

**IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES**

**BETWEEN:**

**F. (S.L.)**

**Petitioner**

**-and-**

**F. (J.T.)**

**Respondent**

**MEMORANDUM OF JUDGMENT**

**INTRODUCTION**

[1] This is an application for equalization and division of property under the *Family Law Act*, SNWT 1997, c 18 and spousal support under the *Divorce Act*, RSC 1985 c 3 (2<sup>nd</sup> supp).

[2] Most of the facts are not in dispute. The parties married in 1999. During their 18 year marriage the husband, J.T., was the primary breadwinner. The parties moved often as J.T.'s career advanced. They lived in Manitoba, Nunavut, British Columbia and, most recently, Yellowknife. J.T. also handled all of the parties' financial affairs, including investments.

[3] The wife, S.L., worked intermittently at various jobs including retail and clerical positions. None of these provided significant remuneration. She ran a day home from 2008 until 2012, while the parties lived in British Columbia. She was unable to continue to operate the day home after the parties moved to Yellowknife because they lived in housing supplied by J.T.'s employer and the lease prohibited operating a business.

[4] S.L. was the primary caregiver for the parties' child after he was born. He is now an adult, attending university and largely self-supporting. The parties agree that child support is unnecessary.

[5] S.L. now lives in Saskatchewan. At the time of trial she was living in Prince Albert, but she had plans to move to Saskatoon.

[6] S.L. is currently 48 years old. J.T. is 54.

[7] The parties agree that S.L. is entitled to spousal support, but they do not agree on the amount and duration. This stems from disagreement over what should and should not be included to determining J.T.'s income, as well as J.T.'s desire to retire in May of 2020, at age 55.

[8] Combined, the parties have net assets of just over \$1 million. Most of it is in the form of cash. The amount does not include a cash transfer that J.T. made to his mother shortly before separation in the amount of \$200,000.00. Whether that should be included in property division is one of the issues in this case.

## **ISSUES**

[9] The Court is asked to decide the following:

- a. Whether the cash transfer from J.T. to his mother in the amount of \$200,000.00, made shortly before the parties separated, should be included in the value of family property for the purposes of equalization;
- b. The date of separation within the meaning of the *Family Law Act*;
- c. Whether J.T.'s annual bonus should be characterized as property or income;
- d. Whether a gift of \$10,000.00 to J.T. from his parents, which was put towards a down payment on the parties' first home, is exempt;
- e. The value of equipment and supplies purchased for S.L.'s day home business at the date of separation; and
- f. The amount and duration of spousal support, including what J.T.'s income is for the purposes of determining the amount of support.

## ANALYSIS

### *The Transfer to J.T.'s Mother*

[10] J.T. transferred \$200,000.00 to a trading account in his mother's name on or about October 28, 2016. He set it up so that he is able to effect trades on his mother's behalf. This was done very close in time to when the parties separated, the exact date of which is considered below. The transfer was made without S.L.'s knowledge or consent.

[11] J.T.'s position is that the transfer occurred prior to the date of separation and so the amount should not be included in the value of the family assets. S.L. argues that it would be unconscionable to treat the value of the transfer as exempt from distribution in the circumstances.

[12] The *Family Law Act* presumes equal distribution of net family property at the date of separation; however, s. 36(6) provides that a party may apply to the Court for an unequal division and the Court may so order, where equal division would be unconscionable. The circumstances that the Court may consider in determining whether equal division would be unconscionable include any circumstances relating to the disposition of property (*Family Law Act*, s. 36(6)(j)(i)). The party seeking unequal division bears the onus of proof. *Anderson v Antoine*, 2006 NWTSC 38 (Canlii); *Lay v Lay*, 2003 NWTSC 11 (Canlii).

[13] The meaning of the term "unconscionable" in the *Family Law Act* has been considered by this Court on a number of occasions. The threshold is a high one: unconscionability is not just unfairness or inequity. Among the words used to describe it are "outrageous", "shocking", "shockingly unfair" and "repugnant to anyone's sense of justice". *Anderson v Antoine*, *supra*, para 25.

[14] J.T. says he made the transfer because he was morally obligated to provide financial support for his mother. His father passed away and his mother had very few means by which to support herself. With respect to the timing, he testified he was motivated to make the transfer at the end of October, 2016 because it would allow him to purchase valuable stocks for the best price. He did not consult with S.L. before he made the transfer. He said he did not have a chance to tell S.L. about it because of his business travel schedule and that shortly afterwards, they decided to separate.

[15] J.T. testified that he had supported his parents throughout the marriage. The specific examples he gave were gifts of airline tickets and a television, and

payment of his father's funeral expenses. There is no evidence that he provided financial support through any form of regular payments to them or on their behalf.

[16] Both parties testified that their marriage had been troubled for some time by the fall of 2016. Among other things, they had been sleeping in separate bedrooms for a number of years; they had stopped attending social functions together; and they had both stopped wearing their wedding rings.

[17] The evidence tendered at trial included a letter which J.T. wrote, but did not send, to a woman with whom he was friends in his youth (the "letter"). It was penned in September of 2016.

[18] In the letter J.T. described his marriage as one of "convenience" and a "prison sentence". Among other things, he wrote that he was "just putting in [his] time until 2018". He also wrote "the only person who knows about this is my mother because she has agreed to help me (. . .)". When asked what this meant, J.T. said his mother had consistently told him that he would always be welcomed home.

[19] I do not accept J.T.'s explanation for either the timing or the purpose of the transfer. Similarly, I do not accept his explanation for why he did not consult with S.L. before he made the transfer or disclose it to her afterwards. If he felt there was nothing wrong with transferring the money to his mother, it would only make sense that he would share the fact that he had concluded such a large transaction with S.L. Instead, she was left in the dark.

[20] The transaction involved a significant portion of the parties' savings which was bound to have an impact on their overall financial position. It was made at a time when J.T. anticipated ending the marriage, as demonstrated by the letter. They separated shortly after he made the transfer. The timing cannot, in the circumstances, be considered a mere coincidence.

[21] J.T.'s evidence of gifts to his parents does not establish that he provided financial support to them or that the transfer to his mother was part of a continuing series of transactions aimed at her financial support. Purchasing gifts from time to time, while generous, is not the same thing as providing regular support.

[22] I am unable to accept J.T.'s evidence that what he meant by the statement that his mother had "agreed to help [him]" was that she offered to let him move back into her home. Viewed in context, it is more likely than not that J.T. was referring to an agreement between himself and his mother whereby he would transfer the money to the trading account in her name.

[23] The evidence leads me to conclude, on a balance of probabilities, that J.T. transferred the money to his mother in an attempt to exempt it from the regime set out in the *Family Law Act*. This is a large amount of money in relation to the overall value of the parties' family property and to not include it in the valuation will have a significant negative impact on S.L. Moreover to allow a transaction conducted in these circumstances to defeat S.L.'s claim to half the value of the transferred funds would be shockingly unfair.

[24] S.L. is accordingly entitled to an unequal division of property. In particular, she shall receive \$100,000 over and above her equalized share of the parties' other family property.

### ***The Date of Separation***

[25] Before they physically separated in July of 2017, the parties remained in the same residence for a period of time, but lived separate and apart. The exact date of separation is in dispute. It must be resolved because it has implications for property equalization.

[26] S.L. says they separated on November 5, 2016. J.T. contends they made the decision to separate and end their marriage on December 8, 2016. Between November 5 and December 8 the value of the parties' property decreased by \$23,151.00.

[27] Section 33 of the *Family Law Act* provides that the property valuation date is "the date the spouses separate and there is no reasonable prospect that they will resume cohabitation". This is a question of fact.

[28] According to S.L., she found the letter described above at some point in late October of 2016. S.L. said that on November 5, 2016 she confronted J.T. about it and told him she wanted to divorce. She took J.T. to the airport the next morning for a business trip and he said he would "stick it out" for a separation period. S.L. took this to mean that they would remain in the same house, but in a state of separation, until their son was finished high school.

[29] S.L. contacted Legal Aid about getting a lawyer the second or third week of November, and spoke to a lawyer on December 4. She also said the parties discussed mediation just after J.T. arrived home from his business trip, approximately November 11 or 12. She tried to find a mediator. She asked J.T. to disclose his assets. Finally, she said there were no efforts to reconcile after November 5.

[30] J.T.'s evidence is that the parties had a discussion about the future of their marriage on November 5; however, he said that S.L. did not tell him she wanted a divorce. He admitted that S.L. confronted him about the letter and said S.L. also asked him if he had a girlfriend. J.T. then went on his business trip. He testified that the next conversation they had about their marriage was on December 8. At that point S.L. told J.T. that she had retained a lawyer who would contact him.

[31] I find that the date of separation is November 5, 2016. While I do not suggest either party was misleading the Court on this issue, I find that S.L.'s evidence makes more sense. On that date S.L. communicated to J.T. that she wanted to end the relationship. Shortly after their discussion on November 5, S.L. took steps to obtain legal advice and she in fact retained a lawyer. This supports her statement that she told J.T. she wanted a divorce on November 5. Further, S.L. said there were no efforts to reconcile after November 5. J.T.'s evidence did not suggest otherwise. In any event, given what both parties said about the state of their relationship by that point there would be no basis for finding there was any reasonable likelihood of reconciliation.

### ***Characterization of J.T.'s Annual Incentive Bonus***

[32] Part of J.T.'s remuneration is in the form of an Annual Incentive Bonus. This is a performance-based bonus, which is typically paid out in January. It is based on the employer's overall financial performance and J.T.'s contribution to it, the previous year. The amount is determined solely by the employer's shareholders.

[33] S.L. argues that the bonus was a "receivable" at the date of separation and therefore, should be treated as property. Respectfully, I disagree. This is clearly part of an annual pay package. Although the amount has varied slightly from year to year, it appears he has earned it annually without exception. It is paid in cash, on his paycheque each January. It is taxed as salary. It is not something like a stock option, which he could choose to exercise or not, nor is it provided to him in the form of property. Finally, there is no evidence suggesting the bonuses J.T. received were typically earmarked by the parties for the purchase of other family property.

### ***Cash Gift from J.T.'s Parents***

[34] J.T.'s parents gave him \$10,000.00 in 1999. He used this as part of a down payment on the parties' first home. It formed part of the payment for the parties second home, in British Columbia. When that was sold, the money was placed

into an account from which many household expenses were paid. S.L. argues that the gift was subsumed into the parties' collective family property and accordingly, it is not exempt from distribution under the *Family Law Act*.

[35] Respectfully, I disagree. The gift was clearly made to J.T. and even though it was eventually placed into a bank account, it is readily traceable. In my view, J.T. has discharged the onus of proving the exemption.

### ***The Value of the Day Home Supplies and Equipment***

[36] S.L. ran a day home from 2008 to 2012 while the parties lived in British Columbia. She purchased equipment and supplies for it in each of those years. The total spent was \$51,331.00. S.L. testified that the equipment and supplies included: learning materials such as puzzles, books, workbooks, crayons and pencils; equipment and furniture, specifically, sippy cups, blankets, high chairs, playpens, bikes, scooter, a Lego table with chairs and storage units for the toys.

[37] Although S.L. did not operate a day home after the parties moved to Yellowknife, she retained the equipment and supplies that remained after she closed the business. They were stored at the home the parties shared in Yellowknife. S.L. did not take them with her when she physically left. Later, J.T. placed them in storage. He said he felt that if he kept them in the home, he would be violating the terms of his lease with his employer. J.T. eventually shipped the supplies to S.L. in Saskatchewan.

[38] S.L. had planned to open a day home following the separation but she eventually decided against this. The reasons are discussed in more detail later. She therefore decided to sell the equipment and supplies and she obtained \$5,700.00 for them. S.L. testified that she determined the price for the items she sold by comparing them to similar items for sale on various internet platforms for used goods.

[39] J.T. disputes the value S.L. has assigned to the equipment and supplies and submits they should be valued by taking the original purchase price and applying a depreciation factor of 30%, for a value of \$35,232.00. He also argues that S.L. should bear the costs of both storage and shipping.

[40] J.T.'s position on the value to be assigned to the day home equipment and supplies is not reasonable, nor is it supported by evidence. Many items, such as pencils, crayons, art supplies, books and puzzles, would be used up or deteriorate significantly in a childcare environment. The more durable items, such as high

chairs and playpens, would depreciate in value, but there is no evidence to support the proposition that the depreciation would be limited to 30%, as J.T. proposes.

[41] What S.L. did to determine the value of the equipment and supplies was reasonable and prudent. She researched the price of similar items and she sold the equipment for what the open market would reasonably support. In the circumstances, it is logical to conclude that the price she obtained represents a fair reflection of what the items were worth. I set the value at \$5,700.00 for the purposes of property equalization.

[42] J.T.'s rationale for having the items placed in storage, ie. that keeping them was a violation of the lease agreement, is unreasonable and unsupported by evidence. The items had been stored at the home from the time the parties moved in without any apparent concern from J.T. or his employer. Placing them in storage was not necessary. Accordingly, J.T. should bear the cost of the storage fees.

[43] S.L. shall bear the cost of the moving fees for the day home equipment and supplies, as they were moved to Saskatchewan at her request and for her benefit.

### ***Spousal Support.***

[44] The objectives of spousal support orders are set out in section 15.2(6) of the *Divorce Act*, which provides that that a spousal support order should:

- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- (b) apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- (c) relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- (d) in so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[45] Section 15.2(4) provides that in making an order for spousal support, the Court is to consider

(. . . ) the condition, means, needs and other circumstances of each spouse, including:

- (a) the length of time the spouses cohabitated;

- (b) the functions performed by each spouse during cohabitation; and
- (c) any order, agreement or arrangement relating to support of either spouse.

[46] While the circumstances of the parties in a particular case may result in certain objectives and factors being given more weight than others, they must all be considered. *Bracklow v Bracklow* [1999] 1 SCR 420 at paras 35-36; 1999 Canlii 715.

[47] The law recognizes three bases upon which a spouse may be entitled to support: compensatory, non-compensatory and contractual. In this case, the parties agree S.L. is entitled to spousal support, on both a compensatory and non-compensatory basis. They also agree that for the purposes of determining support, a yearly income of \$30,000.00 should be imputed to S.L. They disagree on J.T.'s income and, consequently, they are very far apart on the appropriate amount. Duration is also in issue.

[48] S.L. seeks support for 13 years at a rate of \$9,000.00 a month, in addition to a lump sum payment of \$200,000.00. She also submits that for the purposes of calculating support, J.T.'s income should be based on his entire remuneration package, including his housing benefit. Finally, she requests that J.T. be ordered to obtain a life insurance policy which names S.L. as a beneficiary in the amount of \$800,000.00.

[49] J.T. has been paying S.L. interim spousal support in the amount of \$4,000.00 a month, since she physically left the home on July 1, 2017. This was increased temporarily to \$6,000.00 for the months of May, June and July, 2019 by Court order. That order provides that the amount of interim monthly support would revert to \$4,000.00 as of August 1, 2019.

[50] J.T. submits that support should be awarded for an indefinite period in the amount of \$4,000.00 a month, but that it should be subject to review and, if appropriate, adjustment, to take into account his retirement. He wishes to retire in May of 2020, at age 55. J.T. says that S.L. should be expected to achieve self-sufficiency, given that she is just 48.

[51] With respect to the amount of support, J.T. says it should be based on his salary, exclusive of taxable benefits. He sets this amount at \$200,000.00.

[52] In proposing the amounts of support and, in S.L.'s case, duration, the parties have relied on the "without child support" formula of the *Spousal Support Advisory Guidelines*. The *Spousal Support Advisory Guidelines* are not binding and they do not alter the Court's obligation to consider the factors and objectives

set out in the *Divorce Act*. They are, however, helpful in determining the appropriate ranges of the amount and duration of support.

**a. J.T.'s Income**

[53] J.T.'s total remuneration for income tax purposes in 2018 was \$319,403.00. It is expected to be similar for 2019. His income is made of up cash and non-cash components. The cash components in 2018 were: a base salary of \$121,381.00; two bonuses, namely an Annual Incentive Bonus of \$50,168.00 and a mid- to long-term incentive bonus in the form of Performance Deferred Share Units, paid to J.T. in cash in the amount of \$10,655.00; and a northern allowance of \$28,920.00. Together, the cash components amount to just over \$211,124.00.

[54] The non-cash components are: housing provided by the employer, valued for income tax purposes at \$54,600.00, plus two tax gross-up amounts; "points", which are assigned a small monetary value and which can be used for travel and other purchases; and insurances. J.T. can also be reimbursed for vacation travel. In 2018 he was reimbursed \$4,216.00.

[55] One of the documents tendered into evidence was the "2018 Northern/Territorial Allowance Policy" of J.T.'s employer. It outlines the benefits available to employees in certain remote locations, including Yellowknife. One of the stated purposes of the policy, set out at page 1, is providing benefits and specific payments that "(...) address the geographic, and financial realities or remote communicates and/or provides specific incentive for an employee to take an assignment in a specific remote location". It deems Yellowknife as a location where there is, among other things, a significant difference in the costs of goods and services as a result of its geographic location, isolation and limited access to travel, limited availability of services and external competitive labour market pressure.

[56] The terms of the housing benefit itself are set out starting at page 11 and provide, in part, as follows:

Within some of the municipalities covered by this policy, [the employer] may own or lease property in order to provide "**Mobile**" employees with housing. Ownership or lease arrangements are undertaken within specific municipalities in response to local real estate/rental market condition fluctuation, and in order to avoid additional costs relating to the transfer of an employee, the resulting real estate fees, housing hunting trips, and sale costs when the employee transfers out.

[57] J.T.'s housing benefit is intended to provide him with the same housing opportunities that would be available to his colleagues in those parts of the country which, in his employer's view, do not present the same cost of living and other challenges as Yellowknife. The housing benefit does not provide J.T. with additional cash that he can spend as he sees fit. Whether he receives a housing benefit valued at \$54,000 or \$5,000, the cash he has available to pay support remains the same. A value is assigned to the housing benefit for income tax purposes only. Accordingly, J.T.'s housing benefit, including the tax gross-up, should not be included in his income for the purposes of determining spousal support. For the same reason, the amounts paid on J.T.'s behalf for insurance and "points" should not be included in his income.

[58] The vacation travel benefit should not be included in J.T.'s income for the purposes of determining spousal support because it is only provided to him if he first spends money on certain forms of travel. It is not paid up front as cash.

[59] The two bonuses that J.T. receives as part of his remuneration are relatively consistent and have varied only slightly in amount over the years. The Annual Incentive Bonus was \$44,231.00 in 2016, \$47,567.00 in 2017, \$50,168.00 in 2018 and \$49,358.00 in 2019. Similarly, the mid- to long-term bonus paid at the end of each year was \$11,448.00 in 2017 and \$10,655.00 in 2018. There was no evidence of what was paid in 2016.

[60] For the purpose of spousal support, I exclude from J.T.'s income the non-cash components and I set his income at \$211,124.00. This is composed of his base salary, the Annual Incentive Bonus, the mid- and long-term incentive bonus and the northern allowance.

### **b. Amount and Duration**

[61] Using the formula in the *Spousal Support Advisory Guidelines*, with J.T.'s annual salary at \$211,124.00 and imputed annual income for S.L. of \$30,000.00, generates \$4,075.00, \$4,754.00 and \$5,434.00 for the low end, midpoint and high end amounts respectively.

[62] Determining the appropriate amount of spousal support is not an exact science. Even with the assistance of the *Spousal Support Advisory Guidelines*, and the extensive body of case law interpreting the spousal support provisions in the *Divorce Act*, the Court must accommodate a certain number of "unknowns" and do its best to provide for reasonably anticipated contingencies.

[63] There are a number of factors here which lead me to conclude an appropriate amount of support at the mid-point of the range, being \$4,754.00 per month.

[64] First, S.L. has a strong compensatory claim. She was the sole caregiver for the parties' child and her work came second. Playing this role has had a significant effect on her earning capacity. Second, since she has little in the way of marketable skills, it is to be expected that she will need time to take the training that will enable her to earn a reasonable living. Taking time to engage in training leaves less time for employment and this must be considered in determining the amount of support. She will need to rely more heavily on spousal support while she is augmenting her skills and gaining experience. Third, S.L.'s age must be factored into the mix. She is currently 48 years old. Combined with a need to learn new skills, this leaves her less time to gain experience and move up the ladder in any occupation.

[65] While the foregoing militate against awarding spousal support at the low point the range, the fact that S.L. will receive a sizeable family property award makes ordering support at the highest end inappropriate and unnecessary. The property award will soften somewhat the impact of the time she needs to attain reasonable job skills, as well as the impact of her age on her long-term earning capacity.

[66] The *Spousal Support Advisory Guidelines* tie amount to duration. In this case, the suggested duration is 9 to 18 years. This runs from the date of separation, not from the date of the trial. For reasons set out below, however, I have declined to set a definite time period after which the support payments should end.

[67] The marriage was a relatively long-term one of just under 18 years. S.L. has limited employment and income prospects in the immediate future and this is due to the role she played during the marriage. The focus of both parties was J.T.'s career and as a result, the parties relocated relatively frequently. S.L. was a homemaker and caregiver, and any income she earned was secondary. Realistically, S.L. was never in one place long enough to establish a long-term career or augment her skills, with the possible exception of the time the parties spent in British Columbia. Even then, however, her income was secondary and significantly less than J.T.'s.

[68] As noted above, no single one of the goals and considerations set out in the *Divorce Act* with respect to spousal support is more important than the others. In this case, however, the efforts S.L. has made to become self-supporting, as well as

her plans for the future, must be considered with a view to determining the duration of the support.

[69] After the parties separated, S.L. looked at running a day home in Yellowknife, but she found the costs of renting suitable space was prohibitive. She considered moving to Calgary, Alberta, but then decided to move to Prince Albert, Saskatchewan.

[70] S.L. intended to open a day home once she moved to Prince Albert. She found a suitable house to rent for this purpose. Unfortunately, she was unable to attract enough clientele to make it work. She also applied to be a supply teacher, but she was not hired. S.L. eventually found work looking after an infant. This lasted only one week. S.L. said she was unable to sustain the physical demands of being a full-time caregiver to children. S.L. decided to give up on the idea of opening a day home.

[71] At trial S.L. said she had plans to move to Saskatoon, Saskatchewan at the beginning of August, 2019. She said she will rent accommodations from one of her friends for \$1,200.00 a month. S.L. does not anticipate that she will have much in the way of extraordinary expenses. This is all that is known of her anticipated living expenses.

[72] S.L. described the options she considered to give her the skills to become self-sufficient, both short- and long-term. In the short-term, she said she plans to try and find a “nine-to-five” job in Saskatoon and then spend weekends helping her father on his farm. This would entail looking after livestock and assisting with seeding and harvesting.

[73] A longer-term option she described is starting a green house on her father’s farm where she would cultivate vegetables for market gardens in the summertime. She would work with a business partner, with whom she has already had discussions. The business partner would take care of the marketing end and she would be responsible for growing and cultivating the produce. This plan was relatively new and lacked a number of details, including the start-up costs and the time-line for rolling it out.

[74] Finally, another longer-term option S.L. is exploring is taking a business management course at a college in Saskatoon. She has looked at courses at the University of Saskatchewan.

[75] Clearly, S.L.’s plans for overcoming the economic dependence that arose from the marriage, as well as the time frame in which that could be expected to

happen, are far from certain. She has some *ideas* about how to become self-sufficient, but she does not have any concrete plans. This makes duration a challenging issue.

[76] J.T. wishes to retire in May of 2020, which is less than a year from now. He will be 55 years old. He testified that he has some health problems, but his description of these was rather vague and there was no independent evidence about how these issues could be expected to interfere with his ability to continue working, if at all. J.T.'s income will drop significantly when he retires, particularly if he retires at age 55.

[77] J.T. suggested that the support order be made reviewable upon ninety days' notice of his retirement date. Presumably, he would ask to vary the order such that he would pay a reduced amount of support by reason of his decreased income and the fact that the income would be generated property in which S.L. will already have shared through asset division. (see *Boston v Boston*, 2001 SCC 43, 2001 2 SCR 413).

[78] Review orders should be granted sparingly and only where there is "a genuine uncertainty at the time of the original trial". *Leskun v Leskun*, 2006 SCC 25 at para 37, [2006] 1 SCR 920. The reasons for this were succinctly stated by the Ontario Court of Appeal in *Fisher v Fisher*, 2008 ONCA 11, 2008 CarswellOnt 43 as follows:

70 Review orders in effect turn an initial order into a long-term interim order made after trial. Accordingly, they should be the exception, not the norm. They are appropriate when a specified uncertainty about a party's circumstances at the time of trial will become certain within an identifiable timeframe. When one is granted, it should include specifics regarding the issue about which there is uncertainty and when and how the trial judge anticipates that uncertainty will be resolved.

71 In any other case, a trial judge should issue a final order based on a preponderance of the evidence called by the parties. In the family law context, a final order will always be subject to variation, which will suffice to protect against future events. A variation is available not only when there is an unexpected change in circumstances, but also when an anticipated set of specified circumstances fails to materialize. This is particularly the case where an initial order specifies a trial judge's anticipation that the recipient spouse will or should be able to earn a given income within a particular timeframe. This flexibility is to be contrasted with a review order, which invariably places the burden on the applicant, albeit in the context of an initial application.

72 Moreover, a trial judge concerned about the burden of proof may structure the support order either to place the burden on the payor or on the recipient as may be appropriate. This may be achieved by terminating support, so that the recipient spouse bears the burden of establishing a material change justifying ongoing support, or by ordering indefinite support, so that the payor spouse bears the burden of establishing a material change justifying the termination of support.

[79] Respectfully, J.T.'s eventual retirement is not an uncertainty such that a review order is justified on this basis. He made it clear in his evidence that he wishes to retire and that he wants to do so as soon as he can. J.T.'s plans for retirement in the next year, with full or partial relief from spousal support obligations, may be unrealistic, however. It is not reasonable in the circumstances to expect that S.L. will achieve the skills she needs to increase her earning capacity so she can earn a reasonable living by May of 2020. Similarly, it is unlikely that she will have grown her capital sufficiently to live off of the income which might be generated by it within the next year.

[80] On the other hand, S.L.'s plans for the future are highly uncertain and, in my view, this justifies a review clause in the order. It is impossible for the Court to assess the feasibility of her future plans and consequently, the likelihood of her financial dependence being ameliorated through retraining, possible employment or prospective business endeavors, within a specified time period.

[81] In recognition of the role she played in the marriage, the resulting economic dependence and S.L.'s limited skill set, support should be payable to S.L. on an indefinite basis. I emphasize that in this context, "indefinite" simply means there is no pre-set end date. It does not mean support payments are permanent.

[82] To deal with the uncertainty of S.L.'s future plans, the order will include a review clause. The review shall be limited to S.L.'s efforts to retrain, obtain and sustain employment or otherwise earn income, her financial circumstances and future prospects for self-sufficiency.

[83] Either party will be able to bring the matter forward under the review clause after 3 years from the date the order is issued. I have chosen this time period deliberately, taking into account the need to provide S.L. a reasonable opportunity to define her plans more clearly and start to follow up on them. The Court must be able to conduct a meaningful review. In 3 years there should be enough information to allow the Court to compare S.L.'s present circumstances to the future ones. It will also permit the Court to gauge whether continued spousal support is necessary and if so, for how long and in what amount. This does not, of

course, prevent either party from seeking a variation at any other time in the future, provided there is a material change in circumstances.

[84] Finally, spousal support will not be adjusted retroactively. What has been paid on an interim basis, while somewhat lower than what I have ordered, is within the appropriate range. The revised amount will take effect from September 1, 2019 and continue until further order.

### **c. Lump Sum Support**

[85] The next question is whether there should be a lump sum of support paid in addition to the periodic payments. S.L.'s pleadings do not seek a lump sum payment, but she sought this relief during her arguments at trial.

[86] The Court has jurisdiction under the *Divorce Act* to order both periodic and lump sum payments. In *Davis v Crawford*, 2011 ONCA 294; 2011 CarswellOnt 2512, the Ontario Court of Appeal addressed the principles to be applied in considering whether a lump sum spousal support award is appropriate. The most important of these is the need to weigh the perceived advantages and disadvantages of ordering a lump sum payment:

66 Most importantly, a court considering an award of lump sum spousal support must weigh the perceived advantages of making a lump sum award in the particular case against any presenting disadvantages of making such an order.

67 The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example: short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.

68 Similarly, the disadvantages of such an award can include: the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum

support is awarded in place of ongoing indefinite periodic support.

69 In the end, it is for the presiding judge to consider the factors relevant to making a spousal support award on the facts of the particular case and to exercise his or her discretion in determining whether a lump sum award is appropriate and the appropriate quantum of such an award.

[87] In this case, nothing would be gained by ordering J.T. to make a lump sum payment, in addition to periodic payments. Through property equalization, S.L. will have a substantial amount of capital, so a lump sum payment is not required to meet an immediate need for this. Further, J.T. has been paying support since shortly after the parties separated and there is no evidence that he has failed to meet this obligation. Finally, ordering J.T. to make a lump sum payment in the amount requested on S.L.'s behalf would seriously and unnecessarily deplete his share of the parties' net assets.

#### **d. Life Insurance**

[88] S.L.'s request that J.T. obtain a life insurance policy, naming her as the beneficiary is dismissed. There is no evidentiary basis to make that order. J.T. was not questioned at trial about life insurance policies that he may hold, and if any, what the policy value(s) is (are). Similarly, he was not questioned about his ability or inability to obtain life insurance.

### **SUMMARY**

[89] The conclusions and orders are as follows:

- a. The cash transfer that J.T. made to his mother in the amount of \$200,000.00 is included in the value of the property for the purposes of equalization. S.L. is entitled to an unequal division of family property and in particular, she shall be paid \$100,000.00 in addition to her equalized share.
- b. The date of separation for the purposes of property valuation within the meaning of the *Family Law Act* is November 5, 2016.
- c. J.T.'s annual bonuses are income.
- d. The gift of \$10,000.00 that J.T. received from his parents is exempt from equalization.

- e. The value of the equipment and supplies from S.L.'s day home business is set at \$5,700.00. J.T. shall be responsible for the storage costs for these items. S.L. shall be responsible for the moving costs.
- f. A corollary relief order shall issue for spousal support. It will include the following terms:
  - i. For the purposes of spousal support, J.T.'s income is set at \$211,124.00;
  - ii. Spousal support is payable to S.L. from J.T. in the amount of \$4,754.00 per month, commencing on September 1, 2019 and continuing until further order;
  - iii. The amount and duration of spousal support may be reviewed by a court of competent jurisdiction upon the application of either party, 3 years from the date the corollary relief order is issued. The review shall be limited to S.L.'s efforts to retrain, obtain and sustain employment or otherwise earn income, her financial circumstances and future prospects for self-sufficiency.
  - iv. The ability to bring the matter forward for review does not limit either party's ability to apply for a variation on the grounds that there has been a material change in circumstances.
- g. S.L.'s request for lump sum support is dismissed.
- h. S.L.'s request that J.T. maintain her as a beneficiary on his life insurance policy or, alternatively that he obtain a life insurance policy and name her a beneficiary, is dismissed.
- i. A Divorce Judgment shall issue.

[90] I shall leave it to the parties' counsel to determine how best to transact the division of property and to incorporate that into an order. If they are unable to agree on the terms of the order, they may seek further direction and advice from the Court.

[91] The parties may speak to costs if necessary.

K. M. Shaner  
J.S.C.

Dated at Yellowknife, NT, this  
27<sup>th</sup> day of August 2019

Counsel for the Petitioner: André Duchene

Counsel for the Respondent: Paul Parker

**IN THE SUPREME COURT OF THE  
NORTHWEST TERRITORIES**

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BETWEEN

**F. (S.L.)**

**Petitioner**

**-and-**

**F. (J.T.)**

**Respondent**

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**MEMORANDUM OF JUDGMENT OF  
THE HONOURABLE JUSTICE K. M. SHANER**

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