

CANADA / JUDGMENT

Armani v. Lovin

2009 BCSC 208

COURT

Supreme Court of British Columbia

DECIDED

20 February 2009

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2009 BCSC 208 Armani v. Lovin

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Armani v. Lovin,

2009 BCSC 208

Date: 20090220

Docket: E073417

Registry: Vancouver

Between:

Geanina-Anamaria Armani

Plaintiff

And

Laurentiu Lovin also known as Laurentiu Armani

Defendant

Before: The Honourable Mr. Justice Ehrcke

Reasons for Judgment

Counsel for the Plaintiff

M. J. Wesley

Counsel for the Defendant

(December 1-5 only)

F. C. M. Lowther

Acting on his own behalf

(remainder of trial)

L. Lovin a.k.a. L. Armani

Date and Place of Trial/Hearing:

December 1-5, 16-19, 2008

January 5, 2009

Vancouver, B.C.

Introduction

- [1] Ms. Armani commenced this action for divorce and corollary relief by a statement of claim filed October 10, 2007 and subsequently amended. She seeks sole custody of the couple's only child, Sebastian. She also seeks an order for child support, spousal support, division and reapportionment of family assets. The defendant, whom I shall refer to as Mr. Armani, was granted leave to amend his statement of defence at the beginning of the trial. He seeks a shared parenting arrangement. He agrees to pay child support, but he claims that his income is substantially lower than what is alleged by Ms. Armani.
- [2] He takes the position that Ms. Armani is not entitled to spousal support or to a property reapportionment in her favour. He says that the home where they lived in the summer of 2008 is not a family asset, and Ms. Armani has no legitimate claim to it.

Background Facts

- [3] Ms. Armani came to Canada from Romania with her parents when she was 17. Before meeting Mr. Armani, she had previously been married and divorced. She had also attended university for a few years, accumulating about \$40,000 in student loan debt.
- [4] Mr. Armani grew up in Romania and completed Grade 8 there. He attended a school of the arts, which he said is the equivalent of high school, and obtained a diploma in music.
- [5] In the summer of 1998, Ms. Armani travelled to Romania for a holiday. There she met Mr. Armani, who was working in a band as a singer and musician. He was 22 years old at the time and she was 27.
- [6] They were married on October 10, 1998, and they continued to live in Romania until June 26, 1999, when they came to Canada. She sponsored his immigration.
- [7] Mr. Armani did not speak English. Once in Canada, he took English courses and worked at various jobs including washing dishes and unloading trucks. Ms. Armani took courses at the University of British Columbia and worked part-time in a restaurant.

- [8] In 2000, the couple lived for 5 or 6 months in New York and then returned to Vancouver. Mr. Armani took English classes during the day and worked at night. He delivered pizzas, worked in restaurants, and later worked in the automotive industry. Ms. Armani took university courses and worked part-time at the Westin Bayshore.
- [9] On December 16, 2001, the couple's only child, Sebastian, was born. For the next 11 months, Ms. Armani stayed at home to care for him. She then went back to work at the Bayshore, and both parties shared the household responsibilities. In April 2003, she started a second full-time job, as a receptionist at Premier Security. She did that for one year, giving Mr. Armani her paycheque. She asked him to try to save as much as possible.
- [10] From the spring of 2003 until February 2006, Mr. Armani worked at the Automotive Styling Centre, earning about \$14 per hour. He started doing some leather upholstery work on his own after hours.
- [11] In 2004, Ms. Armani took a one-month course to become certified to teach English. Since then, she has been working part-time teaching English as a second language.
- [12] Also in 2004, the parties discussed buying real estate in Romania as an investment. Ms. Armani went to Romania for a month with Sebastian to look at apartments but did not buy anything as prices were higher than they expected.
- [13] In October 2005, they purchased a condominium on Bennett Street in Burnaby. The purchase price was \$173,000, and title was in Mr. Armani's name. He borrowed \$8,650 from a friend for the deposit, and took a first mortgage of \$168,869 for the balance of the purchase price and closing costs. Ms. Armani testified that the property was put in Mr. Armani's name because they feared that her student loans would be an impediment to obtaining the mortgage. They lived there with their son until around Easter 2007, when they moved into a townhouse on Dawson Street. They then rented out the Bennett Street condominium until it was sold in December 2007.
- [14] In February 2006, Mr. Armani quit his job at the Automotive Styling Centre, and started working for himself full-time in his own business, Absolute Styling And Entertainment, installing leather upholstery, heated seats, and sound systems in automobiles.
- [15] In April 2006, Ms. Armani started working part-time for Tamwood International, teaching English as a second language. She started out working 2 hours per day, but by September she was working twice that amount. One month she worked 6 hours a day.
- [16] In the fall of 2006, Ms. Armani briefly became involved in a relationship with another man. She testified that when Mr. Armani found out, their relationship was never the same; he was suspicious of her and seemed unable to forgive and forget.
- [17] In December 2006, Mr. Armani asked Ms. Armani to sign a document that he has described as a separation agreement. She eventually did sign it, but then destroyed it.

- [18] The couple continued to live together in the Bennett Street home, but their relationship was clearly under stress. Around Easter of 2007, they moved from Bennett Street to the Dawson Street townhouse.
- [19] Around the middle of September 2007, Ms. Armani moved out, taking Sebastian with her. Around two weeks later, at the beginning of October 2007, she returned, and again lived in the same home as Mr. Armani.
- [20] At the end of December 2007, they went on a previously arranged ski holiday along with another couple.
- [21] On January 26, 2008, they had a fight, and the police were called. Ms. Armani moved out of the Dawson Street home with Sebastian, and has not lived under the same roof as Mr. Armani since.

The Agreement

- [22] In this litigation, Mr. Armani relies heavily on a document that he describes as a separation agreement. Ms. Armani takes the position that the document Mr. Armani has put in evidence is not a valid separation agreement.
- [23] Both parties testified about the agreement, and their accounts differ in some details. From the evidence, I find the following facts.
- [24] Around the beginning of December 2006, Mr. Armani presented Ms. Armani with an agreement that had been prepared, at his request, by his lawyer. According to Ms. Armani's testimony, which I accept on this point, he told her that in light of her affair, she had to sign the agreement in order to prove that she loved him. He told her this would allow them to start over again. He told her that if she signed, he would never mention her affair again, but if she did not sign, she would lose everything, including their child. Ms. Armani refused to sign the agreement for several weeks. He kept asking her to do so, and finally, one day in late December 2006 or early January 2007, he took her to his lawyer's office in a shopping mall. She was crying and distraught. It was around 6:00 p.m., and the lawyer was not there to witness the document. According to Ms. Armani, the lawyer's secretary said she could not witness it. Ms. Armani signed four copies of the document, unwitnessed. Mr. Armani took the copies home in his briefcase. One night, she took the copies out of his briefcase and destroyed them. She said she did so because she was traumatised.
- [25] Because Ms. Armani destroyed the signed copies, Mr. Armani has only been able to present an unsigned copy in evidence. Ms. Armani testified that she is not certain the copy put into evidence is identical to the originals, but she said it looks generally the same. Mr. Armani testified that he got the copy that was put into evidence from the lawyer who drafted it, and that it is the same as the one that was signed. I am satisfied on a balance of probabilities that it is the same as the signed version.

- [26] Mr. Armani's evidence differs from Ms. Armani's. He testified that when they went to his lawyer's office, not only did Ms. Armani sign the agreement, but the signatures were properly witnessed. I do not accept his evidence on this point.
- [27] Mr. Armani testified that the reason there were four copies of the agreement was so that one copy could be kept by the lawyer, one copy could be filed with the court, and each of the parties would have one copy. If the documents had been properly executed at the lawyer's office, as Mr. Armani maintains, then there is no reason why all four copies would have been taken home by the parties. Rather, the lawyer or his secretary would have kept two copies: one for the lawyer's records and another for court purposes. The fact that none of the copies was retained at the lawyer's office is more consistent with Ms. Armani's account that the lawyer was not present because it was closing time, and that the documents were never properly executed because they were never witnessed.
- [28] The document that Mr. Armani has put in evidence as the agreement is quite one-sided. It was drawn up by Mr. Armani's lawyer, with no input from Ms. Armani. According to the terms of the document, Mr. Armani would pay \$13,000 of Ms. Armani's credit card debts, but she would be responsible for repaying all of her student loans. Ms. Armani would give up any claim to the Dawson Street property. She would forever give up any claim to spousal support, and would agree to joint custody and guardianship of their child. Clause 6.1 provided that she would receive no child support, but if she moved to a different residence and the child lived principally with her, Mr. Armani would pay child support of \$230 per month, based on an income of \$25,000.
- [29] I find on a balance of probabilities that there never was a valid agreement between the parties. The signature page contemplated that in order for the document to be properly executed, both parties would sign and their signatures would be witnessed. That was never done. Ms. Armani signed under circumstances in which, because of the lack of witnesses to the signatures, it would be reasonable to believe that the document would not be legally binding. She thereafter destroyed all copies of the document, further confirming that she never intended to enter into a legally binding agreement. I therefore find that the parties never entered into a binding contract.
- [30] If I am wrong and there was in fact a contract, I would in any event set aside the agreement for unconscionability. In this context, unconscionability implies an inequality of bargaining power, where the stronger party took unfair advantage of the weaker through an unconscionable use of power: *Morrison v. Coast Finance Ltd.* (1965), 55 D.L.R. (2d) 710 (B.C.C.A.); *Jonasson v. Jonasson*, [1995] B.C.W.L.D. 1509 (S.C.), affirmed (1997), 30 R.F.L. (4th) 20 (B.C.C.A.); *Miglin v. Miglin*, [2003] 1 S.C.R. 303, 2003 SCC 24.
- [31] In *Rick v. Brandsema*, 2009 SCC 10, the Supreme Court of Canada recognized that the negotiation of an agreement in the context of a disintegrating spousal relationship is uniquely difficult. The Court observed at para. 1:

The reality of this singularly emotional negotiating environment means that special care must be taken to ensure that, to the extent possible, the assets of the former relationship are distributed through negotiations that are free from informational and psychological exploitation.

[32] The manner in which the agreement was crafted in the present case does not meet this standard.

[33] I accept Ms. Armani's evidence that she never wanted to sign the agreement, and only did so after many weeks of pressure because Mr. Armani threatened that she would lose everything if she did not sign. She signed without the benefit of any legal advice, and without full disclosure of Mr. Armani's economic circumstances, particularly the details of his business income and expenses. The terms of the agreement are heavily weighted in Mr. Armani's favour, and were not the result of any negotiations or even discussions between the parties. I conclude that Ms. Armani only signed because of the unconscionable pressure to which Mr. Armani subjected her, and the agreement must be set aside on that basis.

The Separation

[34] One of the issues that need to be determined is the date on which the parties separated.

[35] Section 8(1) of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) provides that the court may grant a divorce based on a breakdown of the marriage, and s. 8(2)(a) provides:

- (2) Breakdown of a marriage is established only if
 - (a) the spouses have lived separate and apart for at least one year immediately preceding the determination of the divorce proceeding and were living separate and apart at the commencement of the proceeding; or ...

Section 8(3) explains how the period of separation is calculated:

- (3) For the purposes of paragraph (2)(a),
 - (a) spouses shall be deemed to have lived separate and apart for any period during which they lived apart and either of them had the intention to live separate and apart from the other; and
 - (b) a period during which spouses have lived separate and apart shall not be considered to have been interrupted or terminated
 - (i) by reason only that either spouse has become incapable of forming or having an intention to continue to live separate and apart or of continuing to live separate and apart of the spouse's own volition, if it appears to the court that the separation would probably have continued if the spouse had not become so incapable, or
 - (ii) by reason only that the spouses have resumed cohabitation during a period of, or periods totalling, not more than ninety days with reconciliation as its primary purpose.

- [36] Usually, it is not difficult to determine the date of separation; it is the date on which the parties move into physically different residences with the intention of living separate and apart from one another. In some cases, a couple may decide to separate but continue living under the same roof for economic reasons. Often, they agree that certain rooms will be "his" and other rooms will be "hers". Provided that they have both formed the same intention to live separate and apart, there is usually no disagreement about the date of their separation.
- [37] The present case is unusual, because the parties disagree strongly about the effective date of their separation.
- [38] Mr. Armani submits that the parties have been separated since December 2006, when he presented Ms. Armani with a "separation agreement" and asked her to sign it.
- [39] Ms. Armani submits that the separation did not occur until she physically moved away from Mr. Armani for the last time on January 26, 2008. I say "for the last time", because she had earlier moved out in September 2007, but returned a week or so later. She admitted that the separation date was listed as December 2006 on the statement of claim as well as in two affidavits she had filed, but she said the 2006 date was not accurate. She said they continued to have intimate relations after that date, and that they lived together as a couple until January 2008.
- [40] I do not accept the position advanced by either party. As I have already found, the December 2006 agreement was not a valid separation agreement. Even at the time they signed it, their intention was to continue living together. I accept Ms. Armani's evidence that she signed the agreement under pressure, because Mr. Armani said this was the only way to repair their damaged relationship.
- [41] During much of the year that followed, the parties not only lived together, but presented themselves to their friends as a married couple. Ms. Armani called some of those friends as witnesses to testify that during the spring and summer of 2007, the parties continued to socialize as a couple, and no one thought of them as being separated.
- [42] On the other hand, I do not accept Ms. Armani's position that the separation did not occur until January 26, 2008. Ms. Armani filed her statement of claim initiating these proceedings on October 10, 2007. She appeared before Mr. Justice Kelleher on December 6, 2007 and obtained a declaration under s. 57 of the Family Relations Act, R.S.B.C. 1996, c. 128, that the parties have no reasonable prospect of reconciliation. I do not believe that she would have done these things if, as she now maintains, she did not consider herself separated from Mr. Armani until January 26, 2008.

[43] I conclude that the parties separated, within the meaning of the Divorce Act, at the end of September 2007, when Ms. Armani moved out for the first time. Although she came back a few weeks later and lived under the same roof as Mr. Armani for a further few months, by that time both parties had come to the view that their relationship was over, and they only continued to live at the same residence for economic reasons. I am satisfied that they ceased to live together as man and wife from that date, that is, the end of September 2007.

Divorce

[44] The parties seek a divorce. They have been living separate and apart for a period of over one year. All the requirements of the Divorce Act having been satisfied, it is ordered that they shall be divorced from each other effective 31 days after today's date.

Custody and Guardianship

[45] Ms. Armani seeks sole custody of their son Sebastian. Mr. Armani seeks a shared parenting arrangement in which Sebastian would reside with him at least 2-3 days per week. The current arrangement is that Sebastian resides primarily with Ms. Armani, and Mr. Armani has overnight access one day during the week, and every second weekend from after school on Friday until the start of school Monday morning.

[46] Ms. Armani submits that she should have sole custody because she has always been Sebastian's primary caregiver. She also suggests that Mr. Armani has some disreputable friends with whom Sebastian should not be associating. Mr. Armani denies that suggestion. I do not find any support in the evidence for the allegation that Mr. Armani has disreputable friends who are a bad influence on Sebastian.

[47] Mr. Armani submits that Ms. Armani was neglectful of Sebastian during the time of her affair, and that he is therefore a better parent. If Ms. Armani occasionally focused more on her own needs than those of Sebastian during the time of her affair, I find that these were rare instances which have not been repeated in the last year or so.

[48] I am satisfied that both parties love their child and have been good parents to him. Although Mr. Armani has taken a significant role in his upbringing, Ms. Armani has been the primary caregiver.

[49] In deciding the issue of custody and guardianship, I must be guided by what is in Sebastian's best interests, not what would be in the interests of the parents.

[50] On all the evidence, I am satisfied that it is in Sebastian's best interests that the parties should have joint custody and guardianship, and that Sebastian's primary residence should be with Ms. Armani, and I so order. Mr. Armani shall have reasonable access, which shall include overnight access every week from after school Tuesday until the start of school Wednesday morning, and every second weekend from after school on Friday until the start of school Monday morning.

- [51] The parties will share access equally during Christmas break, Spring break, and the summer holidays.
- [52] The joint guardianship shall be on the so-called "Joyce model". That is to say:
- (a) The parents are to be joint guardians of the estate of the child;
 - (b) In the event of the death of either parent, the remaining parent will be the sole guardian of the child;
 - (c) The plaintiff, who has primary responsibility for the day-to-day care of the child, will have the obligation to advise the defendant of any matters of significant nature affecting the child;
 - (d) The plaintiff will have the obligation to discuss with the defendant any significant decisions which have to be made with respect to the child, including significant decisions concerning his health (except emergency decisions), education, religious instruction, and general welfare, and the defendant will have the obligation to discuss these issues with the plaintiff, and each parent will have the obligation to try to reach agreement with respect to those major decisions;
 - (e) In the event that the parents cannot reach agreement with respect to any major decision despite their best efforts, the plaintiff will have the right to make such decision, and the defendant will have the right, under s. 32 of the Family Relations Act, to seek a review of any decision which he considers contrary to the best interests of the child; and
 - (f) Each parent will have the right to obtain information concerning the child directly from third parties, including teachers, counsellors, medical professionals and third party caregivers.

Division of Assets

- [53] Pursuant to s. 56 of the Family Relations Act, each spouse is entitled to an undivided half interest in each family asset upon the happening of what is commonly referred to as a "triggering event", which may be a separation agreement, a declaration under s. 57, an order for dissolution of marriage or judicial separation, or an order declaring the marriage null and void. I have found that the agreement of December 2006 is not a valid separation agreement. The triggering event in the present case is therefore the s. 57 declaration made by Mr. Justice Kelleher on December 6, 2007.
- [54] What vests on the date of the triggering event is the spouse's interest in the asset itself, not the value of the asset: *Ghurani v. Ghurani* (1993), 46 R.F.L. (3d) 48 (B.C.C.A.). The valuation date is usually the date of trial.

[55] "Family asset" is defined in s. 58(2) as including any property owned by either spouse that is ordinarily used for a family purpose. Section 60 provides that the onus is on the spouse opposing a claim under s. 56 to prove that the property in question was not ordinarily used for a family purpose.

[56] The presumed half interest in family assets is subject to an order for reapportionment under s. 65, which provides:

65(1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, would be unfair having regard to

- (a) the duration of the marriage,
- (b) the duration of the period during which the spouses have lived separate and apart,
- (c) the date when property was acquired or disposed of,
- (d) the extent to which property was acquired by one spouse through inheritance or gift,
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
- (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 or the marriage agreement, as the case may be, be divided into shares fixed by the court.

[57] The factors to be considered on an application for reapportionment are limited to those listed in s. 65(1). The statute does not give the court "a roving commission to inquire into the spending habits of the spouses during the marriage", nor are "reckless, wasteful or improvident expenditures made by either of the spouses during marriage" a basis for the court to order a reapportionment: *Newson v. Newson* (1986), 3 B.C.L.R. (2d) 1 (C.A.) at p. 16.

Bennett Street Condominium

[58] The Bennett Street home was sold in December 2007. By agreement, the net proceeds of approximately \$75,000 were distributed between the parties and used to pay off certain debts. I am satisfied that the distribution of the proceeds of that sale was fair to both parties and should not be subject to further adjustment or reapportionment.

Dawson Street Townhouse

[59] In 2004, Mr. Armani told Ms. Armani he had lost their savings in the stock market. She went to Romania for a month to look at real estate there, but did not buy anything. When she returned, another couple they knew told them about a development being built on Dawson Street in Burnaby. They went to look at it together, and purchased a unit that was not yet built. Mr. Armani signed the offer to purchase for \$286,900 on March 15, 2005 and paid a

deposit of \$14,345 on March 22, 2005. He paid the other half of the down payment on December 5, 2005, for a total of \$28,690. The completion date was scheduled for September 30, 2006, but it was moved back to March 2007. Ms. Armani testified that Mr. Armani told her this was his way of making up for the money he had lost in the stock market. She testified that the purchase documents were put in his name because they believed her student loan might be an impediment to a mortgage. The purchase was completed at the end of March 2007. He paid a balance on closing of \$15,806, in addition to taking out a first mortgage of \$224,777 and a second mortgage of \$40,753.

- [60] The original second mortgage was replaced by a new second mortgage of \$80,000 in August 2007. Payment on that mortgage fell into arrears, and the second mortgagee took foreclosure proceedings. On September 16, 2008, Master Caldwell granted an order nisi of foreclosure. The last date for redemption is March 16, 2009. The amount required to redeem is \$81,696.50 plus accrued interest at the rate of 12.5%.
- [61] The Dawson Street property had a 2008 tax assessed value of \$390,000. At the end of November 2008, each of the parties had a realtor prepare a "comparative market analysis". The analysis prepared for Ms. Armani resulted in a "recommended price" of \$409,000. The analysis prepared for Mr. Armani recommended a price of \$380,000 to \$390,000, but warned of a downward trend in the market.
- [62] Mr. Armani takes the position that Ms. Armani has no interest in the Dawson Street home. He bases this on three points. First, he says that the "separation agreement" declares that Ms. Armani has no interest in the townhouse. I have already found, however, that the provisions of the separation agreement cannot be upheld. Second, he submits that the Dawson Street townhouse cannot be a family asset because it was acquired after the parties were separated. That, however, is based on his submission, which I have rejected, that the parties separated in December 2006. Finally, he submits that he had to borrow money to make the initial payments on the townhouse, and Ms. Armani contributed nothing.
- [63] The fact that Mr. Armani borrowed money to acquire Dawson Street is a factor that might be considered on an application to reapportion the property, but it is not a basis for finding that it is not a family asset.
- [64] The parties did not separate until September 2007, and they lived together in the Dawson Street home, with their child, for approximately five months prior Ms. Armani moving out. During that period of time, it was their matrimonial home. I find that the Dawson Street property is a family asset.

- [65] In her amended statement of claim, Ms. Armani requests a reapportionment of family assets. In his pleadings, Mr. Armani has not sought a reapportionment. He did not file a counterclaim. Throughout the proceedings, however, he has consistently taken the position that Ms. Armani is not entitled to any interest in Dawson Street. I shall proceed on the basis, therefore, that each party seeks a reapportionment of the Dawson Street property in their favour.
- [66] The triggering event occurred on December 6, 2007. On that date, each party's interest in the Dawson Street townhouse vested. Each party is presumed to have a one-half interest in the property unless there is a reapportionment.
- [67] A reapportionment will only be ordered if it is shown that an equal division of the property would be unfair, having regard to the factors set out in s. 65(1) of the Family Relations Act. In this case, the duration of the marriage was nine years. The parties have lived separate and apart for a little over a year. The property was acquired by an offer to purchase and down payment in 2005. The purchase was completed and the parties moved in around Easter 2007. It has not yet been disposed of. It was not acquired through an inheritance or gift. Both spouses have an equal need for economic independence and self-sufficiency.
- [68] That leaves clause (f) of s. 65(1), "any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse." Mr. Armani submits that Dawson Street should be reapportioned in his favour because he borrowed the money for the down payment. He made two payments of \$14,345 on March 22, 2005 and on December 5, 2005, for a total of \$28,690. At the end of March 2007, he paid a balance on closing of \$15,806 and also took out a first and second mortgage. He had to borrow that money from friends, and is still significantly indebted because of it. He submits that Ms. Armani made no financial contribution to the acquisition of the property, and that she should therefore have no interest in it.
- [69] Having regard to all the factors set out in s. 65(1) of the Family Relations Act, I conclude that there should be a reapportionment of the net equity in the Dawson Street property, after payment of all mortgages and other registered charges, 60% in Mr. Armani's favour. Ms. Armani's interest in the net equity shall be 40%.

Other Property and Debts

- [70] The parties have already effectively divided their chattels, and I would not make any adjustment to that division. Each shall keep the items in his or her possession as his or her own.
- [71] Ms. Armani has kept the 1999 VW automobile. The evidence of its current value is conflicting and unclear. I find it to be worth approximately \$5,000. She is entitled to retain that vehicle, but must compensate Mr. Armani by paying him half its value, that is, \$2,500.

- [72] Ms. Armani has substantial student loans outstanding. She submits that they are a family debt, for which both parties should be equally responsible. The evidence with respect to the student loans is incomplete and confusing. It appears that the current amount outstanding is about \$38,000. It also appears that the majority of the loans were incurred prior to marriage. I find that approximately \$5,000 of the amount currently outstanding was incurred during the marriage and for a family purpose. Mr. Armani shall compensate Ms. Armani for half that amount, that is, \$2,500, and Ms. Armani shall then be solely responsible for the repayment of her student loans.
- [73] All other unsecured debts in the name of either Mr. Armani or Ms. Armani shall be his or her sole responsibility.

Child Support

- [74] Mr. Armani acknowledges that he has a responsibility to pay child support for their son Sebastian, but the parties cannot agree on Mr. Armani's income for support purposes. In his Form 89 financial statement sworn January 4, 2008, he said his income was \$34,874.
- [75] Mr. Armani is self-employed. His total income (line 150) from his 2005 income tax assessment was \$45,256. On his 2006 tax return, he listed his total income as \$16,253. On the statement of business activities attached to that return, he listed his gross business income as \$116,770 and his gross business profit as \$44,228, with business expenses of \$28,466.
- [76] On his 2007 tax return, he listed his total income as \$33,759. On the statement of business activities attached to that return, he listed his gross business income as \$163,479 and his gross business profit as \$56,372, with business expenses of \$22,613.
- [77] Plaintiff's counsel cross-examined Mr. Armani extensively about his business income and expenses. She took him through all the invoices he could find for the year 2008. There were additional sales for which there were no invoices. She also asked him to account, in detail, for his disbursements and expenses. She asked him about the typical profit he makes on each type of job that his business does. As a result, she estimated that his actual income available for support purposes for the year 2008 is between \$43,000 and \$65,000.
- [78] The business records Mr. Armani submitted at trial for 2008 were incomplete. He did not co-operate in answering questions about his income during examination for discovery. Based on the testimony and the records before me, including Mr. Armani's past income tax returns, I find that an annual income of \$40,000 should be attributed to him for support purposes.
- [79] At that income, the prescribed amount of support for one child in British Columbia in accordance with the Federal Child Support Guidelines, SOR/97-175 (the "Guidelines") is \$370 per month, and I order that he pay Ms. Armani that amount each month as basic child support commencing February 1, 2009.

[80] As well, Mr. Armani must pay his share of extraordinary expenses. This includes \$400 per month for day care and \$180 for Kumon tutoring. I do not agree with Ms. Armani's claim that expenses for sports or other activities should be included. The extraordinary expenses are to be paid in amounts proportional to the parties' incomes.

[81] Ms. Armani's income, as set out at line 150 of her income tax returns is as follows:

2001:

\$

3,107

2002:

\$

2,944

2003:

\$

16,172

2004:

\$

12,834

2005:

\$

3,384

2006:

\$

10,805

2007:

\$

15,021

- [82] Mr. Armani submits, and I agree, that with her education, Ms. Armani is currently capable of earning substantially more than she has in the past. Her past income is based on part-time employment. Despite the fact that she has not yet earned her degree in chemistry from the University of British Columbia, she has completed several years of course work toward that degree. Her educational level is far higher than Mr. Armani's, and there is no reason why she should be earning so much less than he is.
- [83] Ms. Armani currently works four hours per day at \$21.38 per hour. I find that she could work full-time if she chose to do so, although not necessarily with her present employer. If she were working full-time, it is likely she could earn as much as Mr. Armani, or \$40,000 per year, and that income should be attributed to her for support purposes.
- [84] The total monthly extraordinary expenses are \$580. Mr. Armani shall pay his proportionate 50% share of those expenses, or \$290 per month. As he has not been reliable in the past in making those payments to third parties, he shall make the payments directly to Ms. Armani, within 14 days of her providing him with receipts for the payments she has made for the extraordinary expenses.
- [85] Ms. Armani also claims retroactive child support from the end of January 2008 to the present. Mr. Armani made some payments during that period, but his payments were not reliable. He sometimes wrote cheques which were not honoured because of insufficient funds. Some of the payments were made out of funds held in trust from the proceeds of the sale of the Bennett Street property. He is not entitled to credit for those payments.
- [86] I find that Mr. Armani should have been paying \$370 per month basic child support for the 12 months from February 1, 2008 to January 31, 2009, for a total of \$4,440. His share of extraordinary expenses, given that they are different in the summer than during the school year, should have been a total of \$3,000. On the record before me, it is unclear how much he actually paid during that period. He is ordered to pay to Ms. Armani retroactive child support totalling \$7,440 for the period from February 1, 2008 to January 31, 2009, less any amounts he has already paid. He is to make that payment as a lump sum no later than May 31, 2009.

Spousal Support

[87] Ms. Armani seeks spousal support pursuant to s. 15.2 of the Divorce Act.

[88] Section 15.2(4) sets out some of the factors to be taken into account:

15.2 (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including

- (a) the length of time the spouses cohabited;
- (b) the functions performed by each spouse during cohabitation; and

(c) any order, agreement or arrangement relating to support of either spouse.

[89] Section 15.2(6) sets out the objectives of a spousal support order:

15.2 (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should

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

[90] The Supreme Court of Canada noted in *Moge v. Moge*, [1992] 3 S.C.R. 813 that the objective of self-sufficiency is only one of the considerations and emphasized that all of the objectives in s. 15.2(6) must be taken into account.

[91] In *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420, the court observed that entitlement to spousal support is not limited to compensatory principles, but may also be justified on needs-based and contractual principles.

[92] Ms. Armani in her testimony asked for spousal support for several years, until she can complete her university degree. However, at the end of the trial, during submissions, her counsel agreed that Mr. Armani could not afford to pay spousal support at this time, and asked for an award in the amount of \$1.

[93] Mr. Armani submits that Ms. Armani has already had a reasonable opportunity to complete her university education. He says that she simply has not done well enough in her coursework to complete her degree. He says that with the education she already has, she now has a greater income earning capacity than he does, and there is no basis for awarding spousal support to her.

[94] Ms. Armani's university transcripts for the years 1995-1996, 1996-1997, 1997-1998, and 1999-2000, have been filed as exhibits. She did well at the beginning of her university career, but she does not appear to have fully applied herself in the later years. I agree with Mr. Armani that he should not be responsible for supporting her further university education.

[95] Ms. Armani already has a significantly higher level of education than Mr. Armani. I have found that her earning capacity is equal to that of Mr. Armani.

[96] I have considered the condition, means, needs and other circumstances of each spouse, and the objectives of spousal support set out in s. 15.2. I can find no basis on either compensatory, needs-based, or contractual principles for making an order for spousal support.

Costs

[97] Mr. Armani asked that the costs order reflect the fact that this trial took considerably longer than the five days that had been scheduled. He submitted that this was due to plaintiff's counsel appearing late in court on several occasions.

[98] It is indeed regrettable that court time was lost due to the late attendance of plaintiff's counsel on more than one occasion, although she did offer an explanation each time. For example, on the last day of trial, there were unusually bad road conditions due to snowfall, and counsel had difficulty getting to the courthouse.

[99] In any event, plaintiff's counsel points out that Mr. Armani bears equal responsibility for the length of this trial. First, she points to the fact that on the date scheduled for Mr. Armani's examination for discovery, he refused to answer any questions. This resulted in plaintiff's counsel having to spend far longer in his cross-examination at trial than would otherwise have been the case. Second, at the opening of the trial, Mr. Armani applied to amend his statement of defence. That application was granted. The result was that Ms. Armani had to deal with issues relating to custody and access that previously had not been contested.

[100] In my view, both sides are equally responsible for the unusual length of this trial, and no special order for costs is appropriate.

[101] In light of the issues raised and the positions advanced by each party in their pleadings and throughout the trial, I conclude that there has been mixed success, and that neither party is entitled to an order for costs. Each party shall bear his or her own costs, and the court hearing costs shall be shared equally between them.

The Honourable Mr. Justice W. F. Ehrcke

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Prepared on 27 October 2026 · Esheria