

CANADA / JUDGMENT

Banh v. Chrysler

2020 BCSC 2299

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2299 Banh v. Chrysler

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Banh v. Chrysler,

2020 BCSC 2299

Date: 20200415

Docket: E54644

Registry: New Westminster

Between:

Wayne Banh

Claimant

And

Amber Danica Melvie Chrysler

Respondent

Before: The Honourable Mr. Justice Groves

Oral Reasons for Judgment

Counsel for the Claimant appearing by teleconference:

R. Yousefi

Counsel for the Respondent appearing by teleconference:

P. Cote

P. Sekhon

Place and Date of Trial:

New Westminster, B.C.

November 18-22, 25-29 and

December 18, 2019

Place and Date of Judgment:

New Westminster, B.C.

April 15, 2020

- [1] During the trial, the claimant Wayne Banh was self-represented. I will refer to him in these reasons as either the claimant or Mr. Banh. When closing submissions were heard on December 18, 2019, Mr. Banh's former counsel, who I understand to have been away on maternity leave during the trial, Ms. Yousefi, represented Mr. Banh.
- [2] The respondent, Amber Danica Melvie Chrysler, who I will refer to in these reasons as either the respondent or Ms. Chrysler, was for the entirety of the proceedings represented by experienced counsel, Mr. Cote and Mr. Sekhon.
- [3] I would be remiss if I did not thank counsel for the effective way in which they presented their closing arguments, summarized the evidence, and advanced the case of their respective clients. All parties were ably represented by their chosen counsel.
- [4] Over the course of the ten days of evidence, the court heard extensively from both the claimant and the respondent. Much of their evidence was focused on the narrow issue of the care of their son, Liam Edwin Banh, who was born on June 8, 2016 ("Liam").
- [5] In terms of other evidence, the court also heard from the claimant's sister, Melissa Honeyman, and her husband, Monte Honeyman. Those two individuals testified as to the claimant's care of Liam, as much of the time during which the claimant has parented his son, he has done so at the home of the Honeymans in West Vancouver. This was necessary as the claimant resided, for the most part, in Victoria and would travel to the Lower Mainland for his time with Liam.
- [6] Additionally, the Honeymans commented on the claimant's relationship and parenting experience with his now-adult daughter, Jayde. Additionally, Jayde's mother, Tanya Hodgson, testified in a positive way about the shared parenting she had experienced with the claimant in regards to their child, Jayde, and about the claimant's extended family and their involvement in Jayde's life as a child.

- [7] In regards to the respondent's evidence, she testified, as did a friend and someone who regularly assists her, Yvonne Austin. Ms. Austin's evidence was helpful in her observations of Ms. Chrysler with Liam, and was helpful as it relates to the state of Ms. Chrysler's current disability resulting from a motor vehicle accident or accidents, some of which happened during the marriage.
- [8] Finally, to paint the full picture of the evidence, Blaine Wilkins, a pharmacist and the owner of a pharmacy where the claimant was employed at the time, attended court in response to a subpoena issued by Ms. Chrysler's counsel. He testified, as did Mr. Chris Lam, who was the third pharmacist who, along with Mr. Wilkins and Mr. Banh, worked in Mr. Wilkins' pharmacy in Victoria. They testified as to their working relationship at the pharmacy where the three pharmacists shared responsibility for coverage.
- [9] As is unfortunate in this case, as is in the case in many pieces of matrimonial litigation that end up at trial, the evidence called and the issues raised, and specifically the time spent in evidence on the issue of parenting time for Liam, was grossly exaggerated as in comparison to the actual dispute between the parties. To some degree, perhaps the trial was an opportunity to air grievances or explain past behaviour.
- [10] In regards to the background facts, there is really not all that much that is in dispute. The parties married on August 9, 2014. They did not live common-law prior to the marriage. In fact, Mr. Banh only moved into the respondent's condominium in Surrey, British Columbia, in October 2014, three months after their marriage. As such, they lived together for only 21 months, because the parties separated on August 9, 2016. This was their second marriage anniversary. As such, this dispute results from a two-year marriage with a cohabitation of 21 months, which by any definition is a very short marriage and a short relationship.
- [11] As noted, Liam was born on June 8, 2016. At the time of separation, he was two months old.
- [12] It is fair to say that the parties' separation was a difficult one. The separation happened, it appears, in the driveway of the claimant's parents' home in Victoria, after the parties had arrived there that evening for a visit. They lived in Surrey at the time. Something was done, something was said, a dispute arose and the police were called by someone, not the parties. Mr. Banh then stayed at his parents'. Ms. Chrysler went to a shelter. The Ministry of Children and Family Development (the "Ministry") became involved, and both parties retreated, recognizing their relationship was over, and I have concluded that from this point on both parties acted poorly.
- [13] Mr. Banh, who appears to have been working until separation on a contract basis as a pharmacist out of the home in Surrey, was off work for a little while and remained in Victoria, but by November 1, 2016, it appears that he had gotten a job as a pharmacist in Keremeos in the southern interior. He had difficulties dealing with the Ministry, especially with that distance. His job in Keremeos was great financially. He earned a lot more money compared to his historic earnings, but he also worked every day, essentially, very long days, with little time off. What little time off he got was spent in Victoria where his family lived

and his investment properties were.

- [14] The Ministry file was then handled out of Surrey. He said he could not contact them and arrange to meet them to get a resolution of their concerns so that he could see his son, because of his work in Keremeos, his lack of time off, and the distance between locations.
- [15] From anecdotal experience from past court cases, it has become apparent to me that there is a shortage of pharmacists in small towns in rural British Columbia. This appears to be the case in regards to the claimant's employment in Keremeos. He appeared to work 12 hours a day, six to seven days a week, covering all the pharmacist needs in a small town, which no doubt had only one or two pharmacies. I accept Mr. Banh's evidence as such about his working conditions.
- [16] That being said, I think it is fair to conclude, however, that Mr. Banh was upset, perhaps angry, and he did not deal with the source of his anger initially. He chose instead to work. He did not make much effort in 2016 and 2017 to see Liam. Eventually he retained counsel in Victoria and began the process to get the issue resolved and to start seeing his very young son.
- [17] It is from here that criticism can be fairly pointed at the direction of Ms. Chrysler. Despite not really addressing this, it appears that Ms. Chrysler herself had some issues of concern with the Ministry. There is in evidence a document which suggests that because of perhaps her physical conditions and concerns about that, although that was not really clear, the Ministry insisted that she have someone in her home with her overnight while she parented Liam. I say this was not really addressed satisfactorily in the evidence because, as noted, the plaintiff was self-represented at trial and did not cross-examine at length on this issue, and to some degree what the problem with the Ministry was remains to me unclear.
- [18] It is important to note that, as a result of apparently numerous motor vehicle accidents, the most significant of which happened during her pregnancy during the marriage, Ms. Chrysler had and has significant physical difficulties. This was evidenced by her in court. I think it is fair to conclude that it was likely the source of most, if not all, of the Ministry's concern.
- [19] Getting to my comments about her behaving badly, it is fair to conclude and I do conclude that the respondent was needlessly difficult about the claimant's time with his son, and specifically after the order of Mr. Justice Bernard, Ms. Chrysler acted, one hopes not but perhaps at the direction of her counsel, as if the order did not matter or if the additional considerations and limitations could be added to the order.
- [20] Around this time, Mr. Banh sought time with his son. Ms. Chrysler knew that Mr. Banh had an ability to care for Liam, as he had, I am satisfied, cared for Liam and for the respondent after Liam's birth. She would have known he had been a successful parent as to his daughter Jayde. She knew that he had an extended family that was supportive. Yet I have concluded that she put up unnecessary roadblocks for Mr. Banh to see Liam.

- [21] Through a seemingly acrimonious start to litigation, the acrimony continued as initially supervised access was put in place with father and son, which was gradually expanded. But even this was a battle, as if the supervision was necessary for anything other than to allow Liam to get to know his estranged father. Mr. Banh eventually got to the stage where he was allowed reasonable time with his son while he was now living in Victoria, having returned there after the commitment to the Keremeos job ended. The access was formalized in the order of Mr. Justice Bernard, which I will deal with at length later.
- [22] At the time of trial, the claimant had been having considerable time with his son, although there were considerable difficulties associated with the timings of his visit. I am not sure how the issue of parenting time got to be the focus of the interaction between Mr. Banh and Ms. Chrysler for several months, the focus in a negative way, the focus of much anxiety, the focus of much failed communication and, as it turns out, the focus of substantial evidence called in the trial.
- [23] At the end of the day, the dispute between the parents about parenting time is not dramatic. Both parents agree, or so it appears, that Liam should spend as much time with each parent as is practical. Both parents concede that if they lived in the same community, that it would be in Liam's best interests that there be close to equal parenting time with his two parents.
- [24] It is fair to say that blame can equally be applied for the unnecessary use of court time and the unnecessary level of conflict that these parties have dealt with, at least until trial, over the issue on which they, at the end of the day, appear to have very little disagreement. By equal blame, I say this: the claimant, until the actual trial, appeared to be advocating that he should be the preferred parent and that he should have primary care of Liam. He had never had primary care of Liam. Liam is not yet of school age and Liam's mother, the respondent, is reluctantly a stay-at-home mother, which has everything to do with her current state of health resulting from motor vehicle accidents, which prohibits her from working. He, on the other hand, works full-time.
- [25] It was folly for the claimant to advocate such a move when he had virtually no criticism of the respondent in terms of her ability to parent, but only had valid criticism of her in regards to her lack of flexibility around parenting time, and her seeming refusal to deal with him in a manner consistent with the interim order of Mr. Justice Bernard.
- [26] That leads me finally to the June 15, 2018 order of Mr. Justice Bernard. That order was a reserve decision, clearly considered. The important paragraphs for the purpose of these reasons are as follows.
- [27] In paragraph 1 of the order of Mr. Justice Bernard, sets out in subparagraph (a) through (g) fixed parenting time and then says in paragraph 1(h):
- h. Thereafter, every weekend from Friday at 6 p.m. until Sunday at 6 p.m. or equivalent period during the week if the Claimant's days off does not fall on the weekend.

2. If Mr. Banh's work schedule conflicts with the above schedule, he is to provide 7 days' notice to the Respondent in order for the parties to arrange other dates or times.
 6. Except in cases of emergency, the parties shall communicate courteously by email regarding all aspects of the Child's care including the facilitation of parenting time and shall keep one another apprised of matters concerning the Child's needs and general well-being to ensure there is overall continuity to his care.
- [28] This order, on the face of it, allows two important things and requires something of importance of both parents. First off, it allows Mr. Banh to have Liam with him every weekend. It further allows him, in the event that he could not make the weekend because of a work commitment or perhaps because of any reason, to have liberty to change the time.
- [29] In paragraph 6, it required, and I note required, the parties to communicate with one another regarding all aspects of parenting, including the facilitation of parenting time.
- [30] It was argued before me that this order was based on a representation made by Mr. Banh to Mr. Justice Bernard that he would be available to parent his son every weekend. In other words, he would be able to get weekends off. I am prepared to accept that perhaps some similar type of representation was in fact made, but clearly there must have been some representation to Mr. Justice Bernard that it was not always possible for him to get weekends off and, as such, the provision was inserted in the order to allow Mr. Banh to request a change in time.
- [31] There is no limits in the order on the number of requests. Changes, I find, were clearly contemplated, a mechanism was set out, cooperation was no doubt implied, and communication was made a requirement. As things played out, after the order of Mr. Justice Bernard, Mr. Banh's availability for specific times of access became problematic. He made a number of requests for changes, seemingly every second weekend. Those proposed changes would be regular and would relate to moving parenting time from a weekend to other days.
- [32] Though I expect that sometimes as a result of acrimonious matrimonial litigation it is difficult for parents to communicate effectively with each other, I have reluctantly concluded, and this is where significant criticism falls at the feet of Ms. Chrysler, that she chose, either on her own or with legal advice, to essentially ignore the aspect of Mr. Justice Bernard's order about changing parenting time and her responsibility to communicate. Almost immediately, she insisted that Mr. Banh, when a request was made, deal with her lawyer. That is clearly not the intention of Mr. Justice Bernard's order, or paragraph 6 would not have been inserted and, rather, a paragraph about dealing with lawyers for changes, an often-inserted clause in orders in acrimonious situations, would have been included rather than the provision that was.
- [33] Though I cannot speak for what was in the mind of Mr. Justice Bernard, my experience as a judge suggests that we leave these issues to parents to hopefully, in a respectful manner, deal with the variations of matters such as parenting time as the need arises. We do not expect

them to default to a "no", especially when the order gives Mr. Banh the right to request changes, and the right in the order to time with his son weekly and overnight. Nor do we, unless the matter is particularly and historically acrimonious, require parties on simple issues to deal through counsel.

- [34] The combined effect of two stubborn individuals refusing to compromise, Ms. Chrysler insisting on involving counsel, and unfortunately Mr. Banh being required to make numerous requests for changes, resulted in the circumstances which I find was harmful to Liam. All the evidence before me suggests that historically, particularly in relation to his daughter, Jayde, and currently, and in this regard I rely on the evidence of the Honeymans, which I accept, the claimant is a capable parent who, when he has his child, provides for quality time with his child, is nurturing and attentive, and makes Liam the focus of his activities. Because of the seeming reluctance of Ms. Chrysler to accommodate the numerous requests for changes, and again I acknowledge they were numerous, Liam has not had the opportunity to experience his father's life and time with his father for reasons, like I say, which do not appear to be readily apparent.
- [35] There is certainly a bit of a dichotomy in the evidence of Ms. Chrysler. On the one hand, she says that she encourages a relationship between Liam and his father, and realizes that it is in Liam's best interest that he have a good relationship with his father. I cannot help but think, and this is my thought, not necessarily directed in the evidence, but it seems to me that the respondent's health challenges, that quality and regular time for Liam to be in the care of another parent would be of assistance to the respondent in organizing the various activities for herself, therapies, doctors' appointments and the like, and would assist her in having time to deal with the necessary matters of her disability and the potential apparent litigation arising out of the motor vehicle accidents, and the obligations which will fall on her in pursuit of her motor vehicle claim for her disability.
- [36] In other words, Liam having a quality relationship with his father and significant time with his father appears to be something that would be beneficial not only to Liam, but also Ms. Chrysler as she struggles somewhat with her health-related circumstances.
- [37] Yet this has not been the approach undertaken by the respondent to date. Her default position to suggested changes was essentially a no or a response to deal with her lawyer, which meant if it was attempted, and in fairness it should have been attempted more, usually resulted in a deadlock over the issue of a change. That deadlock was often related to the requirement, a requirement I note is not noted in the order of Mr. Justice Bernard, seemingly unilaterally imposed, that all requested changes must be accompanied with a full explanation and a disclosure of the work schedule. The evidence before me suggests that the schedule was somewhat haphazard in terms of creation and not necessarily a public document.

- [38] I have concluded, and it is not seriously in dispute, that despite all of what I have said, that there should be an order for joint custody of Liam under the provisions of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp) with the primary care of Liam being with Ms. Chrysler.
- [39] Despite it being ignored by Ms. Chrysler to date, the order of Mr. Justice Bernard, in its spirit at least, is to continue as a result of the evidence heard at trial. It will vary slightly to say that Mr. Banh, rather than have every weekend, shall have every second weekend with Liam, Friday to Sunday, but additionally he is to have up to a 60-hour visit following the week that he does not see his son. He will be required to give one week's notice as to the time of that 60-hour visit, and Ms. Chrysler is required to accommodate this unless, for whatever reason, she is out of town for the time requested or there is an emergent matter that makes it impossible to accommodate such a request.
- [40] I am ordering every second weekend, and after the non-weekend, a 60-hour visit with time that Mr. Banh is to choose, and Ms. Chrysler is required to explain why it does not work, because either she is away or there is an urgent issue which prohibits it from happening.
- [41] Liam's time with his father has to be a priority over everything or virtually everything.
- [42] The parties are further directed under the Family Law Act, S.B.C. 2011, c.25 [FLA] to share parental responsibilities for all major decisions related to the child's medical, educational, and other needs. Each party is to have sole responsibility for the child's day-to-day needs when the child is with them.
- [43] If the parties are not able to agree on a joint decision, Ms. Chrysler, as the primary parent, after full consultation, is entitled to decide on issues in which they disagree, and Mr. Banh is given the ability to challenge that decision by court application.
- [44] At the closing submissions, the impression was given that Mr. Banh may have, in fact, moved to the Lower Mainland. If he has, then that is a material change in circumstances from the evidence that was heard at trial, and there would be liberty to apply for a new schedule by way of notice of application. This schedule is predicated on him working in Victoria, because that was the evidence before me, and predicated on my understanding that he definitely has every second weekend off, but in regards to the other weekend, would have to work and would have his days off mid-week.
- [45] I would hope that if, in fact, Mr. Banh has moved to Vancouver or the Lower Mainland, and that after all the time and all the expense that both parties have incurred, that they could agree on a schedule something close to equal time between the parents. No evidence was called about this scenario at trial and, as such, no adjudication can be made in these reasons.
- [46] Finally, as is somewhat standard, the parties are to share equally the school spring break vacation and the school summer vacation. Liam should be in school this fall. Mr. Banh is further entitled to up to three weeks, consecutive or otherwise, with Liam over the summer school vacation period. As he works and Ms. Chrysler does not, he can choose those three

weeks each year, but he must do so by April 30 of each year. Ms. Chrysler, upon receiving notice of Mr. Banh's weeks, will then get to choose three weeks of exclusive time for herself with Liam over the summer, and that notice to Mr. Banh must be given by May 31 of each year. The balance of the school vacation will continue on the existing schedule.

- [47] Finally, and this is somewhat unique to these circumstances, Mr. Banh shall be entitled to five days each year, days of his choosing, to take Liam to Victoria to celebrate Chinese New Year with his extended family, as is their usual course. This is an important time for Mr. Banh and his family, and the evidence of those who testified confirms this. He will have to arrange this absence with Liam's teachers and ensure that at least some time is spent with Liam on schoolwork while he is away from school.
- [48] In regards to any variation applications, I am seizing myself of applications for the calendar year of 2020, 2021 and 2022.

Division of Property

- [49] This was a two-year marriage. Virtually and thankfully no small items or chattels or the like are in dispute between the parties. There are four pieces of real property, three of which were owned by Mr. Banh long prior to the marriage, and one of which was owned by Ms. Chrysler prior to the marriage, that are in dispute, and there is a dispute about RRSPs.
- [50] The only real property that the parties lived in was the property of Ms. Chrysler, her condominium in Surrey, British Columbia. Mr. Banh's properties were primarily in Victoria, two of them, and one was in northern Vancouver Island. I will deal with the properties and the evidence about these properties individually.
- [51] The first of these properties is 1158 Empress Avenue. This is a home in which there are a number of rental units, one unit which was regularly occupied by Mr. Banh. The evidence before the court suggests that at the time of marriage, this property was valued at \$425,000. At the time of separation in August 2016, it was valued at \$520,000, an increase of \$95,000. The appraisal value at trial, November 2019, was \$715,000, an increase of \$290,000 from the date of marriage to the date of trial.
- [52] In regards to the indebtedness registered against this property, there seems to have been a modest increase of about \$4,500 in indebtedness from marriage to separation, and a further \$11,000 in indebtedness to the date of trial, for a total increase in indebtedness of approximately \$15,000. The equity in this home at the time of marriage was \$52,796.
- [53] The second property is 2438 Chambers Street, again a property in Victoria. This property was appraised at the time of marriage at \$535,000. At the time of separation two years later, it was valued at \$650,000, an increase of \$115,000. At the time of trial, the property was appraised at \$850,000, an increase of \$315,000 from the date of marriage.

- [54] In regards to the indebtedness, the evidence suggests that there has been an increase of about \$10,000 from marriage to separation, and a further increase of \$22,500 from the date of separation to the date of trial, for a total indebtedness of around \$33,000. The equity at the time of the marriage was modest, \$23,674.
- [55] The third property owned by Mr. Banh was property known as 9 Dogwood Lane, which is a property in Port Alice, British Columbia, on the northern part of Vancouver Island. This property was appraised at the time of marriage at \$75,000. At the time of separation, it was appraised at \$40,000, a loss of \$35,000, and at the time of trial, it was appraised at \$65,000, a loss of \$10,000 from the date of marriage.
- [56] The indebtedness on Port Alice appears to have decreased by about \$22,000 from the date of marriage to the date of separation, and then increased by \$11,000 from the date of separation to trial. This equates to a total decrease of \$11,500.
- [57] The equity at the time of the marriage in this property appears to be zero or negative. There is some uncertainty in the evidence about debt associated with this asset. I get the impression that at one point, the property on 9 Dogwood Lane in Port Alice was quite valuable; that is no doubt when Port Alice was a more thriving community. When it was more valuable, the property seems to have been completely leveraged for the construction of the home on Chambers Avenue. It was leveraged for, it appears, more than its even then value. There is a home line plan related to this property also registered on the Chambers Street property, and that home line is well in excess of the value of the current value or the appraised value at the time of marriage of the Port Alice property.
- [58] I now turn to the respondent's Surrey condominium. This was appraised at the time of marriage at \$175,000. At the time of separation, it was appraised at \$240,000, an increase of \$65,000, and at the time of trial it was appraised at \$345,000, an increase of \$170,000 from the date of marriage.
- [59] In regards to the indebtedness and the equity, that is unknown, because the amount of the indebtedness at marriage is unknown; there is no evidence. By the time of separation, the evidence suggests that there was about \$100,000 owing on the mortgage, and at the date of trial it was \$73,415.
- [60] The crucial issue in this division of property claim, as it relates to these assets, is whether or not the court-imposed traditional date for valuation for the purpose of division of property between the spouses, the date of trial, should be the valuation date, or whether, in applying factors set out in s. 95(2) of the FLA, the court concludes that it would be significantly unfair to divide the growth in the property from the date of marriage to the date of trial.

- [61] Division of property in British Columbia under the FLA is a relatively straightforward process. It is almost like an accounting exercise. There is financial disclosure akin to a Form 7, notionally completed by the parties, representing values at the date of marriage, and a Form 7 itself related to the properties at the date of trial is a requirement. That is the evidence that the court traditionally needs.
- [62] The presumption is that by looking at that bit of information, there can be a determination of growth in the value of the asset from the date of marriage to the date of trial, and that is presumptively divided equally between the parties. The further presumption is that the value of the property at the date of the marriage is excluded, and that value is not subject to division.
- [63] Under the previous Family Relations Act, R.S.B.C. 1996, c. 128 [FRA] there was a general provision in the division of property section which was formulated on the fact that all property at the date of a triggering event, sometimes separation but most often an applied-for court date, was presumptively divided equally between the parties. There was, under the FRA, a more generous allowance or ability for the court to determine whether or not equal division at the date of valuation was unfair. Under the FRA, this was because all property was valued at the time of the triggering event, and there was no presumption of excluded property as currently exists under the FLA.
- [64] In other words, there was no backing out of the value of the property brought into the marriage. Because of this, the FRA provided for a much more generous or liberal approach to variation which was left in the hands of the court.
- [65] It is s. 87(b)(ii) that creates the date of valuation as the date of trial, unless the court otherwise orders. Section 87(b)(ii) provides:
- 87 Unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6,
- (b) the value of family property and family debt must be determined as of the date
- (ii) of the hearing before the court respecting the division of property and family debt.
- [66] It is s. 95(2) of the FLA that sets out the criteria that the court can consider in making an assessment as to whether or not there is a level of significant unfairness which would require a variation from the equal division or equity or growth during the marriage to the date of trial. Section 95(2) provides:
- (2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:
- (a) the duration of the relationship between the spouses;
- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];

- (c) a spouse's contribution to the career or career potential of the other spouse;
 - (d) whether family debt was incurred in the normal course of the relationship between the spouses;
 - (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- [67] The issue as put to me is this: should the value of these four assets be at the date of trial, or should the court apply s. 95(2), or does the court find that there is significant unfairness in valuation at the date of trial in light of the factors set out in s. 95(2)?
- [68] Numerous cases have been provided to me by counsel, and I thank them for them, in which the court has in the past considered the concept of significant unfairness:
- [69] *L.G v. R.G.*, 2013 BCSC 983: This case advises the court that we should be cautious against departing from the default of equal division in an attempt to achieve perfect fairness.
- [70] *Rudyak v. Bekturova*, 2018 BCCA 414: This case instructs the court that while the court has discretion to choose a different date, there must be compelling evidence to depart from the mandated valuation date in the FLA.
- [71] *Lodhi v. Khan*, 2019 BCSC 398: This case talks about the need for an existence of compelling evidence to depart from standard valuation dates and to disentitle one property owner from the benefit of an increased value brought on by market forces, but for no other direct effort of the other party.
- [72] These are, in my view, the most significant cases relied on by counsel for the respondent.

- [73] Let me say first that in regards to Lodhi, a case heavily relied on by counsel for the respondent, I find that case to be very different facts. On the facts before me, Ms. Chrysler is not the owner of any of the properties that Mr. Banh owned, that he developed, that he built, and that he maintained prior to marriage, during the marriage, and notably for the three and a half years after the marriage, the marriage again being for a 24-month period.
- [74] Also, it is not fair to conclude on the facts before me that these properties simply grew in value by no direct effort of any party. These are, for the most part, rental properties. They have to be managed and maintained in order to maintain their value. It is true that market forces have led to some significant growth, but that growth was not without effort and cost borne by the claimant and the claimant alone, cost both in terms of dollars, but also cost notably in terms of time and travel.
- [75] There are a number of factors in this case which lead me to conclude that it would be significantly unfair, having considered s. 95(2) of the FLA, to divide property at the date of trial. This was, at most, a two-year marriage with a 21-month period of cohabitation. From the time of separation to the unilaterally-chosen trial date, a date chosen long in the calendar with no consultation with Mr. Banh, there was a further gap of almost three and a half years. All added up, a division at trial would give the respondent the benefit of five and a half years of growth on assets from a two-year marriage, five and a half years of benefit from assets that she did not manage or control or in any way contribute to based on a two-year marriage.
- [76] This is a very short marriage, a factor set out in s. 95, and the assets in which there was considerable growth were, at all times, primarily rental properties. The vast majority of the growth happened after separation.
- [77] All manner of work required to maintain these numerous rental properties in Victoria and in the northern part of Vancouver Island was work undertaken by Mr. Banh, either when he resided in Surrey during the marriage, or resided in Keremeos for slightly over a year, and as a result some distance was required for him to manage these properties. He did all the work. He did all the work specifically during the most significant period of growth after the marriage.
- [78] The only indirect contribution during the marriage that the respondent made to the maintenance of these assets appears to be one or two emails related to a rental unit and perhaps a phone call and perhaps an unsuccessful showing of one of the units in Victoria. That, in the broader scheme of things, equates to effectively no contribution. Managing rental properties is much more labour-intensive than that, as I find, insignificant contribution.
- [79] Additionally, financial advances were made to the respondent from the claimant in order to pay off her debts, both immediately prior to and in the months of the marriage. These total, by my calculation, in excess of \$33,900. Those advances came from Mr. Banh, went to Ms. Chrysler to pay off her pre-existing debt, and there is nothing to show in terms of asset

accumulation or growth for those advances. To put that amount of money in perspective, there was more money advanced to Ms. Chrysler to pay off her pre-existing debts by Mr. Banh than existed in equity in the Chambers property at the time of marriage.

- [80] In my view, it would be significantly unfair to divide assets at the time of trial, three and a half years after the end of a two-year marriage. In my view, fairness is achieved by dividing the apparent growth in value of the three primary properties between the parties as of the date of separation. In doing so, and additionally, to the benefit of Ms. Chrysler, I would not consider the increase in the amounts of the indebtedness or mortgages on those properties from the date of marriage to the date of separation, and I would not allocate at all to Ms. Chrysler any of the financial loss associated with the Dogwood property in Port Alice in northern Vancouver Island which, as of the date of separation, was considerable.
- [81] In this regard, I believe I am taking an approach to division that is consistent with two of the cases relied on by counsel for the claimant. The first of these is the decision in *Williams v. Killey*, 2014 BCSC 1846. In this case, the parties were married for about three and a half years and the excluded property of the husband increased in value during those years by \$107,000. There was no contribution, direct or indirect, to that property in which the growth occurred by the claimant wife of that marriage, similar to the facts here.
- [82] So on the facts in *Williams*, a substantially longer marriage and similarly no contribution to the growth in assets, direct or indirectly, by the claiming spouse. In *Williams*, the court reapportioned that growth in the property 85% to the husband and 15% to the wife.
- [83] The case most on point, in my view, in this decision is *Davie v De Mark*, 2017 BCSC 872. In that case, which was a case of a one-year marriage, DeWitt-Van Oosten J., as she then was, valued property at the date of separation and reapportioned the difference or the growth 70% in favour of the wife, who had owned the pre-existing asset. The short duration of the marriage was a key factor in that determination. Here I will not go that further step, but I will simply divide the value of growth at the date of separation equally.
- [84] Considering the growth in value equity as of the date of separation, and again not considering the increased mortgage indebtedness, I note the following. In regards to *Empress*, the equity grew \$95,000. In regards to *Chambers*, the equity grew \$115,000. That is \$210,000 in growth, divided equally, would entitle Ms. Chrysler to \$105,000. That is after a two-year marriage. Substantially more is allocated to Ms. Chrysler from this growth than existed in the total equity in those two assets when she married Mr. Banh, which was only \$86,500. The respondent married someone with equity in land of \$86,500, and two years later from those assets she gets \$105,000 for herself. If dated at trial, her share in the equity with the added three and a half years of separation, plus the marriage, would be \$302,500 from assets that, at the beginning of the marriage, had \$86,500 in value. That is, by any reasonable definition, substantially and grossly unfair.

- [85] From the \$105,000, Ms. Chrysler needs to account for the more modest growth in her equity in her Surrey condominium. That growth totalled \$65,000 to the date of separation on this asset that she brought into the marriage, but on an asset I note he also contributed to during the marriage by paying the lion's share of the regular household expenses while the parties resided there.
- [86] Mr. Banh is entitled to one-half of that growth or \$32,500 which, when deducted from the \$105,000 that Ms. Chrysler is entitled to from the growth in Empress and Chambers, leaves a balance payable by Mr. Banh to Ms. Chrysler of \$72,500. I make that order.
- [87] In making that order, I am relying on s. 95(2)(a) of the FLA, a factor related to the length of the marriage, and the entirety of the factual circumstances noted above which qualify, in my opinion, under s. 95(2)(i) as other factors that would lead to significant unfairness.
- [88] Upon such payment and the additional RRSP adjustment which I am about to deal with, each party's claim against the other for division of property are to be dismissed, and each party is to keep all the property in their own name.
- [89] The evidence in this about the RRSP is unclear about what was held prior to the marriage, what was contributed to in terms of RRSP during the marriage, or for that matter what was withdrawn from RRSPs during the marriage. Equally unclear is what was contributed to and withdrawn from the RRSP by Mr. Banh after separation. He had some RRSPs which now appear to be gone. He may have made some contribution to during the marriage, that is uncertain, but the onus is on him to disclose. I concede that he has tried to disclose, but there are many questions that remain.
- [90] I conclude that there was, in all likelihood, modest growth in his RRSPs during the marriage. I direct that Mr. Banh is to transfer \$5,000, RRSP dollars, that is, to an RRSP set up by Ms. Chrysler in satisfaction of her claim against his RRSPs. If that is not available, he has the option to transfer her a further \$4,000 in regular funds rather than RRSPs.

Child Support

- [91] There appears to be an interim order of July 1, 2017. It is a without prejudice order. It sets interim support at \$1,463 a month. Interim without prejudice orders are often simply orders put in place to tide the recipient over until a true determination of income can be made at trial, when better evidence is available.
- [92] Pursuant to that order, some monies have been paid. I cannot determine how much. It would seem to me that an order in that amount was estimating Mr. Banh's income at \$163,700, but that is not clear in the order.
- [93] Mr. Banh's income is not traditional. He has, in my view, and I find, three sources of income or three sources of information which combined can give the court a determination as to what his income is.

- [94] The first is his declared income on his personal income tax return. That, for the most part, has included his actual T4 income and includes some of his rental income, but not all. It includes some of his rental expenses, but not all. A second source of income that can be looked to in determining Mr. Banh's income is his corporate income tax return. It appears that one of his rental units may be run through his corporate income tax return, but again not all the rental income and not all the expenses appear to be captured. Some of his business and professional income has periodically been run through his corporate income tax return.
- [95] Then there is a third component, the undeclared income. There is evidence before me, though not evidence of any great weight, but evidence nonetheless which leads me to the conclusion that there is undeclared income by Mr. Banh related to his rental properties. It seems that periodically in making tax disclosures, he would guess at his income, his rental income, and he did not include all his rental income and, for a surprising reason, did not appear to include all of his rental expenses.
- [96] Those are the three sources which should be analyzed each and every year to determine what Mr. Banh's income is for the year. It goes without saying that child support is, of course, dependent upon a payor's income.
- [97] I have chosen to start a determination of his child support obligations in November 2016, that is a few months after separation, but it is a time period at which he apparently had begun employment in Keremeos.
- [98] I note as well that in 2017, his income was very high and that was, I am satisfied, for lack of a better term, a one-off.
- [99] Based on all the evidence, I have determined Mr. Banh's income as follows:
- [100] In 2017, his personal income tax return suggests an income of \$168,851. His net corporate income from his corporate income tax return is a further \$20,000, and for that year I am attributing to him \$10,000 in undeclared rental income. That creates a combined income for Mr. Banh of \$194,645. The \$20,000 net corporate income is a rounded number, I should add.
- [101] In 2018, Mr. Banh's personal income tax return indicated income of \$89,669. He had \$858 in corporate income, and I am attributing to him \$15,000 for undeclared rental income, as less appeared to be declared in 2018 than in 2017. That gives him a total income of \$105,527.
- [102] For 2019, Mr. Banh's income on his personal return is \$96,542. His corporate income is \$916. I am again imputing to him \$15,000 in undeclared rental income, so his total income that year is \$112,458.
- [103] On the issue of child support, for the last two months of 2016, November and December, and for all of 2017, for a period of 14 months, I am basing a child support obligation on the determined income of \$194,645. That works out to \$1,704 a month and would require Mr.

Banh in that 14-month period to pay \$23,856. For 2018, based on his income of \$105,527, he would be required to pay \$993 in child support. For 12 months, that totals \$11,916. For the entirety of 2019, and I am including December of that year, though that is post-trial, his income is \$112,458, requiring him to pay \$1,043 a month. For 12 months, that is \$12,516.

- [104] To the end of December 2019, Mr. Banh has a child support obligation of \$48,288. I am not sure what he has paid. He has paid through the Family Maintenance Enforcement Program ("FMEP"), so that is readily discernible. I am directing FMEP to recalculate their figures to note that his child support obligation through to December 2019 totals \$48,288. Any amount that he has paid is to be deducted from that and arrears if any are to be established on that basis.
- [105] Ongoing, effective January 1, 2020, I am determining his income again at \$112,458 and am requiring him to pay ongoing the amount of \$1,043.

Spousal Support

- [106] Spousal support is required to be determined after property division is done, because property division can sometimes be a factor. I note here that the property division to be achieved, that Ms. Chrysler is receiving, is coincidentally almost equal to the amount of her mortgage. If she effectively marshals her property division, she could be living mortgage-free.
- [107] In regards to spousal support, spousal support has a threshold of requirement of entitlement. This is a short marriage, but there is a child.
- [108] The income disclosed by Ms. Chrysler is, to some degree, uncertain. I say that because she was not clear on what the sources of her income was in her evidence. There may be some non-taxable income component, as she may have received in some years disability payments from the Insurance Corporation of British Columbia ("ICBC") or otherwise, and she has received significant tort advances, recognizing as I do that those tort advances suggest that there is no issue about liability for her injuries in the motor vehicle accidents, and there is a recognition by ICBC, no doubt, that she is entitled to some compensation for lost income.
- [109] The tort advances suggest that ICBC has recognized her loss is a tort responsibility. Her evidence is, which I accept, that but for the accidents and her injuries, it would have been her plan to return to work after taking a year off with the child. In other words, but for the accident, she would have been back at her work, her income in the \$50,000 to \$55,000 range, as of June 2017.

- [110] The court has to consider in making a spousal support determination the Spousal Support Advisory Guidelines. Those are generally considered after one imputes to the program the income of both parties, and though I have determined Mr. Banh's income over various years, I simply cannot determine her's based on the evidence before me, particularly as it relates to the tort advance.
- [111] I do, however, recognize, as I have said, that in the future, Ms. Chrysler will be compensated for her loss by the defendant driver or drivers which have caused her inability to work. That has essentially been admitted and it has been suggested that support should be paid on an ongoing basis and that at some point, when she receives her settlement, there can be an adjustment.
- [112] In my view, that is completely impractical. Settlements in insurance cases are often all-in settlements, and with the knowledge of a responsibility to account for money received for lost income, there is a built-in incentive to compromise that claim and enhance other claims in any tort settlement. That suggestion would also give Mr. Banh additional rights to inquire and impose upon Ms. Chrysler additional obligations to disclose in a continuing manner and that is not in anyone's best interests.
- [113] Here, in determining spousal support, the court must be cognizant that she is a person who is temporarily in need because of the motor vehicle accidents. At least one of them, and the most serious accident, happened during the marriage, the debilitating accident, it seems, but that has to be balanced with the recognition that her loss of income is related to the accident, not the marriage. That has to be balanced with the recognition that with childcare responsibilities, some impact is usually felt on immediate and successful return to work. And one has to recognize that if she was able to return to work, Mr. Banh would be facing the requirement to contribute to daycare.
- [114] Additionally, in considering her division of property award, it is practical that she could reduce or substantially eliminate her ongoing mortgage requirement.
- [115] Clearly, spousal support is the most vexing aspect of this decision. I have concluded that for the period to trial, there was an entitlement to transitional spousal support and there is a short-term entitlement to further transitional support post the marriage - post the trial. Looking at Mr. Banh's income and having a rough idea of what Ms. Chrysler's income would have been, it is fair to conclude and I do conclude that for the last two months of 2016 and all of 2017, it is likely the case that Ms. Chrysler could have received an order for about \$3,000 a month in spousal support, and in 2018 and 2019, based on the much reduced income of Mr. Banh, Ms. Chrysler would likely have received around \$1,200 a month for 24 months in spousal support.
- [116] \$3,000 a month for 14 months is around \$42,000. \$1,200 a month for 24 months is \$28,800. That is around \$70,800 in spousal support. A further 18 months of spousal support post-trial at \$1,200 a month would be another \$21,600 in spousal support.

- [117] I have determined that what is appropriate to do in this circumstance is to provide for a lump-sum spousal support to deal with these numbers. The \$70,800 in support through the end of 2019 would cost Mr. Banh about \$46,000 after a 33% reduction for the tax benefits that he would get. The further 18 months of support at \$21,600 with a 33% reduction would cost Mr. Banh about \$14,250. That would be \$60,250 and that is the amount of lump-sum spousal support that I am ordering Mr. Banh to pay to Ms. Chrysler.
- [118] I do this for several reasons. First off, this is a case in which there is a modest claim for support based on a temporary need, a need not related to the marriage. Additionally, I am concerned that if Ms. Chrysler is having to retroactively claim or in the future claim spousal support, that may have some dilatory effect on some of the benefits that she is receiving, either for child tax benefits or for disability benefits. Thirdly, to order support on a monthly basis in a traditional way, as I have noted, would create an ongoing obligation to inquire and to disclose which is not beneficial for these people who clearly do not get along.
- [119] At the end of the day, after a two-year marriage, I am ordering 56 months of support, effectively, or just over four and a half years of support.
- [120] In conclusion, I am not going to repeat the terms related to the parenting time which I have already said, but in regards to the monetary awards, in summary, I have determined Mr. Banh's child support obligation from separation to and including December 31, 2019 at \$48,288. FMEP is to amend their records to note that that is the obligation and to credit him for any payments that he has made.
- [121] As of January 1, 2020, and ongoing, I am determining his income at \$112,458 and requiring him to pay child support in the amount of \$1,043 a month.
- [122] For spousal support, I am requiring Mr. Banh to pay \$60,250 in lump-sum spousal support and upon such payment, which is to be made within six months, that spousal support obligation is at an end.
- [123] In terms of property, Mr. Banh is to pay to Ms. Chrysler the sum of \$72,500 to balance out their respective claims against each other's real estate holdings, and he is further to pay her \$5,000 by way of RRSP transfer or \$4,000 in cash. Once those two payments are made, and again those payments must be effected within six months, each party is to keep their own assets in their own name.
- [124] It would be my inclination that each party bear their own costs because there has been mixed success. Any comments on that?
- [125] MR. COTE: If we can, My Lord, just obviously it's a lot of information and it's been a while since the trial, if we could just have leave if we disagree as to costs, if we can come back and appear before you for a short submission?

[126] THE COURT: Yes, that is perfectly reasonable. We will leave costs then. I would only request that you make arrangements to get back in front of me within the next 30 days, and by make arrangements, I mean contact Supreme Court Scheduling within the next 30 days, not necessarily get it set up.

[127] MR. COTE: Thank you, My Lord.

[128] THE COURT: Yes, Ms. Yousefi?

[129] MS. YOUSEFI: My Lord, I just -- I was wondering whether your reasons are going to be transcribed or if should we order the transcript?

[130] THE COURT: Madam Registrar, if you could order a copy of the reasons at the court cost, and then once they are transcribed, I will make sure that they get to both counsel.

[131] MS. YOUSEFI: Thank you so much, My Lord.

[132] THE COURT: Thank you. Thank you both.

[133] MR. COTE: Thank you, My Lord.

"J.R. Groves J."

GROVES J.

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