

CANADA / JUDGMENT

Wallace v. Pichichero

2021 BCSC 1642

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1642 Wallace v. Pichichero IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Wallace v. Pichichero, 2021 BCSC 1642 Date: 20210820 Docket: E67316 Registry: Nanaimo

Between: Judy Wallace Claimant And Mark Pichichero Respondent Before: The Honourable Mr.

Justice Branch Reasons for Judgment Counsel for Claimant: T. Vining Counsel for Respondent: E.

Strain Place and Date of Trial: Nanaimo, B.C. March 22-29, 2021, April 12-16, 2021, May 30-June 1,

2021 Place and Date of Judgment: Nanaimo, B.C. August 20, 2021 Table of Contents I.

INTRODUCTION. 3 II. THE BACKGROUND. 3 III. ISSUES. 11 IV. ANALYSIS. 11 A. Property Division. 11

1. Legal Principles. 11
2. Family Assets. 13
3. Exchange Rate on US Bank Accounts. 19
4. The Flying L Ranch. 20
5. The Home. 22
5. Occupational Rent 23
6. Charles Schwab Accounts. 26
7. Life Insurance Policies. 27
8. Art 28 B. Spousal Support 28
1. Legal Principles. 28
2. Entitlement 30
3. Quantum and Duration. 33 Should the payments to Mr. Pichichero from the DVA be considered as income for the purposes of any means assessment?. 33 Intentional Underemployment 35 Calculation. 37
4. Right of Review. 38

5. Lump Sum v. Periodic. 39 V. CONCLUSION. 40 I. INTRODUCTION

- [1] This long-running family case has finally reached the trial stage. The key issues relate to property division and spousal support. The case is complicated by the fact that both parties are disabled, but with one spouse receiving much higher disability benefits than the other.
- II. THE BACKGROUND
- [2] The claimant, Ms. Wallace, was born July 10, 1958, and is presently 62 years old. The respondent, Mr. Pichichero, was born September 7, 1960, and is 60 years old.
- [3] Prior to meeting Mr. Pichichero, Ms. Wallace did administrative work. She was previously married, but was divorced on February 12, 1987.
- [4] Mr. Pichichero was in the U.S. Army for two years prior to meeting Ms. Wallace. In 1982, while still in the Army, he suffered an injury when a man fell from a balcony onto Mr. Pichichero's head, neck, and back. He was honourably discharged in May 1984. The discharge was his decision, but he advised Army personnel upon his departure that he was not doing well physically. He began seeking treatment from the Department of Veteran's Affairs ("DVA"). He eventually became eligible for DVA disability benefits. His entitlement to DVA benefits increased over the years as his assessed percentage disability increased, and as annual cost of living adjustments were applied.
- [5] Ms. Wallace and Mr. Pichichero met while they were both attending the University of Texas, San Antonio. They moved in together shortly before receiving their bachelors' degrees in 1986. They moved to San Francisco in 1987 in order to pursue masters' degrees. They married in December 1987.
- [6] While in San Francisco, Ms. Wallace took graduate courses in accounting and Mr. Pichichero took courses towards a Master of Arts in educational psychology. However, neither finished these degrees. Beginning in 1988, Ms. Wallace entered the work force and began working in various administrative, human resources and accounting positions. In June 1995, she started up a contract management firm, The Business Equation Inc. ("BEI").
- [7] Mr. Pichichero left his masters' program in 1988 after the unexpected death of his faculty advisor. He completed a paralegal course in 1989. He did some work for lawyers who encouraged him to go to law school. Mr. Pichichero was accepted at the Hastings School of Law in 1989. He obtained his law degree in 1992 and was called to the Bar in California.
- [8] After his call, Mr. Pichichero started doing contract work for a number of different lawyers. He also did some teaching. He was unable to secure full-time employment. In 1995, he returned to university to obtain his masters' in public administration with the hope that this would improve his marketable skills. He completed the program in 1997.
- [9] The parties purchased a home in San Francisco. Mr. Pichichero says that his health started to deteriorate as a result of mould in this home.

- [10] Mr. Pichichero's father died in 1994. He left Mr. Pichichero bequests including a coin collection and bare land at Lot 5 Oak Hills, Bandera, Texas ("Flying L Ranch"). The parties visited the land, but never stayed overnight. Neither the ranch nor the coin collection were ever used as collateral for loans.
- [11] In approximately 1997, Mr. Pichichero obtained full-time employment as a staff attorney for the Veterans Administration Medical Center. However, he was only able to maintain this position for approximately one year. He obtained employment with a company called Comcor Advisory Services in 1998, but he only worked there for two months. He moved on to the utility firm Teligent Inc. Ms. Wallace testified that Mr. Pichichero got into a conflict with a director at the firm, and was told to just stay home. Mr. Pichichero accepts that he had a disagreement with a director, but suggests this director was just upset because Mr. Pichichero had found mistakes made within that director's department. He agrees that he was told he no longer needed to fulfill the tasks of his regular position. Rather, he could stay home and could take work from other lawyers or teach. He suggests he was being reserved for special projects rather than being shunted out of the company.
- [12] Ms. Wallace's company, BEI, collapsed in 1999. However, she was soon able to find a human resources position with SourceCorp, Inc. Ms. Wallace was soon offered a major promotion, but it required the parties to move to Texas. They decided to accept the position. Mr. Pichichero ended his employment with Teligent Inc., such as it was.
- [13] The parties were involved in a motor vehicle accident in June 2000. Both were injured. Ms. Wallace continued to work until July 2002, but eventually her pain became too much. Micro fractures were discovered in her vertebrae at that time. She was told it would take at least two years before it would be clear if she could work again. She and her employer agreed that she should go on disability benefits at that time. On May 2, 2003, she was accepted as disabled by her work insurer, Unum, and she has received monthly benefits ever since. These generous payments represent 66 2/3% of her last salary, but are reduced by other benefits to which she may be entitled. The Unum benefits are payable until Ms. Wallace reaches age 67.
- [14] The parties' first home in Texas allegedly also had toxic mould problems that caused Mr. Pichichero to suffer a vast array of difficulties, including asthma, toxic encephalopathy, autonomic nervous system dysfunction, immune deregulation, mould hypersensitivity, toxic effects of mycotoxin exposure, chronic sinusitis, allergic rhinosinusitis, allergic food gastroenteritis, hormone imbalance, fibromyalgia, vasculitis, neck pain, toxic effect solvents and toxic effect metals. He says that these problems prevented him from following up on job prospects. He found day-to-day living overwhelming; he was not able to keep up with bill payments and the like while he was at home and Ms. Wallace was at work. However, Mr. Pichichero was able to go on a number of business trips with Ms. Wallace.
- [15] In 2000, the parties purchased property located at Kitsee Knoll Way, Quinlan, Texas ("Kitsee Knoll Property").

- [16] In 2002 or 2003, the parties visited Vancouver Island and decided to move to Canada. After moving to BC they purchased 4 properties, largely using the \$350,000 USD they had received from the sale of their San Francisco home. These properties were:
- a) 7684 Tozer Road, Fanny Bay ("Home");
 - b) 180 Memorial Avenue, Parksville ("Parksville Property");
 - c) 3291, 3289 and 3287 Third Avenue, Port Alberni ("Port Alberni Property"); and
 - d) 5088 Beaver Harbour Road, Port Hardy ("Port Hardy Property"). (collectively, the "BC Properties")
- [17] The parties lived in the Home, and rented out the other properties (the "Rental Properties").
- [18] Mr. Pichichero inquired about obtaining employment as a teacher at Malaspina College. However, he chose not to pursue this because he did not want to complete the required training. For the remainder of Mr. Pichichero and Ms. Wallace's relationship, their only economic activity was managing the Rental Properties. The parties did some renovations on the properties. Mr. Pichichero primarily dealt with the tenants and contractors, while Ms. Wallace handled the finances.
- [19] Although their relationship was always strained, tensions increased after arriving in BC. They frequently debated financial issues. Mr. Pichichero became concerned that their money was not being properly managed, and that Ms. Wallace might be siphoning off funds. He started requesting more information about where the funds were going.
- [20] By 2008, Mr. Pichichero says that his health was such that he could no longer manage the Rental Properties, and he asked that the parties look into selling them. The parties started making efforts in this regard.
- [21] In 2009, the US Social Security Administration accepted disability claims for both parties. They found Mr. Pichichero had been disabled back to the September 2, 2000 motor vehicle accident. They found Ms. Wallace had been disabled from July 15, 2002, based on ongoing impairments from the motor vehicle accident including disc bulges, post-concussion cognitive disorder, somatoform disorder, and histrionic personality disorder. On February 28, 2010, Mr. Pichichero received a judgment from the DVA increasing the determination of his disability to 80%.
- [22] In 2011, the parties sold the Port Alberni Property.
- [23] Ms. Wallace says the parties separated November 20, 2011, following an argument in which she brought an end to their sexual relationship. They both continued to live in the Home.
- [24] Mr. Pichichero filed these proceedings on September 21, 2012. A Family Relations Act, R.S.B.C. 1996, c. 128, s. 57 [FRA] declaration was pronounced October 4, 2012 ("Declaration Date").

- [25] Ms. Wallace left the Home on November 8, 2012, and moved to Oklahoma to be with her parents. She holds the beneficial interest in the home in which she currently lives, although her parents are on title. She also owns another property with a partner that is being used as a gallery space.
- [26] In November 2015, Mr. Pichichero was involved in a motor vehicle accident in the parties' jointly-owned vehicle. That vehicle--a 2001 Nissan Maxima--was written off, and the proceeds were deposited into the Trust Account.
- [27] The Parksville Property was sold in August 2013, and the net proceeds of \$411,958.59 were deposited into Ms. Wallace's counsel's trust account ("Trust Account").
- [28] In 2017, the Flying L Ranch was sold. Ms. Wallace refused to allow the sale to complete unless she received the same amount as Mr. Pichichero did from the sale of the property. The sale proceeds were approximately \$29,193.24 CAD. Mr. Pichichero received that amount from the sale directly while Ms. Wallace received an equivalent payout from the funds held in the Trust Account.
- [29] In November 2017, Mr. Pichichero posted advertisements on the internet seeking to rent out two of the three bedrooms in the Home for \$2,000 per month. He intended to continue living in the Home while the other bedrooms were rented. However, he removed the advertisements a short time later, and has not attempted to rent out any rooms since.
- [30] In 2019, the parties sold the Port Hardy Property and agreed to split the proceeds. Each party received about \$128,000. The parties agreed that this property did not need to be further considered as part of any property division.
- [31] In July 2019, the Kitsee Knoll Property was sold for \$46,615.95 CAD. The proceeds were placed in the Trust Account.
- [32] Mr. Pichichero has remained in the Home since Ms. Wallace left. He has not paid Ms. Wallace any rent. Renovations continued on the Home. Mr. Pichichero says he spent substantial funds on renovations, although he provided little in the way of receipts. Mr. Pichichero has had women stay over at the Home from time to time.
- [33] The parties started making efforts to sell the Home in 2013, but these were unsuccessful. In 2017, the parties received an offer on the Home for \$440,000. However, Mr. Pichichero declined to complete the sale. Ms. Wallace sought direction from the court in relation to the sale, and Justice Groves issued the following orders on July 27, 2017, inter alia:
1. The Respondent will have until August 22, 2017 to pay the sum of \$220,000.00 into the [Trust Account].
 2. Upon receipt of the foregoing payment, the Claimant will execute the necessary documents to transfer her interest in the [Home] to the Respondent. ("Groves Order")
- [34] On February 22, 2018, Justice Groves issued a further order stating, inter alia:

1. The value of the property located at 7684 Tozer Road, Fanny Bay, British Columbia will be set at \$440,000.00.
4. The foregoing orders are made without a determination as to the respective claims of the parties for a reapportionment of assets. ("Groves Valuation Order")
- [35] Mr. Pichichero registered a Form A Transfer conveying Ms. Wallace's interest to himself. Ms. Wallace's transfer of her interest in the Home attracted income tax payable by her of \$3,200.
- [36] In April 2020, Mr. Pichichero was in another motor vehicle accident when his car struck a deer. He says that he sustained a concussion and found it very difficult to focus for several months.
- [37] Following the various deposits and withdrawals discussed above, there is now \$676,478.21 in the Trust Account. To summarize, this includes the following, plus interest:
 - a) \$411,958.59 representing the proceeds from the sale of the Parksville Property;
 - b) less \$29,193.24 representing the payment out to Ms. Wallace to equalize the sale proceeds Mr. Pichichero received from the February 2017 sale of the Flying L Ranch;
 - c) plus \$220,000.00 paid in by Mr. Pichichero in August 2017 pursuant to the Groves Order;
 - d) plus \$3,713.44 received from ICBC for the write-off of the parties' 2001 Nissan Maxima;
 - e) plus \$46,615.95 from the sale of the Kitsee Knoll Property.
- [38] There has been an increase in value of the Home since the Groves Valuation Order. It is presently assessed at \$544,000.
- [39] Mr. Pichichero has not had any paid employment since leaving California. He did establish a website which he uses to post poetry. Although the website has an online store, Mr. Pichichero states that he has never earned anything through the website.
- [40] Mr. Pichichero's line 150 income in 2018 was \$17,434.12, primarily flowing from his US Social Security Disability income. In that year, he also claimed \$15,217.50 in medical expenses. In 2019, his Line 150 income was \$28,188.89, including \$16,488.06 in disability benefits, \$9,158.19 in net rental income, and \$2,542.64 in dividends. He claimed \$20,504.18 in medical expenses. Mr. Pichichero currently receives \$1,795.80 USD per month in DVA benefits, which amount is not reflected in his tax returns. This additional source of funds nets to roughly \$26,965.01 CAD annually at the exchange rate of 1.2513 applicable as at the first day of trial.
- [41] In 2020, Mr. Pichichero surrendered his California Bar licence. He says he has not performed any legal work since he has been in Canada. His brother noted him as general counsel on a company website, but Mr. Pichichero says that he never performed any legal work for him.

- [42] As of 2019, Ms. Wallace was in receipt of disability benefits that pay \$88,446.48 USD per year, or approximately \$110,558.10 CAD at the rate of 1.2513 as at the first day of trial. Of this amount, \$59,020.08 USD were Unum benefits; the remainder reflects her Social Security Disability benefits. III. ISSUES
- [43] The two issues that this Court must address are property division and spousal support.
- [44] The parties agree that the FRA governs the property division given that the parties were married and pleadings filed prior to March 18, 2013.
- [45] Pursuant to the FRA, the court is required to consider property division before it considers spousal support: *Nustad v. Nustad*, 2020 BCSC 534 at para. 17.
- [46] The parties agree that the spousal support issues are to be determined pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA]. IV. ANALYSIS A. Property Division
1. Legal Principles
- [47] Under the FRA, when a married couple separates, each spouse is presumptively entitled to a one-half interest in all family assets held on the Declaration Date: s. 56. A "family asset" is property owned by one or both spouses that is ordinarily used for a family purpose: s. 58.
- [48] In terms of the valuation date for the family assets, the default is the date of trial. The court in *S.M.S. v. D.M.T.*, 2015 BCSC 1335 stated as follows:
- [27] The approach to valuation dates under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] was thoroughly canvassed by Joyce J. in *N.M.M. v. N.S.M.*, 2004 BCSC 346 at paras. 60-76. In his summary at para. 76, Joyce J. concluded:
- [76] From my review of the forgoing authorities I distill the following principles: Because it is the triggering event that gives each spouse a prima facie equal interest as tenants in common in each family asset the circumstances as they exist at that date are to be considered in determining whether the prima facie equal division would be unfair. Generally speaking, the spouses will share any increase or decrease in value of a family asset that occurs after the triggering event because their interests in the asset have vested. Valuation at the date of trial is generally appropriate when considering the mechanism under s.66 to achieve the division of family assets, for example by dividing the assets in species by vesting the various assets in the names of the parties or by vesting an asset in the name of one party in exchange for an order compensating the other for the divested interest. While generally the appropriate date for valuing family assets will be the trial date it appears there is discretion to fix another date, not earlier than the triggering event, if that is necessary in order to achieve fairness. Discretion may exist to reapportion assets or to vest title in one spouse while awarding the other compensation taking into account events following the triggering event where, for example, the conduct of one party alone has caused the asset to increase or decrease in value and it would create unfairness and injustice if those events were ignored. Where it is established that one spouse has disposed of a family asset or caused it to

decrease significantly in value it is open to the court to order compensation for that loss. Such a compensation order will be based on the loss in value and will necessarily involve determining the value of the asset prior to the loss. [Emphasis in original.]

- [49] Where a standard division of family property would result in an unfair division of property given the length of the marriage or other relevant factors, the court may reapportion the property in favour of the appropriate spouse. The applicable considerations are set out in s. 65: 65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to
- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse, the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

[50] In *Santelli v. Trinetti*, 2019 BCCA 319, the Court of Appeal explained the proper approach to s. 65:

[73] Unfairness as contemplated in s. 65 does not permit consideration of a broad range of circumstances that could create inequity. Rather, a court may vary or reapportion the division of property only where the distribution of assets under the marriage agreement is unfair taking into account those factors set out in s. 65(1): Beese at paras. 21, 34. The object of the provision is to permit a court to intervene to avoid unfairness where the economic consequences of the marriage breakdown are not shared equitably. The focus is on distribution of assets and the resulting economic consequences.

2. Family Assets

[51] Ms. Wallace provided a helpful spreadsheet outlining the various assets held by the parties, as well as detailing her position on the appropriate division. I include it here as it is a touchstone for the discussion which follows, although I have not wholly accepted the conclusions embedded within it: TOZER ROAD PROPERTY AND FUNDS HELD IN TRUST
VALUE ASSET TO BE RETAINED BY CLAIMANT ASSET TO BE RETAINED BY RESPONDENT
7684 Tozer Road, Fanny Bay, British Columbia (\$440,000.00 less \$220,000.00 payment made by Respondent respecting property) \$222,000.00 \$220,000.00 Payment made by Respondent respecting 7684 Tozer Road, Fanny Bay, British Columbia \$220,000.00 \$220,000.00 CRA

income tax debt incurred by Claimant associated with the transfer of her interest in 7684 Tozer Road, Fanny Bay, British Columbia to Respondent \$-3,200.00 \$-3,200.00 Total funds held in trust account of Claimant's counsel = \$676,478.21 less \$220,000.00 payment respecting 7684 Tozer Road, Fanny Bay, British Columbia = \$456,478.21 \$456,478.21 \$228,239.11 \$228,239.11 TOTAL \$893,278.21 \$445,039.11 \$448,239.11 BANK ACCOUNTS IN JOINT NAMES OF THE CLAIMANT AND RESPONDENT Total funds held in joint bank accounts at the date of the s. 57 declaration = \$52,350.03 CAD and \$74.72. USD. At trial, parties agreed funds were spent on equal amount expenses related to renovations of Tozer Road Property, rental properties in Canada, and, two investment properties in USA Agreed at trial funds spent on joint expenses post separation Agreed at trial funds spent on joint expenses post separation Agreed at trial funds spent on joint expenses post separation TOTAL \$0.00 \$0.00 \$0.00 BANK ACCOUNTS IN NAME OF CLAIMANT CCCU Chequing Account No. XX33 \$118.19 \$118.19 CCCU Member Equity Shares, Account No. XX20 \$11.73 \$11.73 USAA Federal Savings Chequing Account No. XX8-2 (\$4,506.66 USD x 1.2513 = \$5,639.18 CAD) \$5,639.18 \$5,639.18 USAA Federal Savings Chequing Account No. XXXX5-7 (\$27,832.90 USD x 1.2513 = \$34,827.31 CAD) \$34,827.31 \$34,827.31 USAA Federal Savings Chequing Account No. XXXX7-4 (\$50.72 USD x 1.2513 = \$63.47 CAD) \$63.47 \$63.47 TOTAL \$40,659.88 \$40,659.88 \$0.00 BANK ACCOUNTS IN NAME OF RESPONDENT CCCU Savings Account No. XX15 \$6,079.25 \$6,079.25 CCCU Member Equity Shares, Account No. XX53 \$5.67 \$5.67 RBC Savings Account No. XX26 \$101.14 \$101.14 RBC Savings Account No. XX00 \$1,001.41 \$1,001.41 BMO Chequing Account No. XX20 \$1,196.00 \$1,196.00 Tangerine Savings Account No. XX48 \$30,663.44 \$30,663.44 Tangerine Tax-Free Savings Account No. XX78 \$5,375.70 \$5,375.70 TD Bank Account, Account No. XX93 \$1,833.60 \$1,833.60 CapitalOne Orange Savings Account No. XX88 (\$30,339.33 USD x 1.2513 = \$37,963.60 CAD) \$37,936.60 \$37,936.60 Citibank Chequing Account No. XX87 (\$1,512.48 USD x 1.2513 = \$1,892.57 CAD) \$1,892.57 \$1,892.57 Citibank Savings Account No. XX90 (\$1,010.61 USD x 1.2513 = \$1,264.58 CAD) \$1,264.58 \$1,264.58 Chase Chequing Account No. XX39 (\$2,111.50 USD x 1.2513 = \$2,642.12 CAD) \$2,642.12 \$2,642.12 Chase Savings Account No. XX58 (\$156.01 USD x 1.2513 = \$195.22 CAD) \$195.22 \$195.22 Randolph Brooks Federal Credit Union Checking Account No. XX77 \$0.00 \$0.00 Randolph Brooks Federal Credit Union Savings Account No. XX95 (\$489.94 USD x 1.2513 = \$613.06 CAD) \$613.06 \$613.06 Randolph Brooks Federal Credit Union Checking Account No. XX97 (\$12,723.68 USD x 1.2513 = \$15,921.14 CAD) \$15,921.14 \$15,921.14 Randolph Brooks Federal Credit Union Money Market Savings Account No. XX07 (\$46,848.91 USD x 1.2513 = \$58,622.04 CAD) \$58,622.04 \$58,622.04 Randolph Brooks Federal Credit Union Savings Account No. XX25 (\$5.01 USD x 1.2513 = \$6.27 CAD) \$6.27 \$6.27 USAA Federal Savings Chequing Account No. XX4-2 (\$138.70 USD x 1.2513 = \$173.56 CAD) \$173.56 \$173.56 USAA Federal Savings Checking Account No. XX3-7 (\$5,018.29 USD x 1.2513 = \$6,279.39 CAD) \$6,279.39 \$6,279.39 Charles Schwab Investment Account No. XX60 (\$43,983.49 USD x 1.2513 = \$55,036.54 CAD) \$55,036.54 \$55,036.54 TOTAL \$226,866.30 \$0.00 \$226,866.30 VEHICLES IN RESPONDENT'S POSSESSION 2001 Nissan Pathfinder \$3,700.00 \$3,700.00 2007 SnowBear Utility Trailer \$500.00 \$500.00 Aluminum Boat and Trailer \$300.00 \$300.00 TOTAL \$4,500.00 \$0.00 \$4,500.00 SAFETY DEPOSIT BOX CONTENTS Travellers

cheques located at Chase Bank safety deposit box (\$500.00 USD x 1.2513 = \$625.65 CAD) \$625.00 \$625.00 Cash located at Chase Bank safety deposit box \$470.00 \$470.00 Travellers cheques located at CU (San Antonio) safety deposit box (\$2,000.00 USD x 1.2513 = \$2,502.60 CAD \$2,502.60 \$2,502.60 TOTAL \$3,598.25 \$0.00 \$3,598.25 MISCELLANEOUS ASSETS IN CLAIMANT'S POSSESSION Chattel Items from 7684 Tozer Road, Fanny Bay, British Columbia \$1,000.00 \$1,000.00 TOTAL \$1,000.00 \$1,000.00 \$0.00 MISCELLANEOUS ASSETS IN RESPONDENT'S POSSESSION Chattel Items from 7684 Tozer Road, Fanny Bay, British Columbia \$7,500.00 \$7,500.00 Coin collection \$0.00 \$0.00 Approximately 10 miscellaneous original works of art \$1,000.00 \$1,000.00 TOTAL \$8,500.00 \$0.00 8,500.00 PAINTINGS Picasso numbered lithograph \$103.00 \$103.00 Neil Doughty painting \$203.00 \$203.00 Kirsten Burge painting \$77.00 \$77.00 TOTAL \$383.00 \$0.00 \$383.00 TOTAL ASSETS \$1,178,785.64 \$486,698.99 \$692,086.66 EQUALIZATION PAYMENT OF ASSETS \$102,693.84 -\$102,693.84 EQUAL DIVISION OF ASSETS \$589,392.82 \$589,392.82 \$589,392.82 TAXABLE ASSETS OF THE CLAIMANT Charles Schwab IRA Investment Account No. XX01 (Balance at October 1, 2012 = \$138,508.95 USD) (Balance at January 31, 2021 = \$147,567.82 USD) \$147,567.82 Divide via direct transfer Divide via direct transfer Penn Mutual Life Insurance Policy No. XX43 (Cash surrender value as at October 1, 2012 = \$15,440.53 USD (Cash surrender value as at December 31, 2021 = \$45,373.77 USD) \$45,373.77 No division due to set-off of Respondent's BMO Life Insurance Policy or division via direct transfer of equivalent IRA Funds No division due to set-off of Respondent's BMO Life Insurance Policy or division via direct transfer of equivalent IRA Funds TOTAL \$192,941.59 \$0.00 \$0.00 TAXABLE ASSETS OF THE RESPONDENT Charles Schwab IRA Investment Account No. XX96 (Respondent) (Balance at October 1, 2012 = \$21,375.92 USD) (Balance stated in Respondent's February 22, 2021 Financial Statement = \$42,734.44 USD) \$42,734.44 Divide via direct transfer Divide via direct transfer BMO Life Insurance Policy (No documents of policy provided by Respondent) Unknown Unknown TOTAL \$42,734.44 \$0.00 \$0.00 CLAIMANT'S REAPPORTIONMENT OF ASSETS CLAIMS Reapportionment of \$37,550.00 in the Claimant's favour to account for the Respondent's use of the Tozer Road Property/occupational rent of the Tozer Road Property during the period of December 1, 2012 to August 1, 2017 \$37,550.00 Reapportionment of \$52,000.00 in the Claimant's favour to account for the circumstances of the Tozer Road Property for the period of September 1, 2017 to present \$52,000.00 If the Court does not accede to the Claimant's submission that the balances that were held in the sole bank accounts of the respective parties as at the date of the section 57 declaration should be considered for the purposes of division between the parties with the currency conversion rate to be used for the American accounts being as at the date of trial, there should be a reapportionment of assets/compensation order of \$14,066.23 made in the Claimant's favour to account for the Respondent's disposition of the balances that were held in his sole bank accounts at the date of the section 57 declaration. \$14,066.23 (the "Chart")

- [52] I note that the coin collection is valued at zero in the Chart, not because that is its value, but rather because Ms. Wallace accepted that it was properly attributed solely to Mr. Pichichero as an inheritance from Mr. Pichichero's father.

[53] Mr. Pichichero generally accepts the scope, ownership, valuation and division of the family assets set out in the Chart, subject to the following proposed adjustments.

3. Exchange Rate on US Bank Accounts

[54] Mr. Pichichero's proposes that the exchange rate applied to the US financial assets be that in effect as of the Declaration Date, rather than the Chart's use of the rates at the time of trial. The exchange rate on the Declaration Date was approximately at par. At the outset of trial, each US dollar was worth \$1.2513.

[55] Mr. Pichichero says that this approach should be adopted either as a matter of exercising the court's discretion to choose a different valuation date, or as a matter of reapportionment based on unfairness: *Janis v. Janis*, 2016 BCCA 364 at paras. 54-55. Mr. Pichichero argues that, as his US funds have now largely been spent, using the exchange rate at date of trial would mean that he is credited with having had the advantage of more Canadian funds than he was actually able to extract from those US accounts.

[56] The problem with this argument is that there is no means of determining from the record when the US dollar amounts were spent by either party. No accounting was provided. As such, it is not possible to determine whether Mr. Pichichero was able to exchange his US dollars at a rate above or below \$1.2513. I take judicial notice that there have been periods since the Declaration Date when the exchange rate was higher than \$1.2513: *G.W.M. v. W.C.M.*, 2015 BCSC 1624 at para. 177; *Meydaner v. Meydaner*, 2020 ONSC 3857 at para. 211. Given this limitation in the evidence, I am unable to conclude that using the usual trial date rate is unjust. In *C.S. v. C.B.*, 2020 BCSC 1020, the court had evidence as to the exchange rate on the date of earlier withdrawals (paras. 38, 59 and 125). Mr. Pichichero complains that this work would have been a "fool's errand", but I fail to see why it would have been so difficult to show the dates of his withdrawals, along with the exchange rates on those dates. Hence, I decline to exercise my discretion to use a different valuation date, and I do not find any unfairness justifying the exercise of s. 65.

[57] I find that all US assets held by either party should be valued at the exchange rate on the first day of trial, that being \$1.2513.

4. The Flying L Ranch

[58] Mr. Pichichero seeks to exclude the value of this property on the basis that it was an inheritance from his father.

[59] In *W.D.F. v. L.A.B.*, 2005 BCSC 1157, the court helpfully summarized the law on the proper treatment of inherited real estate at paras. 34-40. In sum:

- a) an inherited property not ordinarily used for a family purpose will not be considered a family asset (citing *Hefti v. Hefti* (1998), 57 B.C.L.R. (3d) 171 (C.A.);

- b) property may be held as an investment for future family use rather than being physically used, thereby still rendering it family property (citing *Ogilvie v. Ogilvie* (1995), 14 B.C.L.R. (3d) 296);
- c) merely talking about the use of such property for the future, or discussing it as part of estate planning, is insufficient to categorize it as "ordinarily used for a family purpose" (citing *Hefti*); and
- d) where both parties actively maintain the property and make payments on it, it may be considered family property as part of a retirement planning scheme (citing *Ogilvie*).

[60] In applying these factors, the court in *W.D.F.* concluded:

[40] In the present case, at most there were discussions between the parties as to the potential use of that property. There was no actual use of the property as physical property or an investment or otherwise. This was really a form of estate planning, similar to that in *McClure*, *supra*. I find that the K.1[] property is not a family asset. In the event I am wrong I would reapportion it entirely in the favour of Mr. *W.D.F.*

[61] I find that the Flying L Ranch should be treated as excluded property in favour of Mr. *Pichichero*. There is no evidence of Ms. *Wallace* changing her position in reliance on the existence of this asset. There is no evidence of Ms. *Wallace* contributing to the asset beyond the apparent payment of the property taxes from joint family property. There is no evidence of Ms. *Wallace* taking on additional responsibilities so that Mr. *Pichichero* could tend to the property. The property did not yield income used for family purposes. The parties only visited the property on limited occasions, and never stayed overnight. There was no structure placed on the property. The property was not pledged in order to obtain funds used for a family purpose: *Wallington v. Maxwell*, 2008 BCSC 416 at para. 56, *rev'd in part* on other grounds 2010 BCCA 251, further proceedings 2016 BCSC 219. Mr. *Pichichero* says he kept the property for sentimental purposes, although he acknowledged in cross examination that it could also serve as an investment.

[62] I would distinguish this case from *Ogilvie*, where the parties had a history of routinely visiting the property. In *Ogilvie*, the non-inheriting spouse was also solely responsible for some of the maintenance payments and was actively involved in communications regarding utilities. Ms. *Wallace* also cited *S.M.S. v. D.M.T.*, 2014 BCSC 2387 at paras. 86-93; however, in that case, there was evidence the parties had actively planned to use the inherited property to construct a matrimonial home. There were no such plans in the instant case.

[63] The only material factor favouring inclusion of the property is the fact that family property appears to have been used to pay the property taxes. However, I find that this is insufficient to bring it within the scope of family asset, and it is unnecessary to consider whether it could alternatively be allocated to Mr. *Pichichero* on s. 65 grounds. Further, there was no evidence as the amount of those taxes in any event. Given the value of the property, I do not expect that they were substantial. On balance, I do not find this property was "ordinarily

used for a family purpose".

[64] Hence the final accounting will need to reflect the fact that, although Ms. Wallace received \$29,193.24 to equalize the amount of money that Mr. Pichichero received from the sale of the Flying L Ranch, she did not actually have an interest in this property.

5. The Home

[65] The transaction that took place pursuant to the Groves Order used a valuation of \$440,000 for the Home. However, the Home was assessed in 2021 at \$544,000. How should that increase in value be addressed?

[66] By the close of trial, Ms. Wallace accepted that, absent a finding of unfairness under s. 57, she was not in a position to claim the gain on the value of the Home after the Groves Order required that Mr. Pichichero purchase her interest for \$220,000. This is particularly so given that the Groves Valuation Order made a specific declaration of the Home's value.

[67] As to the application of s. 57, I do not find any unfairness that would allow Ms. Wallace to receive a portion of the increase in the value of the Home. Her interest was purchased as a result of the Groves Order. She pushed for that order. She clearly believed that \$440,000 was a fair price for the Home, and that \$220,000 was a reasonable recovery for her interest. Hence her efforts to enforce a sale at that level. While she did not have access to the funds paid for her interest, as they were kept in her counsel's trust account, this restriction was the unavoidable outcome of Justice Groves' orders. If Ms. Wallace was unhappy with the restriction imposed by Justice Groves, she could have appealed the order, but she did not.

[68] I am confident that, had the value of the Home had gone down after her interest was sold, Ms. Wallace would not have offered to return any of the funds in trust to Mr. Pichichero. Furthermore, Ms. Wallace did nothing further to contribute to the upkeep of the Home after the Groves Order. Given that Mr. Pichichero assumed the economic risk associated with the Home by financing the purchase of Ms. Wallace's share, it is fair that he should receive the entire benefit of any increase in the value.

[69] As for Ms. Wallace's tax bill associated with the disposition, Ms. Wallace submits it should be shared equally between the parties. I am satisfied that this is a proven cost to the division of family assets, and that the fair result is for the parties to split the tax burden evenly, being \$1,600 each: *McKenzie v. McKenzie*, 2015 BCSC 241 at para. 8.

5. Occupational Rent

[70] Ms. Wallace seeks an unequal division of the Home to account for her claim for occupational rent: *McManus v. McManus*, 2019 BCSC 123.

- [71] Given my conclusion above, I find that the cut-off for any occupational rent claim is the date that Ms. Wallace's interest in the Home was transferred. After that date, the Home must be treated as Mr. Pichichero's, such that he could no longer have an occupational rent obligation to Ms. Wallace.
- [72] This leaves the question whether there is a valid claim for occupational rent up to that date.
- [73] Occupational rent is an equitable remedy. It tends to be awarded cautiously, only in exceptional circumstances, and where required to do justice between the parties. It is not generally treated as a standalone claim, but rather as part of the property division, where it tends to act as an "equalizer": *Shen v. Tong*, 2013 BCCA 519 at para. 49; *Stasiewski v. Stasiewski*, 2007 BCCA 205 at para. 33; *J.D.G. v. J.J.V.*, 2016 BCSC 2389 at para. 227.
- [74] Contrary to certain older authorities, ouster is not required in order to make a claim for occupational rent: *K.E.J. v P.R.J.*, 2018 BCSC 1401 at paras. 136-138; *McManus* at para. 74.
- [75] In assessing whether to grant an award for occupational rent, the court will consider a range of factors, including:
- a) the conduct of both spouses, including the failure to pay support;
 - (c) delay in making the claim;
 - (d) the extent to which the non-occupying spouse was prevented from having access to his or her equity in the home;
 - (e) whether the non-occupying spouse moved for the sale of the home, and if not, why not;
 - (f) which spouse paid the mortgage and other carrying charges of the matrimonial home;
 - (g) whether the children resided with the occupying spouse and, if so, whether the non-occupying spouse paid, or was able to pay, child support; and
 - (h) whether the occupying spouse increased the selling value of the property. *Higgins v. Higgins*, 19 R.F.L. (5th) 300, 2001 CanLII 28223 (S.C.J.) at para. 53.
- [76] Applying the most relevant factors here:
- a) Maintenance of the Home was performed using joint funds.
 - b) Ms. Wallace was clearly unable to return to the Home.
 - c) I conclude below that Ms. Wallace should have been paying support, but has not been.
 - d) There was no firm advance agreement that the Home would be sold, but that quickly became the intention. However, this process became quite delayed.
 - e) Mr. Pichichero had to deal with the bulk of the "on the ground" efforts to sell the Home. The evidence was that, by August of 2017, the Home had been shown about 46 times.

- f) Ms. Wallace may notionally have had to pay "rent" in Oklahoma, but this carries little weight given that she held beneficial title to the property, and any amounts paid were to her own parents.
- [77] On balance, I find that there is a reasonable basis for an occupational rent claim within the equalization analysis. Of particular moment is the fact that Ms. Wallace effectively shared in the expenses for maintaining the Home during the relevant period, even though she did not, and could not, live there. I would contrast this with cases where the court denied occupational rent largely on the basis that the occupying spouse shouldered the entire expense burden during their occupancy; see *Harrison v. Harrison*, 2011 BCSC 1139 at para. 96, and *Boucher v. Boucher*, 2011 BCSC 1125 at para. 46.
- [78] In terms of the appropriate rental amount to attribute, a joint appraisal obtained from the expert Dennis Larson provided the following data for market rents for the Home: January 1, 2011 \$1,000/mo January 1, 2012 \$1,100/mo January 1, 2013 \$1,150/mo January 1, 2014 \$1,150/mo January 1, 2015 \$1,200/mo January 1, 2016 \$1,500/mo January 1, 2017 \$1,750/mo
- [79] I note that these amounts appear to be quite conservative given the evidence of Mr. Pichichero's own efforts to rent two of the three bedrooms in the Home for \$2,000. It is true that the report is somewhat dated, but it is the best available evidence and, more importantly, it covers the relevant period. That said, I would reduce any amounts by 50% to account for the fact that Mr. Pichichero testified that he was largely restricting himself to a limited portion of the Home in order to facilitate its sale or possible rental. The figure must also obviously be reduced by a further 50% to account for their shared interest in the Home.
- [80] In *K.E.J.*, the court awarded occupational rent, but also required a reduction in the amount payable to account for 50% of the insurance costs incurred. The court did not allow a claim for the alleged amounts spent on maintenance to be offset because there was insufficient evidence in support. I find that the same situation exists here. There was an allegation of expenses paid, but there was insufficient detail or documentation to support an offset.
- [81] As such, I find that Ms. Wallace is entitled to an unequal division to reflect a notional payment to her of 25% of the rental figures set out in the Larson report for each calendar year from Ms. Wallace's departure from the Home in November 2012 until the date she effectively sold her interest in August 2017.
6. Charles Schwab Accounts
- [82] At the Declaration Date, Ms. Wallace held a US-dollar Charles Schwab Individual Retirement Account ("IRA") with a balance of \$138,508.95 USD. She has not made any withdrawals from this account since that date. As of January 31, 2021, the account had a balance of \$147,567.82 USD.

- [83] At the Declaration Date, Mr. Pichichero also held a US dollar Charles Schwab IRA with a balance of \$21,375.92 USD. He provided evidence at trial that in 2017, he made a withdrawal from his Charles Schwab IRA in the sum of \$3,000, but says he returned the funds to the account shortly after the withdrawal. In Mr. Pichichero's Financial Statement, sworn February 22, 2021, he stated that his account had a value of \$42,734.44 USD.
- [84] Ms. Wallace submits that, since IRAs are pre-tax assets intended to be drawn on in retirement, the best means of ensuring an equal division of the balances of these registered investment accounts would be achieved via tax-free equalization between the two accounts. Ms. Wallace notes that this method of equalizing US IRA accounts was used in *S.C. v. A.D.*, 2009 BCSC 1749 at para. 48, and *Trevison v. Hellekson*, 2008 BCSC 1560 at para.104. Ms. Wallace also seeks leave to bring this issue back before the court if it is determined that Mr. Pichichero reduced the value of his Charles Schwab IRA by removing any further funds.
- [85] Mr. Pichichero, on the other hand, proposes that the valuation of these accounts be included as part of the broader asset valuation and equalization payment calculation based on a valuation at trial. He argues that, given that the investments are located in the United States, it would be difficult to enforce a division at source.
- [86] I find that Ms. Wallace's proposed approach is the most appropriate resolution in the circumstances. It ensures equality. Any question as to the jurisdiction to make such an order is answered by the decisions in *S.C.* and *Trevison*. I do give each party leave to re-attend for further directions if equalization at source is refused by the relevant US entities. I do not give express leave to return to address any withdrawals by Mr. Pichichero. There was insufficient evidence of such conduct to justify such an express term.

7. Life Insurance Policies

- [87] At the Declaration Date, Ms. Wallace held a Penn Mutual Life Insurance Policy Account with a cash surrender value of \$15,440.53 USD. At December 31, 2021, the policy had a cash surrender value of \$45,373.77 USD. This policy is a pre-tax asset.
- [88] At the Declaration Date, there is some evidence that Mr. Pichichero may have held a BMO Life Insurance Policy Account with an unknown value. However, he omitted listing this policy in six Financial Statements sworn in these proceedings. He also did not produce any statements relating to this policy. His testimony at trial suggests that he has virtually no information about this policy. His counsel speculated in final argument that perhaps it was a policy attached to a loan, which disappeared when the debt was paid off.
- [89] Ms. Wallace suggests that the most appropriate remedy for Mr. Pichichero's failure to provide adequate disclosure respecting this policy is that Ms. Wallace should be able to keep 100% of her policy, and Mr. Pichichero can keep 100% of his policy, whatever it may be. In the alternative, Ms. Wallace submits that an equal division of the values of the policies be achieved by including their respective values in the calculated amounts to be equalized via the tax-free direct transfers between the IRAs.

[90] I find that the alternative approach proposed by Ms. Wallace is the most reasonable solution to this issue. Her initial proposal is overly harsh, in that it could grant Ms. Wallace a benefit in the tens of thousands of dollars, when it is quite possible (perhaps even likely) that Mr. Pichichero's policy no longer exists. This approach also provides the most mathematical precision in ensuring an equitable outcome. To ensure that Mr. Pichichero has a proper incentive to help solve the mystery associated with his possible policy, I order that Mr. Pichichero produce all documents in relation to this policy within one month to facilitate the calculation, failing which Ms. Wallace may apply for an additional remedy for any non-disclosure.

8. Art

[91] There is no dispute about the status of the art identified in the Chart, but I simply note that its ownership and valuation was determined at trial by way of a sealed bid process that took place with the consent of both parties. B. Spousal Support

1. Legal Principles

[92] Both parties initially sought spousal support from the other. However, at trial, Ms. Wallace was prepared to adjourn her request generally. Mr. Pichichero did not oppose this. As such, I focus solely on Mr. Pichichero's request for spousal support in these reasons.

[93] In considering a claim for spousal support, entitlement is the threshold issue. This requires a consideration of the objectives set out in s. 15.2(6) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.):

(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.

[94] All of the objectives should be considered as no single objective is paramount: *Moge v. Moge*, [1992] 3 S.C.R. 813 at 853.

[95] The objectives should be assessed in light of the factors outlined in s. 15.2(4) of the Divorce Act:

- (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.
- [96] There are two possible grounds for entitlement to spousal support, being compensatory or non-compensatory support. Compensatory support addresses cases where, as a result of the parties' roles during marriage, one spouse has suffered economic disadvantages due to the union--for example, by sacrificing career opportunities to rear children. Non-compensatory support is needs-based, and focuses on the parties' respective means and the fact that, by virtue of their marriage, the parties have some ongoing responsibility to care for each other: *Zacharias v. Zacharias*, 2015 BCCA 376 at paras. 26-27.
- [97] The applicable principles were recently summarized by Master Elwood in *Harfield v. Wilson*, 2021 BCSC 653 at paras. 29-32:
- [29] In *Moge v. Moge*, [1992] 3 S.C.R. 813, a leading authority, the Supreme Court of Canada described marriage as a joint endeavour. The Court stated that the longer a relationship endures, "the closer the economic union, and the greater will be the presumptive claim to equal standards of living upon its dissolution" (at p. 870).
- [30] In British Columbia, this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. "Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become": *W. v. W.*, 2005 BCSC 1010, para. 11.
- [31] However, the fact of a long marriage does not, in and of itself, give rise to an entitlement to spousal support. Rather, it supports an award if the court concludes it is necessary to achieve a parity of living standards, and accepts that this "presumptive claim" is the appropriate goal in the circumstances: *Zacharias*, at para. 48.
- [32] Likewise, income disparity alone does not provide a basis for awarding spousal support. Marriage, even a long marriage, does not automatically entitle a spouse to the same standard of living he or she enjoyed during the marriage: *Lee v. Lee*, 2014 [BCCA] 383, at para. 60 and 65.
2. Entitlement
- [98] Ms. Wallace takes the position there is no entitlement to spousal support. I disagree. While there is no basis for a compensatory entitlement, there is a basis for a non-compensatory award. The following factors are the most relevant in this case:

- a) The apportionment of property outlined above will not dramatically alter either party's needs or means. Each party had various "swings and roundabouts" within the property apportionment analysis above: *Paisley v. Paisley*, 2009 BCSC 879 at paras. 91-93.
- b) The parties had a long-term relationship, living in a marriage-like state for more than 24 years.
- c) There is little evidence that Mr. Pichichero did much to facilitate Ms. Wallace's income earning efforts. It appears she supported him as much as he supported her, if not more so. For the first 10 years of their relationship, Mr. Pichichero was enrolled in post secondary schooling rather than contributing to Ms. Wallace's career. Thereafter, his employment was very sporadic. Further, he did not make any material sacrifices for Ms. Wallace's career. Mr. Pichichero was already working outside the office when Ms. Wallace's opportunity to move to Texas arose. There is no evidence that he made inquiries to see if he could continue working for his firm after a move to Texas. In any event, I infer that Mr. Pichichero was no longer on good terms with the management of Teligent Inc. at the time of the move, as indicated by the fact that they largely removed him from his prior responsibilities, advised him to work from home, and allowed him to take on other work. There is little evidence of any efforts to see whether he could find the same or similar work in Texas. His efforts to find any work after the move were extremely limited. He enjoyed the travel associated with Ms. Wallace's work without doing much to support her work. His various injuries and illnesses prevented a useful contribution to her career. Any contribution through his agreement to move to Texas is very stale, given that neither party has worked for the past 18 years--there was no longer a career to promote after Ms. Wallace stopped working herself. In sum, I find that Mr. Pichichero's lack of employment had nothing to do with him putting Ms. Wallace's interests ahead of his own. Rather, it was his own inability to maintain employment that caused this. As such, there is no basis for a compensatory spousal support award.
- d) Both parties have been declared disabled from work. Many of the conditions from which each claims to suffer are unusual in the extreme, and are almost beyond counting. The quality of the medical evidence supporting both parties' disabilities left something to be desired. Nonetheless, based on the limited evidence before me, and my assessment of the parties' practical abilities and functioning, I accept that neither is capable of working at this time. I find that I can reach this conclusion based solely on their respective neck and back injuries alone. This avoids the need for me to opine on some of the more unusual diagnoses each has received.
- e) Both clearly require financial support to manage their disabilities, but Ms. Wallace is in the fortunate situation where her disability benefits far exceed those available to Mr. Pichichero.
- f) Mr. Pichichero's means are modest. His needs are high, particularly for medical care. I find that he would remain at a standard of living far below that of Ms. Wallace absent an award for spousal support. His medical expenses are high in part because he is accessing

uninsured services outside of the US, but I cannot find that it is unreasonable for him to seek treatment here in Canada, where he has now made his home. I also cannot fault his decision to seek even temporary relief from the pain caused by his recent motor vehicle accidents through massage and acupuncture. The fact that the most recent accidents happened after the date of separation does necessarily not exclude it from a consideration of his needs: *Jubinville v. Jubinville*, 2013 BCSC 2262 at paras. 50-52. The fact that the injuries from the latest motor vehicle accident, in April 2020, were layered on top of continuing historical injuries he incurred during the marriage justifies some consideration. I further consider the fact that the marriage was a long one; that it was a mutually interdependent giving rise to a presumption of ongoing support; and that the parties' financial lives continued to be somewhat intertwined after the separation: *Fyfe v. Jouppien*, 2011 ONSC 5462 at para. 54, and *Firth v. Firth*, 2012 BCSC 857 at paras. 72-73. Together I consider these factors enough to overcome the relatively significant gap of approximately eight years between the separation and the April 2020 accident.

- g) Given that his current debt load is largely due to his decision to borrow in order to buy out Ms. Wallace's interest in the Home, I do not place much weight on the existence of those particular obligations.

[99] Based on these points, I find that Mr. Pichichero has established an entitlement to support, but only on the basis of need, and not on a compensatory basis.

[100] The next issues are the appropriate quantum, duration, and structure of the support payment.

3. Quantum and Duration

[101] Mr. Pichichero is content to have the quantum of spousal support determined on the basis of the parties' current reported income levels. Ms. Wallace, on the other hand, raises three arguments in relation to the proper assessment. Should the payments to Mr. Pichichero from the DVA be considered as income for the purposes of any means assessment?

[102] Ms. Wallace argues that Mr. Pichichero's monthly veterans' benefit payment should be treated as income or, at a minimum, as part of his "means", despite the fact that it is not included in his tax returns. Should it be treated as income or is it simply a periodic payment meant to compensate for pain and suffering?

[103] In *Gebresadik v. Tesfay*, 2021 BCSC 127 at paras. 86-87, the court held in an FLA proceeding that a court can estimate what portion of a settlement or damages award was meant to compensate for lost income.

[104] In *Lozinski v. Lozinski*, 2017 BCCA 280, the Court of Appeal considered whether the trial judge erred in considering the availability of a Veterans Affairs disability pension, paid out under the Pension Act, R.S.C. 1985, C. p-6, as part of the support assessment. This required a consideration of whether the characterization of such amounts as pain and suffering payments in the statutory insurance policy interpretation decision *Manuge v. Canada*, 2012

FC 499, should also be applied to the family law context. In *Manuge*, the court concluded that the disability amounts paid were not "monthly income benefits" within the meaning of the insurance policy and, accordingly, that a deduction was not contractually justified. In *Lozinski*, the court found that the trial judge did not err in considering the payments as part of the court's assessment of the "conditions, means, needs and other circumstances" under s. 15.2(4) of the Divorce Act:

- [32] The question for resolution is whether the judge erred when fixing child and spousal support by considering the VA Pension as part of the "conditions, means, needs and other circumstances of each spouse" pursuant to s. 9(c) of the Guidelines and s. 15.2(4) of the Divorce Act. Whether VA disability pensions may be considered Guidelines income is an important issue, but it is not directly engaged because, as discussed below, given the shared parenting context, the judge was entitled to consider non-income resources. That is how he approached the VA Pension. In addition, Ms. Lozinski did not seek its inclusion in income, nor did the judge make the order on that basis. In these circumstances, I would leave comprehensive analysis and determination of whether VA disability pensions may be considered Guidelines income for support purposes to another day.
- [33] Nevertheless, while distinguishable, the cases that analyse whether VA disability pensions may be considered Guidelines income provide helpful guidance and context for how such pensions should be treated when support is fixed based on the "conditions, means, needs and other circumstances of each spouse"
- [44] As noted, the same phrase is found in s. 15.2(4) of the Divorce Act regarding spousal support. The Supreme Court of Canada has interpreted "means" in the spousal support context expansively to include "all pecuniary resources, capital assets, income from employment or earning capacity, and other sources from which the person receives gains or benefits": *Strang v. Strang*, [1992] 2 S.C.R. 112 at 119; *Leskun v. Leskun*, 2006 SCC 25 at para. 29. In *Kerr*, the court relied on this interpretation in considering s. 9(c) of the Guidelines:
- [33] The Supreme Court of Canada has considered the scope of the terms "condition" and "means" in the context of spousal support cases. It has held that the "condition" of a litigant includes such factors as their age, health, needs, obligations, dependants and their station in life. A litigant's "means" encompasses all financial resources, capital assets, income from employment and any other source from which the spouse derives gains or benefits.
[Footnotes omitted.]
- [45] The broad and flexible interpretation of "conditions, means, needs and other circumstances" is consistent with the jurisprudence in this province. For example, in *Ortynski v. Ortynski*, 2014 BCSC 73 at para. 45, the Court held that s. 9(c) captured wealthy paternal grandparents' contributions, and in *Reber v. Reber*, 2002 BCSC 884 at para. 76, child tax benefits and a daycare subsidy were considered on the same basis

- [46] In my view, the judge engaged in the sort of broad and flexible analysis mandated by Parliament in s. 9(c) of the Guidelines and s. 15.2(4) of the Divorce Act. In doing so, he recognized the compensatory nature of the VA Pension and its intended purpose of improving Mr. Lozinski's quality of life. He also proceeded on the basis that the VA Pension is not income, citing L.F. and Wells with apparent approval: paras. 72-79. Nevertheless, given the shared parenting context, he was entitled to consider the VA Pension as part of "all financial resources, capital assets, income from employment and any other source from which [Mr. Lozinski] derives gains or benefits": Kerr at para. 33. As is clear from his testimony, this is the manner in which Mr. Lozinski treats the VA Pension.
- [51] I also see no error in the judge's approach to determining the quantum of spousal support. After finding entitlement on both a compensatory and non-compensatory basis, he reviewed the SSAG ranges using the parties' Guidelines incomes, not including the VA Pension. Nevertheless, he recognized that, regardless of its purpose, Mr. Lozinski's receipt of the VA Pension created an increased discrepancy in the parties' respective standards of living, which is a relevant factor for consideration. In my view, his choice to award spousal support at the higher end of the SSAG spectrum as a result was well within his discretion: *Redpath v. Redpath*, 2006 BCCA 338 at paras. 40-42. Given the broad definition of "means" in the case law, the judge was entitled to consider the VA Pension in determining the appropriate quantum of spousal support. I see no material error, serious misapprehension of evidence or error in law that would justify disturbing the spousal support award. [Emphasis added]
- [105] I am prepared to adopt a similar approach here, i.e. that such benefits should at least be considered part of Mr. Pichichero's means if not his income. I find that completely ignoring these benefits would be improper, particularly given that there was insufficient evidence or expert opinion to establish with certainty that the DVA payments are in fact purely for "pain and suffering" (as in *Manuge*) rather than being, at least in part, meant to compensate for loss of employability as well. *Intentional Underemployment*
- [106] Second, Ms. Wallace argues that Mr. Pichichero is intentionally underemployed. However, I accepted above that both are disabled from work. In particular, Mr. Pichichero did appear to be in genuine discomfort over the course of the trial, needing to move around in the courtroom and change positions during his testimony. Furthermore, his thought patterns during his testimony were scattered, moving quickly off topic. I draw some comfort from the fact that the US military has continued to treat him as disabled to present, as has the US Social Security Administration. His inability to hold down long-term employment in the past is also some evidence of a capacity problem.
- [107] The fact that Mr. Pichichero has taken several driving trips down to the US over the years is not sufficient evidence of a capacity to work. Nor does the fleeting (and apparently unauthorized) mention as general counsel on his brother's firm's website, or the operation of his poetry website, signal an ability to earn income.

- [108] Finally, Ms. Wallace argues that Mr. Pichichero could at least rent out part of the Home, as he does not need three bedrooms for himself. She notes that he did make efforts to rent his extra bedrooms for \$2,000 per month. I accept that it would be reasonable for him to make use of his extra space in this way; see *Cosentino v. Cosentino*, 2015 ONSC 271 at paras. 16-17, 100. Although the facts in *Cosentino* are somewhat distinguishable, there is a parallel in that the Home is suitable for rent and Mr. Pichichero has taken steps to rent it, without necessarily "following through", so to speak.
- [109] Were Mr. Pichichero to rent, there would likely be expenses associated with this effort. I conclude that there is the potential for Mr. Pichichero to earn \$1,000 net per month, thereby supporting an attributed increase in his income of \$12,000. There is also an element of balance and fairness here, in that I reduced the occupational rent claim on the basis that Mr. Pichichero has (and could) restrict his use of the Home. That restriction to part of the Home could in turn reasonably be expected to be used to earn Mr. Pichichero additional income.
- [110] I note that a spouse does not have a general obligation to rent out their primary residence post-separation: *Cesarone v. Knox*, 2016 BCSC 53 at para. 30. However here, as noted above, Mr. Pichichero himself has acknowledged the Home's suitability for renting and has attempted in the past to rent it out. Further, given he is disabled from work, he has few other avenues available to achieve self-sufficiency. On the whole, I consider it fair to attribute \$12,000 in additional income to Mr. Pichichero. Calculation
- [111] There is complexity created by the different tax regimes applicable to the parties. In particular, the parties accepted that spousal support payments would not be deductible for Ms. Wallace, as they would be here in Canada. The Spousal Support Advisory Guidelines: The Revised User's Guide (April 2016) recognizes that where a payor cannot deduct payment of spousal support from their income tax, it necessitates an exception to the Spousal Support Advisory Guidelines ("SSAG"): at p. 68. To address this problem, Ms. Wallace proposed an "apples to apples" approach that first drew down each party's income to a figure net of taxation. As of 2020, Ms. Wallace was in receipt of approximately \$73,066.08 USD (net) per year or \$91,427.59 CAD. Under Ms. Wallace's analysis, Mr. Pichichero was in receipt of net funds (including his veterans' pension payment) totalling \$36,094.80 USD or \$45,165.42 CAD. Plugging in both net figures as non-taxable amounts without gross-up into a SSAG Divorcemate calculation for a 24-year marriage, yields low, medium and high amounts of \$1,388, \$2,032, and \$2,323.
- [112] The lack of a compensatory claim, and the relative softness of the non-compensatory claim, would suggest that a figure towards the lower end would be appropriate. If one were to add in a further \$12,000 in attributed net rental income to Mr. Pichichero, a calculated support range would fall further. On the other hand, the fact that the veterans' benefits should not necessarily be recognized as pure "income" pulls the tension back upwards.

- [113] This case presents a relatively unique set of facts, in which the parties live in different jurisdictions with different tax regimes, have no employment income and no ability to work, but have relatively significant "means", including potentially income-generating real estate assets and a suite of disability benefits. The SSAG calculation is not a binding legal formula, but a guide to assist in determining an appropriate support amount: *Chutter v. Chutter*, 2008 BCCA 507 at para. 100. While I acknowledge it should be departed from cautiously, I would depart from a formal application here given the unique complicating factors: *Chutter* at paras. 100-102.
- [114] Considering all of the relevant factors and tensions here, I find that an appropriate award for spousal support is \$1,300/month.
- [115] In terms of duration, the SSAG approach above proposes an indefinite period for support. I do not find that the 9 years since separation reasonably end the obligation to pay support after a 24-25 year marriage.
- [116] However, although I do not impose an end point, I do find that a right of review is appropriate, as discussed further below.
- [117] In terms of retroactivity, the potential for a spousal support claim by Mr. Pichichero was made known at the outset of this litigation. In the absence of a reason to order otherwise, the date of effective notice should generally be the commencement date for payment of retroactive spousal support: *Willms v. Willms*, 2020 BCCA 51 at para. 28, citing *Kerr v. Baranow*, 2011 SCC 10 at para. 29. Having regard to the factors listed in *Willms* at para. 28, I see no reason to depart from the general rule in this case. There were no issues of poor conduct or delay raised, nor any evidence that such a retroactive award would cause Ms. Wallace undue hardship.
- [118] I find that the support order should extend back to when Ms. Wallace left the Home in November 2012. Until then, the parties' economic lives remained integrated. This is also when Mr. Pichichero filed his counterclaim, in which he gave notice that he was seeking spousal support.
- [119] Although the parties' earnings varied somewhat over the years, I find that the relatively consistent amounts coming in justify applying the \$1,300/month figure over this entire period.

4. Right of Review

- [120] Ms. Wallace is set to cease receiving her Unum disability benefits at age 67, or on July 9, 2025. I find that the date of this certain change in the parties' relative positions creates a justification for a right of review without the need to provide proof of a material change in circumstances: *Leskun v. Leskun*, 2006 SCC 25 at para. 37. There are also a range of other conditions that could conceivably bring an end to the Unum payments. As such, I find that a right of review should trigger when and if Ms. Wallace's Unum benefits cease: *Mansoor v. Mansoor*, 2008 BCSC 820 at para. 153. This review right will also help ensure that Mr.

Pichichero's obligation to pursue self-sufficiency is taken seriously.

5. Lump Sum v. Periodic

[121] Mr. Pichichero asks that any spousal support award be lump sum. He argues that Ms. Wallace has made it clear that she does not wish to pay spousal support, and, further, there may be difficulties in enforcement given that Oklahoma is not a reciprocal jurisdiction.

[122] While the latter point is certainly correct, I did not hear any evidence from Ms. Wallace suggesting that she would not respect an order of this Court.

[123] I find that there is an insufficient basis to order a lump sum award. While the parties' relationship has collapsed, that is commonplace in these types of cases, and is not a sufficient basis to make such an award. As this court recently summarized in *Small v. Small*, 2020 BCSC 707:

[278] Lump sum support awards are exceptional, and should only be made where there is a special need or specific circumstances that renders it appropriate. The circumstances that may warrant a lump sum award are summarized by our Court of Appeal in *Santelli* at paras. 163-166 and *Parton v. Parton*, 2018 BCCA 273 at paras. 47-48. They include:

- i. the existence of animosity between the parties, which might favour a lump sum award to reduce future sources of conflict; ii. other reasons that it might be desirable to terminate contact between the parties, including a history of domestic violence; iii. providing capital to meet immediate need on the part of the dependent spouse; iv. a history of non-compliance with court orders that suggests the payor spouse is unlikely to comply with support orders in the future;
- v. the difficulty of enforcing a periodic support order where the payor spouse lives outside of Canada; and vi. a lack of proper financial disclosure from the payor spouse.

[279] The advantages to be gained by a lump sum award must be balanced against any disadvantages to the payor spouse. A lump sum support award should not be made where the payor does not have the ability to make a lump sum payment without undermining his or her future self-sufficiency: *Santelli* at para. 166.

[124] Very few of these factors apply in the present case. While there is a certain amount of animosity between the parties, I do not find it sufficient to overcome the disadvantages of making a lump sum award. Ms. Wallace is reliant on monthly disability benefits, and hence I find it would be unfair to require her to "front-end load" her spousal support obligation: *K.D.R.A. v. Y.J.A.A.*, 2014 BCSC 2310 at para. 157-58. Furthermore, the fact that the claim is made on a needs basis rather than a compensatory basis weighs against a lump sum award: *S.M.S. v. D.M.T.*, 2014 BCSC 2387 at para. 149.

[125] I find the spousal support award should be periodic. V. CONCLUSION

- [126] There is no dispute regarding the issuance of the requested divorce order. The parties have been living separate and apart for many years. I am satisfied that the requirements for a divorce order pursuant to s. 12 of the Divorce Act, are met in this case. I therefore grant an order for divorce that will take effect on the 31st day after the date of these reasons.
- [127] As to the property issues, I leave it first to the parties to derive the precise equalization payment (or distribution from the Trust Account) that flows from these reasons. If there is any disagreement, the parties may seek a further one-hour attendance to be held prior to the entry of the final order.
- [128] As for spousal support, I find that there is a non-compensatory basis for support to be paid by Ms. Wallace to Mr. Pichichero at a \$1,300 per month, retroactive to November 2012. Ms. Wallace's claim for spousal support is adjourned generally. There will be a right of review of spousal support when and if Ms. Wallace's Unum benefits come to an end.
- [129] If the parties are unable to agree on costs, they may address same by way of written submissions of not more than 10 pages on the following schedule:
- a) Ms. Wallace: 30 days from today;
 - b) Mr. Pichichero: 60 days from today;
 - c) Ms. Wallace: 75 days from today.
- [130] That said, my preliminary view is that, given that there was divided success, absent additional facts, an order requiring that each party bear their own costs would be appropriate. "Branch J."

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