

CANADA / JUDGMENT

A.M.D. v. K.R.J.

2015 BCSC 1539

COURT

Supreme Court of British Columbia

DECIDED

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2015 BCSC 1539 A.M.D. v. K.R.J. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: A.M.D. v. K.R.J., 2015 BCSC 1539 Date: 20150831 Docket: 1139081 Registry: Prince George Between: A.M.D. Claimant And K.R.J. Respondent Before: The Honourable Madam Justice Sharma Reasons for Judgment Counsel for the Claimant: R.C. Gibbs, Q.C. Counsel for the Respondent: J.M. Werb Place and Date of Trial: Vancouver, B.C. July 14 & 15, 2015 Place and Date of Judgment: Vancouver, B.C. August 31, 2015 Table of Contents I: INTRODUCTION. 3 II: BACKGROUND. 4 III: ISSUES. 8 IV: CHILD SUPPORT. 8 A: Legal Principles. 8 B: The Claimant's Income. 9 C: The Respondent's Income. 11 D: The Set-Off 11 E: Retroactive Child Support 13 V: DIVISION OF PROPERTY. 15 A: Legal Principles. 15 B: Family Property and Excluded Property. 16 C: Reapportionment 17 VI: SPOUSAL SUPPORT. 22 A: Legal Principles. 22 B: Entitlement to Spousal Support 23 C: Quantum, Duration and Retroactivity of Spousal Support 25 VII: SUMMARY. 28 VIII: COSTS. 28 I: INTRODUCTION

- [1] Having ruled on the matter of relocation in my reasons indexed at 2015 BCSC 946, I heard the remainder of the issues between the parties during this two day summary trial, including child support, division of property and spousal support. All issues are to be determined pursuant to the Family Law Act, S.B.C. 2011, c. 25 [FLA].
- [2] I do not have to adjudicate on the parenting arrangements because the parties have agreed to the following Orders by consent:
- 1) The claimant and respondent are and shall continue to be joint guardians of the child, D.J., born August 15, 2008, pursuant to s. 39 of the FLA.
 - 2) The claimant and the respondent shall share all parenting responsibilities under s. 41 of the FLA with respect to D.J. on the following terms:
 - i. In the event of the death of either party, the surviving party shall be the sole guardian of D.J.
 - ii. Each party shall consult with the other about important decisions which must be made with respect to D.J., including significant decisions concerning the health (except emergency decisions), education, religious instruction and general welfare of D.J., and both parties shall attempt to reach agreement with respect to those major decisions.
 - iii. Pursuant to s. 49 of the FLA, in the event the parties are unable to reach an agreement regarding any important

decision concerning D.J., either party may apply to the court for a determination of the issue. iv. If D.J. requires emergency health care, the party exercising care and control of D.J. shall do all that is necessary to provide for such health care and will immediately notify the other party of the emergency.

- v. Each party may obtain information and documentation concerning D.J. directly from third parties, including teachers, counsellors, medical professionals and third party caregivers and each party is entitled to attend any of D.J.'s appointments with such professionals. vi. Each party's name, address, email address and phone number shall be provided to D.J.'s school, doctors, dentists, health care providers, extracurricular activity providers and associations and similar third parties.
- 3) Notwithstanding the shared parenting responsibilities of the parties, each party shall keep the other fully informed as to D.J.'s health, education and general welfare and shall discuss all such issues with the child's best interest in mind.
- 4) The respondent shall have parenting time with D.J. between 4:30 p.m. Thursday and 3:00 p.m. Sunday, with the exception that on holidays, where the respondent has the Monday off, the respondent's parenting time shall be extended to Monday at 3:00 p.m.
- 5) The party commencing parenting time with D.J. shall pick D.J. up from the party ending parenting time or from such other person as may be caring for D.J. II: BACKGROUND
- [3] The respondent was born on September 8, 1977. He completed his high school education before joining the work force. In November 2003, he purchased a home in Fort Nelson, B.C. (the "Home") for \$189,000. He provided a down payment of \$5,000. The balance of the mortgage at the time of purchase was \$183,915. At the time, he was working as a gas plant operator.
- [4] The claimant was born on July 1, 1983 in Fort Nelson and has lived there all her life. She is a high school graduate with no post-secondary schooling. She lived in Calgary for about nine months at the age of 19 where she worked at an engraving store but moved back to Fort Nelson because she could not support herself and her then-boyfriend. The claimant worked at a hardware store in Fort Nelson as a sales clerk and then as an office administrator from April 2003 until February 2005. She gave birth to her daughter, R., on February 28, 2005 at the age of 21. She was no longer in a relationship with R's father.
- [5] The parties began dating in April 2005 and commenced a marriage-like relationship in October 2005 when the claimant and R., who was eight months old at the time, moved into the Home. The claimant was 22 years old and the respondent was 28 years old.
- [6] At that point, the respondent had paid \$5,944.55 toward the principal of the mortgage and the balance of the mortgage was approximately \$177,970. The assessed value of the Home in 2005 was \$190,900.
- [7] The parties married on April 14, 2007. Their son, D.J., was born on August 15, 2008.

- [8] The claimant was on maternity leave, not working outside of the home, when the parties began living together. However, she deposed that at that time she did assist a friend with her bookkeeping, being paid "under the table". She worked sporadically throughout the parties' relationship, including: March - April 2006 at a hardware store; April 2006 - January 2007 at a propane company (laid off after a fire); and August 2007 - January 2008 at a construction firm (quit due to health concerns when pregnant with D.J.).
- [9] The claimant deposed that during the relationship she did all of the household chores, even during the times she, too, was working outside the home. She stated that she did all the cooking, cleaning, grocery shopping, laundry, minor repairs, banking and bill paying. The parties had one joint bank account into which all of their money was deposited and from which all of their bills were paid.
- [10] When the parties began living together, the respondent worked as a gas plant operator earning a gross annual income of \$47,800. In or about April 2007, the respondent obtained employment with a different company, first as a subcontractor and then as an employee. He was a plant/field operator throughout the parties' relationship.
- [11] The respondent received employee bonus shares at the beginning of each year as a bonus for the previous year. The number of shares varied from year to year, however, he began receiving them in 2008 based on his employment in 2007. The shares are "unvested", however, over time, as the respondent continues his employment with the company, they are rolled over into his vested stock savings plan.
- [12] After a relationship of four years and three months, the parties separated on January 14, 2010. D.J. was 17 months old at the time.
- [13] The respondent deposed that at the time of separation, the balance of the mortgage on the Home was approximately \$152,562 and the property was assessed at \$239,600. The value of the respondent's unvested shares was \$78,742.
- [14] A few months after separation, in May 2010, the claimant and the children moved into a rented townhouse paying \$1,200 per month plus utilities until May 2011 when the rent increased by \$50 per month.
- [15] Sometime after separation, the respondent became a head operator with the company he worked for. From approximately 2007 to May 2011, the respondent's work schedule was eight days in the bush, six days off in Fort Nelson. From the time of separation until May 2011, D.J. lived with his mother and sister, R., for eight days, followed by six days with his father during his time off from work.

- [16] In May 2011, the respondent's work schedule changed when he became an acting assistant foreman. He began and continues to work four days per week at a camp approximately 3.5 hours' drive from Fort Nelson. He has three days off each week during which D.J. lives with him. On long weekends, D.J. stays with him for an extra day. D.J. lives with his mother and sister the rest of the week from Sundays at 3:00 p.m. to Thursdays at 4:30 or 5:00 p.m.
- [17] Immediately upon separation, the claimant worked as a temp on two occasions for local government. When that position ended in August 2010, she obtained a full time position as a bartender for approximately three months. She went back to temping in November 2010 but could not secure a long term position so, in November 2011, she took a full time position with a transport company that served the oil and gas sector making \$18 per hour. While working at that job, the claimant also took weekend shifts at the bartending job.
- [18] Because of the high cost of daycare for her two children, she was essentially paying the babysitter half of her wages, with no financial assistance for daycare from the respondent. As a result, when the opportunity arose in or about June 2012, the claimant began working only at the restaurant every Thursday to Sunday which was ideal for both parties' parenting time schedules.
- [19] The claimant currently works Thursday, Friday and Saturday evenings and, on occasion, Sundays during the day when the restaurant is short-staffed. Her usual work week is 23 hours (29.5 if she works Sunday) and she is paid \$13 per hour plus tips. In her affidavit filed November 7, 2013, the claimant deposed, "I think it reasonable to think of my tips as \$100 per night but I stress that this is not predictable income and I cannot count on it in planning my expenditures." In her 4th financial statement filed July 9, 2015, the claimant affirmed, "I am not making the tips I used to. Before my average amount in tips received was \$100 per shift. Now that average is at \$60 per shift." III: ISSUES
- [20] The issues for me to determine are as follows:
- 1) What is the appropriate amount of child support, including retroactive support, in light of the shared parenting arrangement?
 - 2) What is the appropriate division of property?
 - 3) Is the claimant entitled to spousal support and, if so, at what amount and for what duration?
- IV: CHILD SUPPORT
- [21] During the summary trial, the claimant abandoned her claim for child support of her daughter, R, as well as for any specific retroactive s. 7 special expenses. The claimant seeks monthly child support for D.J. retroactive to the date of separation, January 14, 2010, and submits that the set-off amounts are inappropriate considering the other s. 9 factors. She also seeks a determination of the parties' proportionate shares for prospective s. 7 special expenses.

- [22] The respondent seeks to impute income to the claimant for a number of reasons. He also asserts that the set-off amount of support is appropriate, if the child tax benefits received solely by the claimant are factored into her income. A: Legal Principles
- [23] Because of the shared parenting arrangement in this case, I will consider s. 9 of the Federal Child Support Guidelines, SOR/97-175 [Guidelines], which states:
9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account
- (a) the amounts set out in the applicable tables for each of the spouses;
 - (b) the increased costs of shared custody arrangements; and
 - (c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.
- [24] In *Contino v. Leonelli*, 2005 SCC 63 at para. 39, the court explained that a formulaic approach to the application of s. 9 is not appropriate. In each case, the court must assess the relevance and weight of the three factors identified in s. 9 with an emphasis on a flexible and fair analysis: *Hadjioannou v. Hadjioannou*, 2013 BCSC 43 at para. 131. Once it is determined that the 40% threshold has been met, the court considers the table amounts of each spouse and the resulting set-off amount owed to one of the parties, if any. The court then has the discretion to depart from the set-off amount or make adjustments to it if it is inappropriate in light of the other two factors in s. 9: *Contino* at para. 41.
- [25] At para. 25 of my reasons indexed at 2015 BCSC 946, I found that the current parenting schedule results in the respondent having D.J. for approximately 42% of the time during a typical week. I find that the previous 8 day / 6 day arrangement resulted in approximately the same percentage of parenting time. Therefore, the respondent has met the 40% threshold in s. 9 of the Guidelines since separation and continues to do so.
- [26] Having concluded that the threshold in s. 9 is met by the respondent, I must now determine the incomes of the parties. B: The Claimant's Income
- [27] The claimant's line 150 income for the years since separation are as follows: 2010 \$23,168 2011 \$35,775 2012 \$28,221 2013 \$22,326 2014 \$25,960
- [28] The respondent submits that an income of \$45,000 should be imputed to the claimant, relying on a January 2013 vehicle loan application in which she listed her monthly income as \$3,250 (or \$39,000 per year) and on the claimant's affidavit statement that she is certain she earned more in tips than she declared on her income tax returns.

- [29] Claimant's counsel submits that it is common to represent oneself in the best light when applying for loans and notes that her mother was a co-signer. I agree with this submission. I also note that if the claimant was including the child support payments and child benefits she received at the time for both children, the statement of income on the loan application was not far off. However, in the child support context, such amounts are not included when determining income (see ss. 2 and 3 of Schedule III of the Guidelines).
- [30] Claimant's counsel concedes that the amount of tips added to her employment income in her 2014 tax return (\$9,500) and her 2013 tax return (\$9,000) was an estimation, however, she submits it is common for workers in the restaurant industry to not have knowledge or keep record of their precise earnings through tips. She also deposed that the amount she receives in tips is not guaranteed or predictable. She gave further evidence that, within the last year, her income from tips has declined.
- [31] I do not find that the claimant's statement "I'm sure I made more" in relation to tips is sufficient evidence on which to impute to her further income. I accept that the \$9,000 and \$9,500 declared on her most recent tax returns were estimations and were reasonable given the number of shifts she worked in a given week. I decline to impute income to the claimant on the basis of this vague statement or the respondent's assumption that the estimation is incorrect.
- [32] Therefore, I find the claimant's line 150 incomes accurately represent her income for child support purposes. C: The Respondent's Income
- [33] It is not contested that the respondent's line 150 incomes fairly represent the respondent's income for child support purposes. Those amounts are as follows: 2008 \$93,467 2009 \$100,840 2010 \$107,084 2011 \$113,024 2012 \$131,213 2013 \$170,730 2014 \$177,675 D: The Set-Off
- [34] According to s. 9(a) of the Guidelines and recognizing the change which occurred to the child support tables in 2012, the set-off amounts which would be owed by the respondent since separation are as follows: Year Respondent Claimant Set Off Amount 2010 \$964 \$236 \$728 2011 \$1,013 \$333 \$680 2012 \$1,177 \$306 \$871 2013 \$1,476 \$193 \$1,283 2014 \$1,528 \$226 \$1,302
- [35] The claimant asserts that she incurred increased costs upon separation because she had to pay rental costs for new accommodations while the respondent remained in the family home: s. 9(b). I agree this is a relevant factor. She also submits that the means and needs of the two parties, namely their wide income disparity and the claimant's hand-to-mouth existence after the separation, make the set-off amounts inappropriate: s. 9(c).
- [36] The respondent submits that child tax benefits are a relevant consideration when assessing the means, needs and circumstances of the parties under s. 9, relying on *L.R.C. v. J.M.C.*, 2008 BCSC 408 at para. 84. He argues that the claimant had the sole benefit of the Universal Child Tax Benefit and BC Family Bonus for D.J. despite the fact the parties have had shared

parenting of D.J. since separation. He further argues that the court should consider that she has received \$503 in child support from R.'s father since 2010. He claims these benefits and support added \$22,150 per year to the claimant's employment income.

- [37] In this case, the following factors persuade me that it would be inappropriate to apply the set-off. The respondent has D.J. just over 40% of the time; this is not a situation of 50/50 parenting time. The claimant has structured her work schedule in such a way as to allow D.J. to have had the benefit of being with a parent (rather than at a daycare or with another third party) for his entire week before he started full time school. This was an enormous benefit to D.J. but it also financially benefited the respondent who did not have to arrange or pay for child care when he was in the bush. This schedule has also meant the claimant has to work all weekend, while the respondent enjoys weekend time with D.J.
- [38] With regard to the child care benefit, I note the claimant is now saddled with a Canada Revenue Agency (CRA) debt, apparently because the respondent did not claim the benefit for a number of years. The evidence indicated the parties did not discuss the allocation; so when the respondent decided to claim the benefit (without advance notice to the claimant), she automatically came into debt with the CRA, through no fault of her own. It could be argued that the debt is not a significant factor since the income from the credit is not being allocated to her. That reasoning is sound but, because of the claimant's low income, I find that the benefit of the credit from a number of years ago did not carry forward into other years; it simply assisted her to make ends meet. The debt is now being automatically deducted by the CRA which reduces her accessible income. The parties should have discussed how to deal with the credit and the debt. But, in the absence of that discussion, I find that it is appropriate and fair to take that circumstance into account pursuant to s. 9(c).
- [39] Taking all these factors into account, I find that the set-off should not apply. E: Retroactive Child Support
- [40] The parties did not provide case law addressing when it is appropriate to make an award for retroactive child support. In *Petrie v. Senay*, 2015 BCSC 1083 at paras. 39 - 51, Justice Greycl recently reviewed the law on retroactive child support, referring to the leading case of *D.B.S. v. S.R.G.*, 2006 SCC 37. The basic approach requires the court to examine four factors to determine if a claim for retroactive child support is appropriate: the reasons for delay, the misconduct of the payor, any hardship suffered by the child as a result of the shortfall and any hardship the payor might suffer if a retroactive award is granted. Then, as noted at para. 48 of *Petrie*, the court has four choices for the date to which the support order should be made. The Supreme Court of Canada held in *D.B.S.* that generally it is inappropriate to make a support award retroactive to a date more than three years before formal notice was given to the payor parent unless the payor engaged in blameworthy conduct. As stated at para. 125:

- [125] The proper approach can therefore be summarized in the following way: payor parents will have their interest in certainty protected only up to the point when that interest becomes unreasonable. In the majority of circumstances, that interest will be reasonable up to the point when the recipient parent broaches the subject, up to three years in the past. However, in order to avoid having the presumptive date of retroactivity set prior to the date of effective notice, the payor parent must act responsibly: (s)he must disclose the material change in circumstances to the recipient parent. Where the payor parent does not do so, and thus engages in blameworthy behaviour, I see no reason to continue to protect his/her interest in certainty beyond the date when circumstances changed materially. A payor parent should not be permitted to profit from his/her wrongdoing.
- [41] In this case, the claimant filed the notice of family claim May 5, 2011, which serves as formal notice. The parties agree that the respondent paid child support in the amount of \$750 per month since separation based on a verbal agreement between the parties. I note that the claimant did not have legal advice at the time. On December 4, 2013, that verbal agreement became a without prejudice interim order before Justice Grauer.
- [42] Although the claimant is seeking retroactive child support to the date of separation, I find that the verbal agreement between the parties for the years 2010, 2011 and 2012 provided reasonable arrangements for D.J. considering the parties' respective incomes: s. 150(2) of the FLA. Certainly there was no evidence before me to suggest that D.J. suffered hardship as a result of any shortfall. It was not until 2013 that the parties' incomes changed in such a way that \$750 per month was no longer reasonable in light of the Guidelines. Therefore, retroactive child support is only payable for the year 2013 until present.
- [43] Applying the deduction for monthly child support already paid, the respondent will pay the claimant the following in retroactive child support: Year Monthly Amount Owed Retroactive Award 2013 $\$1,476 - 750$ $\$726 \times 12 = \$8,712$ 2014 $\$1,528 - 750$ $\$778 \times 12 = \$9,336$ 2015 (8 months) $\$1,528 - 750$ $\$778 \times 8 = \$6,224$ TOTAL \$24,272
- [44] Going forward, the respondent will pay the claimant \$1,528 per month commencing September 1, 2015 based on his 2014 income.
- [45] The parties will exchange annual income tax returns and notices of assessment by June 1 of each year or as soon as the notices of assessment become available. The amount of child support to be paid by the respondent to the claimant will be adjusted annually in accordance with the respondent's income. If there is a material change in the claimant's position (because of increased income, etc.), then the appropriateness of the set-off can be reconsidered.
- [46] The parties will pay agreed upon s. 7 special expenses in proportion to their incomes. If counsel cannot agree on the appropriate percentages based on my income findings, keeping in mind that in the s. 7 special expenses context spousal support and child tax benefits are included in income, this matter will be referred to the registrar. V: DIVISION OF PROPERTY

- [47] The authorities direct that the court should first make the appropriate division of assets before considering the issue of spousal support: *Hartshorne v. Hartshorne*, 2004 SCC 22 at para. 86; *Foster v. Foster*, 2007 BCCA 83 at para. 50.
- [48] The claimant seeks equal division of the increase in value of the Home, the respondent's pension and the respondent's shares since October 2005 when their marriage-like relationship began. While she concedes that the respondent brought approximately \$5,000 in equity into the Home pre-relationship, she asserts that he has also enjoyed four and a half years of its use since separation with no benefit to her.
- [49] The respondent seeks a declaration that the Home, as well as various bank accounts, RRSPs, RESPs, shares and music equipment is excluded property. He submits that the claimant should have only a 25% interest in the increase in the value of the Home during the relationship (less her liability for payments required to maintain the property since separation) and in the increase in the value of his RRSPs and shares acquired before the date of separation because she contributed very little to these assets during the parties' short relationship.
- [50] The parties agree that the claimant will pay the balance of the CIBC joint line of credit acquired for the purpose of paying for the s. 211 report and the respondent will have no further liability toward interest on that account. The parties also agree that all other unsecured debts will remain with the person who presently services them since most, if not all, were acquired after the time of separation. A: Legal Principles
- [51] Upon separation, each spouse has a right to an undivided half interest in all family property regardless of their respective use or contribution and is equally responsible for family debt: s. 81. Family property is, inter alia, all real and personal property owned by at least one spouse on the date of separation: s. 84(1)(a). Property acquired by a spouse before the relationship began is excluded from family property: s. 85(1)(a). However, its increase in value during the relationship is family property: s. 84(2)(g).
- [52] The court may only order an unequal division of family property or family debt if it would be significantly unfair to equally divide it, considering a number of factors such as the length of the relationship between the parties, a spouse's contribution to the career of the other spouse or a tax liability that may be incurred by a spouse as a result of a transfer or sale of property: s. 95. B: Family Property and Excluded Property
- [53] The parties agree that all assets acquired by the parties after the date of separation are excluded property since, in this case, they were not derived from family property: s. 84(1)(b) (i). The Home was purchased by the respondent before the parties' relationship and is, therefore, excluded property; however, its increase in value since the relationship began is family property.

- [54] The assessed value of the Home in 2005 was \$190,900 with the balance of the mortgage at approximately \$177,970; therefore, the total equity the respondent had in the home at the time the relationship began was \$12,930. The parties agree on and accept the valuation of the Home for the purposes of this trial to be \$265,000, as set out in the competitive market analysis provided by the respondent in his November 23, 2014 affidavit. The balance of the mortgage in November 2014 was \$97,204, resulting in equity of approximately \$169,800. Therefore, there has been an increase in the equity of the Home of \$156,870, which divided equally would result in \$78,435 to the parties.
- [55] The respondent's RRSPs were acquired in July 2000 and July 2005, before the parties began cohabitating. However, the increase in their value since October 2005 is family property.
- [56] The respondent submits there has been little or no increase in the value of the RRSPs since October 2005. He provided statements showing the values of his RRSPs to be \$26,312.11 and \$20,215.97 in November 2006. Statements from December 2009 for the same accounts indicate values of \$24,806.12 and \$18,162.08 respectively. Finally, statements from October 2014 show values of \$30,608.77 and \$24,358.61. While there is no evidence of the increase or decrease in these funds during the first year of the relationship (October 2005 to November 2006), I agree that little or no increase occurred in the value of the RRSPs during the parties' relationship and, therefore, no portion of them is family property. The respondent will retain his RRSPs.
- [57] The respondent began receiving his vested and unvested shares in 2008 during the parties' relationship; therefore, they are, by definition, family property. I agree with the respondent that only the shares granted to him before separation are family property. These shares are to be valued at the time of trial: s. 87. I accept the valuation produced by Thompson & Co. for the respondent, but I would not exclude the dividends which the shares would have generated since January 2010 as the respondent has. I find the value of the shares which are family property to be \$85,729. An equal division would result in \$42,864 to each party. C: Reapportionment
- [58] The respondent asks the court to reapportion the above family assets in his favour so that the claimant would receive only 25% of their value. He argues that an equal division of the Home and the shares is significantly unfair, pursuant to s. 95 of the FLA, for the following reasons:
- (a) All property was brought into the relationship by the respondent.
 - (b) The respondent paid the mortgage on the Home before and during the relationship.
 - (c) The parties' relationship lasted for only four years and three months.
 - (d) The claimant has not contributed to the maintenance of the Home during the five years the parties have been separated.

- (e) The shares were acquired through the respondent's employment and were only maintained after separation because of his continued employment.
- [59] The respondent relies on case law under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], in which property was reapportioned to the husband because of the short duration of the marriage and the fact that he brought the major portion of the family assets into the marriage: *Zaurrini v. Zaurrini* (1981), 33 B.C.L.R. 15 (B.C.C.A.); *Jasinski v. Jasinski*, 2006 BCSC 878 at para. 47; *B.D.M. v. A.E.M.*, 2014 BCSC 453 at para. 235; and *Li. v. Long*, 2014 BCSC 48 at para. 160.
- [60] These cases are distinguishable. First, I note that the threshold for reapportionment was lower under the FRA ("unfair") than under the FLA ("significantly unfair"). The legislature has raised the bar to justify an unequal distribution; it is necessary to find that the unfairness is "compelling" or "meaningful" having regard to the s. 95(2) factors: *Remmen v. Remmen*, 2014 BCSC 1552 at para. 44. Cases under the former "unfair" threshold are of limited assistance: *Walburger v. Lindsay*, 2015 BCSC 341 at para. 91.
- [61] Second, the property regime under the FRA did not exclude property acquired by a spouse before the relationship between the spouses began as the FLA now explicitly does in s. 85. The only remedy for excluding such property was through reapportionment under s. 65 of the FRA. In the new framework, such property is already excluded, except for its increase in value during the relationship until the time of trial. Justice Baker responded to a similar argument in *Jaszczewska v. Kostanski*, 2015 BCSC 727 at para. 144:
- [144] I begin with the submission made by Counsel for Mr. K that equal division would be significantly unfair because Mr. K brought assets into the relationship while Ms. J did not. In my view, this factor can be given little or no weight in the circumstances of this case. As I stated in the preceding paragraph, this is not a case where the relationship was of very short duration. In any event, the FLA established a new regime for identifying and valuing family assets. It contains provisions excluding from family property the assets each party brings into the relationship if those assets still exist when the relationship ends; or the value of the pre-relationship property can be traced into other family property. I have already determined that \$60,000 paid by Mr. K for the down-payment on the Kildonan property is excluded property. Given the new regime for excluded property, I do not think the Legislature intended that mere disparity in wealth at commencement of the relationship would generally justify unequal division of family property at the end of the relationship. [Emphasis added.]
- [62] In any event, I find that the respondent did not bring substantial assets into this relationship. In *Jasinski*, for example, the husband brought assets to the marriage valued at \$350,000 (para. 50). In *Li*, it was millions (para. 147). In contrast, the respondent bought the Home with a \$5,000 down payment and had contributed about another \$1,000 to the principal of the mortgage by the time the parties began cohabitating.

- [63] Having distinguished the cases relied upon by the respondent, I will consider the relevant s. 95(2) factors.
- [64] I note that the factors for consideration under reapportionment have changed in the new legislation. In particular, s. 65(1) of the FRA specifically invited the court to consider circumstances relating to the acquisition, preservation, maintenance or improvement of family assets. These factors are not included in s. 95 of the FLA. It could be argued that the parties' relative contributions should be considered under s. 95(1)(i) as "any other factor that may lead to significant unfairness", but in my view, the court cannot ignore the clear language in s. 81 which states that "spouses are both entitled to family property and responsible for family debt, regardless of their use or contribution."
- [65] Justice Baker reviewed recent FLA case law on this issue in *Jaszczevska* at paras. 165 - 170, noting that in some cases the court did consider unequal contribution, among other factors, to warrant unequal division or as insufficient reason to establish "significant unfairness". In *Jaszczevska*, after determining that the legislature would have specifically said so if they intended unequal contribution to remain a significant factor justifying unequal division of family property under s. 95 (para. 163), Baker J. found persuasive reasons to consider this factor since the "the work Mr. K has done to develop the Maplewood Living project; and the time he has spent on the construction of the Kildonan property has meant that he gave up the opportunity to earn income in other ways" (para. 171).
- [66] Respectfully, I agree with Justice Fleming in *Nearing v. Sauer*, 2015 BCSC 58 at para. 141:
- [141] Section 95(2) does not appear to allow for the wide ranging examination of each spouse's contribution to the accumulation of family assets and their respective capacities that occurred pursuant to s. 65(1)(f). Instead the court may consider a spouse's contribution to the career or career potential of the other spouse under s. 95(2)(c) or a spouse's detrimental impact on to the value of family property or potential family property under s. 95(2)(g) which appears focused on the spouse's direct actions vis-à-vis the value of family property. I interpret the words "spouse's contribution" in s. 95(2)(c) as including the full spectrum of all levels of contribution from one spouse negatively impacting on the other spouse's career to greatly enhancing the career or career potential of the other spouse.
- [67] I note that, in any case, jurisprudence under the FRA did not consider the extent to which spouses contribute financially to household expenses as a basis for reapportionment pursuant to s. 65: *Jaszczevska* at para. 140. As Justice Dohm stated in *Johnstone v. Johnstone* (1982), 33 B.C.L.R. 368 at 388 - 389 (S.C.): "If spouses each contribute positively to the development of the family asset s. 51(f) will not apply. If, on the other hand, one spouse tries to build up the assets and the other to acquire "experiences" this must be a factor to consider whether or not it would be unfair to divide the assets equally."

- [68] In the circumstances of this case, I do not take into account the parties' financial contribution to the family property during the relationship as s. 81 is clear that each spouse has a right to an undivided half interest in all family property regardless of their respective use or contribution. Moreover, the evidence was uncontroverted that the claimant had the responsibility for maintaining the home by doing chores, etc. during the relationship, and, therefore, contributed positively to the building up of the asset.
- [69] I agree that the parties' relationship of four years and three months was of short duration, which supports an unequal division. I find this to be a strong factor in the respondent's favour.
- [70] On the other hand, it was the claimant who contributed to the respondent's career by caring for the children and the household during the relationship and, since separation, she has continued to do so by arranging flexible parenting times to accommodate his rising career.
- [71] The respondent asks me to consider that the claimant has not contributed to the Home or the RRSPs and shares during the five years of separation. This must be balanced against the fact that the respondent has had exclusive use of the Home during these many years while the claimant has been paying rent for alternative accommodations for her and the children. I further note that the only shares to which the claimant is entitled are those received during the relationship, not since separation. I do not accept the respondent's argument that his continued employment since separation has secured the value of the shares received during the relationship in such a way that they should be reapportioned in his favour.
- [72] Having considered all of the relevant factors in s. 95(2), I do find it would be significantly unfair to the respondent to equally divide the family property but I do not agree that a 75% share in his favour is fair. Instead, I find he is entitled to 60% and the claimant 40%. The strongest factor in favour of reapportionment is the length of the marriage. However, I also consider that the respondent bore the risk alone of the value of the Home decreasing since the relationship began and that the claimant probably would not have been in the financial position to acquire such an asset without the respondent's initial investment.
- [73] In addition, I understand that there may be tax consequences to the division of the respondent's shares. I find that, over and above this reapportionment, the tax consequences should be taken into account: s. 95(2)(h).
- [74] I make the following property orders:
- 1) The claimant is entitled to compensation of \$62,748 as her 40% share of the increase in the value of the Home since the parties' relationship began.
 - 2) The claimant is entitled to compensation of \$34,291 as her 40% portion of the value of the respondent's shares accumulated during the relationship. If the parties cannot agree on the tax consequences which should be taken into account, this matter will be referred to the registrar.

VI: SPOUSAL SUPPORT

- [75] The claimant seeks spousal support retroactive to the date of separation, January 14, 2010. She submits that the respondent's refusal to pay spousal support over the last five and a half years since separation has her "stuck in the poverty trap" while the respondent has "abundant means". She also relies on the fact that her work schedule and parenting time have been flexibly arranged to accommodate the respondent's rigid work schedule. The court's finding that it is not in D.J.'s best interests to relocate to Alberta further exacerbates her financial difficulties due to the lack of opportunities in Fort Nelson and the fact that she had to forego an employment opportunity that would have seen her income increase.
- [76] The respondent submits that the claimant is not entitled to spousal support for any period of time. The essence of his argument is that he left the claimant as he found her - when he met her, she already had a child and had previously worked only part time, low paying jobs; upon separation, she chose to remain in a low paying job and has not demonstrated any intention to obtain higher paying work or further education or training. He asserts there is no evidence of their relationship having an effect on her career since no career path was being sought. Their relationship did not hold her back.
- [77] The parties agree that, pursuant to the December 4, 2013 order of Judge Grauer, the respondent paid the claimant without prejudice interim spousal support in the amount of \$778 per month for three months. A: Legal Principles
- [78] In determining entitlement to spousal support, s. 161 of the FLA instructs the court to:
- (a) recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
 - (b) apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
 - (c) relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses; and
 - (d) as far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.
- [79] In determining what is practicable regarding self-sufficiency, the court must consider all the circumstances, including the age and gender of the spouse, her skills and education, or lack thereof, the opportunities for retraining and the realistic prospect of the spouse being able to find not just a job, but one which enables her to become self-sufficient: *Tedham v. Tedham*, 2005 BCCA 502 at para. 33, leave to appeal ref'd [2004] S.C.C.A. No. 4.
- [80] The amount and duration of spousal support must be determined by considering the conditions, means, needs and other circumstances of each spouse, including the length of the relationship, the functions performed by each spouse during the relationship and any agreement or order relating to spousal support: s. 162.

- [81] In making an order respecting spousal support, the court must give priority to any duty to pay child support: s. 173(1). It must not consider any misconduct of a spouse except that which unreasonably causes or aggravates the need for spousal support or affects the ability to provide spousal support: s. 166. B: Entitlement to Spousal Support
- [82] I do not agree with the respondent's submission that the claimant has not been economically disadvantaged by the relationship or its breakdown. During the relationship, the claimant took on the role of primary caregiver, staying home with the children. I make no comment whether R. is a child of the marriage, as the child support claim in that regard has been abandoned. However, the evidence shows that when the claimant and R. began living with the respondent, they did so as a family. The respondent benefitted from the claimant's work at home, caring for the children and the household, and the claimant did not work, except immediately prior to giving birth to their son, D.J. After their son's birth, the claimant stayed home until the date of separation, when D.J. was 17 months old. The claimant and the children were financially dependent upon the respondent.
- [83] Upon the breakdown of the relationship, the claimant lost the use of the Home and the benefits of the respondent's high income. Although the parties did begin a shared parenting arrangement, I find that the claimant accommodated the respondent's work schedule, both during the 8 day / 6 day arrangement and the more recent Thursday to Sunday arrangement.
- [84] I also find that the claimant is not at fault for leaving the full time position for the more flexible job at the restaurant. Not only was she doing what was in the best interests of D.J. before he entered school full time considering the respondent's work schedule, the respondent's refusal to financially assist with daycare made the situation untenable.
- [85] Despite the short length of the parties' relationship, the parties had a child together. The claimant has been disadvantaged financially as a result of both the marriage and its breakdown. She continues to have financial need and there is great disparity between the parties' incomes. Furthermore, she will continue to experience future financial disadvantage due to the ongoing care of D.J. who lives with her more than half of the time.
- [86] The claimant is entitled to spousal support on a compensatory and non-compensatory basis. C: Quantum, Duration and Retroactivity of Spousal Support
- [87] The respondent submits that if the claimant is entitled to spousal support it should be at the low end of the range provided in the Spousal Support Advisory Guidelines ("SSAG") because of the short length of the marriage and because D.J. is now in school full time. He also submits that the quantum should be based on his 2010 income of \$107,084 at the time of separation, rather than his current higher income, implicitly agreeing to a retroactive award.
- [88] Since the respondent did not present arguments on the appropriateness of a retroactive award or the date of retroactivity, I will focus on the issue of what income is to be applied to a retroactive award.

- [89] There is some debate regarding what income is to be used for each year in question in calculating retroactive support. Justice Wong reviewed different approaches taken by the court in *P.K.C. v. J.R.R.*, 2014 BCSC 932. In some cases the court simply applied its discretion to order an amount (paras. 162 - 163); in others the court awarded an amount based on what the recipient would have been entitled to receive (paras. 164 - 165). In one case mentioned by Wong J., the court used an average of the payor's income during the retroactive period to arrive at a lump sum amount (para. 166).
- [90] Justice Wong favoured the approach taken by Justice Brown in *K.S.F. v. S.M.F.*, 2011 BCSC 1563, in which he used the actual earnings of the parties in the applicable years to calculate retroactive support, taking into account any spousal support paid during those years (para. 172 - 177).
- [91] I agree with this approach, which is succinctly stated by the court in *Lewis v. Adesanya*, 2014 ONJC 326 at para. 23: "Courts should use the current year's income wherever possible in assessing support obligations" because this approach is consistent with s. 16 and 2(3) of the Guidelines. Those sections require that the most current information be used when determining annual income. While *Lewis* involved retroactive child support, the SSAG state that "the starting point for determining income under the [SSAG] is the definition of income under the [Guidelines]."
- [92] Next, I must determine the appropriate duration for spousal support. The range provided by the SSAG at the time of separation when D.J. was approximately two years old and the claimant was 28 years old would have been a minimum duration of four years (until D.J. attended school full time) and a maximum duration of 16 years (when D.J. finished high school).
- [93] The respondent wishes to rely on the spousal support objective of promoting, as far as practicable, the economic self-sufficiency of each spouse within a reasonable period of time to limit the duration of the claimant's entitlement to spousal support. However, I keep in mind the fact that the respondent's refusal to assist with childcare costs and spousal support after separation, as well as his inadequate child support payments, has aggravated the claimant's need for spousal support (s. 166). I also note, however, that there was some evidence suggesting that the claimant was receiving some financial assistance from her new partner and perhaps from family (to pay for travel). Furthermore, the division of property provided above will assist in meeting the claimant's financial needs going forward.
- [94] In my view, the claimant is entitled to spousal support for a period of five years. Considering the means and needs of the parties over the five years after separation and because I have limited the duration of the spousal support award, I find it is appropriate to use the midrange of the SSAG in order to substantially equalize the net disposable incomes of the parties at the time.

- [95] A summary of retroactive support is as follows: Incomes SSAG Mid Range (monthly) Support paid Difference Year K.R.J. A.M.D. 2010 \$107,084 \$23,168 \$1,953 (x 12) \$0 \$23,436 2011 \$113,024 \$35,775 \$1,637 (x 12) \$0 \$19,644 2012 \$131,213 \$28,221 \$2,407 (x 12) \$0 \$28,884 2013 \$170,730 \$22,326 \$3,724 (x 12) \$778 \$43,910 2014 \$177,675 \$25,960 \$3,784 (x 12) \$1,556 \$43,852 Total \$162,060 \$2,334 \$159,726
- [96] Because I did not receive any submissions from counsel on this point, I assume the parties will attempt to agree on whether the award of retroactive spousal support should be paid as a lump sum or by instalments. I recognize that a lump sum payment of retroactive spousal support is not tax deductible to the payor or taxable in the hands of the recipient in contrast to periodic support payments. If the parties agree on a lump sum payment or a limited number of instalments, I find it is appropriate to strike a balance between the tax effects to the payor and the recipient and order that the retroactive spousal support award of \$159,726 be adjusted to the midpoint between the claimant's and the respondent's marginal rates. If counsel cannot agree on the adjustment, this matter shall be referred to the registrar.
- [97] Because I have found the claimant's entitlement to spousal support was for five years, as of the date of trial and with the retroactive award for spousal support, no award is made for ongoing support. VII: SUMMARY
- [98] To summarize I make the following orders:
- 1) The respondent shall pay the claimant \$24,272 in retroactive child support.
 - 2) The respondent will pay the claimant child support in the amount of \$1,528 per month commencing September 1, 2015 based on his 2014 income, to be adjusted annually, if necessary.
 - 3) The claimant is entitled to compensation of \$62,748 as her 40% share of the increase in the value of the Home since the parties' relationship began.
 - 4) The claimant is entitled to compensation of \$34,291 as her 40% portion of the value of the respondent's shares accumulated during the relationship.
 - 5) The claimant is entitled to a retroactive spousal support order of \$159,726. If paid as a lump sum award, it will be grossed down to account for tax consequences. VIII: COSTS
- [99] If the parties cannot agree on costs, they may inform the registry no later than 30 days from the date of judgment to either: (i) schedule a brief hearing before me; or (ii) provide a schedule for the exchange of written submission provided that the date in the schedule that the exchange will close shall not be later than 75 days from the date of this judgment. Written submissions on costs shall not exceed seven pages, with no less than 1.5 spacing. Reply submissions are limited to three pages. "Sharma J."

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