

CANADA / JUDGMENT

Wellard v. Wellard

2020 BCSC 1877

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 1877 Wellard v. Wellard

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wellard v. Wellard,

2020 BCSC 1877

Date: 20201202

Docket: E21833

Registry: Fort St. John

Between:

Deborah Elizabeth Wellard

Claimant

And

Gregory Bruce Wellard

Respondent

Before: The Honourable Mr. Justice Giaschi

Reasons for Judgment

Counsel for Claimant:

P. Boles

Appearing on his own behalf

Gregory Bruce Wellard

Place and Date of Trial:

Fort St. John, B.C.

June 29 and 30, July 2 and 3, and August 20 and 21, 2020

Place and Date of Judgment:

Fort St. John, B.C.

December 2, 2020

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Introduction

- [1] The parties began living together in 1977, married on October 23, 1982, and separated on November 20, 2012. After their separation, they continued to live together but separately until July 2013 when the claimant moved to Ontario.
- [2] Following the separation and the claimant's move to Ontario, the respondent continued to live in the family home, continued to have the sole use of recreational properties the couple had purchased and continued to have the sole use of the chattels the couple had acquired during the course of the marriage. The respondent also refused to pay any spousal support to the claimant. The claimant had been unemployed for two years before separation and continued to be unemployed for lengthy periods of time following separation. The respondent earned approximately \$100,000 per year until late 2013 when he chose early retirement at the age of 60. It was not until a court order was obtained on April 30, 2019, that the respondent began paying interim spousal support in the amount of \$2,200 per month.

- [3] The notice of family claim was filed on July 26, 2013, and amended on June 28, 2019. Pursuant to the provisions of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) ["DA"] and the Family Law Act, S.B.C. 2011, c. 25 ["FLA"], the claimant claims:
- a) An order for divorce;
 - b) Imputation of income to the respondent;
 - c) Spousal support retroactive to July 26, 2013;
 - d) Orders for the sale of all family property;
 - e) Unequal division of family property and debt;
 - f) A declaration of an interest in the respondent's pensions, RRSPs and bank accounts; and
 - g) Occupation rent.
- [4] The respondent, who was self-represented at the trial and throughout much of this proceeding, agrees to an order for divorce. He opposes an unequal division of family property and says that some of the chattels the family acquired during the marriage are excluded property because he acquired them using his inheritance. He also opposes the sale of family assets. In respect of spousal support, the respondent pleads and submits that he should not be required to pay spousal support because he is retired and it was the parties' long-term plan that he would retire at age 60.
- [5] In summary, for the reasons set out herein, I order that:
- a) The family property is to be divided, subject to various adjustments and compensation orders to take into account dispositions of family property made after separation;
 - b) None of the chattels were proven to have been acquired using an inheritance;
 - c) An unequal division of family property is justified on the basis of the respondent's exclusive use and occupation of the family home from 2013 through 2019;
 - d) The respondent is not liable for retroactive spousal support due primarily to the claimant's delay in applying for such support;
 - e) An annual income of \$50,000 is imputed to the respondent as his early retirement was voluntary; and
 - f) The respondent is to pay ongoing spousal support, subject to review on the respondent's 70th birthday.

Credibility and Reliability

- [6] I found the claimant to be a credible and reliable witness. She gave her evidence in a careful and succinct manner, readily acknowledged when she could not remember things, and was not prone to exaggeration.

- [7] The respondent, on the other hand, lacked both credibility and reliability. He filed financial statements that were misleading as to his expenses by failing to note that Carol Savage, a friend who lived with him in the family home after the parties' separation, paid for a significant share of his expenses. He was untruthful to the court in that, during the trial, he advised he did not know the whereabouts of Ms. Savage but, as events unfolded, it became obvious that he had been in contact with her during the trial. He also gave inconsistent and contradictory evidence about his inheritances and what happened to some jewellery that was gifted by his mother.
- [8] Accordingly, I generally prefer the evidence of the claimant over that of the respondent.

Facts

Pre-Separation

- [9] The claimant was almost 53 years of age at the date of separation and 60 years of age as of the trial.
- [10] The respondent was 59 years of age at the date of separation and 67 years of age as of the trial.
- [11] The claimant has a grade 10 education, having left high school at the age of 16. She and the respondent first started dating in September 1977 and, shortly thereafter, began living together in St. Catharines, Ontario. At the time, the respondent worked for General Motors and the claimant worked as a waitress. The parties lived in St. Catharines until the respondent lost his job. They then moved to Fort St. John, BC in January 1979.
- [12] The parties initially lived in rental accommodations in Fort St. John and Grand Haven. They had one vehicle which was used by the respondent as the claimant did not then have a driver's licence.
- [13] In August 1979, the first child of the marriage was born. This was followed with the birth of a second child in October 1980 and a third child in December 1985.
- [14] In 1983, the parties purchased a 10-acre lot in Charlie Lake, which had a small log cabin on it that they fixed up.
- [15] From the time of their arrival in Fort St. John, the respondent worked at the Swanson Lumber Mill. In the ensuing years he attended various education/training courses to upgrade his qualifications. He apprenticed as a millwright, obtained his electrical certification and eventually also obtained an instrumentation certification. He was gainfully employed throughout the marriage and was the main, and often the only, wage earner of the family. By the time the parties separated, the respondent was earning approximately \$100,000 per year.

- [16] The claimant was predominantly a stay-at-home mother. Although she had some periodic employment as a waitress prior to the birth of the third child, she primarily looked after the children and the family home.
- [17] I note that the claimant testified that her career aspirations were to be a nurse or a teacher and that she gave up those aspirations to stay home with the children. I accept that these may have been her aspirations, but I am not satisfied that becoming a nurse or teacher were ever realistic career objectives for the claimant.
- [18] In 1989, the claimant enrolled in a training program to become certified as a community support worker. After receiving her certification, she began working as a support worker. The work was sporadic until 1992, when the claimant obtained a full-time position at a group home. This job lasted two and a half years. Thereafter, she had occasional employment, although for at least two years before the parties separated, she had been unemployed.
- [19] In 1993, the parties sold their 10-acre property in Charlie Lake and used the funds from the sale for a down payment on a 5-acre bare land lot also in Charlie Lake. They subsequently built a house on the new property, which became the family home.
- [20] In the 2000s, the claimant began having medical problems. She had meniscus issues which required two surgeries. She broke her ankle which required more surgery. She also broke two different toes. The claimant was eventually diagnosed with osteoporosis, a condition from which she continues to suffer.
- [21] By 2009, the children of the marriage had left the family home and the parties separated for the first time. The cause of the separation was the respondent's drug use. The claimant's evidence, which I accept, is that commencing in the early 1980s both parties used drugs, mostly cocaine. The parties stopped all drug use in 1989, but the respondent relapsed after 10 years. It was this relapse that caused the parties to separate in 2009. It was only after the respondent agreed to attend a treatment program in 2010 that the claimant returned to the family home and the parties resumed their relationship.
- [22] The respondent's drug use caused him to be moody and easy to anger. He was controlling of and demeaning to both the claimant and the children. At times, the respondent was physically violent with the claimant. The claimant testified that more than once the respondent put his hands around her neck and squeezed.
- [23] Following the resumption of their relationship, in October 2011 the parties purchased three adjoining bare lot properties in Morson, Ontario, on Lake of the Woods, for \$120,000 (the "Morson Properties"). The parties leveraged their family home to obtain the funds for the purchase. Their plan was to use the Morson Properties as summer vacation properties and eventually as their retirement home. As the Morson Properties had no buildings, they purchased a Commander motor home which they could use to travel to and from the Morson Properties and to live in while there. They eventually built a small tool shed on the Morson Properties.

- [24] The claimant testified that the respondent resumed his drug use sometime after returning from his rehabilitation treatment in 2010. This is disputed by the respondent, who testified at trial that he has been sober for 10 years. I accept the claimant's evidence over that of the respondent. The claimant's evidence is corroborated by an email she sent to the respondent on August 31, 2014. In that email she wrote, "I did give up when you came home from rehab and everything fell back into old patterns".
- [25] In November 2012, the parties began to live separately within their home. On July 13, 2013, the claimant left the family home and returned to Ontario. She testified that the decision to leave was made after the respondent came at her with his hands held up in the choking position. She cringed and he said, "you're still scared of the old man".
- [26] The claimant testified that during the course of the marriage, the respondent told her that all of the family property was his and that, if she left the marriage, she would leave with nothing but the clothes on her back. I accept the claimant's evidence that this occurred.
- [27] The parties acquired various motor vehicles, motor homes, motorcycles, recreational vehicles, boats and trailers during the marriage, which they still owned at the date of separation. The parties referred to these chattels as "toys". The respondent alleges that these chattels were purchased using an inheritance he received. The claimant believed many of these chattels were purchased using a line of credit, which was secured against the family home and used from time to time to make large purchases. I will address the source of the funds used to purchase the chattels when I consider whether some or all of them are excluded from family property.
- [28] The parties had also accumulated various RRSPs and pensions by the time they separated. I will address the evidence in relation to these later.

Claimant's Life Post-Separation

- [29] When the claimant left the family home for Ontario, she withdrew \$50,000 from the line of credit that was secured against the family home. I accept that she did this because the respondent had told her he would not pay her support or give her an interest in the family property. I accept that she had no other source of funds and took the money to pay for her living expenses and to retain a lawyer. In this regard, I note that the claimant had not worked since at least 2010.
- [30] The claimant moved to her parent's home in Roslin, Ontario. At the time, her father was suffering from cancer. Shortly after arriving in Ontario, the claimant's mother died in February 2014. Thereafter, the claimant provided palliative care to her father in his home until he died in November 2014.
- [31] Following the death of her parents, the claimant continued to live in their home for two years until it was sold. She then lived in a converted hotel and later with a friend.

- [32] The claimant began working again in 2016. She cleaned motel rooms for a period of time and then worked in a retirement home. She eventually got a job working in a cheese-packing factory. The employment was not consistent and she received some Employment Insurance benefits. The income she earned from employment was not substantial. Her earnings from employment were: \$20,566 in 2016; \$24,954 in 2017; and \$12,369 in 2018.
- [33] The claimant was required to make withdrawals from her RRSP to make ends meet. In 2015, she withdrew \$3,242 from her Manulife/Standard Life RRSP. In 2018, she withdrew the remaining \$36,196.
- [34] In the late fall of 2018, the claimant received approximately \$30,000 from the estate of her parents.
- [35] The claimant has not worked since 2018. She testified that she has looked extensively for a job without success. Her osteoporosis also makes work challenging. I accept the claimant's evidence and find that she has attempted to find employment and become self-sufficient, but has had limited success because of her age, her medical issues and her limited training.
- [36] The claimant received no support payments from the respondent until Justice Macintosh ordered that the respondent pay her \$2,200 per month in support commencing May 15, 2019.
- [37] In 2019, the claimant's only sources of income were six spousal support payments from the respondent and her share of pension payments from the respondent's pension plans which, by order dated June 7, 2019, were ordered to be split equally between the parties.

Respondent's Life Post-Separation

- [38] Following the parties' separation, the respondent continued to live in the family home at Charlie Lake, continued to have the exclusive use of the Morson Properties and continued to have the exclusive use of the various chattels the parties had acquired during the marriage, except for a Jeep Wrangler which the claimant had taken with her to Ontario.
- [39] The respondent also continued to be employed full time following the separation of the parties. In 2013, his line 150 income as reported on his tax return was \$95,537.
- [40] The respondent voluntarily retired at the end of 2013 at the age of 60. He testified that it was always his intention to retire at age 60. The claimant did not disagree that the parties had contemplated retirement at age 60. However, she testified that this retirement plan was not applicable after the parties had separated.
- [41] Upon retirement, the respondent commenced to draw on his pensions. He had two private pensions: one with IWA Forest Industry and Pension Plans Ltd. ("IWA"); and another with Canadian Forest Products Ltd. ("Canfor"). He also had contributed to the Canada Pension Plan ("CPP").

- [42] The respondent did not consult with the claimant before drawing on his pensions and did not share any of the pension benefits with the claimant. He testified, however, that he was always willing to share his pensions with the claimant, and that all she needed to do was to complete the appropriate paperwork. I do not accept the respondent's testimony in this regard.
- [43] There is no documentary evidence corroborating the respondent's testimony. To the contrary, the evidence establishes that the respondent fought the claimant's efforts to obtain a division of the pensions. Several court orders were required before the pension payments were finally divided. Even after the court ordered the division of the payments, the respondent signed the papers noting he was doing so "under duress". Moreover, the respondent continued to take pension payments after Master Vos made an order restraining him from doing so on February 6, 2019. On July 15, 2019, Justice Myers found that the respondent had breached the February 6, 2019 order of Master Vos by disposing of pension payments from his IWA and Canfor pensions.
- [44] The respondent's tax returns for the years 2014 through 2019 report his annual incomes as: \$58,688 in 2014; \$41,195 in 2015; \$38,786 in 2016; \$38,936 in 2017; \$50,009 in 2018; and \$149,869 in 2019. I note that the respondent's income in the years 2014 through 2019 consisted of pension payments, RRSP withdrawals and some WCB payments. I further note that the large total income reported in 2019 is due to the respondent withdrawing almost \$112,000 from an RRSP that year. Justice Myers found this RRSP withdrawal to be a breach of the restraining order made by Master Vos.
- [45] In December 2013, Ms. Savage began living with the respondent in the family home. They continued to live in the family home until it was sold by court order in 2019. I will address the evidence relating to the sale of the family home later in these reasons for judgment. For now, it is sufficient to say that I find the respondent listed the family home for sale in 2014 at an excessively high price to ensure that it did not sell and that he and Ms. Savage could occupy the home.
- [46] Ms. Savage paid no rent during the time she lived in the family home. She did, however, contribute to expenses, something which the respondent attempted to conceal. In the respondent's various financial statements he made no reference to Ms. Savage contributing to expenses. In an affidavit filed with the court on June 24, 2019, he deposed that Ms. Savage "has no direct or indirect financial contribution". However, through efforts of claimant's counsel, the financial records of Ms. Savage were obtained and they confirm that she contributed substantially to household expenses such as telephone, cable, internet, gas, and car insurance, among others. The respondent eventually conceded this in cross-examination.
- [47] It is further relevant to note that, in contrast to the lifestyle of the claimant, since the parties separated the respondent has enjoyed multiple vacations to various Caribbean destinations.

Procedural History

- [48] The notice of family claim was filed on July 26, 2013, and the response to family claim was filed on August 21, 2013. Judicial case conferences were held in November and December of 2013. A third conference was held on February 27, 2014, which resulted in a consent order which, among other things, permitted the claimant to value the family home and directed that the respondent provide the claimant with pension information.
- [49] Following the judicial case conference on February 27, 2014, neither party moved this matter ahead until January 2019. The substantial delay and inaction between March 2014 and January 2019 was not adequately explained in the evidence. In any event, commencing in February 2019 there were a series of applications and orders. In summary, these were:
- a) On February 6, 2019, Master Vos made an order pursuant to s. 91 of the FLA, restraining the respondent from disposing of any property which the claimant claimed an interest in;
 - b) On April 30, 2019, Macintosh J. restrained the respondent's pension plans from paying benefits and made several orders including:
 - i. That the respondent produce various tax and financial records;
 - ii. That the respondent pay interim spousal support in the amount of \$2,200 per month commencing May 15, 2019;
 - iii. That the respondent complete documentation to divide his pensions; and
 - iv. That the family home be listed for sale with the claimant having conduct of sale;
 - c) On June 7, 2019, Macintosh J. ordered that the respondent's pensions be divided equally between the parties and that the respondent complete the documentation to do so;
 - d) On June 26, 2019, Master Keighley made multiple orders requiring the respondent to deliver an updated list of documents and to produce various documents. He also ordered that the claimant was to appoint appraisers to appraise the Morson Properties. Finally, he ordered that the respondent pay a fine of \$2,500;
 - e) On July 15, 2019, Myers J. found that the respondent had breached the February 6, 2019 order of Master Vos by cashing in RRSPs and disposing of pension payments, and that he had breached the April 30, 2019 order of Macintosh J. and the June 26, 2019 order of Master Keighley by failing to produce the ordered documents. Justice Myers ordered, among other things, that the respondent produce the documents that day, and fined the respondent \$5,000;
 - f) On October 25, 2019, Justice Tindale approved the sale of the family home for \$575,000 and ordered that the proceeds from the sale be paid into trust;
 - g) On March 19, 2020, Master Caldwell fined the respondent \$1,000 and ordered that:

- i. The respondent's arrears of support were to be paid from the funds held in trust;
 - ii. The respondent was to produce his 2019 tax returns; and
 - iii. The respondent was to provide claimant's counsel with the location of the various "toys" for the purposes of appraisal; and
- h) On June 9, 2020, Tindale J. ordered that the respondent was to provide a financial statement complete with all tax returns within seven days.

Issues

[50] The issues in this matter, and the order in which I will address them, are:

- a) What is the family property and debt available for distribution? Is there any excluded property?
- b) Should there be an unequal division of family property in favour of the claimant?
- c) Is the claimant entitled to spousal support?
- i. Is the claimant entitled to spousal support retroactive to July 2013?
- ii. What are the incomes of the parties for the calculation of ongoing support purposes and should an income be imputed to the respondent?
- iii. What is the appropriate amount and duration of ongoing spousal support?

Discussion

Family Property and Debt at Separation

Legal Principles

- [51] Part 5 of the FLA addresses family property and debt.
- [52] Pursuant to s. 84 of the FLA, "family property" is all real and personal property owned by one or both spouses on the date of separation and property acquired after separation that is derived from the disposition of family property.
- [53] Section 85 of the FLA excludes certain property from family property. The only exclusion that is relevant in this matter is s. 85(1)(b), which excludes inheritances and property derived from an inheritance. The onus is on the party claiming an exclusion to demonstrate that the property is excluded.
- [54] Pursuant to s. 86 of the FLA, family debt includes all debt incurred by a spouse while married up to the date of separation. Debts incurred by a spouse after separation are not family debt unless incurred for the purpose of maintaining family property.

- [55] Under s. 81 of the FLA, upon separation each spouse is presumptively entitled to a one-half undivided interest in any family property and is responsible for one half of any family debt. The presumptive one-half interest in family property is subject to an agreement or order that provides otherwise. The court may make an order for re-apportionment under s. 95 of the FLA and order an unequal division of property if equal division would be "significantly unfair". In other words, there must be a finding of significant unfairness before family property and debt can be divided unequally.
- [56] When determining the value of family assets and debts, s. 87 of the FLA provides that the valuation date shall be the trial date or date of the agreement, unless otherwise ordered or agreed to. Setting the valuation date at another date such as the date of separation requires a finding of significant unfairness (*Eisele v. Eisele*, 2015 BCSC 2297; *Blair v. Johnson*, 2015 BCSC 761).
- [57] Pursuant to s. 97 of the FLA, the court may make such orders as are necessary, reasonable or ancillary to give effect to property division. The orders that may be made include, pursuant to s. 97(2)(c), requiring one spouse to pay compensation to the other spouse for family property the spouse has disposed of, transferred, exchanged or converted.
- [58] With these principles in mind, I now address the family property and debts.

Submissions of the Parties

- [59] The claimant submits that the family property includes the family home at Charlie Lake, the Morson Properties, various chattels acquired by the parties over the course of the marriage and various RRSPs accumulated during the course of the marriage. The claimant submits that the proceeds from the family home, which was sold by court order, should be divided unequally in her favour. The claimant submits that the Morson Properties should be sold and that the proceeds be divided unequally in her favour. The claimant submits that she be paid compensation by the respondent in an amount equal to one-half the value of the chattels or "toys" at the date of separation. The claimant also submits that she be paid compensation for the RRSPs cashed in by the respondent.
- [60] The respondent does not dispute that the family home and the Morson Properties are family property. He submits that the family home was sold for too low a price and notes that he alone continued to pay the mortgage, taxes and the upkeep of the family home until it was sold.
- [61] In respect of the Morson Properties, the respondent disputes whether this court has jurisdiction to order a sale. In his evidence, he indicated that he desperately wishes to retain ownership of these properties. He submits that he would prefer the claimant be given a larger share of the funds held in trust in exchange for him receiving sole ownership.

- [62] The respondent disputes that the various chattels or "toys" are family property. Specifically, he says that many of them were purchased using funds he received from inheritances. He similarly says that some of funds in his RRSP (\$30,000) were from an inheritance. I interpret the respondent's statements to be a submission that the chattels and his RRSP are excluded from family property pursuant to s. 85(1)(b) of the FLA.

The Family Home and Related Debt

- [63] It is not disputed that the family home at Charlie Lake is family property and that at all material times there was a mortgage and letter of credit facility registered against title to the property. The property was sold by court order in November 2019 for \$575,000. The net proceeds from the sale, after payment of the mortgage, the line of credit, commission fees, and the costs of the sale, were \$347,375.77. The net proceeds from the sale were paid into Ms. Boles' trust account. There have since been several withdrawals from the trust account that have been authorized by the court, which I will address later. The analysis below addresses the entitlement of the parties to the \$347,375.77 in net proceeds.
- [64] If the net proceeds from the sale of the family home were to be divided equally, each party would be entitled to \$173,687.88. However, the line of credit was paid off upon the sale of the family home and, although the exact balance owing on the line of credit at the time of sale is not known, it is clear on the evidence that the balance included amounts withdrawn by the parties after the date of separation. The claimant admits she withdrew \$50,000 from the line of credit when she left for Ontario. The respondent admits that he withdrew \$8,000 from the line of credit after the separation. Neither party has suggested or testified that their respective withdrawal was for the maintenance of family property. To the contrary, the claimant testified that her withdrawal was for living expenses and to pay a lawyer, and the respondent stated he made this withdrawal to prevent the plaintiff from taking it. As these withdrawals were made for apparent personal use, they do not constitute family debt and must be accounted for.
- [65] The claimant is solely responsible for the \$50,000 she withdrew from the line of credit and the respondent is solely responsible for the \$8,000 he withdrew. These amounts can be set-off, leaving a net amount of \$42,000 for which the claimant is responsible. Half of this amount, or \$21,000, must be deducted from the claimant's share of the proceeds from the sale of the family home and added to the respondent's share. When this is done, the claimant's share of the proceeds is reduced to \$152,687.88 ($173,687.88 - \$21,000$) and the respondent's share is \$194,687.88 ($173,687.88 + \$21,000$).
- [66] I note that the respondent has made veiled submissions that the family home was sold by the claimant at too low a price. I reject any such submission. Ann Clayton was retained to appraise the family home. Ms. Clayton was not called to testify at the trial but her report was tendered by the claimant. The respondent raised no objections to the admission of this report, and when asked by the court he indicated that he agreed to its admission into evidence. Ms. Clayton appraised the property at \$590,000 as of October 17, 2019. Given this

valuation, the sale of the family home for a price of \$575,000 was eminently reasonable.

The Morson Properties

- [67] The respondent submits that this court does not have jurisdiction over the Morson Properties on the grounds that the properties are located in Ontario. This submission is completely lacking in merit. The FLA applies to all property owned by a spouse at the date of separation, wherever it is located.
- [68] The Morson Properties are clearly family property, having been purchased by the parties during the course of the marriage. The values of these properties have been established by three appraisal reports signed by Dave Holland and Loren Knopf. These reports were commissioned pursuant to the order of Master Keighley dated June 26, 2019. The appraisers were not called to testify at the trial, however, the respondent did not object to the introduction of the reports and he indicated that he agreed to their admission into evidence when asked.
- [69] The residential appraisal reports valued two of the lots at \$60,000 each and the third lot at \$70,000, as of August 2019. I accept these reports as establishing the combined value of the Morson Properties at \$190,000 as of August 2019. Further, in the absence of any other evidence, I also accept these reports as establishing the combined value of the Morson Properties as of the date of the trial.
- [70] The claimant requests that the Morson Properties be sold. The respondent opposes a sale of the Morrison Properties and requests that he be permitted to purchase the claimant's interest in these properties from his share of the funds held in trust by Ms. Boles. In my view, it would serve no useful purpose to order a sale of the Morson Properties if the respondent is prepared to buy out the claimant's interest. A sale would cause further delay and would reduce the funds available to the parties through real estate commissions and the costs of a sale.
- [71] Accordingly, the respondent may purchase the claimant's interest in the Morson Properties for the sum of \$95,000, provided he signifies his intent to do so by notice in writing within 14 days of the date of these reasons and delivers the full purchase price within 30 days of the date of these reasons. If the respondent does not deliver a notice of his intent to purchase the claimant's interest in the Morson Properties or does not deliver the purchase price within the time required, the Morson Properties are to be sold and the claimant is to have sole conduct of sale.
- [72] I note that I have not granted the respondent's request that he be permitted to purchase the Morson Properties from his share of the funds held in trust by Ms. Boles. As will be seen, this is because the respondent's share of the trust funds will be fully depleted when the various orders that are made against him herein are implemented.

Chattels, Household Furnishings and Jewellery

[73] The chattels or "toys" the parties owned at separation that were acquired during the marriage consisted of the following items (the "Recreational Chattels").

Item

2009 Dodge Ram

2009 Jeep Wrangler

1998 Commander Motorhome

1992 Harley Davidson

2008 Larson speed boat

2 skidoos

2 ATVs

7 kayaks

Shoremaster Boat Lift

Fishing Boat

Glendale Motor home

2 Giant electric bikes

Seacan (shipping container)

Trailer (for ATVs and skidoos)

1954 Chevy pickup

1976 Triumph spitfire

1976 Harley Sportster

[74] With the exception of the Jeep Wrangler, which the claimant took with her to Ontario, the Recreational Chattels remained in the possession of the respondent post-separation. The claimant submits that these chattels are family property and that she should be paid compensation by the respondent in an amount equal to one-half their value at the date of separation. The respondent submits that the Recreational Chattels were purchased using funds from his inheritances and are excluded property.

[75] I will first address whether the Recreational Chattels are excluded from family property. I will then address whether there should be a compensation payment to the claimant based on the values of the chattels at separation.

Are the Recreational Chattels Excluded?

- [76] Pursuant to s. 85(1)(b) and (g) of the FLA, inheritances and property derived from an inheritance, are excluded from family property. Pursuant to s. 85(2) of the FLA, the spouse claiming excluded property is responsible for demonstrating the property is excluded. Thus, the onus is on the respondent to prove that any of the Recreational Chattels were derived from an inheritance that he received. He has not met this onus.
- [77] The respondent received two inheritances during the course of the marriage, one from his mother and one from his father.
- [78] Unfortunately, there is only one document in evidence relating to these inheritances. That letter, dated September 30, 2009, is merely notification that an application would be made for grant of letters probate in respect of the estate of Theresa Eileen Wellard. It provides no information concerning the beneficiaries of the estate, the amounts the beneficiaries were to receive, or when they received their bequests.
- [79] The lack of documentation concerning the respondent's inheritances is problematic and concerning. On June 26, 2019, Master Keighley ordered, inter alia, that the respondent was to produce all documents relating to his inheritance and the use and disposition of the inheritance. The respondent did not comply with that order. The issue of his non-compliance came back before the court on July 15, 2019, when Myers J. found the respondent was in breach of Master Keighley's order and again ordered that the respondent produce the inheritance documents, among others, by July 22, 2019. As of the trial, the respondent had not provided any documents relating to the inheritances or the uses of the inheritances. His failure to comply with these court orders causes me to draw an adverse inference that the documentation would not support the exclusion of the Recreational Chattels from family property.
- [80] In any event, the respondent's testimony about his inheritances was inconsistent and contradictory, and does not establish that any of the chattels are excluded property.
- [81] At one point in his testimony, the respondent stated that he received two inheritances: one from his mother in the amount of \$185,000 and a second from his father in the amount of either \$25,000 or \$30,000. An immediate difficulty with this testimony is his inability to recall the amount of the inheritance from his father. Was it \$25,000 or \$30,000? His evidence on the amount of the inheritance from his mother was also inconsistent. In cross-examination, the respondent admitted that he told Macintosh J. on April 30, 2019, that the amount of the inheritance was \$110,000. Also, during his submissions he stated that the inheritance from his mother was \$178,000. Thus, on the basis of his own testimony and submissions, it is not clear what amounts he received as inheritances.
- [82] The respondent's testimony on how he used the inheritances was also inconsistent and unreliable. The respondent initially testified that he used the inheritance from his mother to give cash gifts totalling \$65,000 to the three children, and that the balance was used to purchase most of the "toys", specifically the truck, Jeep, Larson boat, lift, motorhome and Harley motorcycle. In cross-examination it was put to him that the Jeep was purchased, in

part, by trading in a previous vehicle. He replied that the previous vehicle was purchased with an inheritance as well. He completely failed to explain how that could be the case. Additionally, in cross-examination he admitted that some of the "toys" were purchased using the line of credit, an answer that undermined his testimony that the Recreational Chattels were purchased using his inheritance.

- [83] The respondent also testified that the inheritance from his father was used to start his Sunlife RRSP. However, in cross-examination he testified that some of the inheritance was used to pay lawyers and that he purchased a log house with a \$10,000 inheritance from his father.
- [84] In my view, even without drawing an adverse inference from the respondent's failure to produce documents detailing his inheritances, the respondent has wholly failed to prove that any of the Recreational Chattels were purchased using funds he received as inheritances. I do not know when the inheritances were received, how much they were or how they can be traced to any of the individual chattels allegedly acquired using them. The respondent's testimony was inconsistent, contradictory and imprecise and is completely unsupported by any documentary evidence.
- [85] Before leaving the issue of inheritances and excluded property, I note that the claimant received an inheritance of approximately \$30,000 after the parties separated, which she used to pay for her living expenses. The respondent seemed to suggest that it was not fair that his inheritances should be treated differently from the inheritance received by the claimant. There is, however, an important distinction between the two. The respondent's inheritances were received while the parties were together and are therefore family property unless excluded. The inheritance received by the claimant, on the other hand, was received after the parties separated, and therefore does not constitute family property.

Sale and Valuation of Chattels

- [86] Having determined that the Recreational Chattels are not excluded property, I must now determine whether I should order that they be sold, or whether they should be retained by the respondent and a compensation payment be made to the claimant for her half interest.
- [87] The claimant made limited submissions on what should be done with the Recreational Chattels, other than requesting a compensation payment instead of a sale and division of the proceeds. The respondent made no submissions on this issue.
- [88] In my view, there would be significant unfairness to the claimant if the Recreational Chattels were ordered to be sold and the proceeds divided between the parties. The unfairness results from the nature of the chattels, the passage of time since separation and the fact that the respondent has had the exclusive use of the chattels since separation. The chattels are assets such as cars, boats and motorcycles that suffer from depreciation and deterioration over time. These assets have undoubtedly substantially decreased in value during the six years the respondent has had the exclusive use and possession of them. It would be

substantially unfair for the claimant to bear a portion of this loss when she had no use of the chattels.

- [89] A sale of the Recreational Chattels would also present difficulties. Any such sale would have to be conducted by the claimant as the respondent has repeatedly demonstrated an inability to comply with court orders. The chattels are, however, located in two different locations. Most of them are located in Morson, Ontario, a remote location. The others are located in British Columbia. Organizing and coordinating sales in these different locations would be difficult for the claimant and undoubtedly involve further delay.
- [90] I therefore order that the respondent is to be granted sole possession and ownership of the Recreational Chattels, other than the Jeep Wrangler, and that he is to compensate the claimant for her half interest in the chattels. The respondent can retain the chattels or sell them, as he wishes.
- [91] The next question is, what is the value of the claimant's half interest in the Recreational Chattels? Regrettably, there is no appraisal report providing valuations for the chattels. The absence of such a report is, in part, due to the respondent's lack of cooperation. The claimant made efforts in 2020, before the trial, to obtain access to the chattels for appraisal purposes. However, this did not occur and Master Caldwell noted that the respondent was "playing games".
- [92] The only evidence of the values of the Recreational Chattels is the estimates of the parties in their financial statements. I have considered the parties estimates of the values of the various chattels. Where both parties have given an estimate for a particular chattel, I accept the respondent's estimate which is, in all cases, the lower estimate and which I consider to be mildly more realistic than the estimates of the claimant. Where the respondent has not provided an estimate for a chattel, I accept the claimant's estimate of value. The table below lists the chattels at issue, the year of purchase and the purchase price where known, the parties' estimates of value, and finally my finding of the value of the listed chattel.

Item

Purchase Year and Amount

Claimant's Estimate of Value

Respondent's Estimate of Value

Finding as to Value

2009 Dodge Ram

2009 - \$24,519

\$24,519

\$18,000-\$20,000

\$18,000

2009 Jeep Wrangler

2009 - \$33,500

\$19,685

\$18,000

\$12,000

1998 Commander Motorhome

2011 - \$22,500

\$30,000

\$20,000

\$20,000

1992 Harley Davidson

2009 - \$15,000

\$11,449

\$10,000

\$10,000

2008 Larson speed boat

2010 - \$23,739

\$19,045

\$18,000

\$18,000

2 skidoos

2011 - \$18,523

\$8,000

\$8,000

2 ATVs

2011

\$8,000

\$8,000

7 kayaks

\$2,500

\$2,500

Shoremaster Boat Lift

\$1,000

\$1,000

Fishing Boat

\$500

\$500

Glendale Motor home

2005 or 2011

\$6,000

\$3,000

\$3,000

2 Giant electric bikes

\$1,400

\$1,000

Seacan (shipping container)

\$1,000

\$1,000

Trailer (for ATVs and skidoos)

\$2,000

\$2,000

\$2,000

1954 Chevy pickup

1982

\$2,000

\$2,000

1976 Triumph spitfire

2011

\$1,000

\$1,000

1976 Harley Sportster

\$6,000

\$6,000

Totals

\$132,098.00

\$74,000

\$114,000.00

[93] The total value of the Recreational Chattels is \$114,000. However, the 2009 Jeep Wrangler was taken by the claimant when she left the family home and was sold by her in 2015 for \$12,000. This sale must be taken into account as it was a disposition of family property in which the respondent had a half interest. When the sale of the Jeep is taken into account, the total value of the chattels other than the Jeep is \$102,000. Therefore, claimant's total net interest in the Recreational Chattels is \$45,000 (\$51,000 - \$6,000) and the respondent's interest is \$57,000 (\$51,000 + \$6,000).

[94] The respondent shall retain and have sole ownership of the Recreational Chattels, other than the Jeep, and shall make a payment in the amount of \$45,000 to the claimant as compensation for her interest in those chattels.

Household Contents and Jewellery

[95] In addition to the above Recreational Chattels, the claimant also claims a half interest in the contents of the family home and jewellery. The claimant values the household contents at \$20,000 and the jewellery at \$6,000.

[96] Concerning the household contents, the claimant's evidence was that she arrived at a value of \$20,000 by multiplying the number of rooms by \$2,000 per room. There is no basis in fact or logic for so valuing the household contents. I have no evidence of what the household contents were, or of their age or condition. In my view, the evidence before me is simply insufficient for me to assign a value to the household contents and I decline to do so.

[97] With respect to the jewellery, the claimant testified that the jewellery was gifted to her by the respondent's mother and that she left it at the family home when she left for Ontario.

- [98] The respondent testified that the jewellery was given to both of them. He also gave conflicting evidence to the court at different times as to what happened to the jewellery. At one time he told Master Caldwell that the jewellery had been sold. As a consequence, he was ordered to produce the documents relating to the sale. Those documents were never produced. At trial, he testified that the jewellery was given to secure a loan. He later testified that it was given to the parties' daughter. In his financial statement made in May 2020, he stated "mother's ring & earrings inheritance passed on to oldest".
- [99] The respondent's ever-changing evidence about what happened to the jewellery is completely unbelievable. I accept the claimant's evidence that the jewellery was a gift to her and find that the jewellery is family property.
- [100] However, I do not accept the claimant's valuation of the jewellery at \$6,000, which is nothing more than a guess. The respondent's valuation of the jewellery at \$3,000 is similarly a guess, but I accept his value as an admission against interest. As the jewellery was disposed of by the respondent, he is required to compensate the claimant for her half interest, which is \$1,500.
- [101] The total payment required to compensate the claimant for her interest in the Recreational Chattels other than the Jeep and the jewellery is \$46,500. I order and direct that this amount be paid to the claimant from the respondent's share of the proceeds from the sale of the family home which are held in trust by Ms. Boles.

Pensions and RRSP

- [102] At the time the parties separated, the respondent had the IWA and Canfor pensions. He also had contributed to CPP.
- [103] The respondent began drawing on these pensions upon his early retirement in late 2013. He did so without consulting with the claimant and he did not share any of the pension payments he received with the claimant.
- [104] The pensions were the subject of court orders on April 30 and June 7, 2019. On June 7, 2019, Macintosh J. ordered that the respondent's IWA, Canfor and CPP pension payments be split equally with the claimant. The respondent delayed in signing documentation to give effect to the division, and withdrew further amounts from the pensions in breach of the orders, as was found by Myers J. on July 15, 2019.
- [105] Although the evidence is not entirely clear, it appears from the claimant's 2019 tax return that the pension payments were not actually split until November 2019. I find that the respondent received the full amounts of the pension payments from at least January 2014 to October 2019, a period of 70 months. These payments were a distribution and disposition of family property and should have been shared with the claimant from the outset. In the circumstances, it is appropriate that the respondent make a payment to the claimant to compensate her for this disposition of family property.

[106] I now address what the compensation payment should be.

[107] The respondent's tax returns and assessments for the years 2015 through 2019 indicate the pension payments he received. Regrettably, his tax return and assessment for 2014 is incomplete and does not contain a breakdown of his reported income or otherwise indicate the amounts he received as pension income. I infer that his pension payments in 2014 would have been similar to 2015. The table below sets out the pension payments received by the respondent from 2014 through 2019.

Year

CPP

IWA/Canfor

2014

\$8,412

\$19,017

2015

\$8,412

\$19,017

2016

\$8,631

\$19,017

2017

\$8,751

\$19,017

2018

\$8,883

\$19,017

2019

\$8,541

\$22,184

Total

\$51,630.00

\$117,269.00

[108] The total amount received by the respondent in pension payments from 2014 through 2019 was \$168,899. There was, however, sharing of the pensions in the last two months of 2019, which needs to be taken into account. The amount shared with the claimant in 2019 was \$3,006 as reported on her 2019 tax return. This means that the total of the pension payments was \$171,905. The claimant's share of these pension payments should have been half that amount, or \$85,952. She in fact received only the \$3,006 reported in her 2019 tax return. Therefore, she is entitled to a compensation payment in the amount of \$82,946 to equalize the pension payments made during the years 2014 through 2019.

[109] I note that, pursuant to the June 7, 2019 order of Macintosh J., the respondent's IWA, Canfor and CPP pensions are now divided equally, and going forward the parties will each receive approximately \$17,000 per year from these pensions.

[110] The RRSPs held by the parties were as follows:

- a) The claimant had an RRSP with Manulife in the amount of \$27,900 at the time of separation;
- b) The respondent had an RRSP with RBC in the amount of approximately \$66,605, according to his November 2013 financial statement; and
- c) The respondent had an RRSP with Sunlife in the amount of \$60,899, according to his November 2013 financial statement.

[111] All of the RRSPs were accumulated during the marriage and there is no evidence of either party making a contribution to an RRSP after the parties separated. Therefore, all of the RRSPs are family property and subject to division between the parties under Part 5 of the FLA. The division of these RRSPs would normally be accomplished by valuing the RRSPs as of the date of trial and then effecting the division by way of a spousal rollover. That procedure is not available here as all of the RRSPs have been drawn down and have been subject to tax. The various withdrawals by the parties were dispositions of family property and must be accounted for. To address these dispositions, I calculate the after-tax amounts of the withdrawals and then divide those amounts equally between the spouses. I then set-off the amounts and make a single compensation order.

[112] The claimant made two withdrawals from her RRSP. In 2015 she withdrew \$3,242 and in 2018 she withdrew the remaining \$36,196. The total withdrawals made by the claimant were \$39,438. I accept that the claimant was forced to make these withdrawals as she was not being paid any support by the respondent and required the funds to live on. Nevertheless, the respondent is *prima facie* entitled to a one-half interest in these withdrawals, net of taxes. The tax rate applied to the claimant's withdrawals was 30%. Therefore, the value of the RRSP withdrawals after taxes was \$27,600. The respondent's share is \$13,800.

[113] The respondent's RRSPs were transferred into an account named "TOPS PPS" with CIBC shortly after separation. The respondent made several withdrawals from this "TOPS PPS" account during the years 2014 through 2019, as follows:

Year

Withdrawal

2014

\$21,175

2016

\$5,000

2017

\$5,000

2018

\$10,050

2019

\$111,795

Total

\$153,020

[114] I find that, pursuant to s. 84(1)(b)(i) of the FLA, that the CIBC "TOPS PPS" opened by the respondent after separation was derived from property owned by the respondent before separation, and is therefore family property. The total of the withdrawals made by the respondent is \$153,020. Applying a tax rate of 30%, the value of the withdrawals after taxes is \$107,114. The claimant's share is \$53,557

[115] When the \$13,800 owing by the claimant to the respondent is set off against the \$53,557 owing by the respondent to the claimant, the net compensation payment owing on account of the parties disposing of their RRSPs is \$39,757 by the respondent to the claimant.

[116] The claimant additionally submits the respondent had cash or cash assets in the amount of approximately \$42,000 which he has not disclosed and to which the claimant is entitled to a half share. The claimant attempted to show the existence of these assets through an analysis of the respondent's bank records. The evidence, in my view, falls far short of establishing that the respondent had undisclosed cash or cash assets at the date of separation.

Should there be Unequal Division of Family Property in Favour of the Claimant?

[117] The claimant pleads that an unequal division of family property is warranted in this matter because the respondent's post-separation conduct resulted in a significant decrease in the value of the family property. The conduct complained of is:

- a) The respondent's failure to complete documentation to divide his pension;
- b) The respondent's refusal to pay support to the claimant, which caused the claimant to cash in her RRSP's and thereby incur income tax and other liabilities;
- c) The respondent's breach of duties owed to the claimant; and
- d) The respondent's failure to reduce the listing price of the family home.

[118] Section 95 of the FLA permits the court to make an order for an unequal division of family property if equal division would result in significant unfairness. The factors to consider are set out in s. 95(2) and (3).

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;
- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
- (c) a spouse's contribution to the career or career potential of the other spouse;
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;
- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
- (g) the fact that a spouse, other than a spouse acting in good faith,
- (i) substantially reduced the value of family property, or
- (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
- (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
- (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.

- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [119] Given the pleadings and submissions of the claimant, ss. 95(2)(f) and (g) of the FLA are particularly relevant in this matter. They were considered by Justice Grauer, as he then was, in *Warde v Slatter*, 2019 BCSC 1430:
- [35] The general rule is that equal division should prevail unless it will result in "something objectively unjust, unreasonable, or unfair in some important or substantial sense": *Jaszczewska v Kostanski*, 2016 BCCA 286 at paras 41-42.
- [36] The distinction between subparagraphs 95(2)(f) and (g) was discussed by Madam Justice Fleming in *JDG v JJV*, 2016 BCSC 2389 at paras 236-239. There, Fleming J observed that the key issue arising under subparagraph (f) it is a one of causation: the effect of conduct, regardless of fault or motive; whereas subparagraph (g) includes a fault element of acting in other than good faith.
- [37] In either event, these are but two factors the court may consider in addition to "any other factor that may lead to significant unfairness". In other words, when considering subparagraphs (f) and (g), the important question, regardless of motive, is whether the circumstance under consideration has led to significant unfairness in the sense discussed in *Jaszczewska*.
- [120] The claimant submits there should be a redistribution of family property because the respondent drew on his pensions and RRSPs, and because his actions forced the claimant to cash in her RRSP. However, I have made compensation orders to address these dispositions of family property. The tax consequences of these events do not give rise to a significant unfairness that would justify a redistribution of family property.
- [121] The claimant further submits that a redistribution of family property is justified on the basis of the respondent's exclusive use of the Morson Properties and the Recreational Chattels or "toys". I am not satisfied that this is so. There is no evidence that the claimant was prevented from using the Morson Properties or the toys. She also took no active steps to have the properties or the toys sold. Although I accept that the respondent was and remains opposed to selling the Morson Properties, the claimant should have taken steps to obtain an order for the sale of the properties. In any event, there is no evidence upon which I could value the amount of any redistribution on account of the respondent's sole use of the Morson Properties.
- [122] The only submission of the claimant in relation to a redistribution of family property that has merit is in respect of the sale of the family home. I now address this submission.

Delay in the Sale of the Family Home

- [123] Following the separation of the parties, the family home was listed for sale by the respondent. The home was first listed for sale in 2014. The listing price was \$888,000 and subsequently reduced to \$849,000. The home did not sell. The claimant requested that the listing price be lowered but the respondent refused to do so. The home remained unsold until the claimant obtained an order for conduct of sale on April 30, 2019. The home was eventually sold in the latter part of 2019 for \$575,000.
- [124] The claimant says that the respondent intentionally delayed the sale of the family home from 2014 to 2019 by listing it at an unreasonable price and, further, that the delay resulted in a substantial decrease in the value of the home.
- [125] The respondent denies that he intentionally delayed the sale of the home and denies that the listing price was unreasonable. His evidence was that the claimant wanted to give the house away. He testified that he received six offers from potential buyers in 2015. All of the offers were verbal and all were conditional on the purchasers selling their own homes. He specifically testified that someone named Sheldon offered to pay \$880,000 for the home but the deal fell through because there was a certificate of pending litigation registered against title. He further testified to receiving an offer for \$849,000, but this offer was conditional on him buying the purchaser's house.
- [126] I do not accept that there was ever a serious offer on the family home during the time it was listed for sale by the respondent. The respondent's evidence is completely uncorroborated by any contemporaneous documents and is simply unbelievable. Nor do I accept that the listing price of the home set by the respondent was reasonable. In fact, the evidence establishes that the listing price set by the respondent was unreasonable.
- [127] I have referred elsewhere to the appraisal of the family home done by Ms. Clayton. In her report she provided historic estimates of the value of the home. In particular, she valued the home at: \$531,600 in 2014; \$590,700 in 2015; \$547,900 in 2016; \$607,700 in 2017 and 2018; and \$590,000 in 2019. The respondent's listing price was \$250,000 higher than Ms. Clayton's highest estimate. Similarly, the BC Assessments for the home indicate that it had assessed values of: \$742,000 in 2015; \$645,000 in 2016; \$659,000 in 2017; and \$571,000 in 2018. Although these values are generally higher than those in Ms. Clayton's report, the respondent's listing price was still \$100,000 higher than the largest assessed value.
- [128] It is also significant that once the plaintiff obtained conduct of sale pursuant to the court order and put the house on the market at a realistic listing price, it sold within months.
- [129] I find as a fact that the family home did not sell during the period from 2014 to 2019 because the respondent deliberately set a listing price that was grossly excessive and designed to ensure the home did not sell, so that he and Ms. Savage could continue to reside in the home for as long as possible.

- [130] The claimant submits that as a consequence of the delay in the sale of the family home, the amount obtained upon the sale of the home was less than it otherwise would have been. The claimant relies upon the BC Assessments and, in particular, the assessment for 2015 wherein the home was assessed at \$742,000. The claimant effectively says that the respondent's delay caused a loss to the parties of \$167,000. I do not accept these submissions as they conveniently ignore the report of Ms. Clayton and her estimates of the historic values for the home. Her estimates ranged from \$531,600 in 2014 to \$607,700 in 2017 and 2018. I prefer Ms. Clayton's estimates of value to those contained in the BC Assessments. Her estimates are specifically related to the property and are, obviously, much more detailed than those in the BC Assessments. Based upon Ms. Clayton's estimates of value, I am not satisfied that the price obtained for the family home in 2019 was significantly less than could have been obtained in 2014, 2015, 2016, 2017 or 2018.
- [131] Accordingly, I am not satisfied that the delay in the sale of the family home resulted in the home being sold for a lesser amount. However, the delay may still justify an unequal division of family property under the concept of occupation rent.

Occupation Rent

- [132] The claimant seeks an order that the respondent pay occupation rent for his exclusive use of the family home from the date of separation until it was sold in November 2019 and for his exclusive use of the Morson Lake properties and the "toys".
- [133] I deal with occupation rent in the context of re-apportionment of family property as was directed by the Court of Appeal in *Holland v. Holland*, 2017 BCCA 75, at para. 23:
- [23] In *Shen v. Tong*, 2013 BCCA 519, Smith J.A. (in concurring reasons) discussed how to approach the question of occupational rent. She noted at para. 91 that a claim for occupational rent is not a stand-alone claim, but is generally considered in the context of a reapportionment claim. Section 95 of the FLA provides for an unequal division of property when an equal division would be "significantly unfair". The purpose of occupational rent is "to do what is just and equitable between the parties": *Shen* at para. 94.
- [134] Occupation rent was addressed by Justice Sharma in *Petrie v. Lindsay*, 2019 BCSC 371, at para. 136, where she noted that it is an exceptional remedy to be used cautiously:
- [136] Occupational rent is not typically asserted as stand-alone claim, but is often considered in the reapportionment analysis. Even in that context, it is an exceptional remedy that should only be used cautiously and only to achieve a just and equitable result: *L.W.* at paras. 166-168; *Stasiewski v. Stasiewski*, 2007 BCCA 205 at para. 30. Additionally, *Shen v. Tong*, 2013 BCCA 519, contains a non-exhaustive list of factors to consider in assessing a claim for occupational rent (at para. 94):
- a) whether there has been ouster (although several authorities have indicated that this is not a requirement);

- b) whether children are residing with the occupying spouse;
- c) whether the occupying spouse has made a claim for contribution from the non-occupying spouse for the expenses related to the premises;
- d) whether child and/or spousal support was being paid by the non-occupying spouse;
- e) whether the occupying spouse increased the selling value of the property;
- f) the duration of the occupancy; and
- g) any other competing claims.

[135] With respect to the claims for occupation rent relating to the Morson Properties and the Recreational Chattels, I have already found that there is no basis for a redistribution of family property based on the respondent's use of these. There is no evidence before me of what the occupation rent for these should be. I cannot simply pick a number out of the air.

[136] A redistribution of family property to take into account occupation rent in respect of the respondent's use of the family home is, however, warranted.

[137] The first factor from *Shen v. Tong*, 2013 BCCA 519 is whether there was an "ouster" of the claimant by the respondent. The claimant's evidence, which I accept, was that there had been acts of family violence committed by the respondent during the marriage, and that immediately before she left the family home the respondent had threatened her. In the circumstances, she had little choice but to leave the family home, and I find that there was an effective "ouster" of the claimant.

[138] Another factor is the duration of the respondent's exclusive use of the family home. The respondent had the exclusive use of the home for over six years. Moreover, the evidence has established that the respondent deliberately set a listing price for the home that was grossly excessive and designed to ensure the home did not sell. In other words, he engineered matters to ensure that he could continue to occupy the family home for as long as possible. This is a factor weighing heavily in favour of an order for occupation rent.

[139] Yet another factor is whether child and/or spousal support was being paid by the non-occupying spouse. If the respondent, the occupying spouse, had been paying support to the claimant to assist her with her rent payments, then his use of the family home without occupation rent might be justified. However, the situation is different when the respondent, the main earner of the family, is occupying the family home and not paying any support.

[140] A final factor to consider is whether the respondent has made a claim for contribution from the claimant for the expenses related to the family home. The evidence is clear that the respondent has paid the mortgage, taxes and maintenance expenses on the family home and has made no claim for contribution from the claimant. Based on the respondent's financial statements, the amounts he paid for the mortgage, taxes and maintenance were in the approximate amount of \$1,100 per month, or approximately \$13,000 per year. The fact

the respondent paid these expenses and does not seek to recover them from the claimant is a factor that I am to consider, but it is not determinative.

[141] The claimant relies upon the appraisal report of Ms. Clayton, which contains Ms. Clayton's opinions as to the annual rent applicable to the family home. These amounts are as follows:

Year

Annual Rent

2013

\$30,000

2014

\$30,000

2015

\$25,200

2016

\$20,400

2017

\$21,155

2018

\$22,001

2019

\$22,551

[142] I accept Ms. Clayton's estimates of the rent applicable to the family home. Based on her estimates, the average annual rent over the period from 2013 through 2019 is approximately \$24,400.

[143] It is instructive to compare the amounts paid by the respondent for mortgage, taxes and maintenance against the amounts claimed by the claimant for occupation rent. The amount paid by the respondent for mortgage, taxes and maintenance expenses is significantly less than the rent that could have been obtained. The difference is approximately \$11,400 per year. This is a significant amount when one considers that the claimant had minimal income in the years 2013 through 2019 and was forced to cash in her RRSPs.

[144] Considering all of the above factors, I am satisfied that it is significantly unfair that the respondent had the exclusive use of the family home for six years on a rent-free basis. This is one of the exceptional cases where a re-apportionment of family property is required to

ensure the division of property is just and equitable. It is appropriate that there be an unequal division of family property equivalent to a notional occupation rent for the years 2014 through 2019. The amount of the re-apportionment in favour of the claimant should be one-half of the annual average rent of \$24,400 less the \$13,000 per year paid by the respondent for the mortgage, taxes and maintenance. The amount owed to the claimant is \$5,700 annually, or a total of \$34,200 over the six-year period.

[145] I therefore order that the respondent's share of the proceeds from the sale of the family home be reduced by \$34,200 and the claimant's share be increased by \$34,200. With these adjustments, the claimant's share of the proceeds from the sale of the family home that are held in trust is \$186,887.88 (\$152,687.88 + \$34,200) and the respondent's share is \$160,487.88 (\$194,687.88 - \$34,200).

Accounting

[146] To assist the parties, I provide the following accounting of the proceeds from the sale of the family home in the amount of \$347,375.77 that were deposited into a trust account held by Ms. Boles.

[147] There have been various withdrawals from the trust account that were authorized by the court. Specifically, as of the final day of trial, withdrawals totalling \$23,100 were made from the respondent's share of the proceeds to pay a fine and his interim support obligations to the claimant. Also, during the course of the trial, a withdrawal was authorized and made in the amount of \$50,000 as an interim distribution of property to the claimant. Additionally, it is presumed that since the trial there have been withdrawals of \$2,200 on September 15, October 15, and November 15, 2020, to pay the respondent's interim support obligations to the claimant for those months. This means that as of November 16, 2020, the amount remaining in the trust account should be \$267,675.77, as detailed in the table below.

Date

Item

Amount

Balance

14-11-2019

Net Proceeds

\$347,375.77

24-03-2020

Spousal Support

-\$11,100.00

\$336,275.77

05-05-2020

Spousal Support

-\$2,200.00

\$334,075.77

05-05-2020

Fine Payment

-\$1,000.00

\$333,075.77

15-05-2020

Spousal Support

-\$2,200.00

\$330,875.77

15-06-2020

Spousal Support

-\$2,200.00

\$328,675.77

15-07-2020

Spousal Support

-\$2,200.00

\$326,475.77

15-08-2020

Spousal Support

-\$2,200.00

\$324,275.77

Interim Distribution

-\$50,000.00

\$274,275.77

15-09-2020

Spousal Support

-\$2,200.00

\$272,075.77

15-10-2020

Spousal Support

-\$2,200.00

\$269,875.77

15-11-2020

Spousal Support

-\$2,200.00

\$267,675.77

16-11-2020

Balance Remaining

\$267,675.77

[148] Before the compensation payments that I have ordered are taken into account, the claimant's share of the \$267,675.77 remaining in trust is \$136,887.88 and the respondent's share is \$130,787.88. The table below shows these calculations.

Item

Claimant's Share

Respondent's Share

Proceeds from Sale of Home

\$173,687.88

\$173,687.88

Letter of Credit Adjustment

-\$21,000.00

\$21,000.00

Notional Occupation Rent

\$34,200.00

-\$34,200.00

Spousal Support and Fines

0

-\$23,100.00

Spousal Support, Sep-Nov

0

-\$6,600.00

Interim Distribution to Claimant

-\$50,000.00

0

Balance

\$136,887.88

\$130,787.88

[149] The compensation payments that I have ordered the respondent pay to the claimant total \$169,196.00, as per the table below.

Compensation Payment for Recreational Chattels and Jewellery

\$46,500.00

Compensation Payment for Pension Withdrawals

\$82,946.00

Compensation Payment for RRSP set-off

\$39,757.00

Total Compensation Payments

\$169,203.00

[150] The compensation the respondent owes the claimant will exceed the respondent's share of the funds held in trust by approximately \$38,415.

Support

Is the Claimant Entitled to Support?

[151] I now turn to the discussion of spousal support, which is governed by s. 15.2 of the DA and ss. 160-165 of the FLA.

[152] The objectives of an order of spousal support are set out in s. 15.2(6) of the DA and s. 161 of the FLA in almost identical wording. Those objectives, as expressed in the DA, are to:

- (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.

[153] The factors to take into account in determining the amount and duration of spousal support are set out in s. 15.2(4) of the DA and s. 162 of the FLA. Those factors, as expressed in the DA, are:

- (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.

[154] Pursuant to s. 15.2(5) of the DA and s. 166 of the FLA, misconduct of a spouse is generally not a relevant consideration in determining spousal support.

Summary of Legal Principles

[155] The principles generally applicable to spousal support are summarized in *Chutter v. Chutter*, 2008 BCCA 507. There are three grounds for entitlement to spousal support: contractual, compensatory and non-compensatory (*Chutter* at para. 47).

[156] Contractual spousal support is not in issue here.

[157] Compensatory support is intended to redress economic disadvantages that arose as a consequence of the marriage. Compensatory support was addressed in *Chutter* at paras. 50-53:

[50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is

entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (Bracklow [v. Bracklow, [1999] 1 S.C.R. 420] at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success ([Moge v. Moge, [1992] 3 S.C.R. 813] at 861-863; Bracklow, at para. 39). In Moge, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

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

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

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

[Emphasis added by Rowles J.A., citations omitted.]

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

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

[12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These

decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims.

[Emphasis added by Rowles J.A., citations omitted.]

[158] Non-compensatory support is needs-based support meant to narrow the gap between the needs and means of spouses. It was discussed in Chutter at paras. 54-55:

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (Bracklow, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (Bracklow, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.

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

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

[Emphasis added.]

[159] In assessing the "needs" of the recipient spouse, the standard of living enjoyed by the parties during the marriage must be considered as well as the standards of living after the marriage: Chutter at para. 60.

[160] In *Lee v. Lee*, 2014 BCCA 383, Justice Newbury, writing for the majority, noted that a spouse who experienced a marked decline in standard of living should receive some financial assistance upon marriage breakdown.

[66] At the same time, the case law of this province referred to above does indicate that a party who experiences a marked decline in standard of living due to divorce should receive some financial assistance (either in the form of re-apportionment of assets or maintenance) in adjusting to his or her new situation - hence the concept of a "transitional" award, which is recognized by the SSAG. Such awards have regularly been made in favour of women, but

rarely in favour of men, perhaps reflecting that, as Rogerson suggests, "Non-compensatory support is significantly structured by social norms of what is fair and just. The economic dependency of husbands on wives is not reinforced and naturalized by strong cultural norms, as is the dependency of wives on husbands ...". (At 234-5.) It seems to me that, setting aside for the moment the support already paid by Ms. Lee from August 1, 2012 to June 1, 2013, Mr. Lee could have expected some transitional award, if only on the "principle" that what is sauce for the goose is sauce for the gander. As it is, Ms. Lee did pay a total of \$17,500 to Mr. Lee, presumably assisting him in adjusting to his new circumstances.

The Claimant's Entitlement to Spousal Support

- [161] In my view, it is clear on the evidence before me that the claimant is entitled to spousal support on both a compensatory and non-compensatory basis. The respondent was economically advantaged by the relationship and the claimant was economically disadvantaged by the relationship. The parties were in a traditional marriage relationship of long duration. The claimant was mostly a stay-at-home mom. The respondent was able to pursue and advance his career because the claimant looked after the family home and the children.
- [162] In respect of non-compensatory support, it is equally clear that there is entitlement. The parties enjoyed a comfortable life while married. However, post-separation there has been a vast disparity between the parties' lifestyles.
- [163] The claimant is and has had periods where she was near destitute. Although suffering from osteoporosis, she has attempted to work but with very limited success. She has been forced to liquidate what few financial assets she had just to survive.
- [164] In contrast, the respondent has enjoyed a very comfortable life post-separation. In fact, it appears that his quality of life improved. He continued to occupy the family home until it was sold. He continued to enjoy the Morson Properties and the various Recreational Chattels. He had Ms. Savage contribute to his expenses rather than pay rent, which he would have had to share with the claimant. He has enjoyed a steady stream of income, albeit a reduced stream upon his early retirement. He has even been able to enjoy multiple vacations to Caribbean destinations.
- [165] There is, in my view, no doubt but that the claimant is entitled to spousal support.

Is the Claimant Entitled to Retroactive Spousal Support to July 2013?

- [166] The original notice of family claim, which included a claim for support, was filed on July 26, 2013 and was served on the respondent on July 30, 2013. The evidence establishes that the respondent paid no support to the claimant until the claimant brought an application dated April 15, 2019 for the payment of retroactive and interim support. That application was heard by Macintosh J. on April 30, 2019. He ordered the respondent to pay interim support on a without prejudice basis commencing May 15, 2019, in the amount of \$2,200

per month. He adjourned the application for retroactive support because there was insufficient time to hear it. That application for retroactive support was never brought back before the court until now.

[167] The factors to consider in determining a claim for retroactive spousal support are summarized in Petrie, at para. 109:

- a) whether there is a reasonable excuse why support was not sought earlier;
- b) the conduct of the spouse being asked to pay support;
- c) the circumstances of the recipient spouse; and,
- d) if the award will visit any hardship upon the payor.

Kraft v. Kraft, 2018 BCSC 496 (citing D.B.S.)

[168] I will consider each factor in turn. The factors should be considered holistically, and no single factor is determinative (Petrie at para. 110).

(i) Delay in Bringing the Claim

[169] The first factor to consider is any delay in bringing the claim for support and whether there is a reasonable excuse for the delay. This is a significant factor in the circumstances of this case as there was a delay of almost six years from the date the notice of family claim was filed to the date of the application for interim support. Further, this delay was not explained in the evidence.

[170] In D.B.S. v. S.R.G., 2006 SCC 37 at para. 130, the Supreme Court of Canada noted that unreasonable delay in advancing a claim for support could result in the period of delay being excluded from the award:

130 A second way courts can affect the quantum of retroactive awards is by altering the time period that the retroactive award captures. While I stated above that the date of effective notice should be chosen as a general rule, this will not always yield a fair result. For instance, where a court finds that there has been an unreasonable delay after effective notice was given, it may be appropriate to exclude this period of unreasonable delay from the calculation of the award. Unless the statutory scheme clearly directs another outcome, a court should not order a retroactive award in an amount that it considers unfair, having regard to all the circumstances of the case.

[Emphasis added.]

[171] Delay in bringing an application for spousal support has been considered in a number of cases. Some of those cases were summarized by Justice Schultes in Segura v. Segura, 2020 BCSC 650, at para. 131:

[131] Regardless of whether there is any entitlement, counsel submits that serious concerns should arise from the lengthy delay by Ms. Segura in seeking spousal support. In addition to the passage from Kerr that I have cited, he refers to cases from this jurisdiction in which delays in seeking support weighed against a support order:

- Halliday v. Halliday, 2016 BCSC 2036: Despite the fact that the applicant had suffered from chronic fatigue throughout the relevant period, the Court found that there was no reason that she could not have applied for spousal support as soon as the payor left the family residence, noting that she "was not being held at ransom" by the payor during that period. As a result, support was made retroactive only to the point that she filed a notice of intention to proceed with her court action and demanded support from the payor.

- Vik v. Vik, 2018 BCSC 611: the Court found that it would be unfair to the payor to order spousal support retroactive to the recipient's initial court actions, which were filed five years before the trial and had not sought spousal support. Instead support was made retroactive only to the previous year, when the recipient had finally made a court application that included such a request.

- Lee v. Lee, 2011 BCSC 286: an unexplained delay of eight years between seeking spousal support in a counterclaim (under the previous court rules) and making the application for it that was before the Court was found to disentitle the would-be recipient spouse from receiving any retroactive award.

[172] Lee is particularly relevant to the matter before me. In that case, spousal support was claimed in a counterclaim filed October 2002, but an application for support was not filed until October 2010. Justice Pearlman held that the lengthy and unexplained delay warranted a dismissal of the claim for retroactive support.

(ii) Conduct of the Respondent

[173] The second factor to consider is the conduct of the spouse being asked to pay support, the respondent. This factor militates in favour of an award for retroactive support.

[174] Put simply, the respondent's conduct has been atrocious. During the course of the marriage he threatened the claimant that if she left the marriage she would leave with nothing but the clothes on her back. He appears to have done everything possible to ensure that threat came true.

[175] The respondent knew, or ought to have known, that the claimant's employment prospects were limited given her age, that she had not worked for several years and that she was suffering from osteoporosis. Despite this knowledge, he refused to pay any support until ordered by the court to do so. Moreover, once he was ordered by the court to pay interim support, he breached the order by failing to pay the required support, which necessitated a further order entitling the claimant to withdraw the support payments from the funds held in trust.

[176] The respondent further retained possession of all of the family assets, with the sole exception of the claimant's Jeep, and prevented the sale of the family home by listing it at a completely unreasonable price. He refused to consider a sale of the Morson Properties and continues to oppose such a sale. He has repeatedly failed to provide full and proper disclosure as required by the Supreme Court Family Rules, B.C. Reg. 169/2009 and by various orders of this court. As found by Myers J. on July 15, 2019, he breached an order of Master Vos dated February 6, 2019 by cashing in an RRSP and disposing of pension payments.

(iii) The Circumstances of the Claimant

[177] The third factor to consider is the circumstances of the recipient spouse, the claimant. The claimant's circumstances up to the trial would have militated in favour of an order for retroactive support. However, her financial circumstances have improved significantly through the orders made in this judgment.

[178] Up until the date of the trial, the claimant was in need of financial support. The claimant had and has limited employment prospects due to her employment history, her medical condition and her age. She had no financial resources when she left for Ontario except the \$50,000 that she withdrew from the parties' line of credit and which she acknowledged in her notice of family claim. She has lived off of a small inheritance she received and by cashing in her RRSP, her only financial asset. She was in need of support during the period 2013-2019, a fact which should have been known to the respondent.

[179] On the other hand, the orders that I have made in this decision will considerably improve the claimant's circumstances. She will receive the entirety of the balance of the funds held in trust and the respondent will owe her approximately \$38,000. She will continue to receive her half share of the pension payments and, as I will go on to explain, she will receive some ongoing spousal support.

(iv) Hardship on the Respondent

[180] The final factor to consider is whether a retroactive award will visit any hardship on the respondent. This factor militates against an award of retroactive support. The respondent is now retired, living off a limited pension income which is now shared with the claimant and has no financial or other assets of any significance. An award of retroactive spousal support could, and probably would, be financially devastating to the respondent.

Conclusion on Retroactive Support

[181] I am required to consider all of the above factors in a holistic fashion when determining whether a retroactive award of spousal support is appropriate. The balancing of these factors is difficult in the circumstances of this case as the factors are near equally balanced. On the one hand, the six-year delay by the claimant in bringing an application for support is significant, the delay has not been explained and an award of retroactive support will be

financially devastating to the respondent. On the other hand, the respondent is very much the author of his own misfortune. He chose to retire early. He chose to not pay support. He chose to delay the sale of the family home. He chose to draw on his pensions and RRSPs and to not share those withdrawals with the claimant.

- [182] Ultimately, in my view, it is not appropriate to make an order for retroactive spousal support. The claimant's unexplained delay in bringing an application for support and the financial hardship a retroactive award will impose on the respondent narrowly outweigh the other factors.

Is the Claimant Entitled to Ongoing Spousal Support?

- [183] I now address the claimant's claim for ongoing spousal support. The claimant submits that ongoing spousal support should be of indefinite duration and based upon an imputed income to the respondent of approximately \$100,000 per year.

The Parties' Income for Determining Spousal Support

- [184] Under the Spousal Support Advisory Guidelines ["SSAG"], the starting point for the determination of income for spousal support purposes is the gross incomes of the spouses as defined in the Federal Child Support Guidelines, SOR/97-175 ["Guidelines"]. It is generally the line 150 total income from the spouse's most recent T1 General Income Tax Return, adjusted in accordance with Schedule III: Guidelines, ss. 2(3), 16. However, if the court is of the opinion that the income reported in the most recent T1 form is not the fairest determination of the spouse's income, the court may have regard to the spouse's income over the past three years and determine the amount that is fair and reasonable: Guidelines, s. 17(1).
- [185] The claimant's line 150 income in 2019 was \$16,206 and consisted of interim support payments from the respondent in the amount of \$13,200 and her half-share of the respondent's pension payments in the amount of \$3,006. The claimant's financial statement sworn on April 24, 2020, lists the pension amounts she received as totalling \$950 per month, or \$11,400 per year. However, the filed tax returns of the parties indicate that the claimant's share of the respondent's pension payments and her line 150 income going forward will be \$17,000 per year. This is the amount that should be used in calculating support.
- [186] With respect to the respondent's income, his line 150 income as reported in his T1 General Income Tax Returns for the years 2013 to 2019, was: \$95,537 in 2013; \$58,688 in 2014; \$41,195 in 2015; \$38,786 in 2016; \$38,936 in 2017; \$50,009 in 2018; and \$149,869 in 2019.

[187] The respondent's income dropped dramatically in 2014 because the respondent took early retirement at the age of 60 and began to receive his pension. It is to be further noted that the excessively high income in 2019 is because the respondent cashed in an RRSP that was family property. Under the Guidelines, I am to use either the respondent's 2019 line 150 income or take an average of his income over the prior three years, unless income is imputed to him.

Imputation of Income

[188] The claimant submits that I should impute income to the respondent on two grounds. First, the claimant says income should be imputed to the respondent on the basis that he voluntarily withdrew himself from the workforce by taking early retirement in 2014. Second, the claimant says that additional income should be imputed to the respondent on the grounds that Ms. Savage moved into the family home in December 2013 and contributed to the expenses of the respondent, but did not pay any rent.

[189] I decline to impute an income to the respondent on the grounds of Ms. Savage's use of the family home. This may have been a relevant consideration in relation to the respondent's income for retroactive support, however, the respondent and Ms. Savage are no longer living together. Ms. Savage is no longer paying a disguised rent to the respondent, if she ever was.

[190] The imputation of income is governed by s. 19 of the Guidelines, which provides that in certain circumstances the court may impute an income to a spouse. The circumstances include:

- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- (b) the spouse is exempt from paying federal or provincial income tax;
- (c) the spouse lives in a country that has effective rates of income tax that are significantly lower than those in Canada;
- (d) it appears that income has been diverted which would affect the level of child support to be determined under these Guidelines;
- (e) the spouse's property is not reasonably utilized to generate income;
- (f) the spouse has failed to provide income information when under a legal obligation to do so;
- (g) the spouse unreasonably deducts expenses from income;

- (h) the spouse derives a significant portion of income from dividends, capital gains or other sources that are taxed at a lower rate than employment or business income or that are exempt from tax; and
- (i) the spouse is a beneficiary under a trust and is or will be in receipt of income or other benefits from the trust.

[191] The evidence is clear that the respondent retired in late 2013 at the age of 60. The evidence is also clear that the respondent's retirement had nothing to do with any physical or medical impairments that prevented him from working. Indeed, in his submissions, the respondent stated that he never claimed he could not work for medical reasons. His evidence was that it was always the intention of the parties that he would retire at age 60, which is what he did.

[192] The claimant refers me to several authorities that address early retirement. These are: *Francis v. Logan*, 2008 BCSC 1028; *Szczerbaniwicz v. Szczerbaniwicz*, 2010 BCSC 421; and *Graham v. Graham*, 2018 BCSC 1888.

[193] In *Francis*, Justice Parrett held that a voluntary decision to take early retirement for personal preferences was not a material change in circumstances justifying a variation of a support order:

[32] In the present case the defendant's decision to take early retirement has had the immediate effect not only of reducing the income he would earn from continued employment but also to reduce the benefits he will receive from both the Canada Pension Plan and from his employment plan.

[34] With the greatest of respect, the decision to take early retirement was not, in this case, dictated by medical needs, or economic exigencies but rather personal preferences and choices.

[35] This decision was also taken in the face of a permanent spousal support order and with full knowledge that his decision to voluntarily reduce his income from employment would also reduce his pension benefits.

[36] In my view, in the circumstances of this case, the defendant's voluntary early retirement was not a material change of circumstances. This conclusion flows from the fact that it was not the result of a reduced ability to earn income or medical uncertainty but rather personal preferences and decisions.

[194] Justice Punnett, in *Szczerbaniwicz*, held that early retirement taken for reasons of personal preferences justified an imputation of income:

[26] Therefore, if the court finds that a party's retirement was motivated by the desire to avoid a maintenance obligation, it will most likely impute income. Even if the party's motivation was not to avoid maintenance, the court will likely impute income so long as the party has the ability to earn an income.

- [27] If the retirement is not voluntary because of economic circumstances, medical reasons, or an employer's actions and the payor is unable to work, the court will tend to reduce the maintenance payable; otherwise, if the payor is still capable of earning an income, his application to terminate or vary spousal support will likely fail: *Bentley v. Bentley*, 2009 CanLII 3779 (Ont. S.C.J.); *Bullock v. Bullock*, 2007 BCSC 318, 36 R.F.L. (6th) 150 at para. 7.
- [29] The reasons for retirement given by the defendant all involve his personal wishes. He does not recognize or acknowledge the effect of his decision on his ongoing obligation to the plaintiff. He did apply prior to his retirement to vary his spousal maintenance obligation but that application did not proceed. At the time of his retirement, he was required to pay spousal maintenance of \$3,300 per month pursuant to an interim consent order. He was frequently in arrears and stopped paying spousal support entirely after November 1, 2008.
- [30] I have no hesitation in finding that the defendant's reasons for taking early retirement do not relieve him of his obligation to pay spousal maintenance. His decision to retire was purely personal. It is of note that he retired shortly after he ceased paying spousal support and the plaintiff's counsel initiated an application to have his pay garnished. Given his history of failing to meet his maintenance obligation, the supposed reasons for his early retirement and the timing of his retirement, I infer that, in part, his motivation was to avoid his court-ordered (and I note consented to) obligation to his wife.

[Emphasis added.]

- [195] The respondent in this matter is in a position similar to the defendant in *Szczerbaniwicz*. While I have not inferred that the respondent retired early for the purpose of avoiding spousal support obligations, the respondent was not required to retire for medical reasons or for any reason other than his own personal preferences. He made the decision to retire knowing the claimant had an outstanding claim for spousal support. I therefore conclude that it is appropriate to impute an income to the respondent.
- [196] The claimant submits that the amount of income I should impute to the respondent is \$150,000. However, there is no basis for imputing such a large income. The average of his gross income for the years 2011, 2012 and 2013, the three years immediately before his retirement, is \$87,400 per year. This would be the highest amount that could be imputed to him. However, even this amount is not appropriate as it assumes the respondent can re-enter the workforce at a position similar to what he had in 2013. This assumption may have been reasonable in 2014 or 2015, but it is not any longer.
- [197] The respondent has now been out of the workforce for almost seven years. He is now 67 years of age. It is not reasonable to expect that the respondent will be able to re-enter the workforce and earn an income of \$87,400 into the future. To the contrary, given his age, his employment prospects are probably limited, even with the skills he has. In view of this, for the purposes of ongoing support, I impute an income to the respondent of \$50,000 per year, an amount I consider reasonable.

What is the Appropriate Amount and Duration of Spousal Support?

[198] Pursuant to the SSAG, using an income of \$17,000 per year for the claimant and \$50,000 for the respondent, the range of spousal support is from \$1,031 to \$1,339 per month with a midpoint of \$1,203 per month. In my view, it is appropriate to use the lowest amount. I am of this view because, with the orders that have been made and will be made in this judgment, the claimant will receive the entirety of the funds held in trust and the respondent will be indebted to her. The claimant will be economically self-sufficient and the standards of living of the parties should be roughly equivalent.

[199] I therefore order that the respondent is to pay to the claimant ongoing spousal support in the amount of \$1,031 per month from December 15, 2020, for an indefinite duration.

[200] I further order, pursuant to s. 168 of the FLA, that either party may apply to the court for a review of the award of ongoing spousal support at any time after October 28, 2022, that date being the respondent's 70th birthday.

Divorce

[201] An order for the divorce of the parties is not contested and the requirements of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) are met. Accordingly, an order for divorce will issue.

Orders

[202] In summary, and pursuant to the provisions of the FLA, I make the following orders:

- a) After taking into account the parties' uses of the line of credit post-separation and notional occupation rent for the respondent's exclusive occupation of the family home, the proceeds from the sale of the family home in the amount of \$347,375.76 shall be divided between the parties as follows,
 - i. to the claimant - \$186,887.88
 - ii. to the respondent - \$160,487.88;
- b) The respondent shall make a compensation payment to the claimant in the amount of \$46,500 in respect of her interest in the Recreational Chattels and jewellery. This amount shall be deducted from the respondent's share of the proceeds from the sale of the family home;
- c) The respondent is the sole owner of the remaining Recreational Chattels and the claimant shall sign whatever documents, if any, that are necessary to effect this;

- d) The respondent may purchase the claimant's interest in the Morson Properties for the sum of \$95,000 provided he gives notice in writing to the claimant of his intent to do so within 14 days of the date of these reasons and further provided he delivers the full purchase price of \$95,000 to the claimant within 30 days of the date of these reasons, or such other time as the parties may agree;
- e) If the respondent does not deliver a notice of his intent to purchase the claimant's interest in the Morson Properties or if he does not deliver the full purchase price within the required timeframe, the Morson Properties are to be sold and the net proceeds from the sale are to be divided equally between the parties. The claimant is to have sole conduct of the sale;
- f) The respondent shall make a payment to the claimant in the amount of \$82,946 to equalize the pension payments made during the years 2014 through 2019;
- g) The respondent shall make a payment to the claimant in the amount of \$39,757, being a set-off of the compensation payments owed by the parties for the disposal of their respective RRSPs;
- h) The amounts referred to in paragraphs (f) and (g) immediately above shall be paid from the respondent's share of the funds held in trust by Ms. Boles, to the extent that there are sufficient funds;
- i) The respondent shall pay ongoing spousal support to the claimant in the amount of \$1,031 per month commencing on December 15, 2020, and continuing indefinitely;
- j) By June 30 of each and every year, each party shall provide the other with a complete copy of their T1 General Income Tax Return for the previous year and any Notices of Assessment or Re-Assessment; and
- k) Pursuant to s. 168 of the FLA, either party may apply to the court for a review of the award of ongoing spousal support at any time after October 28, 2022.

[203] Subject to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) the claimant, Deborah Elizabeth Wellard, and the respondent, Gregory Bruce Wellard, who were married at Beamsville, Ontario on October 23, 1982, are divorced from each other. The divorce is to take effect on the 31st day after the date of this order.

[204] The parties are at liberty to speak to me should they require clarification of any of the above orders and with respect to costs.

"Giaschi, J."

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