CITATION: Liu v. Xie, 2021 ONSC 7535
COURT FILE NO.: FS-20-00016453
DATE: 20211115

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Kai Liu, Applicant

AND:

Cong Xie, Respondent

BEFORE: Kimmel J.

COUNSEL: *Katherine Long* - KATHERINE@TAMMYLAW.CA, for the Applicant

William Francis - WILL@STANCHIERIFAMILYLAW.COM, for the Respondent

HEARD: October 26, 2021

ENDORSEMENT – INTERIM SUPPORT AND COROLLARY RELIEF

The Motions

[1] Two long motions in this matter were heard together. There was a significant amount of affidavit material filed by both sides in support of, and in response to, these motions. They initially came on for a hearing on the regular motions list on October 12, 2021. Due to various objections and technical issues, they were adjourned to a long motion heard by me on October 26, 2021. Prior to the October 12, 2021 return date, both parties had objected to late filed material by the other. These objections became moot when the matter was adjourned as the materials were no longer "late".[1]

The Motion and Relief Sought by the Applicant Father

[2] The applicant father's motion is for interim ongoing and retroactive child and spousal support in the amounts of $5,229 and $10,006, respectively, and proportionate sharing of s. 7 expenses for the children based on imputed annual income to the respondent mother of approximately $445,000 and based on the father's actual current annual income of $24,000. The father also alleges that the mother is in breach of previous orders of the court made in this proceeding and that she should suffer certain consequences as prescribed under r. 1(8) of the

[1] There was one further affidavit filed on behalf of the respondent, sworn on October 21, 2021, that the applicant objected to. It simply attaches correspondence between counsel dealing primarily with the timing of an anticipated s. 30 assessment report and the respondent's request for a further adjournment of these motions, which was not granted.

Family Law Rules, O. Reg. 114/99, including that she should not be permitted to pursue any of the relief she seeks on her motion.

The Motion and Relief Sought by the Respondent Mother

[3] The respondent mother's motion is for the termination of certain paragraphs of orders previously made by this court in this proceeding, and for directions regarding: (i) the distribution and application of the net proceeds of sale of the matrimonial home at 52 Northwood Drive (the "Northwood property"), jointly owned by the parties (the sale of which closed in September 2021); (ii) the distribution of any net proceeds payable to the parties from the sale of the property at 320 Willowdale Avenue (the "Willowdale property"), jointly owned by the parties and other third parties (the sale of which this court has already ordered); and (iii) the responsibility, and source of funds available to pay for the carrying costs of the Willowdale property pending its sale.

[4] In response to the father's support motion, the mother asks the court to determine her annual income for support purposes to be $250,000 and the father's annual income for support purposes to be $75,000, on the basis of which she contends that no (or nominal) spousal support is payable by her and that both parties have child support obligations, with her as the net payor of $2,138 in Table Child Support.

[5] The mother currently pays all of the s. 7 expenses for the children, which she indicates total $3,584 in the aggregate (a significant component of which is for special educational programming for their eldest child who is on the autism spectrum). If the court accepts her position regarding the child and spousal support payable by her, the mother is willing to continue to pay these expenses for the time being without prejudice to her right to seek contribution from the father later, retroactively and going forward. Otherwise, she agrees to proportionate sharing of those expenses, which would require contributions from the father of between $828 (at 45% NDI) and $1,219 if he were to be awarded spousal support at the high end of the Spousal Support Advisory Guidelines (SSAGs), based on her support calculation scenarios. The father's proportionate share of these expenses would be even higher on his support calculation scenario (subject to offset for available funding for the special educational programming for their eldest child).

[6] The monthly spousal support that the mother contends would be owing by her would be nil at 45% NDI of the SSAGs, and at the high end of the SSAG range, it would be $2,962 under her support calculation scenarios.

The Family Context Procedural History

Background – Family Income and Roles

[7] The history of the relationship between the parties over their eight and a half year marriage, and since they separated on May 18, 2019, is described at paragraphs 7-13 in the May 11, 2020 endorsement of Kraft J. and need not be repeated for purposes of this motion. In summary, the wife had been the sole income earner in the family for a period of time leading up to the parties' separation. The father stopped working in 2017 around the time of the birth of the parties' second child (River Zhiqi Liu, born January 4, 2017). Their first child, Coco Xinling Liu, was born December 13, 2013, and is now almost 8 years old.

[8] The parties were married in China and moved to Canada shortly afterwards. At the time they married, the mother was unemployed, and the father was working in China. The mother re-trained in Canada and eventually became a successful mortgage broker with the Bank of Montreal ("BMO"). The mother's income peaked in 2016. Over the past three years, her declared annual income, before deduction of expenses, has been approximately $450,000 on average.

[9] The father struggled with English and did not re-train in Canada. He was not able to advance in his employment in Canada. His last position was as a branch manager with an annual salary of $54,000. Until recently, the father had not worked outside of the home since leaving his employment in 2017.

[10] The parties both claim to have been actively involved in their children's lives and upbringing. They also had a nanny in the house to help with the cooking, cleaning and other needs of the children.

[11] This family lived a comfortable lifestyle, consistent with the mother's income and earnings levels, prior to the parents' separation and while they continued to live in the matrimonial home post-separation.

[12] In addition to owning the matrimonial home (the Northwood property), the parties owned or held an ownership interest in two other investment properties, one that has been sold with little or no net sale proceeds for distribution and the other being the Willowdale property. All of their jointly owned properties had associated carrying costs, including mortgages and property taxes. The parties also both have other loan obligations. Because of their significant debt obligations and monthly living expenses, by the time they got to court in the spring of 2020, they were in what was described as a "financial crisis".

[13] The father recently became re-employed in March 2021 and is currently earning an annual salary of $24,000. He maintains that his English language skills remain a barrier to his earning potential. The father's income earning potential is significantly lower than the mother's for the foreseeable future, although the precise disparity between their actual and potential earning capacities is not agreed.

Orders of Kraft J. May/June 2020 Regarding Family Finances and Debt Service

[14] It was the mother's income that had traditionally been used to service the family debt. Various mortgages and expenses went into default after the parties separated. Concerns were raised on the motion before Kraft J. in May 2020 about how the mother was prioritizing and using her available income. Certain of the mother's accounts were frozen and her assets were ordered to be preserved. The parties' joint account was not frozen so that it could be used to pay for the family's expenses.

[15] Financial disclosure was ordered and the mother was ordered to maintain the financial status quo by paying the household bills and all other expenses associated with the parties' jointly held properties, two of which have been sold since then, pending court order or further agreement of the parties. These aspects of the May 11, 2021 endorsement of Kraft J. were re-affirmed during a case conference with Diamond J. on May 20, 2020.

The Nesting Order of Kraft J. in January 2021

[16] The parties remained together in the matrimonial home (Northwood property) with the children after they separated. A nesting arrangement was ordered by Kraft J. on January 11, 2021 following a motion by the father (see *Liu v. Xie*, 2021 ONSC 222), pursuant to which the parties each took turns living in the matrimonial home with the children. The matrimonial home was eventually sold, and the sale of the home closed in September 2021. The children now spend their time equally with both parents at their separate residences. The net proceeds from the sale of the Northwood property are currently being held in trust.

The Consent Order of Sanfilippo J. made in July 2021

[17] The parties consented to an order made on July 22, 2021 by Sanfilippo J. enabling their eldest child to be immediately enrolled in an Applied Behaviour Analysis/Intensive Behavioural Intervention ("ABA/IBI") program with Connect the Dots Child Development Services at an estimated cost of $500 per week (for 3 days per week), to be paid in the first instance out of the mother's income without prejudice to her right to claim proportionate contribution/apportionment. This consent order required the parties to apply for any available subsidies and government funding for the child's ABA/IBI programming.

[18] The mother did apply for government autism funding and has received $20,000 that she is holding in a bank account in trust for their daughter. The application for, and receipt of, these subsidy funds was disclosed to the father as part of the mother's financial disclosure in her September 30, 2021 financial statement, delivered shortly before the original return date of the father's support motion without supporting documentation.

Consent to s. 30 Assessment

[19] The parties agreed to a private assessment to be completed pursuant to s. 30 of the *Children's Law Reform Act*, R.S.O. 1990, c. C.12. A preliminary verbal report was provided by the assessor at a disclosure meeting on October 6, 2021. The mother sought to adjourn these motions, pending the formal assessment report, given that she expects that the results of that assessment may lead to a different parenting schedule, with the children spending more time with her. That request was denied by Faieta J. in his October 12, 2021 endorsement and again by me at the outset of argument on October 26, 2021.

[20] There is a process that must be followed for the s. 30 assessment report to be prepared, commented upon and considered. If that process leads to a change in the current shared parenting time arrangement, whether by agreement or adjudication, then the implications for support purposes can be addressed at that time. The current support motions should not be further delayed pending the outcome of that process, which could take a number of months.

Summary of Outcome

[21] For the reasons that follow, I make the following orders:

a. For temporary interim support purposes, the applicant father's annual income is imputed to be: $50,000

b. For temporary interim support purposes, the respondent mother's annual income is imputed to be: $350,000

c. The net Table Child Support payable by the mother to the father on an ongoing basis is $3,722 per month, commencing November 1, 2021.

d. Any available grants for funding received for the special educational and other needs of the parties' eldest child shall first be used to cover the expenses for such. This includes, without limitation, the $20,000 in government funding that has already been received by the mother and is currently being held in a trust account, which shall be used to pay for the cost of the ABA/IBA Behavioural therapy for her until those funds have been exhausted. The obligation of the parents to continue to seek out all available funding for their child, as provided for in the July 22, 2021 consent order, remains in place.

e. The s.7 expenses shall be comprised of those indicated by the mother in her support calculations. Any remaining unfunded portion of the s. 7 expenses for the parties' children (after the application of available government funding) shall be paid by the parents in their proportionate shares based on their imputed incomes (above). In terms of the cash flow and as a practical matter, the mother shall continue to pay these expenses directly and deduct the father's proportionate share of the unfunded s. 7 expenses from the monthly Table Child Support she pays him, subject to further court order or agreement of the parties.

f. The spousal support payable by the mother to the father on an ongoing basis is $1,966 per month, based on 50% NDI, commencing November 1, 2021.

g. On consent, no order is made for retroactive child or spousal support at this time. If the father wishes to renew his request for such before a trial or other final resolution of this matter, he shall first schedule a case conference and seek leave to do so if the presiding judge is satisfied that a further interim motion for such is necessary and appropriate.

h. On consent, effective November 1, 2021 the mother's chequing account ending in #*3956 is released from the preservation orders made and affirmed in the May 11 and 20, 2020 endorsements of Kraft J. and the case conference endorsement of Diamond J. The orders arising from those endorsements are amended, accordingly, but shall otherwise remain in full force and effect.

i. Effective November 1, 2021 the parties' joint share of the ongoing carrying costs of the Willowdale property, including any outstanding arrears that they are responsible for, shall be paid for out of the net proceeds from the sale of the Northwood property. There shall be no other distribution of the net sale proceeds from the Northwood property at this time, pending further order of this court or

> agreement of the parties. The mother's obligation to pay this family expense arising from the May 11 and 20, 2021 endorsements is relieved to this extent, and those orders are amended accordingly but shall otherwise remain in full force and effect.

[22] I am not making an order under r. 1(8) of the *Family Law Rules* and have not relied upon that rule to deny the relief sought by the mother on her motion, even though it appears that the mother did deposit and withdraw funds from one of her frozen accounts which was technically not compliant with the preservation and freezing order.

[23] While the mother claims that her technical breaches of those prior orders did not offend the spirit of those orders, which was to ensure that all available resources under her control be applied towards the family (and she has attested that is what any funds removed from those accounts were used for, with specific annotations to address the transactions that the father has questioned), she could have arranged her financial affairs differently to avoid being in breach and to avoid having to come to the court to ask to be relieved from the restrictions (as she has now done). She also could have gone back to seek a variation of the preservation and freezing order after she provided her financial disclosure and in advance of any technical breaches, as that order permitted her to do. She did neither. There is also the matter of the outstanding costs that were awarded against her when the preservation order was made, that have not yet been paid.

[24] Nonetheless, the mother's position regarding the imputation of incomes and the amounts of spousal and child support and s. 7 expenses payable are in response to the father's motion and she should be permitted to advance those positions regardless of any technical breaches of the previous court orders restricting the use of certain bank accounts that were frozen by those orders. The issues raised on the father's support motion should be addressed on their merits. That is the most just, fair and efficient way in which to decide those issues, consistent with the primary objective under r. 2(2) and(3) of the *Family Law Rules*, and consistent with the court's duty to promote that objective under r. 2(4).

[25] Much of the other relief (from the preservation and freezing orders) is linked to the support orders, in that it seeks to address the changes in the family's financial *status quo* since there are no longer a single set of common household bills and two of the parties' jointly held properties have been sold and there are sale proceeds available from one of those sales (the Northwood property). The main account that has been the source of the mother's breaches of the preservation and freezing order is the mother's chequing account that the father has agreed can be released from the restrictions now that the matrimonial home has been sold, the nesting arrangement has ended and the parties are living in separate residences each with their own monthly carrying costs, and support orders have been made.

[26] That said, even if I were inclined to consider releasing the other accounts that the mother has asked be removed from the restrictions of the preservation order, I am not prepared to do so at this time, in part because of the mother's past non-compliance with those orders from which she now seeks relief, and in part because I have not been persuaded that she needs access to those accounts for any particular reason at this time.

[27] The mother complains that the father's financial disclosure was non-compliant in that it did not accompany his Notice of Motion. She argues that this would give the court justification for dismissing the applicant's motion under r. 1(8): see *Aviv v. Boshoer*, 2011 CarswellOnt 9160. This is a "tit-for-tat" argument that does not assist the mother given that the financial disclosure has now been made and is extensively relied upon by both parties. It does not serve the primary objective under r. 2(2) of the *Family Law Rules*, to deal with cases justly, to entertain this type of argument about the timing of financial disclosure when that disclosure has been made and is available to the court to assist in deciding the issues fairly and efficiently.

Analysis of Issues

Imputation of Income for Support Purposes

[28] The starting point for the analysis of the child and spousal support payable by the mother to the father is to determine the income of each parent. The line 150 income on their income tax returns over the past three years is a relevant data point to begin with, however, both are asking the court to impute higher income to the other.

[29] Income is determined for support purposes under the *Federal Child Support Guidelines* ("*Guidelines*"), SOR/97-175, ss. 16-20. Pursuant to s. 16, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the TI General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III. Under Schedule III, s. 1 of the *Guidelines*, it states that employment expenses can be deducted from income for support purposes for: "sales expenses', 'travel expenses', 'motor vehicle travel expenses', 'concerning dues and other expenses of performing duties', 'motor vehicle and aircraft costs' and 'salary reimbursement'. The court may, but is not bound, to reduce a spouse's income level for child support purposes on the same basis as the CRA: see *Cole v. Dixon*, 2016 NSSC 26, at paras. 36-39.

[30] In *Cole* (at paras. 33-34), the court also determined that two different one-time, non-recurring income amounts should not be included in income for support purposes per s. 17 of the *Guidelines* because their inclusion would distort the financial picture and would not result in a fair determination of the spouse's income for support purposes.

[31] Support is prospective and to be paid out of the parties' most current income. Pursuant to s. 19 of the *Guidelines*, the court may impute income for support purposes in circumstances where a spouse unreasonably deducts employment expenses from income. The reasonableness of an expense deduction is not solely governed by whether a deduction is permitted under the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp.). Cash income that is undeclared for income tax purposes is included in child support and must be grossed up to a pre-tax amount in the calculation of a party's income: see *Mallany v. Mallany*, 2010 ONSC 4627, 93 R.F.L. (6th) 402.

[32] It is explicitly considered in s. 19(1) of the *Guidelines* that there can be imputation if: (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 [...] or by the reasonable

educational or health needs of the spouse.", or, if (e) “the spouse's property is not reasonably utilized to generate income.”

[33] The Ontario Court of Appeal has considered what constitutes under-employment in *Lawson v. Lawson*, 2006 , at para. 36:

> Intentional underemployment occurs when a payor chooses to earn less than he or she is capable of earning. There is no need to find a specific intent to evade child support obligations before income can be imputed on the basis of intentional underemployment. When imputing income based on intentional underemployment, a court must consider what is reasonable in the circumstances. The factors to be considered are the age, education, experience, skills and health of the payor, as well as the payor's past earning history and the amount of income the payor could earn if he or she worked to capacity.

[34] The Ontario Court of Appeal has also made it clear that “…once it has been established that a spouse is intentionally unemployed or under-employed, the burden shifts to that spouse to establish what is required by virtue of his or her reasonable educational needs applied a general test and spoke to the burden of proof for the parties. …There is a duty to seek employment in a case where a parent is healthy. As a general rule, a parent cannot avoid child support obligations by a self-induced reduction of income”: see *Drygala v. Pauli* (2002), 219 D.L.R. (4th) 319 (Ont. C.A.), at para. 38.

[35] The Court of Appeal has directed in *Drygala*, at para. 23, that the following questions be considered in this context:

a. Is the spouse intentionally underemployed or unemployed?

b. If so, is the intentional underemployment or unemployment required by virtue of his reasonable educational needs?

c. If the answer to question #2 is negative, what income is appropriately imputed in the circumstances?

[36] Similarly, in appropriate circumstances, rental income can be imputed for real property that is not utilized to generate income in the appropriate circumstances: see *P. (M.) v. P. (W.)*, 2014 ONSC 5744, at para. 67; *Lefebre v. Lefebre*, 2020 ONSC 311, [2020] O.J. No. 506, at paras. 353-361; and *Wilton v. Myhr*, 2019 ONSC 77, at paras. 107-109.

[37] On an interim support motion such as this, courts have repeatedly referred to the important qualification articulated by Sproat J. in *McCombe v. McCombe*, 2014 ONSC 2399, at paras. 35-36, that: “[i]t is beyond the scope of my role and responsibility to attempt to start from scratch and conduct my own analysis or reconcile all the discrepancies in the analysis presented by the parties' in using the 'most reliable number' to determine income for support purposes.”

[38] This is an exercise in “rough justice” and not a science of perfection.

The Mother's Income For Support Purposes

[39] The mother says her employment income for 2020 for support purposes was her line 10100 declared income of $447,647.96 less her employment expenses (line 22900) of $152,067.14, for net employment income of $295,580.82. She argues that this should be further reduced for a non-recurring income inclusion for the vesting of a restricted stock unit of $33,420.54 ("RSU"). She notes that this also omits an undeclared further employment expense of $15,000. Her imputed employment income for support purposes would be $247,160.28 if adjusted for these two further items. She says that her projected 2021 line 10100 income is roughly the same as 2020 (if the RSU is not included in 2020 as a non-recurring item), and she projects similar business expenses in 2021.

[40] The father alleges that the mother has a demonstrated pattern of "padding" her expenses for income tax purposes, including annual deductions in the magnitude of $100,000 - $150,000 for funds she claimed to have paid to non-arm's length parties, including himself and the respondent's siblings. Since separation, the father maintains that the mother has continued this practice of claiming deductions for alleged "employment expenses" that do not correspond with any *bona fide* transactions and for which substantiating documentation has not been produced, in the magnitude in excess of $100,00 per year. The father relies upon the fact that the mother admitted during questioning that $130,000 out of the $152,000 in employment expenses she claimed in 2020 had not been paid by her.

[41] The father also alleges that the mother has a demonstrated history of cash referral income in the magnitude of approximately $80,000 to $100,000 per year, which is not accounted for in her declared income for income tax purposes but should be accounted for support purposes. The father contends that the mother's income should be imputed at $442,939 for support purposes taking all of these variables into account.

[42] Without doing a line by line analysis from the ground up, there may be cause to question claimed business expenses (including commissions) that have still not been paid by the mother, almost a year after the fact. Although the mother asserts that these expenses were incurred to advance her income earning capacity, it is hard to accept the applicability of that premise for the entire amount when a significant proportion of these expenses have still not been paid and there is no evidence from the third parties to whom they are allegedly owed. There may also be reason to consider including at least some of the undeclared cash component of the mother's business income. She has not outright denied receiving any cash referral or other fees or other amounts. I question whether there may be some correlation between the "commissions" she says she owes and the cash "referral fees" that she gets back in return. This will all have to be sorted out at some later point in time.

[43] For the immediate purposes of this motion for temporary support, I agree with the mother that the non-recurring RSU should not be counted in her income for support purposes. However, I do not have to accept all of the mother's claimed business expenses, just because they have not been challenged by the CRA. For support purposes, I do not consider it to be reasonable for the mother to deduct the entirety of her claimed business expenses when over $130,000 of such

expenses have not been paid for over a year and there is some evidence that there may be significant undeclared cash income.

[44] If the non-recurring RSU is removed from the mother's declared 2020 income and if approximately 50% of the challenged unpaid expenses and 50% of the estimated undeclared cash income is added back, that puts the mother's 2020 income at approximately $350,000.

[45] Applying the principles under the *Guidelines* and the caselaw, and in the exercise of my discretion, I am looking to fairly determine the mother's available income and the overall resources available to sustain this family. Having done so, and accounting based on the adjustments indicated above, I find the mother's imputed annual income for 2020, for support purposes, to be $350,000.00. Assuming the mother's reported line 10100 employment income and 22900 expenses for 2021 are within a similar range to what she has projected they will be, her imputed income for 2021 will be the same for support purposes.

The Father's Income For Support Purposes

[46] I now turn to the question of whether it is reasonable that the father earns only $24,000 per year, or whether income should be imputed to him for being intentionally underemployed.

[47] The mother contends that the father should be imputed an annual income of $75,000.

[48] First, the mother contends that the father has been intentionally unemployed for a number of years and is now intentionally underemployed. The mother suggests the father could be earning $65,000 per year, based on his lost full time position as a branch manager for a bank. There is no expert testimony about what branch managers currently earn. We do know that the father's annual income when he left the work force in 2017, approximately four years ago, was $54,000. The mother says that should be $65,000 now based on inflation.

[49] There is a dispute about why the father was not working since 2017. That dispute does not need to be resolved for purposes of this motion. Since the parties separated, the father has had a duty to seek employment. He has provided very little evidence of his efforts to do so. His current employment is at an income level that is 50% less than what he was earning when he left the work force. He suggests that COVID-19 and child-care responsibilities have impeded his re-employment efforts. There is no direct evidence of this, and it is not something that I am prepared to take "judicial notice" of. He points to his poor English skills but those skills were no better when he was working previously in Canada. I have no reason to expect that the virtual work environment would render this more or less of an impediment.

[50] The father is generally healthy. His age, education, experience, skills and past earning history and current earnings all suggest that he should be able to earn at least $50,000 (essentially double what he is currently earning for his current part-time employment). This is slightly less than what he was earning when he left the work force and does not take into account any increase in salary for an equivalent position due to inflation or other work force influences. This discount accounts for the fact that he may have to re-enter the work force at a lower paying job than the job he held when he left. It is not unreasonable to expect that the father could have, since the parties'

separated, found gainful employment at or close to the level he was earning when he left the workforce. I find the father's imputed employment income for support purposes to be $50,000.

[51] Second, the mother contends that there should be an additional annual amount of $18,000 of imputed rental income from a property owned by the father in Wuhan, China, the epicentre of the COVID-19 pandemic ($1,500 per month). The mother alternatively argues that the property could be sold for $500,000 and this level of income ($18,000 per year) could be generated on the capital from the sale proceeds.

[52] While the mother has identified some precedents for the court doing this, none are in circumstances such as this case where this property has, since prior to the marriage and throughout it, been occupied by the father's mother in China rent-free and she continues to live there today. This history provides a legitimate explanation for why the father is not presently charging his mother rent (in contrast with the situation in *P. (M.) v. P. (W.)*, 2014 ONSC 5744 at para 67) and also for why the property is not being rented to a third-party (in contrast with the situations in *Lefebre v. Lefebre*, 2020 ONSC 311 at para. 353-361, and *Wilton v. Myhr*, 2019 ONSC 77 at paras. 107 – 109 in which there was no reasonable explanation for having stopped renting a property that had been previously rented or for not renting a property that was vacant).

[53] Further, I am not satisfied that there is an evidentiary basis before me on this motion upon which I could or should find that the grandmother should be removed from this property in China so that the father can try to rent it out or sell it, nor is there any independent evidence as to whether there is a rental or seller's market for such a property in Wuhan, China at this time or what the rental income or sale price might be. I am not prepared to impute any income to the father from this property for purposes of this interim support motion. This may be revisited when the issue of income for support purposes is finally determined. My decision on this point is based on the "rough justice" of this type of motion and an insufficient evidentiary foundation and is not a final determination of the point.

[54] In the exercise of my discretion, I consider a reasonable income for the father for 2020 and 2021 to be $50,000 and, subject to him becoming employed in a job that pays more than that, his income for support purposes should be imputed to be $50,000.

Table Child Support

[55] Using the imputed incomes of both spouses for support purposes, the net Table Child Support payable by the mother to the father according to her DivorceMate alternative calculations (scenario #8) is $3,722 per month.

[56] I am not inclined to adjust this, even if I might have the ability to do so under s. 4 of the *Guidelines* in respect of the mother's annual income in excess of $150,000 and/or under ss. 9 and 10 of the *Guidelines*. Although the mother has claimed financial hardship (based on her responsibility for unusually high level of debts that she claims to have reasonably incurred to support the family prior to separation) and/or unusual circumstances that might warrant such a departure, these adjustments require a more in-depth analysis of the origin and extend of the mother's debt obligations which should be left to a more fully developed evidentiary record.

[57] The mother's disproportionate debt burden may still be factored into the means and needs aspects of the determination of any spousal support payable. However, this is a case in which I consider it appropriate for Table Child Support to be paid based on the imputed incomes I have determined for both spouses, even though the net payor spouse's income in greater than $150,000.

[58] The mother is ordered to pay net Table Child Support to the father in the monthly amount of $3,722 commencing as of October 1, 2021. This is less than the monthly amount of $5,229 that the father was seeking.

Section 7 Expenses

[59] The mother has been paying all of the expenses for the children. The monthly amount that she pays is $3,584. This includes $500 per week ($2,000 per month) for the ABA/IBI behavioural programming for the parties' eldest child.

[60] The mother has applied for and received $20,000 in government funding for autism education. She says she is holding these monies in trust. The reason for not applying this subsidy money towards the ABA/IBA programming is not apparent. In the absence of any compelling reason to withhold these funds, they should be applied to pay for the ABA/IBA behavioural programming. The unfunded portion of the children's expenses that the mother has been paying should be shared proportionally by the parents, based on their respective imputed incomes of $350,000 (mother) and $50,000 (father).

[61] The father advanced an argument that the expenses the mother has been funding are not s. 7 expenses within the context of this family. Relying on the case of *Hugel v. Hugel*, [2004] O.J. No. 2219 (S.C.), at paras. 11-17, the father argues that in a family with combined annual income in excess of $400,000, the types of extracurricular activities that are included in the s. 7 expenses (except the ABA/IBI programming) are not extraordinary and should be considered included in the Table amount.

[62] If the father was the net payor spouse and significant income earner, I might be inclined to consider this argument more deeply. However, he is the one receiving the net Table Child Support based on the mother's higher income and his proportionate share of these additional expenses is less than 15%. Given the financial crisis that this family has gone through, and the lengths to which the parties have gone to keep the children in a stable environment and continue with the activities, these are extraordinary expenses and should be proportionately contributed to by both spouses.

[63] The father should be paying his share. He has a job, he should be trying to earn more, he will be receiving spousal support and child support and he should contribute. The amounts, aside from the ABA/IBI programming, are modest.

[64] For the time being, and until the $20,000 in subsidy money runs out (or unless it is determined not to be available for the particular ABA/IBA programming that the child is enrolled in), the expenses that the father shall be required to proportionately contribute towards shall be reduced by $2,000 per month. If the parents should need to pay for the ABA/IBI programming in the future and the father still maintains he cannot afford it, then this may have to be revisited.

[65] The mother wishes to continue to pay these s. 7 expenses directly and offset the father's proportionate share against the amounts she owes him each month for child support. This appears to be less complicated than re-doing all of the DivorceMate calculations and she may do so. The calculation should be done based on a 50/50 NDI scenario (which is the basis on which I have determined the spousal support payable, as discussed below).

[66] The mother is further authorized, at least from the court's perspective in terms of the management of this family's finances, to use the monies she received from the government subsidy for autism education and that she is holding in trust to pay for the parties' eldest child's ABA/IBI programming at Connect the Dots Child Development Services, as long as those funds are otherwise permitted to be used for such.

[67] The parties remain obligated under the July 22, 2021 consent order of Sanfilippo J. to continue to apply for any available subsidies and government funding for their child's ABA/IBI programming. If and when the existing or any future subsidy or funding received runs out, the parties shall proportionally share this s. 7 expense going forward.

Spousal Support

General Principles

[68] The SSAGs are income-based guidelines. Income is the most important, but not the only, consideration in the assessment of the financial "means" and "needs" referred to in s. 15.2(4) of the *Divorce Act*, R.S.C., 1985, c. 3 (2nd Supp.), regarding spousal support. The SSAGs are neither legislated nor binding, but instead are advisory (whereas the *Guidelines* are mandatory): see *Fisher v. Fisher*, 2008 ONCA 1, 88 O.R. (3d) 241, at para. 100; *Singh v. Singh*, 2013 ONSC 6476, 40 R.F.L. (7th) 78, at para. 13.

[69] The SSAGs have a different income ceiling, as specified in s. 11.1: "The ceiling is a gross annual payor income of $350,000. After the payor's gross income reaches the ceiling of $350,000, the formulas should no longer be automatically applied to divide income beyond that threshold."

Interim Spousal Support

[70] Section 15.2(2) of the *Divorce Act* provides the Court with jurisdiction to make, *inter alia*, an order for interim spousal support. Pursuant to section 15.2(4), in making an order for spousal support, the court shall take into consideration the means, needs and circumstances of each spouse, including: (i) 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.

[71] Pursuant to section 15.2(6), the objectives of an order for spousal support 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; (c) relieve any economic hardship arising from the breakdown of the marriage; and (d) insofar as practicable, promote economic self sufficiency of each spouse within a reasonable period of time.

[72] It is generally recognized that "…there are three conceptual bases for awarding spousal support: compensatory, contractual and non-compensatory": see *Hamam v. Mantello*, 2020 ONSC 4948, at para. 124.

[73] Interim spousal support is "rough justice". An order for interim support is to provide an income for dependent spouses until a trial of the issues. Ultimate questions as to the extent of economic advantage or disadvantage as a result of the relationship are to be left to the trial judge. Interim support is a holding order to maintain the accustomed lifestyle, if possible, pending a final disposition, provided the claimant is able to present a triable case. It is to be based on the parties' means and needs, not the merits of the case in its entirety. Accordingly, needs and ability to pay take on greater significance. The need to achieve self sufficiency is of less importance: see *Driscoll v. Driscoll*, [2009] O.J. No. 5056 (S.C.), at para. 14.

[74] Any award of interim spousal support in this case will be based on a means and needs (non-compensatory) analysis. There is no contract. The factual issues that would have to be decided to determine whether the father is entitled to compensatory support, and in what amount, are not conducive to determination on a written record. Credibility assessments and other fact finding will need to be undertaken for this aspect of the father's spousal support claim to be decided, and should await a trial where *viva voce* evidence will be adduced and the trial judge will be in a better position to consider the credibility of the parties' versions of the history of the marriage: see *Hamam*, at para. 139.

Means and Needs

[75] Entitlement can be non-compensatory, or needs based. The father has established that he has a *prima facie* needs-based entitlement to spousal support. His monthly expenses far exceed his income. The father still needs to pay rent, insurance, for his car and other basic necessities that are not covered by his income. There might be better expense coverage if the father was actually earning the income that has been imputed, but that would not result in even proximate parity of standards of living between the two households. The net Table Child Support that he will receive should be dedicated to meeting the children's needs and ensuring that they have the comforts of daily living and food on the table when they are with him and are not considered as supplements to his income.

[76] The following factors demonstrate his need and entitlement to some spousal support:

a. He has had to significantly deplete his savings and take on debt since separation, to meet the expenses of daily living: see *Smith v. Smith*, 2019 ONSC 83, at paras. 20-21.

b. The court can look to the standard of living that the recipient spouse enjoyed before separation and what it would take to allow him to maintain or approximate that, and not just what he needs for basic subsistence: see *Gray v. Gray*, 2014 ONCA 659, 122 O.R. (3d) 337, at paras. 26-27.

c. The fact that the father has had to adjust his lifestyle downwards following separation (and thus has reduced expenses) does not reduce his spousal support: *Drouillard v. Drouillard*, 2012 ONSC 4495, at paras. 12-13.

[77] While there is a demonstrated need for some spousal support, the father's needs are not the only relevant consideration. The mother urges the court to take into account that the parties were in a financial crisis and she has been the one servicing the significant family debt and obligations to keep them afloat, which has required her to go even further into debt.

[78] The *Driscoll* decision is often referred to for its summary of principles that have been previously applied in interim support motions: at para. 14. Some of the principles relevant to this case, include:

a. An interim support order should be sufficient to allow the applicant to continue living at the same standard of living enjoyed prior to separation if the payor's ability to pay warrants it;

b. On interim support applications the court does not embark on an in-depth analysis of the parties' circumstances which is better left to trial. The court achieves rough justice at best;

c. The courts should not unduly emphasize any one of the statutory considerations above others; and

d. On interim applications the need to achieve economic self-sufficiency is often of less significance.

[79] The father is seeking spousal support that is well above even the high end of the SSAGs range (which, based on the income that I have imputed, would be low: $2,632, med: $4,934 and high: $5,920). According to the mother's DivorceMate calculations, at 45% net disposable income (using the imputed annual incomes for both parties but accounting for support, s. 7 expenses, benefits and taxes) no spousal support would be payable to the father. At 50/50 net disposable income, the father would be entitled to spousal support of $1,995 per month.

[80] The mother says she cannot afford to pay this while meeting her monthly expenses and still servicing the pre-separation family debt, the loans she took out to pay the family expenses post-separation, her share of the s. 7 expenses, and her employment expenses (even if reduced). She has also recently been assessed with a significant tax bill owing to Canada Revenue Agency that she will need to pay. This family has been living on borrowed funds for some time now and, if necessary, that may have to continue at least until they sell their last remaining joint property interest and are able to do a final accounting and reconciliation of their property and finances.

[81] In the meantime, there will be some short term relief from her obligations in respect of the Willowdale property (one of the obligations the mother has defaulted on because of a lack of resources), which I will address in the next section of this endorsement. The mother has also been relieved of the burden of the monthly carrying costs for the matrimonial home, since it was sold in September 2021.

[82] Some order for spousal support payable by the mother to the father is appropriate to reduce the disparity in the standard of living between the two households. Calculating spousal support at the 50/50 NDI level appears to me to strike the appropriate balance, in the circumstances. This does not bring the father's standard of living up to the level that he enjoyed pre-separation, but also recognizes that the mother can only be stretched so far. This is the "rough justice" that is achieved, in the exercise of my discretion, to strike an appropriate balance between the competing interests and factors at play for temporary support purposes.

[83] The mother shall pay to the father spousal support in the monthly amount of $1,955. This is significantly lower than the monthly amount of $10,006 that the father was seeking.

Corollary Amendments to Previous Orders

[84] The father has agreed that the previous preservation and freezing orders can be terminated with respect to her chequing account (#*3956) and insofar as they require her maintain the financial status quo by paying the household bills and all other expenses associated with the parties' jointly held properties.

[85] With the sale of the matrimonial home (Northwood property), the only jointly held family property for which there are ongoing carrying costs is the Willowdale property. The mortgage on this property was already in arrears by approximately two months when the motion was argued (approximately $10,000). The father agrees that the mother can be relieved of the obligation to pay all of the expenses for their joint interest in this property, but suggests that neither party pay the ongoing carrying costs for this property and that it be allowed to go into default (as opposed to them each sharing this joint expense obligation). This would advance his goal that the Willowdale property be sold as soon as possible.

[86] The previous order requiring the mother to pay the carrying costs for this property (and the other jointly owned properties) was made at a time when there were no joint pooled resources available to fund these expenses. Now there are joint funds available, in the net proceeds of sale from the Northwood property that are being held in trust. The mother suggests that those be used to fund the carrying costs for the Willowdale property until it is sold, or other arrangements are made in an orderly manner to deal with it. She argues that the court's authority to make this order is the same as the authority that was exercised when the court ordered the mother in May 2020 to pay those, among other, family property expenses.

[87] The full implications of the parties defaulting on their obligations in respect of this property are not before the court. There are third party mortgagees and co-owners involved. Without any specific evidence to indicate otherwise, it is reasonable for the court to infer that the parties' continued failure to meet these obligations could expose them to default proceedings with the mortgagee and also the other co-owners.

[88] On a temporary without prejudice basis I am ordering that the monthly joint obligations of the parties in respect of the Willowdale property be funded by the sale proceeds from the Northwood property that are being held in trust. Both parties should be working in furtherance of the sale of this property. If that cannot be accomplished within a reasonable time frame, then

the parties may agree to default (after having had the opportunity to fully consider the implications of such), or if they cannot agree and one of them wishes to stop the payment of these obligations from the Northwood property sale proceeds, they may bring a further motion to the court to address the question of whether, and from what source, these ongoing obligations should be funded pending the sale of the Willowdale property.

Costs and Final Disposition

[89] The orders made on these motions are summarized in paragraph 21 above, with the reasons provided thereafter. The possibility of revisiting certain aspects of those orders are indicated in the relevant sections of this endorsement, where applicable.

[90] The parties agreed to exchange cost outlines for these motions by November 5, 2021, which I assume they have now done. They agreed to try to agree upon the issue of costs with the benefit of knowing the outcome of these motions, which they now have. They asked for three weeks to try to settle costs, failing which they requested the opportunity to make brief written cost submissions which I agreed to provide for. I am also mindful that the parties have a settlement conference scheduled on November 26, 2021.

[91] If the parties are able to resolve the issue of costs, they are to advise the court of such by emailing my judicial assistant at linda.bunoza@ontario.ca on or before December 6, 2021. If they have not resolved the issue of costs, then they may each deliver a written cost submission, not to exceed three pages double spaced, with the Costs Outlines and any relevant settlement proposals attached, on or before December 13, 2021. They may each deliver a responding cost submission of no more than 1.5 pages double spaced on or before December 23, 2021 Any such cost submissions so delivered shall be filed with the court in the normal course, uploaded onto CaseLines and emailed to my judicial assistant. If no submissions have been received by December 23, 2021 (and the parties have not sought and been granted an extension in the time for delivery of same prior to that date), then the issue of costs will be deemed to have been settled.

Kimmel J.

Date: November 15, 2021