

CANADA / JUDGMENT

Alvarez v. Samson

2018 BCSC 644

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 644 Alvarez v. Samson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Alvarez v. Samson,

2018 BCSC 644

Date: 20180423

Docket: E160731

Registry: Vancouver

Between:

Alma Suzette Alvarez

Claimant

And

Francois Samson

Respondent

Before: The Honourable Mr. Justice Sewell

Reasons for Judgment

Counsel for the Claimant:

Kristen E. Courtney

The Respondent:

Appearing In Person

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 3-6, May 3-5,

August 21-23, October 6, and December 13 and 14, 2017

Place and Date of Judgment:

Vancouver, B.C.

April 23, 2018

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Introduction

- [1] In this family law case, the parties, who did not marry, seek orders for division of family property, spousal support and child support.
- [2] The parties began to live in a marriage-like relationship in 2009 and ended their relationship in early 2014. They have one child, M.

- [3] This trial commenced in April 2017 but did not conclude until December because of numerous adjournments to arrange additional hearing days. The parties resolved some issues by a consent order dated August 23, 2017.

Issues

- [4] The remaining issues to be determined are as follows:

1. When did the relationship begin and end?
2. Is the respondent obligated to pay the claimant child support arrears for 2014? If so, in what amount?
3. Is the claimant obligated to pay to the respondent child support arrears? If so, for what period?
4. Is the claimant obligated to pay the respondent s. 7 arrears?
5. Is child support payable, and by whom, and in what amount, going forward?
6. Is the claimant entitled to receive spousal support for the period March 30, 2014 to December 31, 2014, and if so, in what amount?
7. How much is owed by either party to the other to adjust for family home expenses incurred, rental revenues collected and occupational rent post-separation?
8. Valuation and division of family property.
9. What is the value of excluded property owned by the parties?
10. How should the proceeds from the sale of the matrimonial home be divided?
11. Is an order under s. 213(2)(d) of the Family Law Act, S.B.C. 2011, c. 25 [FLA], requiring the respondent to pay to the claimant an amount for the expenses she incurred as a result of the respondent's alleged failure to comply with his disclosure obligations appropriate? If so, what amount is appropriate?
12. Costs.

Background

- [5] The parties were both born in 1974.
- [6] The parties met in the summer of 2008 at a going away party hosted by the claimant at her home for a mutual friend. At that time, they were both living in the Lower Mainland. The claimant lived in North Vancouver in a house she shared with her brother. The respondent lived in a condominium he owned near Cambie Street in the City of Vancouver.

- [7] When they met, the claimant had been recently divorced from her ex-husband. She had two children from that relationship, who lived with her. Her ex-husband's whereabouts were not known to her but she believed him to be living abroad.
- [8] Shortly after the party, the parties met for dinner and a romantic relationship soon followed. They began dating in the fall of 2008. In 2008, the claimant was employed as a web designer on contract and earned about \$57,500 per year. The respondent was a qualified chef who was operating a catering business. He was also in the process of planning to operate his own restaurant, the My Chef Restaurant. It is unclear from the evidence what his income was at that time.
- [9] In January 2009, the claimant became pregnant. The parties initially maintained separate residences. At some point, the respondent moved into the claimant's home in North Vancouver. The date on which that occurred is in dispute. However, it is clear that it was not earlier than the summer of 2009.
- [10] The parties' daughter M. was born on October 22, 2009. M. had some health problems as an infant. Before being released from hospital at birth, she required major surgery to repair internal organs. Later she required heart surgery. Fortunately she seems to be fully recovered from those early problems.
- [11] Initially the parties maintained separate finances, but later opened a joint chequing account with President's Choice Financial (the "PC Account"), for the payment of shared household expenses. According to the claimant, the respondent at first did not contribute any money to the cost of living in the North Vancouver house. However, later the couple appear to have agreed that the claimant would be responsible for 70% of the living expenses because she had her two children from her previous relationship living with her. I conclude from the evidence that the claimant was not happy with this arrangement but reluctantly agreed to it. It is, however, unclear whether the respondent contributed even the 30% agreed to.
- [12] The My Chef Restaurant did not prosper and the respondent sold the business on August 31, 2011, receiving net proceeds of about \$60,000. His uncontradicted evidence is that most of the proceeds of that sale were used to pay debts incurred in operating the restaurant.
- [13] From the fall of 2009 to mid-2011, the parties continued to live in the claimant's home in North Vancouver, but the respondent retained ownership of his home in Vancouver. However, they discussed and took steps to find more affordable accommodation outside of greater Vancouver. They agreed that if they found such accommodation they would sell their separate homes and pool their resources to purchase it.
- [14] The parties eventually agreed to purchase a home on Depot Road in Squamish (the "Depot Road property"). The purchase of the Depot Road property closed on June 18, 2011.

- [15] To raise funds necessary to purchase this property, the claimant sold her house in North Vancouver. The net proceeds of sale of that house were approximately \$61,500, of which \$55,523.88 was transferred to be applied as part of the down payment on the Depot Road property.
- [16] The respondent did not sell his Vancouver home until after the Depot Road property was purchased. On or about September 30, 2011, he received net proceeds of \$42,770 from the sale.
- [17] The buyer's statement of adjustments for the Depot Road property shows that the parties made a down payment of a total of \$90,523.88. The claimant paid \$55,523.88 of that amount and the respondent paid \$35,000, including an initial deposit of \$10,000.
- [18] The claimant agrees that when the respondent received the net proceeds of the sale of his Vancouver condominium, he paid her \$23,156. The respondent says this was to compensate her for one-half of the proceeds from the North Vancouver home that she contributed to the Depot Road property purchase. The claimant does not accept that these funds were paid to her for that purpose.
- [19] The parties moved into the Depot Road house in June 2011. The carrying costs of the house placed a strain on their finances. The housing expenses and some incidental payments such as funding M.'s registered educational fund were approximately \$2,950 per month. In 2011, the respondent obtained employment at a restaurant in Squamish and in August of that year the claimant got a job at the local RONA hardware store working as a kitchen designer.
- [20] The respondent's job did not last for long. His evidence is that he was laid off because the two owners of the restaurant could not agree on what direction the restaurant should take. After the respondent was laid off from the Squamish restaurant, he obtained a job with Umberto's restaurant in Whistler but left that job sometime in early 2013.
- [21] After working at RONA for about 11 months, the claimant obtained a job with Whistler accommodations at a salary of approximately \$55,000 per year. However, that job did not work out, at least in part because it required too much travel, and the claimant was laid off early in 2013.
- [22] In early 2013, the parties took steps to become qualified life coaches and discussed moving to another country for about a year. The respondent enrolled in an online life coaching course offered by Tony Robbins. The claimant also worked on the course, although it appears she did not separately enroll in it.

- [23] In the same period, the parties investigated various countries to go to for an extended time. Eventually, they decided to go to Ecuador. In the summer of 2013, they found tenants to rent the Depot Road house for one year. In September of 2013, they travelled to Ecuador and rented accommodation in several different cities and towns. They also investigated the possibility of establishing a retreat centre and made enquiries about finding a suitable location for such a venture. Nothing came of these plans.
- [24] In January 2014, the family moved to Cuenca and soon found a suitable unfurnished apartment. According to the claimant, they agreed that they would extend their stay in Ecuador for one year to pursue their idea of establishing a retreat centre. The claimant began working on a business plan for the retreat.
- [25] To secure their chosen apartment, the parties had to commit to a one-year lease. They also had to acquire necessary furnishings for the apartment. The claimant undertook responsibility for acquiring these furnishings.
- [26] In early 2014, the respondent received a job offer to return to Vancouver to become the manager of two restaurants associated with the Plaza Hotel. After some hesitation, the respondent accepted the offer and returned to Vancouver in February 2014 to take up the job.
- [27] The respondent testified that he accepted this job reluctantly because he felt he had become burned out from being in the food service industry for 17 years. He says he finally accepted the position because he felt the family's finances were insufficient for a prolonged stay in Ecuador and because of difficulties in his relationship with the claimant.
- [28] At that time, the parties still had their PC Account. The respondent testified that he deposited his first paycheque into this account and later found that the claimant had withdrawn funds from it. He said that when he discovered the withdrawal, he phoned the claimant in Ecuador and ended the relationship.
- [29] The respondent was employed at the restaurant position until August 2014, when his employment was terminated. His employment earnings from the Plaza Hotel in 2014 were \$35,345.35. He also received Employment Insurance benefits in that year. His evidence is that this was a managerial position and he did not receive any tips.
- [30] The claimant accepts that she and the respondent agreed that he should return to Vancouver. Her uncontradicted evidence is that the parties agreed that she should remain in Ecuador with M. until May and in the meantime dispose of the furnishings that had been purchased and attempt to find someone to take over the lease. She returned to Vancouver in May after finding someone to take over the Ecuador lease and disposing of the furnishings that had just been purchased. Her evidence is that while she remained in Ecuador after the respondent returned to Vancouver, he sent her a total of \$1,000.

- [31] The claimant's version of the reason for the breakup is somewhat different than the respondent's. She testified that around March 28, 2014, the respondent phoned her and asked her for \$5,000. When she asked him what he needed the money for she says he "blew up" and told her the relationship was over.
- [32] It appears there were no further voice communications between the parties until the claimant returned to Vancouver in May. However, the parties did exchange emails about what to do about the furniture that they had purchased for the Cuenca apartment. They agreed that the claimant should attempt to sell it.
- [33] The claimant testified that she sold the furniture to the person who had agreed to take over the lease for about what she had paid for it, \$2,481 US. At that time the Canadian and American dollars were roughly at par. Her evidence, which I accept, is that she used the proceeds to pay living expenses.
- [34] The claimant returned to Vancouver in late May 2014. She stayed with friends for about a month before moving into a rented basement suite in North Vancouver on July 1, 2014. She testified that in that period she earned about \$3,000 per month doing contract consulting work.
- [35] From September 2014 onwards, I find that the parties shared parenting time with M. and that each parent had more than 40% of the parenting time. In September, M. was enrolled at Ecole Andre Piolet, a French language public school located in North Vancouver.
- [36] In July 2015, the parties agreed that the claimant should move into the main floor of the Depot Road property. They agreed that the claimant would pay the respondent \$2,950 per month and that she would be entitled to collect and retain the rent from the downstairs tenant. The respondent agreed to pay the mortgage, property taxes, strata fees and insurance on the property.
- [37] Pursuant to this agreement, the claimant moved into the Depot Road property in July 2015 and paid the respondent \$2,950 per month to the end of May 2016. She paid a further \$1,550 to the respondent in the middle of June 2016, but made no further payments to him. However, she continued to live in the property until the end of November 2016, and continued to collect the rents from the downstairs tenants. She returned to North Vancouver in December 2016.
- [38] When the claimant first moved to Squamish, she took M. to Ecole Andre Piolet each day. However, beginning in January 2016, the arrangement was that she would take M. to school on Monday morning and the respondent would pick her up after school that day and keep her until Friday morning, when he took her to school. The claimant would pick her up after school on Friday and have parenting time with her over the weekend until she returned her to school on Monday morning. The parties each had parenting time for one month of the summer holidays and split other holidays by agreement.

- [39] I will deal with parenting time later in these reasons when I address the respondent's claim for child support.
- [40] After the claimant moved out of the Depot Road property, the upper floor remained vacant, except that the claimant furnished it to be rented out as an Air BnB property. At or about that time the downstairs tenants also moved out.
- [41] The respondent continued to make mortgage payments for some time. In the spring of 2017, the claimant made one mortgage payment. At some point in 2017, the mortgagee agreed to a payment holiday and did not require further payments. The property was sold pursuant to my order in September 2017.

Duration of Marriage-like Relationship

- [42] I find that the parties began to live together in a marriage-like relationship in October 2009, as alleged in the claimant's Notice of Family Claim.
- [43] I accept the claimant's evidence that the relationship ended during the phone call on or about March 28, 2014, just after the respondent's birthday on March 25. I accept the claimant's evidence that in that call, between the claimant in Peru and the respondent in Vancouver, the respondent said that the relationship was over and the parties did not resume cohabitation after that date.
- [44] The duration of the relationship was therefore some 54 months.

Child Support

- [45] The parties claim child support from each other for at least some portion of the post-separation period. The claimant seeks an order for retroactive child support for the period from March 2014 to December 2014, but not thereafter.
- [46] The respondent's position is that M. lived with him more than 60% of the time from July 2015 to April 2017 and that he is therefore entitled to child support determined on that basis for that period.
- [47] I accept the claimant's evidence that M. lived with her almost full time up to the end of August 2014, when M. started to attend Ecole Andre Piolet in North Vancouver.
- [48] I therefore find that the respondent should have paid child support for the period from April 1, 2014 to August 31, 2014. Based on the parties' 2014 incomes, I am also satisfied that the claimant is entitled to child support on a shared parenting basis for the period from September to December 2014.
- [49] The claimant did not commence these proceedings until January 2016 and did not seek child support in her Notice of Family Claim, although she did commence proceedings in Provincial Court on an earlier date. This raises the question of whether it is appropriate to order retroactive child support for 2014.

- [50] The principles applicable to awarding retroactive child support were outlined in *D.B.S. v. S.R.G.*, 2006 SCC 37; and *L.S. v. E.P.*, 1999 BCCA 393. I need not review these decisions in detail. *D.B.S.* points out that a parent has an ongoing obligation to contribute to the costs of caring for the children of the relationship. The custodial parent, however, has an obligation not to delay unreasonably advancing a claim for child support. In this case I find that there was no unreasonable delay in the bringing of a claim for child support. The evidence is clear that for some time before proceedings were commenced the parties had retained counsel and were negotiating towards a settlement of this dispute. I can see no evidence of conduct that would have led the respondent to believe that the claimant was not seeking child support in that period.
- [51] I am also of the view that the respondent's conduct with respect to the payment of child support was somewhat blameworthy. I find that the respondent telephoned the claimant, who was living in Ecuador at the end of March 2014 and abruptly ended the relationship. He paid no child support. At that time the respondent was employed full time in Vancouver and could have paid child support.
- [52] Accordingly, I find that the respondent must pay child support for the period from April 1, 2014 to August 31, 2014 to the claimant on the basis that M. resided with the claimant more than 60% of the time.
- [53] The respondent's line 150 income for 2014 was \$52,952. The Child Support Guidelines ("Guidelines") amount of child support payable on that income is \$487.52 per month. I therefore order the respondent to pay \$487.52 per month for the five-month period from April to August 2014 inclusive, making a total amount of child support payable of \$2,437.60.
- [54] I find that the parties had roughly equal parenting time from September to December 2014 and child support must be determined in accordance with s. 9 of the Guidelines:
- 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.
- [55] For the reasons set out below, I am satisfied that the amount of child support payable from September to December 2014 should be determined on a straight setoff basis. For that period, I decline to impute a different income to the parties from that shown on their income tax returns. In 2014, the claimant's Guidelines income was \$25,500 and the respondent's was \$52,952. This results in the respondent being required to pay \$267.72 per month in child support for that period, for a total of \$1,070.88.

- [56] In his evidence, the respondent attempted to demonstrate that in the period from July 2015 to April 2017, he had more than 60% of the parenting time with M. Throughout that period M. attended Ecole Andre Piolet in North Vancouver.
- [57] Prior to December of 2016 the claimant lived in the Depot Road house in Squamish. From January 2016 onward, the parties agreed, sensibly, that the claimant would take M. to school on Monday morning and the respondent would pick her up after school. On Friday, the respondent would take M. to school in the morning and the claimant would pick her up in the afternoon and return her to Squamish.
- [58] For purposes of determining parenting time, the respondent acknowledged that the parties agreed that they would consider that M. had spent the entire day with the parent in whose house she slept that night. While the claimant lived in Squamish, M. usually slept at her house three nights and at the respondent's house four nights a week. This produces a parenting time ratio of 53% to the respondent and 47% to the claimant. Moreover, the parties agreed that M. would spend one month of the summer holidays with each parent and one-half of the Christmas and Spring break with each parent. The effect of this arrangement would have been to narrow the difference in parenting time.
- [59] The respondent relies on a calendar of days that he had kept which he submits showed that M. had spent approximately 63% of the time with him. Initially, the respondent testified that if his calendar did not specifically identify where M. had spent the night on a particular day, it meant that she had been where she would have been had the agreed schedule been adhered to. However, later in his evidence he insisted that M. had been with him even on certain days even though his own calendar did not support that conclusion. In addition, the respondent took the position that if M. stayed with the claimant's mother on a weekend, that should be regarded as a day she spent with him.
- [60] The parties spent almost a day of court time disputing this issue. However, I have no difficulty in finding that over the period in question, M. spent more than 40% of her time in the care of the claimant.
- [61] I must observe that it is very unfortunate that the provisions of the Guidelines tempt parents into prolonged arguments about where children spend every day of their time. In this case both parties had substantial parenting responsibilities for M. It is quite clear that in substance they agreed to co-parent M. I find as a fact that M. did spend more than 40% of her time in the care of the claimant and that child support must therefore be determined on a shared parenting basis.
- [62] Applying s. 9(a) of the Guidelines after January 1, 2015 is complicated by the fact that both parents are underemployed.
- [63] The respondent is a trained and experienced chef who has demonstrated an ability to earn an income of not less than \$50,000 per year. By her own admission, the claimant is capable of earning a similar amount and has demonstrated the ability to do so in the past.

- [64] However, both parties have elected to pursue other careers that have resulted in them earning considerably less than their qualifications would allow them to. The respondent pursued a career as a life coach for some time. He now operates a business guiding cycling trips. His line 150 income in 2016 was about \$28,000. The claimant's financial statement showed self-employment income of \$26,000. She continues to seek contract work as opposed to steady employment.
- [65] Section 19(1)(a) of the Guidelines addresses the power of the court to impute income:
- 19 (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:
- (a) the spouse is intentionally under-employed or unemployed, other than where the under-employment or unemployment is required by the needs of a child of the marriage or any child under the age of majority or by the reasonable educational or health needs of the spouse;
- [66] I find that neither of the exceptions to the power of the court to impute income set out in s. 19(1) (a) of the Guidelines applies to either party. There is no evidence that childcare needs for M. preclude either parent from pursuing full-time employment in a field in which they could earn \$50,000 per year. Neither parent has shown any reasonable health or educational needs that would impair their ability to earn that income. Both of the parties have in the past demonstrated an ability to earn that amount. Both are intelligent. The claimant has demonstrated administrative and marketing skills and the respondent is a qualified chef.
- [67] I find that the parties have the capacity to earn substantially the same income.
- [68] I therefore conclude that the starting point for determining the amount of child support payable, that is, the applicable table amounts, would result in no payment of child support. I also cannot find any evidence that the increased cost of a shared parenting arrangement should result in one party being required to pay child support to the other. Similarly, nothing in the means, needs and other circumstances of the parties requires any payment of child support.
- [69] I accept the claimant's evidence that the parties agreed initially to be responsible for any special or extraordinary expenses that they incurred. I can see no reason not to respect this agreement. I therefore make no order for payment of extraordinary expenses prior to September 23, 2017.
- [70] The parties agreed to the allocation of ongoing special and extraordinary expenses from September 1, 2017 onward in paragraphs 10, 11 and 12 of the August 28, 2017 consent order.
- [71] While this agreement was not retroactive, it appears to be consistent with the general agreement that the parties should bear the costs of childcare equally. I can see nothing in the evidence that would justify an award of any retroactive special expenses to either party.

[72] I therefore dismiss the respondent's claims for child support.

Spousal Support

[73] Both parties seek spousal support from the other.

[74] The claimant seeks spousal support from the respondent for the period from April 1, 2014 to December 31, 2014.

[75] The claimant did not seek spousal support in her Notice of Family Claim and in her trial brief sought spousal support only for the period from March to December 2014. At trial, the claimant applied to amend her Notice of Family Claim to seek spousal support beyond December 2014. I dismissed that application primarily on the grounds that no claim had been made for spousal support in the Notice of Family Claim and I was satisfied that the respondent reasonably concluded that the only claim for spousal support would be that set out in the claimant's trial brief. That claim was limited to spousal support for a specific time period and related to the particular circumstances of the claimant in the year of separation.

[76] Because the parties did not marry, entitlement to spousal support must be determined in the manner set out in the FLA:

160 If, after considering the objectives set out in section 161 [objectives of spousal support], a spouse is entitled to spousal support, the other spouse has a duty to provide support for the spouse in accordance with section 162 [determining spousal support].

161 In determining entitlement to spousal support, the parties to an agreement or the court must consider the following objectives:

- (a) to recognize any economic advantages or disadvantages to the spouses arising from the relationship between the spouses or the breakdown of that relationship;
- (b) to apportion between the spouses any financial consequences arising from the care of their child, beyond the duty to provide support for the child;
- (c) to relieve any economic hardship of the spouses arising from the breakdown of the relationship between the spouses;
- (d) as far as practicable, to promote the economic self-sufficiency of each spouse within a reasonable period of time.

162 The amount and duration of spousal support, if any, must be determined on consideration of the conditions, means, needs and other circumstances of each spouse, including the following:

- (a) the length of time the spouses lived together;
- (b) the functions performed by each spouse during the period they lived together;
- (c) an agreement between the spouses, or an order, relating to the support of either spouse.

- [77] The claimant's claim for spousal support for 2014 is based on the respondent's conduct in leaving her and M. in Ecuador, returning to Canada and abruptly ending the parties' relationship. The claimant says and I accept that the respondent did not provide any material financial support to the family until September 2014, when he began to share parenting time with M. on a more or less equal basis.
- [78] The claimant submits that she suffered a serious economic disadvantage as a result of her childcare responsibilities, sacrificing her income earning potential to assist the respondent in his failed restaurant business and in pursuit of other joint businesses that never came to fruition. She therefore claims support on the compensatory ground.
- [79] The claimant also seeks support on the grounds that she suffered economic hardship in 2014 because the respondent returned to Canada and left her in Peru with M. without providing any support to her.
- [80] I cannot find any basis on which I should order spousal support in this case. I do not find that either party suffered any material economic advantage or disadvantage as a result of the relationship or its breakdown.
- [81] I find that both parties made career choices based not on their relationship but on their desire to pursue new careers.
- [82] It is true that the claimant did assist the respondent in the establishment and running of the My Chef Restaurant. However, I am not satisfied that to do so the claimant gave up any other career opportunities that would otherwise have been available to her. In addition, there is no evidence that the respondent was enriched from the establishment and operation of the restaurant. On the evidence, I am satisfied that the restaurant was a financial failure.
- [83] I am also unable to find that the claimant spent any considerable amount of time assisting in the restaurant venture. The claimant's counsel referred me to emails and text messages that the claimant sent or received in connection with the My Chef Restaurant. However, the record shows a relatively small number of such communications. For example, Exhibit 94, a record of the claimant's text messages, shows a total of only 80 text messages in the period from June 2009 to November 2011. I prefer the respondent's evidence that the claimant did not play a major role in the operation of the restaurant.
- [84] I also note that from September 2014 to the date of trial the parties had roughly equal parenting time with M., with the respondent appearing to have slightly more parenting time than the claimant.
- [85] In addition, this was a relatively short union between two mature individuals who had relatively well established careers when they began to cohabit. The claim for spousal support relates to a period almost four years ago.

- [86] I regard the claim for spousal maintenance as a retroactive claim, being raised for the first time in these proceedings when the parties exchanged trial briefs. Applying the rationale set out in D.B.S. above, I do not consider that this is an appropriate case to order retroactive spousal support.
- [87] With the limited exception of the late stages of her pregnancy and the period after M.'s birth when she was dealing with M.'s medical condition, there is simply no evidence that the claimant limited her career opportunities because of the parties' relationship.
- [88] With respect to 2014, the claimant's own evidence is that she decided to remain in Ecuador until May and that she had budgeted sufficient funds to meet her expenses up to that period. I also do not have a sufficient evidentiary record to conclude that the claimant was in need once she returned to Vancouver in May 2014. The claimant's income in 2014 was greater than it was in 2013 and 2015, although I note that the claimant's 2015 income was reduced by an automobile expense of \$7,335.81.
- [89] Finally, there is no evidence that spousal support for the period in question, or indeed for any period, is required to promote the economic self-sufficiency of the claimant.
- [90] I also find that there is no basis for ordering the claimant to pay spousal support to the respondent. I have already found that the respondent has the ability to earn an income equal to that of the claimant by utilizing his skills as a chef. Any financial hardship that the respondent faces is the result of his own decision to pursue a less lucrative career path than the one he has the qualifications for and therefore does not warrant any award of spousal support in his favour.

Division of Family Property

Depot Road Property Revenue

- [91] The principal issue between the parties on the division of family property is how to account for the Depot Road property after separation.
- [92] The evidence led by both parties on this issue is far from perfect.
- [93] The claimant submitted a spreadsheet covering the period March 2014 to August 2017, when the Depot Road property was sold. During the period up to March 2017, the respondent made most of the mortgage payments, but the claimant made a number of payments to him to offset the payments he was making.
- [94] After taking those payments into account and factoring in other income and expenses, the claimant's position was that the respondent should be required to make an equalization payment of one-half of \$2,776, or \$1,388 to her in respect of the Depot Road property revenue and expenses post-separation.

[95] The spreadsheet prepared by the claimant's counsel breaks down the accounting for the Depot Road property into four time periods and sets out the amount of adjustment she submits is appropriate for each period:

Time Period

Net Payable

1.

March 2014 to June 2015

Respondent owed \$3,132

2.

July 2015 to June 2016

Respondent owed \$12,055

3.

July 2016 to November 2016

Claimant owed \$7,721

4.

December 2016 to August 2017

Claimant owed \$4,691

[96] The accounting results in the claimant seeking the equalization payment of \$1,388.

[97] However, this accounting fails to take into account the fact that the claimant lived in the Depot Road property from July 2015 to November 2016.

[98] From July 2015 to May 2016, the claimant paid the respondent, by agreement, \$2,950 per month to cover the expenses for the home and some other outgoings such as insurance and contributions to an RESP for M. In June 2016, the claimant paid the respondent \$1,500 but made no further payments.

[99] I accept the claimant's submission that for the first period set out in paragraph 95, the respondent received \$6,264 more than he paid out and must therefore account to the claimant for one-half of that amount, or \$3,132.

[100] However, I do not accept the claimant's submission for the period from July 2015 to June 2016. In this period, the parties lost the benefit of renting all of the house out but continued to rent out the basement suite. The claimant collected the rent from the basement suite of \$1,050 per month and paid the respondent \$2,950 per month.

- [101] This amount was equal to the rent paid by both tenants before the claimant moved into the upstairs in July 2015. However, the claimant had the benefit of living in the home in this period while the respondent was paying for his own accommodation elsewhere. The claimant's position therefore is that she should have the benefit of living rent free in the property while requiring the respondent to account for the payments he received from her.
- [102] In my view, fairness requires that the claimant account for the benefit of living in the home in this period. I fix the amount of that benefit at \$1,900 per month, which is equal to the monthly rental before the claimant moved into the home.
- [103] The additional benefit to the claimant for that 12-month period was therefore $12 \times \$1,900$ or \$22,800. This adjustment improves the claimant's position for that period from minus \$21,350 to plus \$1,450. The aggregate net benefit to both parties therefore was \$4,212. The respondent received \$2,762 in that period and must therefore pay to the claimant \$656 to equalize the financial position for that period.
- [104] In the period from July 2016 to November 2016, the claimant continued to reside in the home but ceased paying anything to the respondent. The claimant submits that she should account to the respondent for \$7,721 for this period. However, I find that fairness requires her to continue to account for the benefit she received from living in the home without paying rent during that time. In my view, the same monthly rental value of \$1,900 should be accounted for by the claimant for this period. This increases the benefit to the claimant for that period by \$9,500. This in turn converts the aggregate position for that period from a net loss of \$7,042 to a net gain of \$2,458. To equalize the position of the parties over that period the claimant must therefore pay the respondent \$11,242.
- [105] The evidence supports the claimant's accounting of the period from December 2016 to the date the house was sold. This shows that the respondent is entitled to an equalization amount of \$4,691 for that period.
- [106] In the result, the following equalization payments should be made:
1. For March 2014 to June 2015, to the claimant \$3,132;
 2. For July 2015 to June 2016, to the claimant \$656;
 3. For July 2016 to November 2016, to the respondent \$11,242;
 4. For December 2016 to August 2017, to the respondent \$4,691;
 5. Net amount payable to the respondent, \$12,145.
- [107] The above assessment does not include the amounts received by the claimant as a result of home stay students. I accept the claimant's submission that a portion of the amount she received for such students was compensation to her for assisting them. In addition, the claimant was required to purchase food for the students out of the payments they made. Taking these factors into account, I can see no basis for an adjustment for this claim.

- [108] The final issue in dispute with respect to the accounting for the Depot Road property is the revenue received from Air BnB. The claimant acknowledges that she received \$28,923 in Air BnB revenue from the Depot Road property after she moved out in November 2016. However, she also spent \$12,000 to furnish and provide supplies for the house to prepare it for Air BnB rentals. She testified that she only recovered \$7,000 for these furnishings when the house was sold. I accept her evidence in this regard. This results in net Air BnB revenue of \$23,923.
- [109] The claimant submits that she should be credited with 70% of this revenue because she took the initiative to arrange for Air BnB accreditation and looked after all of the administration of the Air BnB business. However, I am not satisfied that it would be significantly unfair for there to be an equal division of this revenue. I agree that the claimant did the work necessary to obtain this revenue. However, that revenue was achieved because the property was not rented out.
- [110] On balance, I find that the presumption of the FLA in favour of an equal division of family property should apply to this revenue. The claimant must therefore account to the respondent for one-half of the net Air BnB revenue. However, I do think it is reasonable to award some compensation to the claimant for her efforts in generating this revenue. I fix that amount at \$2,500. The net revenue from Air BnB is therefore \$21,423. The claimant must account to the respondent for 50% of that amount, that is, \$10,712.

The Respondent's Claims set out in Exhibit 65

- [111] The respondent produced his own accounting. In it he calculated that the claimant had received benefits of more than \$200,000 for which she was required to account to him. The benefits are summarized in a table that was marked as Exhibit 65 at trial. In his submissions the respondent produced a spreadsheet which modified his claim somewhat but took the same basic approach.
- [112] In the result, the respondent claims \$104,493.82 from the claimant. I will deal with each of the respondent's claims. Before doing so however, I observe that some of these claims relate to events that occurred before separation and must accordingly be dealt with on different principles than items subject to division as family property.
- [113] The respondent's first claim is for \$12,888.50, which he says represents one-half of the difference between the amount he and the claimant contributed to the down payment on the Depot Road property.
- [114] I reject this claim for two reasons. The first is that the payments in question were made while the parties were cohabiting. They are therefore not subject to equalization under the FLA.

- [115] The second ground on which I reject this claim is that it should more properly be dealt with as part of the analysis of excluded property that can be traced into the Depot Road property. I will address the questions of excluded property and unequal division of family property later in these reasons.
- [116] The claims advanced in paragraphs 2 to 8 of Exhibit 65 relate to the accounting of revenues and expenses for the Depot Road property. I have already dealt with that issue earlier in these reasons.
- [117] The respondent's 9th claim is for a share of the proceeds of sale of three automobiles that he says the claimant sold. These vehicles were all sold prior to separation and are therefore not subject to division.
- [118] The respondent's 10th claim is for \$151 for expenses he incurred with respect to the house while the claimant was still in Ecuador. I reject this claim because the respondent was in possession of the home and receiving the revenue from it in this period.
- [119] The respondent's 11th claim is for \$750, which he says is one-half of the value of the Gold Crown timeshare. The claimant agrees with this amount.
- [120] The respondent's 12th claim is for one-half of the proceeds that the claimant received from the sale of the furniture purchased for the Cuenca apartment in Peru. I do not require the claimant to account for the sale of this furniture. In my view, it was reasonable for the claimant to use the proceeds of this to meet the expenses of the family who were left in Peru when the respondent ended the relationship. I have taken the receipt of these funds into account in my decision not to award retroactive spousal support to the claimant for that period.
- [121] The respondent's 13th claim is for one-half of the arrears of child support received by the claimant from her ex-husband for the two children of their marriage. He claims that the claimant received lump sum payments in the amount of \$34,000 from her ex-husband. He does not specify when these amounts were received but presumably is taking the position that they were received before the parties separated. The claimant says she actually received a total of \$21,500 in arrears payments either from the Family Maintenance Enforcement Program ("FMEP") or from her ex-husband's mother.
- [122] The respondent's claim in this regard is misconceived. Under the FLA, any assets owned by either spouse at the date of separation are family property, unless they are excluded property or expressly made subject to an unequal division. Prior to separation, spouses are entitled to spend their own money as they see fit. According to the FMEP records, the claimant received \$13,800 from her ex-husband in February 2014. I accept the claimant's evidence that she used these funds to meet her expenses.
- [123] Any child support payments received by the claimant from her former husband after separation are not subject to division in any circumstances.

- [124] The respondent's 14th claim is for one-half of any refund the claimant received from the Province of British Columbia because of the teacher's strike in September 2014, which was post-separation. The maximum amount payable to eligible parents who applied for the payment was \$520. It is not clear to me on what basis the respondent is entitled to one-half of any funds the claimant received. I do not allow this claim.
- [125] The respondent's 15th claim is \$12,525 for one-half of the Universal Child Tax Benefit. This amount is based on the total amount received by the claimant from the month after M.'s birth, November 2009 to October 2016, when the respondent began to receive one-half of the benefit.
- [126] Of the 84-month period claimed, the parties cohabited 54 months and the claimant has no obligation to account separately for payments received in that period. In addition, M. lived exclusively with the claimant through August 2014, a period of an additional five months. This reduces any claim the respondent can advance to some 25 months.
- [127] I would not allow this claim. The respondent could have applied to the government for the benefit at any time. In my view, it would be unfair to the claimant to retroactively require her to pay a portion of the benefit to the respondent.
- [128] The same reasoning applies to claim number 16. In my view it was incumbent on the respondent to apply for these benefits if he felt he was entitled to share them.
- [129] The respondent's claims numbered 17 to 27 relate to extraordinary expenses he says he incurred for M.'s care. These claims are not relevant to a division of family property. I have already indicated that the parties agreed to be responsible for special expenses they initiated. In accordance with that agreement, the claimant does not seek to recover any special expenses from the respondent and it would be unfair to permit the respondent to ignore it at this stage of these proceedings.
- [130] The respondent's 28th claim is for occupation rent for the period that the claimant lived in the Depot Road property and did not contribute to expenses. I have already taken this claim into account in dealing with the accounting for the Depot Road property.
- [131] The respondent's 29th claim is for a claim for damage to a rental truck he used to move furniture to Depot Road. However, he has not paid this claim and it was not pursued by the rental company and is now statute-barred. There is therefore no basis for it.

Proceeds of Sale of Depot Road Property

- [132] In September 2017, the Depot Road property was sold. After payment of all closing costs, encumbrances and tax arrears, the net proceeds of sale were \$391,429.88, according to the Order to Pay prepared by the conveyancing solicitors. In accordance with an order of August 23, 2017, the parties have each received \$50,000, leaving a balance in trust of \$291,429.88.

- [133] The FLA provides for an equal division of family property, unless it would be significantly unfair to do so. The claimant submits that some portion of the equity in the Depot Road property should be regarded as excluded property under the FLA.
- [134] The parties agree that some portion of the funds in trust from the sale is family property. However, there is a dispute over the portion of the sale proceeds that should be regarded as excluded property under the FLA.
- [135] The claimant submits that she is entitled to receive \$55,523 from the sale proceeds as excluded property. I accept her evidence that she sold her North Vancouver property in 2011 and that \$55,523 of the net proceeds were used as part of the down payment on the purchase of the Depot Road property. I also accept that there was no increase in the value of the North Vancouver home from the beginning of cohabitation up to the time it was sold. I accept the claimant's evidence that that period, coming as it did just after the financial crises of 2008, was one in which there was no material movement in property values in North Vancouver.
- [136] Ordinarily, these funds would be excluded property under the FLA that could be traced into the proceeds of sale of the Depot Road property. However, in this case, the situation is complicated by financial dealings between the parties in 2011. The respondent acknowledges that the claimant contributed \$55,523 to the down payment, but he testified that he reimbursed her for one-half of that amount.
- [137] The respondent testified that he contributed \$10,000 as a deposit on the Depot Road property as part of \$35,000 that he says was a gift from his parents and an inheritance from his grandfather. However, the respondent produced no admissible evidence to substantiate these assertions. The letters he tendered from his parents are inadmissible to prove the truth of the assertions contained in them. The respondent offered no reasonable explanation why he could not have obtained admissible evidence to establish the source of these funds.
- [138] The claimant submits that the respondent has not established that any of the respondent's excluded property can be traced into the funds used to purchase the Depot Road property.
- [139] Her counsel points out that there is no evidence of the fair market value of the respondent's Vancouver condominium on the date that cohabitation began. She also relies on the fact that the respondent did not receive these proceeds until after the Depot Road property was purchased. Finally, she submits that there is no evidence as to the extent to which the respondent may have paid down debt on his property during cohabitation.
- [140] I find that the parties did agree to sell their respective properties and pool their resources to purchase the Depot Road property.

- [141] I find the net proceeds that the respondent received from the sale of his Vancouver property were excluded property. The respondent's property was subject to the same market forces as the claimant's and I am satisfied that his property did not increase in value in the period between September 2009 and September 2011, when it was sold. Based on the whole of the evidence, I am also satisfied that the respondent did not make any material payments to reduce the amount of debt registered against the property in that period.
- [142] These net proceeds were not received by the respondent until after the Depot Road property had been purchased. The buyer's statement of adjustments for the property shows that \$80,523.88 was paid by the parties as a cash payment of part of the purchase price. Of this amount, \$55,523 was paid by the claimant. The claimant admits that the balance of \$25,000 was paid by the respondent but takes the position that that amount cannot be excluded property because it was paid before the respondent received the net proceeds of sale from his Vancouver property. Including the initial deposit of \$10,000, the respondent therefore contributed \$35,000 to the down payment on the Depot Road property.
- [143] Section 95 of the FLA permits the court to make an unequal division of family property if it would be significantly unfair not to do so. Among the circumstances the court may take into account is an agreement between the parties. In this case, I am satisfied that it would be significantly unfair to the respondent not to recognize his \$35,000 contribution to the down payment as grounds for an unequal division of the proceeds of sale of the Depot Road property.
- [144] Recognizing that contribution is consistent with the agreement of the parties to sell their respective homes and use the proceeds to acquire a new home.
- [145] I find that it was agreed that the respondent would use the equity in his Vancouver home to fund the purchase of the Depot Road property and that the respondent contributed to the down payment because he reasonably expected to receive proceeds from the sale of his Vancouver property to make up for that contribution. I am satisfied that the only reason the Vancouver home proceeds were not paid directly to the Depot Road property purchase was because the Vancouver home did not sell until after the purchase price for the Depot Road property had to be paid.
- [146] In reaching my conclusion that it would be significantly unfair to the respondent not to take his contribution to the down payment into account, I also take into account the payment of the \$23,150 made by the respondent to the claimant on October 4, 2011. While I am unable to determine that this amount was paid expressly to equalize the down payment on the Depot Road property, I am satisfied that the payment was made as part of the general agreement to pool resources to purchase that property.
- [147] Accordingly, I order that the net proceeds of sale after deduction of the claimant's excluded property should be divided so that the first \$35,000 of those net proceeds be paid to the respondent.

[148] The net proceeds of sale of the Depot Road property shall therefore be distributed as follows:

1. The first \$55,523 shall be paid to the claimant as excluded property;
2. From the remaining balance the first \$35,000 shall be paid to the respondent as an unequal division of family property;
3. The balance remaining of \$200,906.88 will be divided equally between the parties, subject to an equalization payment described in paragraph 149 from the respondent to the claimant as determined in these reasons.

[149] The net proceeds of sale available for distribution were reduced by payment of a mortgage securing the respondent's post-separation debts. Half of that amount would have been his pursuant to an equal division and half of it belonged to the claimant. However, the other half reduced the amount the claimant would otherwise have received from the sale proceeds. The respondent must therefore pay to the claimant half of \$55,791, or \$27,895.50.

Balance of Family Property and Debt

[150] The remaining outstanding items of family property are relatively small.

[151] I find that the balances outstanding in the parties' bank accounts on March 30, 2014 are subject to equal division, with one exception. I accept the claimant's submission that the balance in her TD chequing account is excluded property, as it represented the remaining balance of arrears of child support that she received from her ex-husband shortly before the parties separated.

[152] Accordingly, I find that the claimant's financial assets and debts subject to division at separation were as follows:

Tangerine chequing account

\$335.00

TD Mutual Fund RSP

\$34.59

Credit Card Debt

(\$670.00)

Net Position

(\$300.00)

[153] I generally accept the claimant's submission that the respondent's financial disclosure was inadequate in this case. The accounts that have been identified in the evidence in the name of the respondent at separation and therefore subject to division are as follows:

1.

VanCity Spending Account

\$1,710

2.

VanCity TFSA

\$678

3.

VanCity Membership Shares

\$517

4.

PC No Fee Bank Account

\$895

5.

PC No Fee Bank Account

\$234

6.

Tangerine Savings Account

\$125

7.

Franklin Templeton Investment Account

\$3,550

Net Position

\$7,709

[154] Despite the unsatisfactory disclosure made by the respondent, I am not able to draw an inference that he has concealed property. From the evidence, I can infer that he has received some financial assistance from his family. However, except for the respondent's first month of employment back in Vancouver, the parties had not had steady employment for some time when they separated.

[155] In order to equalize the amounts in the accounts, the respondent will pay the claimant \$4,004.

- [156] The only other assets in issue are a Mitsubishi Delica light truck and two specialized mountain bikes owned by the respondent.
- [157] The respondent testified that at separation the Mitsubishi truck was in need of a major repair to the turbo drive and that he sold it for \$1,200. The claimant filed in evidence, online advertisements for similar vehicles showing asking prices of \$11,000 to \$13,000. In addition, the claimant produced an email from the respondent to a prospective purchaser describing the vehicle as being in pristine condition. However, the respondent produced a copy of the motor vehicle tax transfer form filed with the Insurance Corporation of British Columbia stating that the transfer price was \$1,200.
- [158] I am somewhat sceptical about the respondent's evidence on this point. However, I am not prepared to find that he was lying to the court about this sale. Given the relatively small amount of money involved in this issue, the fact that the tax transfer form confirms the price and my overall assessment of the respondent's credibility, I accept that the Mitsubishi was sold for \$1,200.
- [159] The remaining family property claimed is two high-end bicycles owned by the respondent at separation. The respondent submits that these bicycles have a value of \$600. However, there is evidence that he was offering them for sale at significantly higher prices. Based on the prices being sought for the bicycles in these advertisements and the lack of any documentary evidence confirming the respondent's estimate, I find that the bicycles had a value of \$1,695 and \$1,950 respectively, for a total value of \$3,645, which is subject to equal division.
- [160] The total amount subject to division for the vehicle and the bicycles is therefore \$4,845 and to equalize the value of these chattels, the respondent must pay the claimant \$2,423.

Fine

- [161] The claimant seeks an order imposing a fine of \$5,000 on the respondent pursuant to s. 213(1) and (2) of the FLA:

213 (1) This section applies if a person

- (a) fails to comply with
 - (i) an order for disclosure made under section 212 [orders respecting disclosure], or
 - (ii) a requirement to disclose information in accordance with the Supreme Court Family Rules or the Provincial Court (Family) Rules,

within the time or in the manner required by the order or Rules, or

- (b) provides information that is incomplete, false or misleading.
- (2) In the circumstances set out in subsection (1), the court may do one or more of the following:

- (d) make an order requiring the person described in subsection (1) to pay
- (i) a party for all or part of the expenses reasonably and necessarily incurred as a result of the non-disclosure of information or the incomplete, false or misleading disclosure, including fees and expenses related to family dispute resolution,
- (ii) an amount not exceeding \$5 000 to or for the benefit of a party, or a spouse or child whose interests were affected by the non-disclosure of information or the incomplete, false or misleading disclosure, or
- (iii) a fine not exceeding \$5 000;

[162] In this case, I am satisfied that the respondent has failed to meet his disclosure obligations in this litigation and has put the claimant to unnecessary expense to obtain the information necessary to present her case. In particular, the respondent:

1. Failed to disclose the disposal of his vehicle and bicycles on his Form 8 Financial Statement;
2. Did not produce proper copies of his VanCity banking statements until almost the end of the trial;
3. Did not comply with document disclosure orders of Master McDiarmid and Justice Pearlman to produce outstanding documents.

[163] As is apparent from the above summary, the claimant was put to the expense of making two court applications to obtain the documents. In addition, the claimant incurred substantial legal expense as a result of time spent by her counsel corresponding with the respondent and his former counsel to obtain proper document disclosure.

[164] I appreciate that the respondent has been without counsel for much of this case. Nevertheless, he is an intelligent, articulate person who was capable of presenting a thorough argument in this case. In my view, this court must make it clear that the parties to a property or support dispute must make adequate and timely disclosure of relevant documents.

[165] While I decline to draw an adverse inference against the respondent for his non-disclosure, I find that this is a case in which compensation to the claimant under s. 213(2)(d)(i) and (ii) of the FLA in the amount of \$5,000 should be ordered.

[166] The net amount owing after setting off the cross claims of the parties will be paid from the paying party's share of the house sale proceeds.

Summary of Orders

[167] The net proceeds of the sale of the Depot Road property still held in trust will be distributed as follows:

Net sale proceeds per

Statement of Adjustments

\$291,429.88

To the claimant for excluded property

\$55,523.00

To the respondent as unequal

share of family property

\$35,000.00

90,523.00

Balance

\$200,906.88

[168] The respondent will pay the claimant the following amounts:

1.

Arrears of child support from 2014

\$3,508.48

2.

Equalization payment for bank accounts

\$4,004.00

3.

1/2 of value of Mitsubishi truck and bicycles

\$2,423.00

4.

1/2 of post-separation debt paid from sale proceeds

\$27,895.50

5.

Fine pursuant to Family Law Act

\$5,000.00

[169] The claimant will pay the respondent the following amounts

1.

Equalization payment for Depot Road property

\$12,145.00

2.

1/2 of net Air BnB revenue

\$10,712.00

3.

1/2 of value of timeshare

\$750.00

[170] The \$291,429.88 held in trust will be distributed in the manner set out in Schedule A.

Costs

[171] I have concluded that the claimant was substantially successful in this action and is entitled to the costs of the action. I acknowledge that the claimant did not succeed on every issue raised. However, she was successful on the issues involving the largest claims and those that occupied a substantial amount of time at trial.

[172] The principles applicable to an award of costs in family law proceedings were reviewed in *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 (C.A.).

[173] In this case the respondent sought payment of over \$100,000 from the claimant, a claim that I substantially dismissed. He also made claims for spousal and child support that were without merit. He sought to establish a claim to excluded property without any proper evidentiary basis.

[174] The respondent has not shown any reason why the usual order that the successful party is entitled to its costs should not be made.

[175] The costs will be assessed as a matter of ordinary difficulty.

"Sewell J."

SCHEDULE A

Net sale proceeds of Depot Road property

\$291,429.88

Less:

Excluded property

55,523.00

Unequal division

35,000.00

90,523.00

\$200,906.88

Claimant

1/2 of \$200,906.88 =

\$100,453.44

Plus:

Payment as ordered from respondent

14,935.48

1/2 of post-separation debt mortgage

27,895.50

42,830.98

143,284.42

Less payment to respondent

23,607.00

\$119,677.42

Plus excluded property

55,523.00

\$175,200.42

Respondent

1/2 of \$200,906.88 =

\$100,453.44

Plus payment from claimant:

23,607.00

124,060.44

Less:

Payment to claimant

14,935.48

1/2 of post-separation debt mortgage

27,895.50

42,830.98

81,229.46

Plus unequal share of family property

35,000.00

\$116,229.46

Total

\$291,429.88

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