the other alleged sources of income, the claimant says that although she is a trustee of the family trust, she does not control the trust and therefore cannot require it to distribute income to her when the deed of trust stipulates otherwise. She says that while she historically received dividends from the family company, of which she is a minority shareholder, the assets of the company have now been entirely paid out as dividends and she is no longer receiving income from that source.
- [41] It is not necessary to resolve all of these factual and legal disputes, which should more properly be left for trial. For present purposes, I have seen insufficient reason to depart from the presumption that the claimant's income is as she declared it to be on her most recent tax return, grossed up to account for tax. I am therefore fixing her income for purposes of child support at \$6,708,671.
- [42] The stock-based compensation is appropriately included in the calculation because the "weight of authority" is that, at least for purposes of child support, such entitlements are properly included in income in the year they vest, as explained by Horsman J. (then of this court) in *Haley*:
- [158] It is true that vested stock entitlements existing at the date of separation may be divided as assets. In that event, they may not be treated as income for spousal support purposes to the extent necessary to avoid double dipping. However, the weight of case authority suggests that employment compensation in the form of stock benefits should be treated as income for child support purposes in the year the entitlement to the stocks vest, and also for spousal support purposes if the stocks have not already been divided as family property: *Sarro v. Sarro*, 2011 BCSC 1010 at para. 14; *Crossley v. Vorell*, 2021 BCSC 2484 at paras. 67-73 [Crossley]; *A.E. v. A.E.*, 2021 ONSC 8189 at paras. 157-158 [A.E.].
- [43] It is only in the case of spousal support that an issue of double-dipping may arise if the securities have already been divided between the parties.

- [44] On the other hand, I am not prepared to include the other sources of income that the respondent has identified because the evidence for doing so is either lacking or conflicting, and I am unable to resolve those conflicts on this application. I am not persuaded that an adverse inference is warranted on the basis that the claimant has withheld financial information or documents.
- [45] The claimant's income may be determined at trial to be either higher or lower than I have found it to be. If the trial judge ultimately determines that I have misstated the correct figure, an adjustment can be made in the division of assets to compensate her for any overpayment or underpayment between now and the trial as a result of my order.
- [46] In any event, I note that the claimant's income is, by any measure, well above the \$150,000 ceiling prescribed by the Federal Child Support Guidelines and the \$350,000 ceiling prescribed by the Spousal Support Advisory Guidelines, leaving the Court with the discretion to depart from the prescribed amounts payable where appropriate. For reasons set out below, I agree with the claimant that in the unusual circumstances of this case, the interim child and spousal support payable should not be tied to the prescribed figures, having regard to the circumstances, means and needs of the parties and the children.

ii. The Respondent's Income

- [47] There is far less controversy surrounding the respondent's income. The respondent works as an ENT surgeon at a clinic in Burnaby. The parties generally agree that his actual income is as he has reported it be, after adjustments. I have taken the midpoint between their respective figures (the respondent has used \$408,981 in his support calculations whereas the claimant has used \$408,985 in hers) to yield an income of \$408,983.
- [48] The claimant also argues that the respondent is intentionally underemployed, such that additional income should be imputed to him. In my view, however, that is another issue on which the evidence is conflicting and should more properly be left for trial.

iii. Child Support

- [49] The respondent seeks an order for interim child support payable at the table amount. Assuming J. and A. are residing primarily with him, and C. primarily with the claimant, the table amount payable would be \$76,175, based on the parties' incomes as I have found them to be.
- [50] The claimant argues that no child support should be ordered because she has been paying \$25,000 every month in family expenses, just as she had prior to separation. She claims that \$9,000 of that amount covers items that the respondent's has included in his budget. She notes that if her income were set at \$808,506 (the figure she urges upon me), \$1,208,723 (the income reported on her F8) or \$1,442,391 (the figure reported in the most recent management circular), the table amounts payable in any scenario would be considerably less than the amount she is already paying (\$6,233, \$12,476 or \$16,121, respectively, assuming parenting time with all three children were equally shared between the parties, or

\$,4714, \$9,437 or \$12,194, respectively, assuming parenting time with J. were equally shared between the parties, while C. resided primarily with the claimant and A. resided primarily with the respondent).

- [51] Given my findings above, none of these scenarios are applicable. First, J. is now attending university elsewhere in Canada and most of his expenses are being paid from a registered education savings plan that was set up for that purpose. Second, I have granted the claimant exclusive occupancy of the family home, where she will reside with C., while A. will spend half of his time with each parent.
- [52] Assuming C. remains exclusively with the claimant while time with A. is equally shared, the table amount for the claimant would be \$52,513.63, and for the respondent, \$5,215, yielding a setoff amount of \$47,298.63.
- [53] Although I have fixed the claimant's income at a level far higher than she has proposed, there are compelling reasons to depart from the Guidelines in the unusual circumstances of this case.
- [54] In particular, the evidence supports the claimant's submission that the parties' historic lifestyle and spending patterns were established in circumstances where their combined incomes were no more than \$1.4 million. This can be seen from the respondent's own tally of the family spending before and since separation, which he says averaged \$658,912 and \$1,587,390, respectively.
- [55] The respondent has budgeted monthly amounts for child-related expenses ranging from \$6,723.25 (in his second affidavit) to \$9,974.49 (in his financial statement). The vast majority of the spending in that category relates to the children's private school fees (\$7,052.50), which are paid by the claimant. Of the \$255,397.87 in monthly spending shown on his financial statement, \$100,000 is allocated to legal fees for this action, an expense now covered by the advance he is to receive on the division of family property. On the assumption that he will receive support based on the claimant's income of \$6,708,671, he has also budgeted for \$66,000 for the income tax he would have to pay on that support.
- [56] The steep rise in income that the claimant has enjoyed in the last four years is a recent phenomenon of uncertain duration. I am satisfied that the children's needs, while they are with the respondent, can be adequately met with support at a level based on the parties combined historic incomes prior to separation. To award the respondent child support at the table amount based on the claimant's current income would amount to an inappropriate transfer of wealth in his favour, a result not in keeping with the purposes of child support: *Francis v. Baker*, [1999] 3 S.C.R. 250; *J.A.T.P. v. H.M.*, 2023 BCSC 1484; *S.R.M. v. I.A.M.*, 2002 BCSC 1453 and *Macdonald v. Macdonald*, 2002 BCCA 46.

[57] I accept, however, that the children should share at least in part in the claimant's recent increase in income, regardless of which parent is caring for them. Accordingly, I am ordering that, commencing November 1, 2024, the claimant is to pay interim monthly child support of \$25,000, in addition to the family expenses she is already paying.

[58] The parties will share s. 7 expenses in proportion to their incomes as I have found them to be.

iv. Spousal Support

[59] The parties disagree about whether the respondent is entitled to spousal support.

[60] The test to be applied in deciding whether interim spousal support should be ordered was set out in *Robles v. Kuhn*, 2009 BCSC 1163, cited with approval in *Devathasan v. Devathasan*, 2017 BCSC 1010, as follows:

1. On applications for interim support the applicant's needs and the respondent's ability to pay assume greater significance: *Gibb v. Gibb*, [2005] B.C.J. No. 2730 (S.C.);
2. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it: *Grossi v. Grossi*, [1993] B.C.J. No. 878 (S.C.);
3. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best: *Randhawa v. Randhawa*, [1999] B.C.J. No. 3299; *Newson v. Newson*, [1998] B.C.J. No. 2906, 65 B.C.L.R. (3d) 22 (C.A.);
4. The courts should not unduly emphasise any one of the statutory considerations above others;
5. On interim applications the need to achieve economic self-sufficiency is often of less significance;
6. Interim support should be ordered within the range suggested by the Spousal Support Advisory Guidelines unless exceptional circumstances indicate otherwise: *Ladd v. Ladd*, [2006] B.C.J. No. 1930, 2006 BCSC 1280 (S.C.);
7. Interim support should only be ordered where it can be said a prima facie case for entitlement has been made out: *L.G.B. v. M.A.C.M.*, [2005] B.C.J. No. 2966, 2005 BCSC 1786 (S.C.);
8. Where there is a need to resolve contested issues of fact, especially those connected with a threshold issue, such as entitlement, it becomes less advisable to order interim support: *L.G.B.*

[61] After citing those considerations, Fitzpatrick J. added the following observations applicable in situations such as this where the payor's income exceeds the prescribed ceiling:

- [140] I am aware of the principles applicable to determining interim spousal support above the "ceiling" of \$350,000, as set out in the Spousal Support Advisory Guidelines ("SSAG"); the matter is highly discretionary; the SSAG formulas are not to be automatically applied where the income levels are above that figure; the ceiling is not a hard "cap"; and, what is required is to apply an individualized, fact-specific analysis.
- [141] The authors of the Spousal Support Advisory Guidelines: The Revised User's Guide (April 2016), in Chapter 11(b), describe the outcomes in cases involving high earners as "divergent and unpredictable". That certainly appears to be the case
- [62] The respondent argues that his claim for spousal support is justified both on compensatory grounds as well as on the basis of need.
- [63] Those compensatory grounds include the duration of the marriage - this was a long-term relationship lasting more than 22 years. During that time, he says, he sacrificed the opportunity to practice medicine in New York, where he would have earned US\$2 million per year for 21 years, a loss of as much as \$48 million, by his calculation. He says he lost that opportunity, and instead reduced his hours to take on the majority of the child care responsibilities in recent years, so that the claimant could remain in Vancouver and advance her career.
- [64] The claimant disputes all of these allegations. She says the parties did not have a traditional marriage, with their incomes and expenses shared, but rather kept their finances separate. She asserts further that the parties agreed to preserve their financial independence in the prenuptial agreement.
- [65] I am unable to resolve the many conflicts in their evidence on this issue, which will have to be left for trial. However, the respondent has made out a more compelling case for interim spousal support based on need. He has accumulated a \$208,000 debt since separation. In addition, my order will now require him to rent separate accommodation for himself while the claimant resides in the family home. The cost of doing so, he says, is likely to be between \$13,000 and \$15,000 per month.
- [66] In considering the condition, means and needs of the parties, I note that the claimant has recently exercised lucrative stock options yielding a capital gain of between \$3.5 million and \$4 million. In her financial statements, she has budgeted expenses of \$1.63 million per year (including special expense for the children). By way of comparison, the respondent has budgeted his expenses at \$78,433 monthly, not including the income tax payable on the support payments he will receive.
- [67] On the other hand, the respondent's immediate financial needs have been ameliorated insofar as the claimant has agreed to pay him a significant advance from the family assets she holds to permit him to fund this litigation through to trial, which reduces the need to "level the playing field" in the litigation through an award of interim spousal support.

[68] Having weighed these considerations, my order will be that, commencing November 1, 2024, the claimant is to pay the respondent ongoing interim spousal support in the amount of \$30,000, in addition to the family expenses that she is currently paying.

v. Retroactive Support

[69] The respondent seeks to have both child and spousal support paid retroactively to the date of separation. The claimant opposes any retroactive order.

[70] The test to be applied in determining whether, on an interim application, child support should be ordered to be paid retroactively was conveniently summarised by Fitzpatrick J. in *Devathasan*, as follows:

[117] The circumstances in which retroactive child support may be awarded were addressed in *D.B.S. v. S.R.G.*, 2006 SCC 37. The Supreme Court of Canada directed trial judges to adopt a broad and holistic approach in the application of four factors, summarized at para. 133, none of which are determinative on their own:

- a) Is there a reasonable excuse for why support was not sought earlier?
- b) Was there any blameworthy conduct on the part of the payor parent?
- c) Is a retroactive award appropriate in light of the child's past and present circumstances?
- d) Will a retroactive award cause hardship to the payor parent or to his or her other children?

[118] At paras. 120-125 of *D.B.S.*, the Court stated that the commencement date for an award of retroactive child support should not be restricted to the date an application to a court or formal notice is given. Rather, the Court should look to the date of effective notice by the recipient parent to the payor parent. Effective notice was defined as "any indication by the recipient parent that child support should be paid": para. 121. The Court suggested that this is generally when the topic of child support is broached.

[119] There are circumstances where it is reasonable to infer that effective notice has been given to a payor parent, even in the absence of a specific request. This is founded in the principle that both parents have a legal obligation to contribute to the support of their child after separation.

[71] Those same factors have been held to be applicable as well in determining whether a retroactive award of interim spousal support should be made: *Reis v. Bucholtz*, 2010 BCCA 115; *McKenzie v. Perestrelo*, 2014 BCCA 161. However, when dealing with spousal support, concerns about notice, delay and misconduct are, generally speaking, said to carry more weight: *Kerr v. Baranow*, 2011 SCC 10.

- [72] The respondent argues that both awards should be made retroactive to the date of separation because the claimant has behaved in a blameworthy manner. In particular, he says, because the claimant is a lawyer, she should have known that she had an obligation to pay support regardless of when he first advanced that claim, particularly given the steep rise in her income since separation.
- [73] The claimant disputes that her conduct has been blameworthy. She says that, although she is a lawyer, she is a corporate solicitor with no background in family law, and therefore no greater insight into her obligation to pay support than any other payor spouse. In any event, she says, she has continued to pay the same family expenses since separation that she was paying before. Those payments totalled \$749,750 over the period of 25 months following the separation, or about \$25,000 per month.
- [74] The respondent has not provided an adequate explanation for not seeking support prior to filing his counterclaim on November 3, 2023. Although I accept that it has taken many months for the parties to exchange financial information, he has always known that the claimant earns much more than he does and therefore could have sought that relief sooner. On the other hand, the claimant was aware of the steep rise in her income since separation as it was occurring, while the respondent was not, at least not until their financial information was exchanged.
- [75] Another factor weighing in favour of a retroactive award is that, until last summer, the respondent had all three children primarily in his care in the family home. The monthly table amount based on the claimant's income with three children would be \$105,117.27. However, I place limited weight on that factor, given that the evidence does not indicate that the children's lifestyle has been adversely affected by any underpayment of child support during that period. Moreover, at the same time, the claimant sought to engage in a nesting arrangement, but this was refused. In the result, the respondent had the exclusive use of the family home until now, without having to pay many of the associated expenses.
- [76] Finally, for reasons I have already noted, there is little risk that a retroactive award will cause the claimant hardship in the circumstances.
- [77] Having weighed those considerations, I have concluded that the appropriate order is for the claimant to pay the respondent retroactive child support in the higher amount of \$50,000 per month for the one-year period from November 1, 2023 to October 31, 2024, for a total of \$600,000. I am refusing the request for retroactive spousal support, given that much of the case for ongoing spousal support rests on the respondent's need to find alternative accommodation, whereas he has had exclusive use of the family home until now.

III. Summary and Conclusion

- [78] I am making the following interim orders, pending the outcome of the trial:

- a) the claimant will have exclusive occupancy of the family home, with effect as of December 1, 2024;
- b) the respondent may elect to vacation at the Whistler Property for a period of up to seven contiguous days over the winter break and two weekends per month between now and the conclusion of the trial;
- c) the respondent may exercise that option by notifying the claimant at least 30 days in advance of the days he has chosen, and the claimant will arrange for the respondent to have access to the Whistler Property on those days;
- d) commencing on November 1, 2024, the claimant is to pay the respondent interim monthly child support of \$25,000 on the first day of every month, in addition to the family expenses she is already paying;
- e) the parties will share s. 7 expenses in proportion to their incomes as I have found them to be;
- f) commencing on November 1, 2024, the claimant is to pay the respondent interim monthly spousal support in the amount of \$30,000 on the first day of every month, in addition to the family expenses that she is currently paying; and
- g) the claimant is to pay the respondent retroactive child support in the amount of \$50,000 per month for the one-year period from November 1, 2023 to October 31, 2024, for a total of \$600,000.

[79] As success was divided, the costs of the applications will be payable in the cause.

"Milman J."

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