
CANADA / JUDGMENT

B.J.L. v. J.R.D.L.

2005 BCSC 1058

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

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Citation:

B.J.L. v. J.R.D.L.,

2005 BCSC 1058

Date: 20050715

Docket: E07576

Registry: New Westminster

Between:

B.J.L.

Plaintiff

And

J.R.D.L.

Defendant

Before: The Honourable Mr. Justice A.F. Wilson

Reasons for Judgment

Counsel for the Plaintiff:

F.C. Lowther

Counsel for the Defendant:

J. Fairburn

Date and Place of Hearing:

May 13 & June 16, 2005

New Westminster, B.C.

I. Introduction:

- [1] Following a trial at New Westminster on January 7, 8, 9, 10, 11, and 18, 2002, Henderson, J. gave oral Reasons for Judgment on January 18, 2002. There was then a further hearing on March 19, 2002, during which Henderson, J. made further orders with respect to division of the property, and heard submissions with respect to spousal maintenance. On April 9, 2002, he gave oral Reason for Judgment awarding spousal maintenance, and considering costs. On December 5, 2002, he heard an application on behalf of Ms. B.J.L. for a reconsideration of a number of the issues previously dealt with. He issued Reasons for Judgment on March 12, 2003, dealing with those applications, and allowing them in part. Henderson, J. then retired from this Court, and a further application by Ms. B.J.L. for reconsideration came on before me on April 5, and May 31, 2004. I issued Reasons for Judgment on June 17, 2004, allowing those applications in part. There was also an application before me to settle the form of orders granted by Henderson, J. In the Reasons for Judgment of June 17, 2004, I provided drafts of those orders, but gave counsel liberty to apply to make further submissions on the terms of the orders, in light of the matters I allowed on reconsideration. Counsel were also given liberty to apply with respect to costs.
- [2] On this hearing, each counsel have provided further drafts, and made further submissions, as to how the orders of Henderson, J. should be settled. Mr. J.R.D.L. also seeks further reconsideration of the trial order:
- a) declaring that the child, L.J.L., born [], 1979, is no longer a "child of the marriage" as defined by the Divorce Act;
 - b) for a finding that the Richmond condominium was a family asset;
 - c) for a finding that Mr. J.R.D.L. should be entitled to a credit for the reduction in the amount of the principal balance of mortgages outstanding on the Langley property since January 18, 2002.

It is agreed that L.J.L. is no longer a "child of the marriage", the only issue between counsel being whether that should be within the original trial order or in a subsequent order. The other matters, however, are contested.

- [3] In addition, Ms. B.J.L. seeks variation of the trial judgment to vest title to the Langley property solely in her name, and for an order that her interest take priority over that of Canada Customs and Revenue Agency pursuant to a judgment registered against the interest of Mr. J.R.D.L. in the Langley property subsequent to the certificate of pending litigation filed on behalf of Ms. B.J.L.. Ms. B.J.L. also seeks a variation of the amount of spousal maintenance, retroactive to the date of the trial judgment. She also seeks security for

payment of the spousal maintenance. Finally, Ms. B.J.L. submits that she should be entitled to costs of the various hearings subsequent to trial, while Mr. J.R.D.L. says that each party should bear his or her own costs.

- [4] The order for spousal maintenance, arising from the Reasons for Judgment of Mr. Justice Henderson pronounced April 9, 2002, has been settled. That order was entered on May 13, 2005. That order also deals with costs up to and including the hearing of April 9, 2002, as Henderson, J. ordered that each party bear his or her own costs of the action except for payment of the account of Clayton Schultz for the business valuation of the C.[] Ltd., which Henderson J. ordered be paid by Ms. B.J.L..
- [5] A question has arisen as to whether all of the matters which have arisen since trial should be encompassed in one order, or if there should be separate orders. In paragraph 26 of my Reasons for Judgment of June 27, 2004, I said:

"Counsel are in agreement that the orders, to be entered, should reflect the changes made upon reconsideration, rather than having one order reflecting the original Reasons for Judgment, and subsequent orders setting out the variations made. I agree with that approach."

That statement does require some qualification. If there is a reconsideration of the original order, based on facts which existed at the time of trial, it is appropriate for those changes to be reflected in the trial order. However, if they are as a result of events arising subsequent to trial, so that they are in the nature of "variation" of the original order, rather than "reconsideration" of it, those changes should be reflected in separate orders. Thus, for example, changes in the amount of child maintenance payable as a result of the children no longer being "children of the marriage", and retroactive variation of the amount of spousal maintenance based on circumstances since the trial, should be in separate orders. On the other hand, if, as a result of applications to reconsider, changes are made in what are determined to be family assets, or how they are to be divided, as a result of a different view of the facts at trial, those matters should be encompassed within the trial order.

- [6] The final preliminary matter is whether the issue of priority as between Ms. B.J.L.'s claim to Mr. J.R.D.L.'s interest in the Langley property, and the judgment registered against his interest in that property on behalf of Canada Customs and Revenue Agency, should be determined at this time, or in a subsequent hearing. In paragraph 15 of my Reasons for Judgment of June 17, 2004, I allowed Mr. J.R.D.L. 90 days in which to buy out Ms. B.J.L.'s interest in the Langley property, and in the T.[] property, and ordered that if he failed to do so, the property would be put up for sale with the net proceeds to be divided equally. The Langley property has now been listed for sale, with an agreement between counsel that the net sale proceeds after payment of the mortgages, real estate commission, and other normal adjustments, will be paid into a lawyer's trust account. Canada Customs and Revenue Agency was given notice of this hearing by letter from Mr. Lowther dated June 9, 2005. That letter specifically set out that Ms. B.J.L. seeks to have the property vested in her own name, clear of the judgment registered against the interest of Mr. J.R.D.L. by Canadian Customs

and Revenue Agency. After a further exchange of correspondence, counsel for the Canadian Customs and Revenue Agency advised that she would not be appearing at the hearing, and takes no position with respect to Ms. B.J.L.'s application. However, she did ask to be informed of any application for payment out of the sale proceeds "so that C.C.R.A. may consider its' position at that time". Despite the short notice, I am satisfied that C.C.R.A. is aware of the nature of the application, and has chosen not to appear. I will thus not feel constrained in making any order that may adversely affect the interest of C.C.R.A. on this application.

II. Applications by Mr. J.R.D.L.:

A. That L.J.L. Is No Longer a "Child of the Marriage"

- [7] It is agreed by the parties that L.J.L. ceased to be a "child of the marriage" within the meaning of the Divorce Act (Canada) on April 30, 2005. Effective May 1, 2005, the child maintenance payable by Ms. B.J.L. will be only for B.A.G.L., born [], 1985, in the amount of \$245.00 per month. It is also agreed that arrears of child maintenance payable by Ms. B.J.L. is in the amount of \$5,712.00, and that it shall be satisfied by way of a credit to Mr. J.R.D.L. against any payments he is required to make to Ms. B.J.L. pursuant to the orders in this action.
- [8] That variation will be set out in a separate order, rather than the order arising from trial, as it relates to events which occurred after the trial.

B. Richmond Condominium

- [9] It is submitted that the evidence at trial established that the funds used for the down payment to purchase the Richmond condominium were obtained from a combination of a \$15,000.00 loan taken out by Mr. J.R.D.L., and \$25,000.00 withdrawn from the C.[] Ltd., by him, which was agreed to be a family asset. Counsel notes that the Richmond condominium was identified as a family asset on the Scott Schedule filed as an exhibit at trial and was conceded as such by Ms. B.J.L.'s counsel at the time. However, counsel for Mr. J.R.D.L. concedes that, on the analysis done by Mr. Justice Henderson, the Richmond condominium had no value in January, 2002.
- [10] The essence of this submission is that it is unfair that Mr. J.R.D.L. should be obliged to share the appreciation in value of the Langley property since January, 2002, while receiving no benefit on account of the appreciation in value of the Richmond condominium. I do not accept that argument. As set out in paragraph 14 of my Reasons for Judgment of June 17, 2004, the reason why I ordered that Ms. B.J.L. receive the benefit of the appreciation of the value of the Langley property was that, despite the order vesting it in Mr. J.R.D.L., he failed to pay Ms. B.J.L. what Henderson, J. determined to be her interest in it for in excess of two years. Even if the Richmond condominium was a family asset, if it had no value, it would have been vested in Ms. B.J.L. without any requirement that she pay Mr. J.R.D.L. for any interest he had in it.

- [11] In those circumstances, as I am not satisfied that it would have affected the outcome, I am not prepared to order that the Richmond condominium is a family asset in which Mr. J.R.D.L. has had a continuing interest since trial.

C. Reduction in Principal on Mortgages on Langley Property

- [12] Counsel for Mr. J.R.D.L. notes that he has made all mortgage payments on account of the Langley property since the trial in January of 2002, as well as undertaking renovations and improvements to this property, as well as paying spousal support of \$3,000.00 per month. He notes that the Langley property continues to be the home of the children of the marriage. In those circumstances, he submits that it would be an unfair windfall to Ms. B.J.L. if she was to receive benefit from the reduction of principal of the mortgages. He notes that the mortgage balances at the time of trial were \$120,825.00, and that as at June, 2004, the mortgages have been reduced to \$64,860.00. I agree with that submission. I accept that it would be an unfair windfall to Ms. B.J.L. to receive the benefit of the reduction in principal on the mortgages paid down by Mr. J.R.D.L., as distinct from the increase in the value as a result of appreciation of the property.
- [13] Counsel for Ms. B.J.L. submits that, if that is the case, Mr. J.R.D.L. should have to account for occupation rent, relying on *Mills v. Mills* (1980), 20 R.F.L. (2d) 197 (B.C.S.C.). He submits that an allowance of \$2,000.00 per month would be a reasonable occupation rent for the Langley property. I consider this would be a good argument if Mr. J.R.D.L. was seeking to be compensated for payments of interest on the mortgages, or for the costs of maintaining and renovating the property, the costs which might be considered to be those of "maintaining the home". I consider it to be a fair balance to compensate Ms. B.J.L. for Mr. J.R.D.L.'s failure to pay her the amounts due to her that she benefit from the appreciation in the property, without also benefiting from the reduction in the principal of the mortgages as a result of payments by Mr. J.R.D.L., or requiring him to account for occupation rent.
- [14] Under those circumstances, I order that, on division of the proceeds of sale of the Langley property, Mr. J.R.D.L. will be entitled to a credit for the reduction in the principal on the mortgages from the date of trial to the date of sale.

III. Applications by Ms. B.J.L.:

A. Vesting of Langley Property

- [15] Ms. B.J.L. seeks to have the Langley property vested solely in herself, clear of the judgment registered against the interest of Mr. J.R.D.L. on behalf of Canada Customs and Revenue Agency. That would alter the order as made in paragraph 15 of my Reasons for Judgment dated June 17, 2004. I am not satisfied that any valid reason has been put forward to do so. The rationale of that order was to give Ms. B.J.L. a one-half interest in the appreciation of value in the Langley property, in light of Mr. J.R.D.L.'s failure to pay out her interest in the property. To vest the entire property in her, leaving Mr. J.R.D.L. liable for his debt to

C.C.R.A., and no interest in the Langley property, would not be equitable.

- [16] In light of my decision that the property will not vest solely in Ms. B.J.L., it is not necessary to determine the priority as between her and the judgment in favour of Canada Customs and Revenue Agency, as that judgment is registered only against the interest of Mr. J.R.D.L.. Ms. B.J.L. will take the amounts due to her, with the adjustments, following the sale of the property, clear of any claim by C.C.R.A. I am not satisfied that it would be equitable to give her priority for any other amounts which may be due to her, such as spousal maintenance, over the C.C.R.A. claim against Mr. J.R.D.L.'s interest in the Langley property. The judgment is for arrears in income tax, which would normally have to be paid before there would be funds available to be paid to Ms. B.J.L.. The claim for a charging order against Mr. J.R.D.L.'s interest in the Langley property, in priority to the judgment in favour of C.C.R.A., is thus dismissed.

B. Variation of Spousal Support

- [17] Ms. B.J.L. no longer seeks reconsideration of the amount of spousal maintenance ordered by Mr. Justice Henderson in his decision of April 9, 2002, in the amount of \$3,000.00 per month. As noted, that order was entered on May 13, 2005. However, she seeks a variation, retroactive to the date of trial, on the basis that his income since that time has been substantially more than what his income was determined to be by Mr. Justice Henderson. She submits that the increased income, together with his decreased responsibility to maintain the children, are a significant change in circumstances, pursuant to s. 17(4.1) of the Divorce Act (Canada).
- [18] Ms. B.J.L. also relies on s. 15.3 (3) of the Divorce Act, to the effect that a termination of child support constitutes a change of circumstances for the purpose of applying for a spousal support order. However, that is only the case where, as a result of giving priority to child support, the amount of the spousal support order is less than it would otherwise have been. In this case, the children continue to reside with Mr. J.R.D.L., and the child maintenance was thus payable by Ms. B.J.L.. That section is thus inapplicable.
- [19] The principles applicable to applications to vary spousal support were considered recently by the British Columbia Court of Appeal in *W.C.P. v. C.P.*, 2005 BCCA 60. In paragraph eight, Saunders J.A. referred to ss. 17(1), 17(4.1) and 17(7) of the Divorce Act. She then stated, in paragraphs 9 to 11:
9. The principles applicable to a variation application are, as observed by Rowles J.A. in *Haigh v. Haigh* (1997), 31 R.F.L. (4th) 435 (B.C.C.A.), those set out by Macfarlane J.A. in *Oakley v. Oakley* (1985), 48 R.F.L. (2d) 307 (B.C.C.A.) at 313:

- [16] An application to vary or rescind maintenance payments will proceed on the basis of the following principles; the court is to take the amount of maintenance originally ordered as the correct amount at the time the order was made and then to consider to what extent the circumstances of the parties have altered or changed since the decree nisi was granted. The onus to show that such changes have occurred lies on the applicant.
10. The nature of the change that engages s. 17 was described in *Willick v. Willick*, [1994] 3 S.C.R. 670 at 688, in the context of a variation of a child support case. The description there found at para. 21 was said by the Supreme Court of Canada, in *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370, to apply as well to variation of spousal support order:

In deciding whether the conditions for variation exist, it is common ground that the change must be material change of circumstances. This means a change, such that, if known at the time, would likely have resulted in different terms. The corollary to this is that if the matter which is relied on as constituting a change was known at the relevant time it cannot be relied on as the basis for variation .

11. Of significance to this case, is the observation above that a matter known when the support order was made cannot form the basis for a variation. I agree with Newbury J.A. in *T.(L.A.T.) v. T. (W.W.)* (1996), 24 R.F.L. (4th) 51 (B.C.C.A.), that the description by Proudfoot J.A. in *Carter v. Carter* (1991), 34 R.F.L. (3d) 1 (B.C.C.A.) of a change that is "substantial, unforeseen and of a continuing nature" may be close to the mark.
- [20] In his Reasons for Judgment dated April 9, 2002, at paragraphs 2 and 3, Henderson, J. concluded that Mr. J.R.D.L. was "free to pursue advancement in his chosen field, and did so very successfully". He noted that Ms. B.J.L. "was also free, to a reasonable degree, to work outside the home, and did so", but that "her employment (was) neither so remunerative nor so secure as that of Mr. J.R.D.L.", and that she had suffered some health problems. In paragraph 4 he held that she was entitled to an award of spousal support on the compensatory model, but not as if she had been prevented from working at all during the marriage. In paragraph 5, he stated:

Spousal support is also meant to equalize, in rough terms, the respective standards of living of the parties for a period long enough to allow both parties to achieve economic self-sufficiency. My award must take that principle into account as well.

- [21] Counsel for Mr. J.R.D.L. has put considerable emphasis on that paragraph, but I consider that Henderson, J. was considering at that point only one of the objectives of a spousal support order, under s. 15.3 (6)(d) of the Divorce Act. In doing so, I do not take it that he was seeking to exclude the other objectives, which would be contrary to the law as set out by the Supreme Court of Canada in *Moge v. Moge*, [1992] 3 S.C.R. 813.
- [22] In dealing with the amount of the parties' incomes, Henderson, J. said this at paragraphs 8 and 9:

8. Mrs. B.J.L. asks for \$3,000 per month in spousal support for an indefinite period; that amount would give her a net monthly income, with her salary, of \$3,903. After paying child support, she would be left with \$3,358 per month. Her income, as I found earlier, is about \$27,000 per year.
9. Mr. J.R.D.L.'s gross earnings average around \$154,000 per year but fluctuate significantly. If he were to pay \$3,000 per month in spousal support, Mr. J.R.D.L.'s net earnings, after paying it, would be \$6,376 per month. Upon receipt of the child support, he would have \$6,921 in net income, still over double that of Mrs. B.J.L.. From that income, Mr. J.R.D.L. will need to support three of the children of the marriage, although his obligation in that regard will decrease in the reasonably near future because of the age of the children.
- [23] Henderson, J. thus took into account that Mr. J.R.D.L.'s earnings fluctuated significantly, and also that his obligation with respect to support of the children would soon decrease.
- [24] Counsel for Ms. B.J.L. sought maintenance in the amount of \$3,000.00 per month and an award was made in that amount. At paragraph 11 Henderson, J. stated:
11. I will not, however, award spousal support on an indefinite basis. Mrs. B.J.L. can be expected to make significant strides towards full economic self-sufficiency in the next five years. I will fix a review date of April 9th, 2007, on the issue of spousal support. Either party is at liberty to apply for a review after that date.
- [25] Again counsel for Mr. J.R.D.L. relies on the comments with respect to expectations of a full economic self-sufficiency. However, as on an original application, that is only one of the objectives to be taken into account in a variation order, pursuant to s. 17(7) of the Divorce Act.
- [26] In his Reasons for Judgment dated March 12, 2003, Henderson, J. dismissed an application for additional monthly support, saying that was an argument which could have been advanced at trial.
- [27] Counsel for Mr. J.R.D.L. submits that Henderson, J. was aware of Mr. J.R.D.L. having an income in excess of \$300,000.00 before trial, so that amounts in excess of \$200,000.00 would not be a "change in circumstances". Counsel for Ms. B.J.L., on the other hand, submits that Henderson, J. found that Mr. J.R.D.L.'s income was only \$120,000.00 per year. Those submissions turn largely on paragraphs 38 to 42 of his Reasons for Judgment of March 12, 2003, which read as follows:
38. Mr. J.R.D.L. had not yet filed his 2000 tax return by the time of trial in January, 2002. Because of this failure, it is appropriate to give to Mrs. B.J.L. the benefit of any doubt that may arise regarding his 2000 income. There is evidence (Exhibit 1, Tab 27) from Mrs. B.J.L.'s accountant showing a salary of \$326,000 paid to Mr. J.R.D.L. in 2000. However, Mr. J.R.D.L.'s own accountant states that the salary paid that year was \$334,500 (see Exhibit 2, Tab 14, Schedule). I prefer the higher figure. There is no evidence that any dividend was paid in 2000.

39. Mr. J.R.D.L.'s tax return for 2001 was not entered and neither expert expressed an opinion on the matter. At trial, I concluded that a fair notional salary for Mr. J.R.D.L., given his ability, experience, and the nature of the work he performs, is \$120,000 per year. That is the average of the five annual salaries determined by Mrs. B.J.L.'s expert (see Exhibit 1, Tab 27). The average salary determined by Mr. J.R.D.L.'s expert is higher - \$149,021 (see Exhibit 2, Tab 14, Schedule). In argument, Mrs. B.J.L. contended that the notional annual salary should be \$72,000 while Mr. J.R.D.L. said it should be \$90,000. Neither position seemed to me to reflect the reliable evidence. On this question, I considered that the lower figure of \$120,000 more accurately reflected an appropriate salary for Mr. J.R.D.L..
40. Counsel to Mrs. B.J.L. at the rehearing argued that I was obliged to accept one of the two figures advanced by counsel. While a concession made by counsel is usually determinative of an issue, a trial court is not required to act on such a concession where it is clearly contradicted by the evidence. Mr. Lowther's argument that the notional salary should be set at \$72,000 or, at the highest, at \$90,000, is rejected.
41. There is no evidence of the payment of a dividend in 2001.
42. Thus, the amount of money removed from the company by Mr. J.R.D.L., after deduction of his notional fair salary, is \$24,312.50, calculated as follows:

Year Salary Dividends Total From

1998 \$ 72,000 \$122,812.50 \$194,812.50 Tax return

1999 72,000 0.00 72,000.00 Tax return

2000 334,500 0.00 334,500.00 Schultz Schedule

2001 120,000 0.00 120,000.00 By inference

Total: 598,500 122,812.50 721,312.50

Total monies taken from Company: \$721,312.50

LESS:

Notional Salary: (\$120,000 x 4) 480,000.00

Amount to be allocated: \$241,312.50

- [28] However, that discussion was not in the context of determining Mr. J.R.D.L.'s income for the purposes of spousal support, but rather in determining a "fair notional salary", in order to decide what amount Ms. B.J.L. should be entitled to with respect to her shareholdings in C.[] Ltd.. This portion of the Reasons falls under the heading "Valuation of Shares". I thus find that, for the purpose of determining spousal support, Henderson, J. did use an income for Mr. J.R.D.L. of \$154,000.00 per annum, although recognizing that could fluctuate. That is also consistent with his comment at paragraph 66 of the Reasons for Judgment of January 18, 2002:

"The average annual income of C.[] Ltd. since the date of separation, which has been available by Mr. J.R.D.L. and paid to him by way of salary, dividends and a shareholders loan, is \$154,000.00".

- [29] The evidence does disclose that Mr. J.R.D.L.'s income has been substantially higher than \$154,000.00 per year, while that of Ms. B.J.L. has remained relatively stable. Her 2004 income tax return shows income, exclusive of spousal maintenance, of \$36,392.00, made up of employment income of \$29,490.00, other employment income of \$1,565.00, employment insurance benefits of \$2,562.00, interest income of \$1,553.00, and net business income of \$1,221.00. In addition, she shows the spousal maintenance in the amount of \$36,000.00 per year.
- [30] With respect to Mr. J.R.D.L.'s income, the summary of his 2001 income tax return shows earnings of \$239,000.00. The 2002 summary shows earnings of \$327,000.00. The 2003 summary shows total earnings of \$282,000.00. He says that he does not have a copy of his 2004 income tax return, but on a reconstruction he has prepared he shows income of \$249,000.00.
- [31] Counsel for Ms. B.J.L. challenges the amounts Mr. J.R.D.L. shows as his income. First, he notes that Mr. J.R.D.L. controls C.[] Ltd., his source of income, and thus has the ability to determine how much is paid as employment income, how much paid as dividends, and how much left in the company. He also notes that a T4 summary for 2003 showed employment income of \$328,232.75, precisely the same amount shown by Mr. J.R.D.L. for his annual income in his Financial Statement sworn August 18, 2004. However, I accept the amounts as shown on his income tax summaries and reconstruction as accurately reflecting Mr. J.R.D.L.'s income. On a review of the financial statements of C.[] Ltd., the revenue does appear to be fairly stable, and there is not any indication of significant build-ups of equity.
- [32] On the other hand, Mr. J.R.D.L. says that his income may go down in the future. If that is the case, it may be a basis for variation at that time, but it is not a factor to be taken into account at present.
- [33] I accept the submission of counsel for Mr. J.R.D.L. that a mere increase in income of the payor spouse may not be sufficient to show change of a "substantial, unforeseen and continuing nature", particularly when some fluctuation in that income is anticipated by the trial judge. However, when the changes are as substantial as they have been shown to be here, from the base of \$154,000.00 used by Henderson, J. to as much as \$327,000.00, I am satisfied that the threshold of material change has been met.
- [34] In those circumstances, it is necessary to consider the objectives of an order varying a spousal support order, as set out in s. 17(7) of the Divorce Act. In that regard, I adopt the decision of Henderson, J. that Ms. B.J.L. did sustain some economic disadvantage arising from the marriage: Reasons for Judgment of April 9, 2002, paragraph 3. I also find that she has sustained economic disadvantage as a result of the breakdown of the marriage, particularly as she has not received the compensatory payment ordered by Henderson, J., which might have enabled her to reduce her costs, for example by paying off her mortgage,

or earning increased investment income. I further take into account that Mr. J.R.D.L. does have less child care responsibilities than he did at the time of Mr. Justice Henderson's order. There is a need to relieve economic hardship of Ms. B.J.L. arising from the breakdown of the marriage, as she is no longer able to receive the benefit of the large income received by Mr. J.R.D.L., except by way of spousal maintenance. Her economic self-sufficiency is also a significant factor, but, as noted, would have been assisted if she had received her share of the family assets.

- [35] It is thus necessary to consider the means and needs of the parties. From his most recent Financial Statement, sworn August 18, 2004, Mr. J.R.D.L. showed an annual income of \$328,232.75. As noted above, I accept that his reconstruction of his 2004 income tax return, showing an income of \$249,000.00, is a more accurate reflection of his income. Against that, he shows total annual expenses of \$295,992.00. However, despite showing compulsory deductions for income taxes of \$2,360.00 per month, he also shows payments on debt to C.C.R.A. of \$10,000.00 per month, on a debt stated to be in the amount of \$120,000.00. However, in his most recent affidavit, sworn June 13, 2005, he advises that he has been informed that the amount that he owes as of that date to C.C.R.A. is \$136,873.36. It thus appears that he has not been paying the \$10,000.00 per month on that account. In fact, there is no adequate explanation in any of the material filed by him as to how he has spent the income he has had over the last four years, and allowed the income tax debt to build up.
- [36] In terms of assets and debts, Mr. J.R.D.L. is the sole owner of C.[] Ltd., as well as having an interest in the Langley and T.[] properties. He has been able to substantially reduce the balance of the mortgages on the Langley property, from approximately \$120,000.00 at the time of trial to approximately \$52,500.00 now. He does have unsecured debts on credit cards, and for legal fees, as well as to C.C.R.A. However, I am satisfied that he has both the means and needs to pay an increase in the amount of maintenance, and that he has had those means and needs since 2001, notwithstanding the fact that he has allowed his debt to C.C.R.A. to increase substantially.
- [37] As to Ms. B.J.L., in her most recent Financial Statement dated October 12, 2004, she showed an annual income, before payment of spousal maintenance, of \$31,930.00. Against that she shows annual expenses of approximately \$85,000.00. She also has a substantial equity in her property, and has, in fact, been able to increase her savings since the trial.
- [38] In his Reasons for Judgment of April 9, 2002, in paragraph 5, Henderson, J. noted that "spousal support is also meant to equalize, in rough terms, the respective standards of living of the parties for a period long enough to allow both parties to achieve economic self-sufficiency". I agree with that approach. I find that the maintenance which Mr. J.R.D.L. has been paying since May 1, 2002, in the amount of \$3,000.00 a month, is not a sufficient amount to comply with that principle. I am satisfied that if Henderson, J. had been aware that Mr. J.R.D.L.'s income in 2002 would be \$327,000.00, rather than in the range of \$154,000.00, and if it had been requested by counsel, he would have ordered substantially more monthly maintenance. Similarly, I am satisfied that, based on incomes of \$282,000.00

in 2003, and \$249,000.00 in 2004, the monthly maintenance paid by Mr. J.R.D.L. should have been higher. However, if that maintenance had been paid on a periodic basis, it would have been taxable in the hands of Ms. B.J.L., and deductible in the hands of Mr. J.R.D.L.. I will thus order that maintenance payable by Mr. J.R.D.L. to Ms. B.J.L. will be varied, effective June 1, 2005, from \$3,000.00 per month to \$5,000.00 per month. I also order payment by Mr. J.R.D.L. of a lump sum of \$60,000.00, to represent the discounted amount of additional periodic spousal maintenance which should have been paid in the period from June, 2002, to May, 2005.

IV. Security for Maintenance:

[39] I am not satisfied that this is a proper case to order security for maintenance. Although Mr. J.R.D.L. has been late in making payments, he has made all payments of spousal maintenance due. In those circumstances, I am satisfied that an order that Mr. J.R.D.L. make payment by way of post-dated cheques payable on the first of each month is sufficient security. Post-dated cheques for the months of August, 2005, through to July, 2006, shall be delivered by him by July 20, 2005. He shall then deliver a further set of post-dated cheques by the 15th of July in each year for the next 12 months, until further order of the Court.

V. Costs:

[40] All costs to that date were dealt with by Mr. Justice Henderson in paragraph 12 of his Reasons for Judgment dated April 9, 2002. In the applications which have been heard since that time, primarily on Ms. B.J.L.'s applications to reconsider the judgment, but on this hearing also Mr. J.R.D.L.'s application for reconsideration and Ms. B.J.L.'s application to retroactively vary spousal maintenance, there has been divided success. On each hearing the applicant has received some of what was sought, but other claims have been dismissed. In those circumstances, I consider that there has been mixed success, and that each party should bear his or her own costs.

VI. Order Following Trial:

[41] Taking into account my decision on this hearing, and the submissions of counsel as to the form of order, I have re-drafted the order arising from the trial and subsequent hearings. It is attached as Appendix "A". As suggested by counsel, unless I receive objection from either counsel as to the form of the order within seven days of the issuance of these Reasons for Judgment, the order will be entered in this form. Separate orders will need to be prepared and entered with respect to each of F.B.L. and L.J.L. no longer being "children of the marriage", and the effect of that on the child maintenance payable by Ms. B.J.L..

"A.F. Wilson, J."

The Honourable Mr. Justice A.F. Wilson

APPENDIX "A"

No. E007576

New Westminster Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

Between:

B.J.L.

Plaintiff

And:

J.R.D.L.

Defendant

O R D E R

BEFORE THE HONOURABLE) FRIDAY, THE 18TH DAY

MR. JUSTICE HENDERSON) OF JANUARY, 2002

THIS ACTION coming on for trial at New Westminster, British Columbia, on January 7, 8, 9, 10, 11, and 18, 2002, and for further hearing on March 19, 2002; AND UPON hearing Tanis M. Carter, counsel for the plaintiff and David D. Hart, counsel for the defendant; AND UPON Reasons for Judgment being pronounced April 9, 2002; AND UPON hearing the application of the plaintiff for reconsideration, coming on for hearing at Vancouver, British Columbia, on July 10, and 19, 2002, and at New Westminster, British Columbia, on December 5, 2002; AND ON hearing Fred Lowther, counsel for the plaintiff, and David D. Hart, counsel for the defendant, on the application for reconsideration; AND ON judgment being given on the application for reconsideration on March 12, 2003; AND ON the further application of the plaintiff for reconsideration being heard by the Honourable Mr. Justice A.F. Wilson at New Westminster, British Columbia, on April 5, 2004, and May 31, 2004; AND ON hearing Fred Lowther, counsel for the plaintiff and David D. Hart, counsel for the defendant, on the further application for reconsideration; AND ON judgment being given on the further application for reconsideration on June 17, 2004; AND ON the further applications of each of the plaintiff and the defendant for reconsideration being heard by the Honourable Mr. Justice A.F. Wilson at New Westminster, British Columbia, on May 13, 2005, and June 16, 2005; AND ON hearing Fred Lowther, counsel for the plaintiff, and John Fairburn, counsel for the defendant, on the further application for reconsideration; AND UPON judgment being given on the further applications for reconsideration on July 15, 2005.

THIS COURT ORDERS that:

1. subject to s. 12 of the Divorce Act (Canada), the plaintiff, B.J.L., and the defendant, J.R.D.L., who were married at Vancouver, British Columbia, on November 19, 1974, are divorced from each other, the divorce to take effect on the 31st day after the date of this order.

AND THIS COURT DECLARES that:

2. the following persons are children of the marriage within the meanings of the Divorce Act (Canada) as at January 18, 2002:

NAME AND DATE OF BIRTH:

B.A.G.L., born [], 1985 ("B.A.G.L.")

F.B.L., born [], 1981 ("F.B.L.")

L.J.L., born [], 1979 ("L.J.L.");

THIS COURT FURTHER ORDERS that:

3. the defendant shall have sole custody , B.A.G.L., BY CONSENT;
4. the parties shall share joint guardianship of B.A.G.L., BY CONSENT;
5. the plaintiff shall have reasonable access to B.A.G.L., BY CONSENT;

AND UPON the plaintiff (payor) having been found to have an annual Guidelines income of \$27,600 and the defendant (recipient) having been found to have an annual Guidelines income of \$154,000:

THIS COURT FURTHER ORDERS THAT:

6. the plaintiff (payor) shall pay to the defendant (recipient), for the support of B.A.G.L., F.B.L. and L.J.L., the sum of \$545. per month on the 1st day of May, 2002, and on the 1st day of each month until further order of the court;

THIS COURT FURTHER DECLARES that:

7. the family assets will be valued as of the date of trial;
8. the following property of the plaintiff and the defendant are family assets within the meaning of the Family Relations Act:
 - (a) that real property located at [], Langley, B.C. with legal description [] (hereinafter referred to as the "Langley property");
 - (b) that real property, [], T.[], Washington state U.S.A. (the "T.[] property");
 - (c) the 1997 GMC Jimmy vehicle of the defendant; (the "Jimmy");
 - (d) the 1995 Pontiac Sunfire of the plaintiff; (the "Sunfire");
 - (e) the interest of the parties in the company and business known as The C.[] Ltd. ("C.[] Ltd."), with a value of \$150,00;
 - (f) various furniture in the possession of the defendant;
 - (g) those RRSP's of the plaintiff in the amount of \$16,491.39;

- (h) that Canada Savings Bond of the plaintiff in the amount of \$1,000;
- (i) the pension of the plaintiff through her employment with the R.[];
- 9. the debt to the plaintiff's parents in the amount of \$15,000 is a family debt;
- 10. the property of the plaintiff located at [], Richmond, B.C. legal description [] is not a family asset;
- 11. the claims of the plaintiff for reapportionment of family assets is dismissed;
- 12. the Langley property shall be listed for sale and sold for fair market value, with the parties to have joint conduct of sale with liberty to apply to the court in the event of any dispute arising respecting the terms of listing or sale;
- 13. the proceeds of sale from the Langley property shall be disbursed as follows:
 - (a) first, in payment of any real estate commission due on account of the sale;
 - (b) second, in payment of the adjusted 2005 property taxes as of the adjustment date of any sale;
 - (c) third, in payment of the Coast Capital Savings mortgages registered against the Langley property, including any early repayment penalties;
 - (d) fourth, on payment of the legal expense of conveying and clearing title;
 - (e) fifth, the balance to be divided equally between the parties, subject to further adjustments between the parties pursuant to the terms of this order;

With liberty to apply to the court in the event of any dispute arising respecting the payment of the proceeds of sale;

- 14. the Defendant shall be entitled to a credit from the plaintiff equal to 50% of the difference between the outstanding balance of the Coast Capital Savings mortgages registered against the Langley property as of January 18, 2002, less their outstanding balance as of the date of completion of the sale;
- 15. the T.[] property shall be listed for sale and sold for fair market value, with the parties to have joint conduct of sale with liberty to apply to the court in the event of any dispute arising respecting the terms of listing or sale;
- 16. the proceeds of sale for the T.[] property shall be disbursed as follows:
 - (a) first, in payment of any real estate commission due on account of the sale;
 - (b) second, in payment of any outstanding or adjusted property taxes as of the adjustment date of any sale;
 - (c) third, in payment of the legal expense of conveying and clearing title;
 - (d) fourth, the balance to be divided equally between the parties;

17. the defendant shall retain sole title to the 1997 GMC Jimmy vehicle;
18. the plaintiff shall retain sole title to the 1995 Pontiac Sunfire motorvehicle;
19. the plaintiff shall transfer her shares in the C.[] Ltd., to the defendant, for which the defendant shall pay the plaintiff the sum of \$75,000;
20. the plaintiff shall retain the furniture, and shall pay the defendant the sum of \$1,000 in compensation;
21. the R.R.S.P. account of the plaintiff shall be divided equally between the parties, by the plaintiff transferring one-half of the value of that account to the defendant by way of a tax free spousal rollover;
22. the plaintiff shall retain ownership of her Canada Savings Bond, and shall pay the defendant \$500 for his interest in it;
23. the pension of the plaintiff through her employment with the R.[] shall be divided pursuant to the provisions of Part 6 of the Family Relations Act, with the entitlement date being January 18, 2002;
24. the pension entitlement of both parties under the Canada Pension Plan up to the date of this order will be divided in accordance with the Canada Pension Plan, R.S.C. 1985, c.C-8 as amended;
25. the defendant shall pay to the plaintiff the sum of \$7,500 with respect to the debt to the plaintiff's parents, and the plaintiff shall be responsible for payment of that debt, and shall indemnify and save harmless the defendant from liability for it;
26. the interest of the defendant in the Richmond property shall be transferred to and vest in the plaintiff as registered owner in fee simple, subject to the existing encumbrances, free and clear of any interest of the defendant and all persons claiming any interest through him, but subject to the provisos, reservations and conditions contained in the original Crown grant;
27. the defendant shall be entitled to retroactive child support from the plaintiff in the sum of \$8,500, to be satisfied by a credit to the defendant on any payment required to be made by the defendant to the plaintiff by way of compensation payment under this order;
28. the claim of the plaintiff for retroactive or lump sum spousal support, beyond the payments made by the defendant with respect to the condominium property in Richmond in lieu of spousal support prior to the date of this order, is dismissed;

29. the defendant shall pay to the plaintiff the sum of \$60,328.13 as compensation to the plaintiff for monies payable as notional dividends from C.[] Ltd. over the four years from separation to trial, being 25% of the amount taken by the defendant from C.[] Ltd. exceeding the notional salary to which the defendant was entitled, namely \$120,000 per annum for four years;
30. the defendant shall be entitled to a credit in the sum of the \$20,000 from the plaintiff as compensation to the defendant for one-half of the monies received by the plaintiff from the joint bank account following separation in the amount of \$40,000.
31. the defendant shall not be entitled to a credit for any money he has paid for schooling of the parties' son J.R.D.L.;
32. the parties have liberty to apply for further orders and directions regarding the division of the family assets;
33. the application of the plaintiff for spousal support is adjourned pending determination of the division of assets;
34. the plaintiff shall pay to the defendant the costs of the first day of trial in the amount of \$1368;
35. the plaintiff shall pay to the defendant the cost of the valuation by Clayton Schultz & Associates, with liberty to the plaintiff to tax the disbursement;
36. except as hereinbefore provided, each party shall bear his or her own costs of this proceeding;

BY THE COURT

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