

CANADA / JUDGMENT

A.D.J. v. F.J.

2021 BCSC 903

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Supreme Court of British Columbia

DECIDED

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2021 BCSC 903 A.D.J. v. F.J.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A.D.J. v. F.J.,

2021 BCSC 903

Date: 20210504

Docket: E132356

Registry: Vancouver

Between:

A.D.J.

Claimant

And

F.J.

Respondent

Corrected Judgment: This judgment has been anonymized for publication purposes on March 25, 2024.

Before: The Honourable Mr. Justice Veenstra

Oral Reasons for Judgment

Counsel for the Claimant, appearing

via teleconference:

S. Jamal

The Respondent, appearing via teleconference:

F.J.

Place and Date of Hearing:

Vancouver, B.C.

April 22, 2021

Written Submissions of the Respondent:

April 27, 2021

Written Submissions of the Claimant:

April 30, 2021

Place and Date of Judgment:

Vancouver, B.C.

May 4, 2021

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- [1] A business valuator was appointed as a joint expert in this matter pursuant to Supreme Court Family Rules 13-3 and 13-4. The valuator has provided a draft report, giving a nil value to an interest of a sort that has in past judgments been found by the court to be valuable family property. The respondent applies for an order of this Court giving direction to the valuator to provide additional calculations using an approach adopted by the court in a past case involving a very similar situation.
- [2] The claimant opposes the application, arguing that:
- a) The past cases were decided under the Family Relations Act, R.S.B.C. 1996, c. 128, and the approach adopted is no longer available under the Family Law Act, S.B.C. 2011 c. 25;
 - b) The court has no jurisdiction to provide additional direction to a joint expert once the expert has been appointed, and in the particular circumstances of this case, given that the order of Master Muir appointing the joint expert did not specifically instruct the expert as to the approach to be taken; and
 - c) If the respondent wants to have a valuation report using a different approach, the respondent's only remedy is to obtain a rebuttal report at her own cost pursuant to Rule 13-4(8).

Background Facts

- [3] The claimant and respondent were married in 1996 and separated in 2011. There are three children of the marriage. The parties made a partial settlement in June 2011, which left certain property matters to be determined at a future date.
- [4] The present action was started in August 2013. A trial is presently scheduled for 20 days commencing November 15, 2021. The deadline for expert reports is in August 2021.
- [5] The claimant is employed as an investment advisor with RBC Dominion Securities ("RBCDS") - a position he has held since 1996. He has enjoyed considerable success in that position - in many ways akin to the respondent in *S.R.M. v. N.G.T.M.*, 2014 BCSC 442 [SRM 2014] and 2020 BCSC 468 [SRM 2020], who was also an investment advisor at RBCDS.
- [6] In August 2020, the respondent applied for an order appointing "a joint valuator to value the Claimant's book of business (Business Succession Plan) from his employment at [RBCDS]". The Notice of Application specifically referenced SRM 2014 as establishing that a business succession plan falls within the definition of family property. It sought the appointment of the same valuator, Mr. Mynett, who valued the Business Succession Plan in SRM 2020.

- [7] On December 15, 2020, Master Muir issued reasons for judgment granting the respondent's application, and dealing with a number of other issues arising on applications made by the parties [2020 BCSC 1980]. With respect to the joint valuation, the primary dispute between the parties appears from the reasons to be who would pay for the valuation at first instance. They also disagreed as to the choice of valuator. At paras. 72-79 of her Reasons for Judgment, Master Muir concluded that:
- [72] There is no issue that a valuator should be appointed. The claimant agreed to Mr. Mynett's appointment long ago. Mr. Mynett is not available and the parties then agreed to Mr. Ghanavizchian.
- [73] The claimant now opposes the appointment of Mr. Ghanavizchian on the basis that he has prejudged that the respondent's business has no value.
- [74] While I do not believe that Mr. Ghanavizchian is in any way biased or pre-disposed to a particular outcome, I believe that the valuator appointed needs to have credibility with both parties.
- [75] Therefore, I order that a joint valuator be retained to value both the claimant's and the respondent's business interests. The parties will select a valuator by the claimant providing three names of qualified valuers to the respondent within two weeks of this order and the respondent selecting one of those valuers within two weeks of receipt of the names.
- [76] If either party fails to comply with the time limits, the other party has liberty to select any qualified valuator.
- [77] Both parties are to cooperate with the valuator and provide to the valuator whatever documentation or information the valuator requires that is in their possession or control.
- [78] The claimant is clearly more able to pay the fees of the valuator at the outset. Nevertheless, I have concluded that the parties should share the cost of the valuator, but not 50/50. The respondent will be responsible for paying 20% and the claimant 80% of the costs. There is liberty to the parties to argue for a different allocation of those costs at the trial.
- [79] If any issues arise in the valuation, there is liberty to apply.
- [8] No direction was given as to the basis of the valuation.
- [9] Master Muir's order was entered on January 12, 2021, and in respect of the valuations, simply tracked what was said in paras. 75-79 of the Reasons for Judgment.
- [10] The parties agreed to retain Patti Daum, CPA, CA, CBV, as the joint expert. The respondent (who is now self-represented) provided Ms. Daum with the reasons for judgment in SRM 2014 so that she would be aware of the determinations made in that action with respect to very similar factual circumstances.

[11] Ms. Daum provided the parties with a draft report on March 9, 2021. In that draft report, Ms. Daum reviewed the nature of the claimant's relationship with RBCDS, including the Business Succession Plan ("BSP"), concluding that RBCDS maintains ownership of the book of business. As a result, the draft report concludes that:

[A.D.J.] does generate significant financial benefit from the management of the Book; however, the Book itself does not belong to [A.D.J.]. As such, we conclude that the fair market value of [A.D.J.]'s interest in the Book is \$Nil at both Valuation Dates.

[12] In a cover email, Ms. Daum noted the judgment in SRM 2020 and stated that in that case:

While a value was ascribed to the book of business, it was not fair market value. The judge provided instructions to Gary Mynett on how the value was to be calculated; however, this did not constitute fair market value.

The Dec 15, 2020 order of Master Muir called for the "valuation" of the Book of Business As stipulated in my engagement letter, being the understood appropriate measurement of value in family law cases, I have calculated fair market value.

[13] The respondent wrote to Ms. Daum asking her to provide calculations in accordance with the approach directed in SRM 2014. The claimant's counsel objected. Ms. Daum replied on March 11, 2021, stating:

Although I do appreciate where [the respondent] is coming from and believe that she raises pertinent points, many of which I considered before I issued the draft report, I was going to advise her that I can't do alternate calculations (perhaps more of a value to owner exercise, like the judge seemed to order in that other matter) unless both parties agree to this (given the joint nature of the assignment).

I am happy to do further work if the parties agree to the same.

[14] The claimant did not agree to any further calculations being performed; as a result, the respondent has brought this application.

[15] I note that I gave each party leave to provide further written submissions after this matter was argued, directed at specific issues, and subject to a two-page limit. In addition to her submission, the respondent filed an eight-page affidavit. I did not grant leave for the affidavit, and although I reviewed it briefly, did not find it necessary for determination of this application.

Issue

[16] Should the court order the joint valuation expert to provide alternative calculations as to the present value of the claimant's interest in the BSP?

[17] If so, what order should be made with respect to payment for the joint expert's fees for that work?

Applicable Law

[18] In light of the positions taken by the parties, I must consider both the nature of the interest the joint valuation expert is to value as well as the legal principles governing the appointment and use of reports of joint experts in family law matters.

Family Property and the Business Succession Plan

[19] In SRM 2014, the respondent was an investment advisor with RBCDS. Thus, he held the same position with the same firm as the claimant in this case. At paras. 161-206, Butler J. (as he then was) dealt with the question whether the respondent's right to participate in the BSP was a family asset and if so, what order should be made with respect to it.

[20] He described the nature of the BSP at paras. 162-163:

[162] The BSP is designed to allow the employer to retain the clients working with a retiring investment advisor ("IA") by "providing a framework to effectively transfer the management of his or her valued client relationships to another [investment advisor]." If the retiring IA meets the requisite criteria, he may enter into an agreement with the employer. The IA who will begin to work with the clients also enters into an agreement with the employer. The retiring IA receives payments from the employer over a period of three or four years after entering the program. The payment is offset by payments received by the employer from the IA taking over the work with the clients. In order to continue to receive the payments, the retention rate of clients has to meet a certain level.

[163] The transfer of clients generally occurs over a three-year period. During the first year, the retiring IA must assist in management of the accounts and facilitate personal interactions between the new IA and his or her clients. Throughout this time, the retiring IA is still considered an employee and receives monthly payments as income from the company. After the first year, the securities registration for the retiring IA is terminated and he or she is no longer considered an employee. The final two years of payment are received as a retirement allowance.

[21] He described the circumstances of the respondent in that case at para. 166:

[166] At the present time, the respondent has no intention of retiring or changing employers. He is content with his position and plans to work for many more years. He does not know if he will attempt to take advantage of the BSP when he retires but will make that determination as he approaches retirement. If he remains with his current employer, there is no reason for him not to participate in the program if he is accepted. There seems little doubt he would be accepted for the program as he presently has the largest AUM of any IA in his branch office. I conclude it is more likely than not that the respondent will remain with his employer and will choose to participate in the BSP program when he retires.

- [22] I was not advised as to any ways in which the circumstances of the claimant in this matter differ from that description, although that will of course be a matter for evidence at trial.
- [23] Butler J. noted that, following the conclusion of the trial, the Court of Appeal's judgment in *Lightle v Kotar*, 2014 BCCA 69, was released. He obtained submissions from the parties as to the impact of *Lightle* and was ultimately guided by it in his decision.
- [24] Before further reviewing the judgment in SRM 2014, I turn to the *Lightle* case. The respondent in that case was a financial advisor with Canaccord who had a substantial book of business. The trial judge had concluded that the book of business was not a family asset available for division. That was reversed on appeal.
- [25] Willcock J.A., for the majority, commented that:
- [24] The respondent's book of business represents goodwill that can constitute a family asset. The Family Relations Act, R.S.B.C. 1996, c. 128 and the Family Law Act, S.B.C. 2011, c. 25, are remedial legislation and should be read purposefully with a view toward effecting the legislators' intention of addressing the disproportionate effects of marriage upon the ability of child-rearing spouses to become independent following the dissolution of marriage. The term "family asset" used in this legislation should be read in a manner most conducive to effecting that purpose.
- [26] He noted at paras. 28-29 that:
- [28] The Family Relations Act did not define "property." The Interpretation Act, R.S.B.C. 1996, c. 238, s. 29, however, defines property as "[including] any right, title, interest, estate or claim to or in property." That definition of property, as applied to the Family Relations Act, is certainly broad enough to include goodwill.
- [29] The trial judge expressly recognized that a financial advisor's goodwill, what he described as the advisor's connection with the client, has a marketable value in limited circumstances. His conclusion that the asset in the case at bar is not a family asset appears to have been founded upon the view that it was not a "marketable asset" at the time of the triggering event.
- [27] Having distinguished authorities relied upon by the trial judge, Willcock J.A. commented that:
- [41] A common sense approach to the identification and division of matrimonial property will naturally lead to the inclusion of business goodwill accumulated as a result of the direct and indirect contribution of the parties to a marriage.
- [28] He noted at para. 43 two Ontario decisions, including *McLean v. McLean*, [2004] O.J. No. 4261, describing the reasoning as compelling, and commenting:

The discussion of the proprietary interest in an investment advisor's book of business in McLean helpfully addresses the argument that problems with transferability and valuation do not render an interest, right or title something less than, or other than, property at common law.

[29] He thus concluded, at paras. 45-47, that:

- [45] In my opinion, the fact that the value of certain goodwill can only be realized if the seller agrees to not compete with the buyer does not justify its exclusion from the definition of property in the legislation or preclude its valuation. If such goodwill is said to be of no value, the most substantial asset of many marriages will be excluded from the division of property and will be left in the hands of one party to realize on retirement or earlier.
- [46] At the time of the triggering event, the respondent clearly had a marketable asset in his book of business. To the extent both spouses directly or indirectly contributed to a venture, the goodwill in that venture may be considered to be a family asset under the Family Relations Act and the Family Law Act. There is no reason why the respondent's client contacts, knowledge of investment objectives, familiarity with historic investments, and other information accumulated by the respondent during the course of his career cannot be regarded as goodwill with significant value.
- [47] Given the basis for his conclusion that responsibility for the contingent liability to clients of the business ought to be shared by the parties, the trial judge ought to have found the respondent's business as a financial advisor and, specifically his property in the book of business, to be a family asset.
- [30] With respect to valuation of the asset, Willcock J.A. commented at para. 48 that:
- [48] Valuing the book of business, as opposed to realizing the value, requires the parties or their expert advisors or the court, to make assumptions with respect to the basis for valuation and, in particular, whether the asset ought to be valued on the basis of non-competition and co-operation on the part of the seller, or otherwise. A finding that the book of business is a family asset in this case would have called upon the trial judge to make an order for its division, or to value the asset and take account of its value in the division or reapportionment of family property.
- [31] It is noteworthy that, in both paras. 24 and 46, Willcock J.A. asserted that the principles he was discussing were applicable to both the Family Relations Act and the Family Law Act. The case before him was governed by the Family Relations Act, so his comments with respect to the Family Law Act may well be obiter. However, to the extent they are obiter, they are obiter worthy of careful consideration.
- [32] Returning to SRM 2014, Butler J. at paras. 173-206 considered the application of the principles set out in Lightle to the question of whether a BSP is a family asset. At para. 182, he commented that:

While the court does not say so directly, the necessary implication of the reasoning in *Lightle* is that it would be wrong for a court to conclude that a book of business is not part of the pool of assets for division in a matrimonial claim. This is because any successful IA, including the respondent in *S.G. v. K.G.*, would be in the same position as the IA in *Lightle* .,,

[33] Thus:

[185] Accordingly, I must start from the presumption that the respondent's book of business may be considered to be a family asset. There is no question that the claimant indirectly contributed to the respondent's business. There is also no doubt the respondent possesses valuable knowledge of the clients for whom he works, and that his multiple client contacts combined with that knowledge can be regarded as goodwill. Here, the claimant initially pursued the claim on the basis that she is entitled to some portion of the payments the respondent may receive under the BSP. In doing so the claimant is saying, in essence, that the respondent's interest in the BSP is a proxy for his goodwill in his book of business. As discussed in *McLean*, and suggested in *S.G. v. K.G.*, in circumstances where the brokerage firm provides a scheme for a retirement allowance, this is an appropriate approach to the valuation of the goodwill.

[186] In summary, I conclude that the respondent's book of business or right to participate in the BSP can be considered to be a family asset pursuant to the provisions of the FRA.

[34] Justice Butler noted distinctions between the respondent in his case and the respondent in *Lightle*:

[189] Here, the respondent does not have the right to take clients with him if he decides to move to another brokerage firm. The clients belong to the company. The respondent does not appear to have the same "interest" in the clients that the respondent in *Lightle* had. This is a distinction of some importance. It will likely be easier for an IA to move with his or her clients if the advisor has the specific right to do so. In other words, a book of business will have a greater value when an IA has a right to take the clients away with him or her.

[190] I note, however, that the book of business Mr. Kotar took with him to the new brokerage firm represented only a portion of the clients he worked for at the time of the triggering event. Presumably his relationship with the other clients was "typical"; in other words they were clients of the brokerage firm. The court does not suggest that the sole basis for overturning the trial decision was the fact that Mr. Kotar had greater rights to the portion of his book of business that he brought with him. Accordingly, I must find that this distinction between the facts in *Lightle* and the present case is not sufficient to negate or offset the goodwill that the respondent has with the clients he worked with as an experienced IA.

[35] Justice Butler then turned to a consideration of how to determine a value of the interest:

[200] The future value of the respondent's AUM will be influenced by many factors. These will include changes generally to the financial markets and the time and effort he puts into the business over the years. These factors could result, for example, in a situation where he

would retire with the value of his AUM at a level similar to what it was at separation. This could occur because of a collapse or restructuring of the financial markets or by the respondent's decision to restrict his work to fewer clients. If this occurred after the respondent worked for an additional 25 years after separation, the claimant's suggested formula would be unfair to the respondent as it would allocate to her an equal share of the BSP payments. Similarly, if there is a period of rapid inflation or devaluation of currency, the formula she suggests could undervalue her interest.

- [201] Given these difficulties, it is much more practical to establish a present value of the claimant's interest in the future BSP payments. This is in accordance with the usual rule governing the division of family assets; they are to be valued and divided as of the date of the triggering event (or trial): *Lightle* at para. 58. The respondent should make a compensation payment to the claimant which reflects her contribution to the creation of that asset.
- [202] I reject the claimant's suggestion that a valuator should be appointed to determine the value of the respondent's book of business rather than the value of his right to receive payments under the BSP. No evidence was presented at trial regarding the value of his book of business generally. The claimant was content to use the right to the BSP payments as a proxy for the respondent's goodwill. I agree that it is appropriate to approach the issue in this way. This approach avoids the difficulty of attempting to value the goodwill by imposing artificial assumptions on the valuation.
- [36] He concluded as follows:
- [204] In summary, I conclude that the respondent's book of business is a family asset. For the purpose of determining the claimant's interest in that asset, the court will determine the value of the respondent's right to receive payments under the BSP as of the date of the triggering event. In other words, his right to receive payments under the BSP is to be used as a proxy for the value of the asset. The first step for determination of the value of the respondent's interest in the BSP is to apply the following assumptions to the valuation:
- a) The respondent will remain with his employer until retirement;
 - b) He will retire in 15 to 25 years;
 - c) He will choose to participate in the BSP and will be accepted for participation in the plan;
 - d) He will receive payments under the BSP over three years in accordance with the present terms of the BSP;
 - e) Payments made to him under the BSP will be taxed in accordance with current income tax laws.

The value so determined will then have to be discounted by taking into account the other circumstances which may be relevant to assessing both the respondent's and the claimant's interest in that asset.

[37] The report thus prepared was considered by Basran J. in SRM 2020 at paras. 243-271. He noted that the valuator in that case, Mr. Mynett, had valued the BSP on a pre-tax basis at between \$679,000 and \$760,000. Basran J. accepted that the Mynett report was a thorough and comprehensive valuation report, which was prepared in accordance with the directions of Butler J. (para. 264). He then applied further adjustments based on factual and legal arguments raised by the parties, concluding that the claimant's share of the BSP was \$176,000, and that she was entitled to payment of this amount.

Joint Experts on Financial Issues in Family Law

[38] Major changes were made in 2010 to the rules governing expert evidence on financial matters in family law cases. Rule 13-3(2) provides that:

If any party wishes to present to the court expert opinion evidence on a financial issue,

- (a) that evidence must be presented to the court by means of a jointly appointed expert unless the court otherwise orders or the parties otherwise agree, and
- (b) Rule 13-4 applies.

[39] Financial issues are defined to include a claim under Part 5 of the Family Law Act - which would include the claim of the respondent in issue on this application.

[40] Rule 13-4 contains detailed provisions dealing with joint experts:

Matters to be settled prior to appointment

- (1) When an expert is to be jointly appointed by 2 or more parties under Rule 13-3 (2) or (3) (a), the following must be settled before the expert is appointed:
 - (a) the identity of the expert;
 - (b) the issue in the family law case the expert opinion evidence may help to resolve;
 - (c) any facts or assumptions of fact agreed to by the parties;
 - (d) for each party, any assumptions of fact not included under paragraph (c) of this subrule that the party wishes the expert to consider;
 - (e) the questions to be considered by the expert;
 - (f) when the report must be prepared by the expert and given to the parties;
 - (g) responsibility for fees and expenses payable to the expert.

Appointment agreement

- (2) If the parties agree on the matters referred to in subrule (1), they must enter into a written agreement that reflects those agreed upon matters and
 - (a) the agreement must be signed by each party to the agreement or their lawyers,
 - (b) the agreement must be signed by the expert to signify that he or she
 - (i) has been made aware of the content of this Part, and
 - (ii) consents to the appointment reflected in the agreement, and
 - (c) a copy of the agreement must be served, promptly after signing, on every party to the family law case who is not a party to the agreement.

Application to court

- (3) If the parties do not agree that a joint expert is required or do not agree on any matter relating to the appointment of a joint expert, any party may apply to the court in accordance with Rule 10-5 for an order
 - (a) appointing a joint expert, and
 - (b) settling any matter relating to the appointment of the joint expert.

Order

- (4) If the court makes an order on an application under subrule (3), the applicant for the order must promptly serve the expert with a copy of the entered order.

Role of expert appointed under this rule

- (5) Unless the court otherwise orders on an application referred to in subrule (6), a joint expert appointed in relation to an issue, by agreement under subrule (2) or by a court order made on an application under subrule (3), is the only expert who may give expert opinion evidence in the family law case on the issue.

Notice of application

- (6) A party wishing to apply under subrule (5) for leave to introduce the evidence of an additional expert at trial must, within 21 days after receipt of the joint expert's report, serve on all parties the documents that under Rule 10-6 (6) are required for the application.

Additional experts

- (7) The court may, on an application referred to in subrule (6) of this rule, grant leave for the evidence of an additional expert to be introduced at trial if the court is satisfied that the evidence of that additional expert is necessary to ensure a fair trial.

Considerations

- (8) In assessing whether to grant leave for the evidence of an additional expert to be introduced at trial, the court may consider
- (a) whether the parties have fully cooperated with the joint expert and have made full and timely disclosure of all relevant information and documents to the joint expert,
 - (b) whether the dispute about the opinions of the joint expert may be resolved by requesting clarification or further opinions from that expert, and
 - (c) any other factor the court considers relevant.

Cooperation required

- (9) All parties must cooperate fully with a joint expert and make full and timely disclosure of all relevant information and documents to the joint expert.

Cross-examination

- (10) Each party has the right to cross-examine a joint expert at trial.

[41] The background to these rules was discussed by Smith J. in *Aquilini v. Aquilini*, 2012 BCSC 1616:

- [8] The reference to jointly appointed experts is a new feature of the Family Rules that came into force on July 1, 2010. Prior to that, there was nothing to prevent parties from agreeing to appoint joint experts in a particular case, but there was no explicit provision in the rules of court. There was a provision for court appointed experts, as there continues to be in R. 13-5.
- [9] Jointly appointed experts are now referred to in both the Family Rules and the Supreme Court Civil Rules [Civil Rules], but with a significant difference between those two sets of rules. Under the Civil Rules, a joint expert may be appointed by agreement or by order of the court at a case planning conference (R. 11-3). In the absence of such an agreement or order, the parties are free to each appoint their own experts in the traditional way. Under the Family Rules, the procedure is reversed in respect of financial experts. Opinion evidence can only come from jointly appointed experts unless there is an agreement or court order authorizing a departure from that procedure.

[101] In making those Family Rules, the Lieutenant Governor in Council has stated a strong policy preference for the use of jointly appointed financial experts in family cases. That policy decision responds to common features of family cases that are not necessarily present in other kinds of litigation. These include:

- a) The central importance of the division of family assets and the corresponding need for valuation or accounting evidence;
- b) The cost of obtaining such expert evidence in many cases;
- c) The fact that the parties frequently do not have equal ability and resources to retain experts;
- d) The fact that while separately appointed valuation or accounting experts may disagree on some matters, they frequently find a great deal of common ground, resulting in needless duplication of costs (this, of course, assumes that all experts, whether jointly or separately appointed, have proper regard to their duty to assist the court and not act as advocates for either party); and
- e) The overly adversarial nature of some family cases, which can put in issue matters on which the parties should be able to agree.

[42] Justice Smith noted, at paras. 34-35, that the rule creates a mandatory requirement for joint experts, which is then made subject to the parties agreeing or the court ordering otherwise, suggesting a legislative intention that joint experts become the norm on financial issues and separate experts the exception. At para. 33, Smith J. pointed out that the court has discretion to make an order dispensing with the requirement for a joint expert, but the discretion must be exercised judicially in the context of the provisions of Rule 13. He suggested, at para. 43, that the matters to be considered in most cases dealing with appointment of a joint expert will be:

- a) Is the financial issue one on which the court is likely to require expert evidence?
- b) If so, is there evidence of a properly qualified expert who is available and who the parties, or either of them, can afford to retain?
- c) Is appointment of a joint expert consistent with the purpose and intent of the Family Rules?

[43] In *Jensen v. Jensen*, 2013 BCSC 297, one party disagreed with the conclusions of a joint expert business valuator, commissioned its own competing report, and applied for leave pursuant to Rule 13-4(8) to introduce that report at trial. Baker J. commented at para. 44 that:

I am satisfied that it cannot be the case that the mere fact that an additional expert retained by one of the parties disagrees with the opinion of the jointly-appointed expert, either as to quantum or methodology, will generally justify the granting of leave to introduce the evidence of an additional expert at trial. If a party need do no more than retain his or her own expert and demonstrate a difference of opinion, the legislative purpose of the Rules would be defeated and

the procedure envisioned by the Rules essentially undermined. We would, in effect, return to the regime that prevailed before the new Family Rules were introduced; where parties could, but rarely did, agree on a jointly-appointed expert and each party pitted his or her expert against the opposing party's expert.

[44] She noted at para. 46 that:

[46] Too readily granting leave for the introduction of the evidence of an additional expert will also, in my view, eventually undermine the purpose of Rule 13-3. If a party who is dissatisfied with the views of a jointly-appointed expert can simply go out and shop for an opinion more favorable to his or her position; parties will see little benefit in the Rule. If both parties are dissatisfied, then the court can envision circumstances where the result will be three experts providing opinion evidence on a financial issue - the jointly appointed expert; and experts retained by each of the opposing parties to buttress or challenge the views of the jointly appointed expert.

[45] The Court of Appeal considered the provisions of Rule 13-3 and 13-4 in *Bartch v. Bartch*, 2017 BCCA 94. Goepel J.A. noted at para. 26 that:

[26] Family Rule 13-3(2) makes the joint appointment of financial experts the default procedure. This differs from the process in civil actions.

[46] Having cited portions of the judgment in *Aquilini* with approval, Goepel J.A. differed with Smith J. on one point:

[28] Pursuant to Family Rule 13-3(2)(a) the court can make an order relieving a party of the requirement to present evidence through a joint expert. In *Aquilini* it was suggested that before the court makes such an order, it must be satisfied that there are circumstances in the individual case that make use of the joint expert inappropriate or impracticable. I do not believe the court's discretion is so limited. The Family Rules give the court discretion as to whether or not to appoint a joint expert or allow a party to retain its own expert. The Family Rules do not however dictate any particular result and the court should be careful not to unduly fetter its discretion with limitations that are not in the Family Rules. The concurring comments of Lambert J.A. in *Shiell v. Coach House Hotel Ltd.*, (1982), 37 B.C.L.R. 254 (C.A.) at 264 in which he was discussing the exercise of the court's discretion in ordering security for cost pursuant to its inherent jurisdiction is apposite:

I have said that, in my opinion, the inherent jurisdiction to order security for costs survives the making of the new rules. That inherent jurisdiction is a discretionary jurisdiction. As such, the law requires that it be exercised judicially. But the law does not require any particular outcome. Previous decisions in which the discretion was exercised in particular ways, and the reasons for those decisions, constitute guidelines which should be considered by a judge in the interests of uniformity and in response to perceptions of public policy. But they do not constitute binding principles of law. Otherwise the discretion would be at an end: see *Ward v. James*, [1966] 1 Q.B. 273, [1965] 1 All E.R. 563 at 570 (C.A.); and *Evans v. Bartlam*, [1937] A.C. 473, [1937] 2 All E.R. 646.

- [29] If pursuant to Family Rule 13-3(2)(a), the court otherwise orders or the parties otherwise agree that evidence on a financial issue need not be presented to the court by means of a jointly appointed expert, Family Rule 13-4 no longer applies to that financial issue. Once the court relieves one party of the requirement to appoint a joint expert, the other party is then also free to retain its own expert and the evidence of that expert can be introduced without leave of the court.
- [47] In *MacDonald v Leung*, 2019 BCSC 299, Dillon J. provided a mid-trial ruling on the admissibility of a rebuttal report in a case in which a joint expert had provided a valuation of a dental practice. In her consideration of Rules 13-4(7) and (8), Dillon J. commented that:
- [11] Once a joint expert has been appointed, the discretion to grant leave for an additional expert to be introduced at trial depends on whether the evidence of an additional expert is "necessary to ensure a fair trial" (Rule 13-4(7)). In the context of this rule, where a party may be limited in the evidence that he may call to establish his case, there is a potential for the truth seeking function of the trial process to be impaired, especially if proper and meticulous fairness principles are not followed. Ensuring the fairness of the trial trumps other considerations underlying the rule as described in *Aquilini* at para. 10. For this reason, the necessity for a fair trial as stated in Rule 13-4(7) must be given broad meaning.
- [48] In that case, there was a prior relationship between the joint expert and the respondent (not known to the claimant at the time of his appointment), and Dillon J. commented that it "became apparent that [the joint expert] considered that he was engaged only by the respondent." She granted leave for the rebuttal report to be introduced as a matter of trial fairness - in doing so, she commented that:
- [14] Some criteria for assessment of a fair trial process is enunciated in Rule 13-4(8). Fairness is not affected by a party being dissatisfied with the views of the jointly appointed expert (*Jensen v. Jensen*, 2013 BCSC 297 at para. 46). A joint expert is expected to have been provided with all necessary information, been given an opportunity to consider opposing or divergent views, and been allowed further clarification (*Jensen* at para. 50; *Kumagai v. Campbell Estate*, 2016 BCSC 450 at para. 103). The importance of the joint expert being given all necessary information and the opportunity to consider opposing or divergent views is relative to the reality that the probative value of the joint expert opinion depends upon proof of the facts upon which the opinion is based (*Kumagai* at paras. 103-104).
- [49] Finally, I note the reasons for judgment of MacNaughton J. in *Kasapoglu v. Kasapoglu*, 2020 BCSC 1810, in which she concluded that expert evidence as to the enforceability of a prenuptial agreement under Turkish law was not a "financial issue" as to which a joint report was necessary. In the course of her analysis, she considered both *Aquilini* and *Bartch*, commenting at para. 26 that:

[26] This Court has consistently concluded that factual issues of a financial nature relating to property division, like valuations, appraisals, accounting assessments, and actuarial issues, be addressed by a joint expert. That, in my view, is what Justice N. Smith was referring to in Aquilini when he referred to financial experts at paras. 9-10 and what the Court of Appeal was referring to in Bartch at para. 26.

Analysis

[50] While intended for an initial application to appoint a joint expert, I find the three-step analysis proposed in Aquilini to be helpful in this matter; that is:

- a) Is the financial issue one on which the court is likely to require expert evidence?
- b) If so, is there evidence of a properly qualified expert who is available and who the parties, or either of them, can afford to retain?
- c) Is appointment of a joint expert consistent with the purpose and intent of the Family Rules?

A financial issue on which the court is likely to require expert evidence

[51] This question may appear at first blush to be obvious, given the judgments in Lightle, SRM 2014 and SRM 2020. The claimant in this matter, like the respondents in those cases, is an investment advisor with a substantial book of business. His rights under the RBCDS BSP are similar if not identical to those of the respondent in SRM.

[52] The claimant argues that both Lightle and SRM 2014 were decided under the Family Relations Act, while the present case is proceeding under the Family Law Act. The claimant relies on s. 87 of the Family Law Act, which states:

87. Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,
- (a) the value of family property must be based on its fair market value,

As a result, it is argued, the court will not look behind the views of a business valuator as to the proper interpretation of fair market value.

[53] This submission misapprehends the role of the court in interpreting the Family Law Act. It also ignores the statements of Willcock J.A. in Lightle, found at both paras. 24 and 46, that the principles being enunciated are equally applicable to both the Family Relations Act and the Family Law Act. While the claimant may want to make arguments that the comments with respect to the Family Law Act are obiter and not fully considered, those arguments are properly made at trial. The function of the court at this point is simply to have the appropriate information ready for trial.

[54] With respect thereto, the respondent proposes that the directions to be given to Ms. Daum be almost identical to those given to Mr. Mynett in SRM 2014, adjusted only to reflect the different ages of the investment advisors in question. The proposed assumptions are as follows:

- a) The respondent will remain with his employer until retirement;
- b) He will retire in 2 to 15 years;
- c) He will chose to participate in the BSP and will be accepted for participation in the plan;
- d) He will receive payments under the BSP over three years in accordance with the present terms of the BSP;
- e) Payments made to him under the BSP will be taxed in accordance with current income tax laws; and
- f) Any other circumstances which the business valuator may deem to be relevant to assessing the parties' interests in the BSP.

[55] The claimant argues that the court should not be specifying assumptions like this in the absence of findings of fact being made at trial. Thus, it is argued, there has to be an initial trial in order to determine the assumptions to be given to the valuator, followed by a further trial once the valuator's work is done. I do not agree. These are all assumptions as to future conduct. They appear to me to be appropriate in the circumstances, and will provide the trial judge with an information base that will enable further adjustments and provision for contingencies to be made at trial in order to determine the matter without the need for multiple proceedings.

[56] It will of course be open to the trial judge to disregard all of this evidence should the claimant establish that the assumptions are not applicable or that the approach adopted in SRM 2014 is not appropriate - either as a result of changes in the law or differences in the facts. However, I am satisfied that it is appropriate that on this issue the court have before it the proposed expert evidence.

A properly qualified expert who is available

[57] There is no issue that Ms. Daum is a properly qualified expert. Her correspondence as cited above makes clear that she is ready, willing and able to perform the additional analysis sought by the respondent in the event of agreement or a court order.

Consistent with the purpose and intent of the Family Rules

- [58] I begin with the claimant's objection that the court has no jurisdiction to provide additional direction to a joint expert once the expert has been appointed, and in the particular circumstances of this case, given that the order of Master Muir appointing the joint expert did not specifically instruct the expert as to the approach to be taken. The claimant argues that the respondent, having failed to appeal Master Muir's order, cannot now seek to add to the instructions given to the business valuator.
- [59] There is no evidence to suggest that the respondent was aware at the time of Master Muir's order that the valuator would take the view that she could not, on the basis of the wording of that order, conduct a valuation based on the SRM approach.
- [60] The claimant argues that Rule 13-4(1)(c) requires that all facts be settled prior to the appointment of the joint expert. As a result, it is argued, the court has no ability to provide further directions. Presumably, the claimant's position would be that, should a need for revised instructions and assumptions emerge during the course of the expert's work, the only remedy is to appoint a new expert to start from scratch. That approach makes no sense and is inconsistent with the requirement of Rule 1-3 that the object of the rules is to "secure the just, speedy and inexpensive determination of every family law case on its merits". While it is a matter of good practice to have the full set of assumptions prepared in advance of the joint expert beginning her work, that should not prevent the court from acting where necessary to ensure the goal of having the appropriate expert evidence before the court at trial.
- [61] In any event:
- a) Rule 13-4(3) authorizes the court, on application, to settle "any matter relating to the appointment of the joint expert", and
 - b) Master Muir's order gives either party liberty to apply for further directions.
- [62] There is simply no merit to this objection.
- [63] The claimant also argues that, if the respondent wants to have a valuation report using a different approach, the respondent's only remedy is to seek leave for a rebuttal report as additional expert evidence at her own cost pursuant to Rule 13-4(8). I disagree.
- [64] The cases make clear that Rule 13-4 represents a legislative policy in favour of limiting expert evidence on financial issues to a joint expert in most cases. Pursuant to Rule 13-4(7), an additional expert should only be authorized if "necessary to ensure a fair trial". Rule 13-4(8) specifically instructs the court, when determining whether to authorize an additional expert, to consider whether the issue giving rise to the request "may be resolved by requesting clarification or further opinions from" the joint expert. That is exactly what is being proposed in this case.

- [65] As noted in Jensen and Bartch, granting leave for one additional expert gives the other party the right to obtain its own expert - giving rise to the risk of three experts rather than one, with attendant cost, delay and extended trial length. Once again, authorizing additional experts where not necessary militates against the object in Rule 1-3.
- [66] The claimant suggests that having the court instruct the joint expert to provide calculations based on additional assumptions, at the instance of the respondent, risks "tainting" the independence of the joint expert and turns her into an advocate for the respondent. I don't see that as a concern where the instructions as to assumptions are the instructions of the court. Ms. Daum's correspondence makes clear that she has been very careful to avoid any actions that might call into question her impartiality. The concerns as to fairness that arose in MacDonald do not arise in these circumstances.
- [67] The claimant suggests in supplemental submissions that, if the respondent's proposed instructions are to be provided to the joint expert, then "he should also have the opportunity to provide appropriate facts and assumptions to the expert". However, no proposed facts and assumptions have been provided by the claimant for consideration by the court. Having failed to bring forward any such facts and assumptions on this application, the claimant will have to do so by way of further application. It would not be appropriate for the court to authorize the provision of additional facts and assumptions at large, without court review or consent of the parties.
- [68] I note that in this case there are concerns as to timing. The expert report deadline of August 20 is less than four months away. Ms. Daum has already performed substantial work reviewing the situation of the parties. There is no reason to believe that she cannot adapt her draft report to include a consideration of the additional assumptions proposed by the respondent.
- [69] As noted in Kasapoglu, this court has consistently concluded that factual issues of a financial nature relating to property division should be addressed by a joint expert. I see no reason to depart from that approach in the present case.

Costs of additional valuation work

- [70] Master Muir ordered that the parties share the accounts of the joint valuator with the respondent paying 20% and the claimant 80%.
- [71] The claimant argues that this additional work is primarily for the benefit of the respondent, and should be paid for by her.
- [72] The court is providing further directions to a joint expert. That expert was appointed pursuant to Master Muir's order. These directions are necessitated as a result of the business valuator's norms and standards having departed from the approach taken by the courts in cases involving investment advisors' books of business and business succession plans. The work to be performed is an essential part of the task for which the joint expert was initially appointed. I see no reason to depart from the order made by Master Muir with respect to the

costs of the report.

Conclusion

[73] I would grant the order sought, that is:

- a) As part of the joint valuation report that the joint valuator, Ms. Patti Daum, is preparing pursuant to the Order of Master Muir made December 15, 2020, she shall also determine the present value of the claimant's interest in the RBCDS BSP as at June 30, 2011 and the present date, based on the following assumptions:
 - i. The respondent will remain with his employer until retirement,
 - ii. He will retire in 2 to 15 years,
 - iii. He will choose to participate in the BSP and will be accepted for participation in the plan;
 - iv. He will receive payments under the BSP over three years in accordance with the present terms of the BSP,
 - v. Payments made to him under the BSP will be taxed in accordance with current income tax laws, and
 - vi. Any other circumstances which the business valuator may deem to be relevant to assessing the claimant's and respondent's interests in the BSP.
- b) The cost of any additional work necessitated by this order shall be paid for on the same basis as set out in the order of Master Muir made December 15, 2020.

[SUBMISSIONS]

[74] By consent, it is ordered that the respondent shall have her costs of this application as double costs in the cause.

"Veenstra J."

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