
CANADA / JUDGMENT

D.L.T. v. D.T.B.

2007 BCSC 210

COURT

Supreme Court of British Columbia

DECIDED

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2007 BCSC 210err1 D.L.T. v. D.T.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

D.L.T. v. D.T.B.,

2007 BCSC 210

Date: 20070214

Docket: E67523

Registry: Kelowna

Between:

D.L.T.

Plaintiff

And

D.T.B.

Defendant

Before: The Honourable Mr. Justice Rogers

Reasons for Judgment

Counsel for the Plaintiff:

S.D. Swail

Counsel for the Defendant:

D.M. King

M.D. Brooke

Date and Place of Trial:

January 30 and 31;

February 1 and 2, 2007

Kelowna, B.C.

Introduction

- [1] The parties in this family litigation each seek reapportionment of the former family home. The plaintiff husband's theory is that he should have the greater share of that asset because the family's equity was increased by a gift he received from this ailing father about a year before the separation. The defendant wife asserts that she deserves the greater portion because she sacrificed her career for the marriage, her economic disadvantage as a result of being a homemaker, and the plaintiff's unwillingness to pay support voluntarily.
- [2] The defendant also asserts that income should be imputed to the plaintiff because he is purposefully underemployed, and she seeks spousal support and child support plus special and extraordinary expenses based on that imputed income.
- [3] The parties have essentially agreed upon custody, guardianship and access with respect to the remaining child of the marriage. The plaintiff wants joint custody, but the defendant says that is not workable because the parties cannot have civil discourse.

The Facts

- [4] Mr. T is 48 years old. He is a Grade 12 graduate, and he has a couple of years of post-secondary education. Mr. T's father was in the helicopter business. Mr. T became a helicopter pilot in his teens. By the late 1980s and early 1990s, Mr. T was operating his own successful helicopter business. His company was based in Alberta. It had as many as 8 helicopters and up to 25 employees. Mr. T managed the business and flew helicopters. Mr. T married his first wife and they had two boys, D and P. Mr. T and his first wife separated. The boys came to live with Mr. T in Calgary. Mr. T sold his business and his working life went into a kind of hiatus. This was in the early 1990s.
- [5] Ms. B is 50 years old. She graduated from Grade 12 and went on to university. She obtained a B.A., a B.Ed., and finally a Masters degree. She also attended a technical school and earned a certificate in communications with an emphasis on television production. By the early 1990s, Ms. B had settled in Calgary. She had a teaching job in a private school. Expectations for students and teachers at this school were very high, and Ms. B found working there stressful. Ms. B owned a mortgaged condominium in an adult only complex. She had between \$15,000 and \$18,000 in savings, and she had accumulated a small pension entitlement through her teaching work. There was no evidence that Ms. B had had any romantic attachments before this point in her life.

- [6] Mr. T and Ms. B met in Calgary in 1992. By December 1992, they were romantically involved. Sometime between mid-December 1992 and February 1993 Mr. T, D, and P moved into Ms. B's condominium. Mr. T wanted to leave Calgary and move to B.C. where his family was. Ms. B's family was in B.C. too and she agreed to move with Mr. T, but she did not want to move to the Lower Mainland. Eventually, the couple agreed to move to Kelowna. Ms. B sold her condominium and quit her teaching job.
- [7] They arrived in Kelowna in the spring of 1993. They rented a house on Abbot Street. Ms. B applied to the Kelowna School District for work. She learned that the District had no need of new teachers, so she applied to several private religious schools and got onto their substitute teacher call lists. Ms. B also started tutoring children at the couple's home. As for Mr. T, he was receiving a steady income of \$4,100 per month from the sale of his business, and he was entitled to a final balloon payment of \$150,000 in 1997.
- [8] Mr. T and Ms. B were married in Kelowna on September 11, 1993.
- [9] Because Mr. T was not otherwise occupied, he decided to enrol in a carpentry course at the local community college. Ms. B agreed with and supported that decision. Mr. T completed one school year of that course and began to do some practical work as a carpenter. He felt that the \$9 per hour he earned was not adequate compensation for the difficult work he did. He was, at that time, in his mid-30's and was simply not as spry as the other, much younger, first-year carpenters. Mr. T decided to not pursue a career as a carpenter.
- [10] Around 1994, Mr. T and Ms. B incorporated Okanagan VTOL, and they began to operate various business ventures through that company. Mr. T was the operating mind of Okanagan VTOL throughout. In 1994, the company borrowed some money from, among others, Mr. T's parents and purchased a helicopter. It leased the helicopter to an individual in Saskatchewan. The helicopter was primarily used there for firefighting work. Mr. T went with the helicopter to Saskatchewan to fly it during the fire season and to assist the lessee with business development.
- [11] Mr. T's carpenter training was not wasted. In 1996, Mr. T and Ms. B put together \$50,000 and invested it in a residential property in the same neighbourhood as their rental house. The place they bought was not suitable for their family, and so Mr. T spent many hours doing various renovations to the interior and exterior of the property. By this time, D and P were living with Mr. T and Ms. B half of the time, and the couple had their own child, Q, who was born on July 4, 1996.
- [12] In 1997, VTOL bought another helicopter for use in fire work in Saskatchewan. That was a bad year for fires, though, and VTOL lost about \$100,000.
- [13] In 1998, the company did rather better. The company's income was split between Mr. T and Ms. B, and each reported about \$70,000 on their tax returns.

- [14] Unfortunately a change in regulations rendered both of the company's helicopters unsuitable for the work they had been doing in Saskatchewan. By 2000, Mr. T was ready to get out of the helicopter business. He testified that he was in his mid-40's, that flying was a tiring and risky occupation, that the business did not provide a reasonable return on the huge investment required to own a helicopter, and that he was ready to make a change. In the year 2000, Mr. T caused VTOL to sell the machines. The corporation received cash and a fixed wing airplane in compensation for its helicopters. VTOL used some of the cash to pay down part of its debt, and it purchased some RRSPs for Mr. T and Ms. B. A year later, VTOL sold the airplane and used the proceeds to buy a condominium at the Big White Ski Resort near Kelowna. VTOL rented the condominium out during weekdays and the family used it on weekends.
- [15] After selling the helicopters, Mr. T took a job selling avionics for Northern Airborne Technology, a company based in Kelowna. This company was affiliated with a larger corporate entity known as Chelton. Chelton was headquartered in Boise, Idaho.
- [16] Mr. T's hours were quite regular when he worked for Northern Airborne. He worked 9 a.m. to 5 p.m. and was home on the weekends. He traveled on business five to seven days per month.
- [17] Ms. B was not wholly idle while Mr. T worked at carpentry, flying and finally selling avionics. She taught on a substitute basis at several private schools in Kelowna, and she tutored students at the couple's home. In 2000, she finally got onto the Kelowna School District's substitute teacher on-call list, and she began to get reasonably steady work as a substitute teacher. She continued to tutor students. Her teaching income was, of course, paid to her as employment income, but she funnelled her tutoring income through VTOL.
- [18] During the winter of 2002-3, VTOL rented some retail space at the Big White Ski Resort, and Ms. B started up a flower shop there. The shop was not financially successful, and VTOL shut it down after only one season of operation.
- [19] At some point in the family's history while D was still living with the parties half-time, the family and one of D's aunts pooled their resources to buy D a piano. D studied music on that instrument and became quite accomplished. The parties have agreed that D should have ownership of the piano.
- [20] In February 2003, Mr. T's elderly father loaned the couple \$110,000. In his submissions, Mr. T's counsel characterized this as a gift to Mr. T alone. I have reviewed Mr. T's testimony in direct examination. Mr. T quite clearly said words to the effect that "he loaned us \$110,000". That accorded with Ms. B's recollection as well. I will, therefore, characterize that transaction as a loan and not as a gift.

- [21] Mr. T managed the family finances. He decided that the loan proceeds would be used first to pay off the mortgage on the family home, which was then between \$65,000 and \$85,000; about \$20,000 would be used to retire the outstanding balance of VTOL's line of credit, and the rest should be invested equally in RRSPs for him and Ms. B.
- [22] In the summer of 2003, Mr. T's father fell ill. Mr. T decided to take a leave of absence from his job to go care for his father during the latter's last days. Mr. T's father passed away in September 2003. According to Mr. T, his father bequeathed the estate to him and his sister in equal shares. Mr. T and his sister managed the estate in an irregular way. They seem to have agreed that the estate would forgive the debt owed to it by Mr. T and Ms. B, that Mr. T's sister should get credit for a number of assets she received inside and outside of the estate, and that Mr. T's take from the estate should be limited to an automobile and \$21,500 in cash paid to him, not by the estate, but by his sister. So, that is what they did. Mr. T received \$21,500 from his sister in September 2003. Mr. T used \$20,000 from that fund to pay down a line of credit. The balance of approximately \$1,500 was used by the family for living expenses.
- [23] Mr. T remained out of work until February 2004. During that time, the family lived on Ms. B's relatively small teaching and tutoring income and on VTOL's line of credit. In the spring of 2004, Mr. T returned to work doing the same job as he had with Northern Airborne Technology, but now he was working for Chelton directly. Instead of earning a salary, he became a commissioned sales person. Ms. B supported Mr. T in his decision to make this change. Mr. T caused his commission income to flow through VTOL.
- [24] In September 2004, Mr. T disposed of the car he received from either his sister or his father's estate. He used the proceeds from that disposition to purchase a Ford Ranger pickup truck for \$22,900.
- [25] Unhappy differences arose between Mr. T and Ms. B. They separated in November 2004. Mr. T stayed in Kelowna for a while, but sometime in early 2005, he moved to White Rock. Ms. B remained in the family home with Q. By then, Mr. T's older sons D and P had moved out and were living independently.
- [26] In early March 2005, Ms. B drew down VTOL's line of credit by \$3,000 and invested that sum in an RRSP for herself. Several days later, she withdrew \$14,000 from that same line of credit. That withdrawal pushed the line up to nearly its maximum of \$115,000. About the same time, Ms. B withdrew a cash advance of \$9,500 from the couple's Visa credit card. She extracted the current balance from the couple's joint bank account and withdrew \$880 from an account that the couple had created for Q's benefit. In total, Ms. B appropriated \$27,000 to herself from the couple's personal and corporate resources.
- [27] Upon learning of Ms. B's action relating to the couple's finances, Mr. T caused VTOL to wind up its affairs. The company had earlier used the proceeds of sale of the Big White condominium to reduce its line of credit. It had also collected an account receivable from Chelton. All told, VTOL distributed its 2004 income to Mr. T by way of T4 income in the amount of \$49,000 plus dividend income of \$24,528, and T4 income to Ms. B in the amount

of \$32,000 plus dividend income of \$24,528. By the time VTOL was wound up, its assets were limited to some aircraft parts worth about \$10,000 which Mr. T took; some office furniture worth about \$1,500; a Toyota automobile worth about \$15,000; and an account receivable of about \$14,000, all of which Ms. B took (the receivable equalled the \$14,000 draw Ms. B made on VTOL's line of credit).

- [28] Later in 2005, the parties sold a second Big White condominium they had held in their personal names. The proceeds of sale from this condominium paid off the balance of the VTOL line of credit.
- [29] Mr. T paid no spousal or child support immediately after the separation. Ms. B applied for support, and her application came before the court in October 2005. The presiding Master ordered Mr. T to pay child support of \$600 per month commencing November 1, 2005. The Master left the issue of retroactive support to the trial judge. The Master dismissed Ms. T's application for spousal support. Ms. B successfully appealed the Master's dismissal of the spousal support application, and in December 2005, the appeal judge ordered Mr. T to pay spousal support in the amount of \$500 per month.
- [30] Ms. B's application for support was predicated upon the financial statement she had prepared many months earlier. That financial statement did not report the income attributed to her in VTOL's last year of operation. Ms. B's 2004 tax return would have shown that income, but she did not supply it to the court for consideration at the original hearing or at the appeal. Ms. B did, however, rely on Mr. T's 2004 tax return, and that document did report Mr. T's share of the corporate income. It appears, therefore, that when the court made its spousal support order the evidence relating to the parties' income was in an "apples and oranges" state. That is to say, the evidence relating to Mr. T included income attributed to him from VTOL, but the evidence relating to Ms. B's income did not include that income. Mr. T's income appeared to be very much greater than Ms. B's - an impression that might have been lessened if Ms. B had put her actual tax return with the corporate income before the court.
- [31] That said, I note that the learned justice on appeal was aware that about \$24,000 of Mr. T's income that year was attributable to a one-time dividend. She appears to have netted the dividend income out of her assessment. But nevertheless, that still left Mr. T with about \$49,000 of corporate income that was acknowledged and Ms. B with about \$32,000 of corporate income that was not acknowledged.
- [32] In any event, after the support orders were made, Mr. T paid child and spousal support as ordered. However, in July 2006, he unilaterally reduced his child support payments to \$530 per month. On September 1, 2006, he stopped paying child and spousal support altogether and he has made no payments since. Mr. T candidly admits that he had no rational grounds for not making the payments as ordered. He was, in his words, simply fed up with the matrimonial action. He said that he was frustrated by what he felt was Ms. B's disinclination to get on with resolving the dispute.

- [33] At the end of September 2006, Ms. B was offered full-time teaching work in an elementary school. She accepted the offer. She now has a one-year contract which will expire at the end of June 2007. Her income from that employment is on the order of \$50,000 per year. She does not know whether she will be offered another contract for the 2007-8 school year.
- [34] Ms. B has suffered from depression and mood disorder for a number of years. Ms. B has been seeing a psychiatrist every three or four months since at least 2000.
- [35] Notwithstanding Ms. B's complaints of fatigue, depression and scattered thinking, she was able to work as many days of substitute teaching as were offered to her, and she was able to teach as many tutoring students as she could fit into her busy schedule. In addition to this, she operated the flower shop and assisted in the operation of VTOL.
- [36] In the year of the separation, she had a contract which provided her with regular work, teaching French to federal civil servants. She did some substitute teaching as well. Ms. B's federal contract expired in the summer of 2005. During the 2005-6 school year, Ms. B went back to substitute teaching. She worked 105 out of a possible 177 days. More recently, Ms. B has been able to carry off her new job as a full-time teacher.
- [37] It is clear on the evidence that Ms. B's emotional difficulties have never prevented her from actually participating in the work force to the degree that opportunity presented itself. However, whether Ms. B had an opportunity to work full time after the separation and before September 2006 is another question entirely.
- [38] Mr. T's commission income has not grown as rapidly as he and Ms. B had hoped when he started working for Chelton. He does, however, apply himself diligently to promoting his employer and its products. Mr. T works in a sophisticated industry. I accept his evidence that avionics cannot be simply added to a given airframe. A lengthy certification period is required, and sometimes an even longer period must pass for manufacturers to become familiar with and to gain confidence in the new equipment. Mr. T frequently travels for work. Sometimes he makes calls in territories where, even if Chelton were to make a sale, he would not earn a commission. Mr. T is Chelton's resident expert on the application of its products on rotary wing aircraft. I accept his evidence that it is not an unproductive waste of time for him to travel to, say, South Africa to promote Chelton's avionics. That is because, given the interconnected and global nature of the aviation industry, adoption of Chelton equipment in South Africa could well lead to a cascade effect which could result in increased sales of that equipment in a territory where Mr. T can earn a commission.
- [39] Presently, Mr. T shares accommodation in White Rock with his new romantic partner. He also shares expenses with her. In 2005, Mr. T traded the pickup truck for a two-seat car that is more suitable for urban commuting. Mr. T has cashed in approximately \$26,000 of his RRSPs since separation. Both the pickup truck sale and the RRSP conversions were contrary to a restraining order pronounced by the Master in April 2005.
- [40] Ms. B cashed in an RRSP as well; that was in 2005 and it was for \$5,000.

- [41] Ms. B continues to live in the former family home. She has the majority of the family's furniture. The house is mortgage free and could be sold for something on the order of \$1 million. Ms. B has resisted selling the house. She maintains that if it must go on the market, no sale should be negotiated before August 1st of the year. That is because, according to her, it would be too stressful for her to have to arrange to move while she is teaching, and it would be too disruptive for Q to move during his school year. If she does move, Ms. B says that she would select new accommodations near Q's school and the homes of his friends.
- [42] Ms. B has made certain minor expenditures to maintain the house since separation. Those expenses include paying the property taxes, some interior painting, plumbing repairs, irrigation maintenance, repairs to doors and to replace a garage door opener, garden plants, piano tuning, replacing a pool cover and opening and closing the pool, replacing the hot water tank, cleaning the carpets, and an appraisal of the property. The total is \$7,460.
- [43] The parties adduced no evidence with respect to the value of the family furnishings. Presently, Ms. B has RRSPs worth approximately \$93,000, the Toyota car, and pension entitlements from her teaching work in Alberta and B.C. Mr. B has remaining RRSPs of approximately \$29,800 and no employment pension entitlements.
- [44] In his submissions, Mr. T's counsel advanced a claim that Ms. B should pay occupation rent. Mr. T did not put this claim forward in his statement of claim. Further, Mr. T adduced no evidence whatsoever of how much rent their house could fetch.
- [45] In April 2005, the parties agreed to share joint custody and guardianship of Q. They also agreed that Q should live primarily with his mother. That arrangement has worked reasonably well. Despite the parties' difficulty in communicating with each other about money, they have not had significant disputes over Q's upbringing. Mr. T has had access with Q periodically since the separation. Arranging that access has not been a source of friction for the parties. Q is involved in numerous extra-curricular activities and requires daycare on the days that Ms. B works. The parties agree that Q's karate, soccer, basketball, skiing, sailing, golfing and tennis activities are extraordinary expenses within the meaning of s. 7 of the Child Support Guidelines. Ms. B asserts that bible camp, science camp, music lessons and dance lessons are also extraordinary expenses. Mr. T asserts that Q has not actually taken music lessons, that he has quit dance, and that while going to camps may be good for Q, the cost of the camps Ms. B has selected is excessive. Mr. T did not present evidence to show that other less expensive camps might be available for Q. Mr. T agrees that daycare for Q is an appropriate special expense.

Discussion

Custody, Guardianship and Access

- [46] Although the parties have had difficulty being civil to one another over money matters, they have been able to rationally deal with each other's relationship with Q. They have had no significant disputes over his schooling, religious training, personal or study habits, and they

have managed access times in a rational way. In my view, there is no compelling reason to severe the joint custody and guardianship arrangement to which they agreed in April 2005. Q will continue to be primarily resident with Ms. B, and she will be the party having the authority to make those decisions contemplated in the Joyce model guardianship order.

[47] The parties agree that Mr. T will have reasonable access to Q, including one half of the school summer vacation and including reasonable telephone access. Mr. T will advise Ms. B by May 1st of every year of the weeks he would like to have Q during the summer. Mr. T will also advise Ms. B at least 10 days in advance of access visits he would like to have during the school year. I find that those arrangements are in Q's best interests, and I will make an order accordingly.

Family Assets

Statutory Framework

[48] The Family Relations Act, R.S.B.C. 1996, c. 128, establishes a class of property called family assets. The provisions of the Act most relevant to this litigation are:

58 (1) Subject to section 59, this section defines family asset for the purposes of this Act.

(2) Property owned by one or both spouses and ordinarily used by a spouse or a minor child of either spouse for a family purpose is a family asset.

(3) Without restricting subsection (2), the definition of family asset includes the following:

(a) if a corporation or trust owns property that would be a family asset if owned by a spouse,

(i) a share in the corporation, or

(ii) an interest in the trust

owned by the spouse;

(b) if property would be a family asset if owned by a spouse, property

(i) over which the spouse has, either alone or with another person, a power of appointment exercisable in favour of himself or herself, or

(ii) disposed of by the spouse but over which the spouse has, either alone or with another person a power to revoke the disposition or a power to use or dispose of the property;

(c) money of a spouse in an account with a savings institution if that account is ordinarily used for a family purpose;

(d) a right of a spouse under an annuity or a pension, home ownership or retirement savings plan;

(e) a right, share or an interest of a spouse in a venture to which money or money's worth was, directly or indirectly, contributed by or on behalf of the other spouse.

- (4) The definition of family asset applies to marriages entered into and property acquired before or after March 31, 1979.

59 (1) If property is owned by one spouse to the exclusion of the other and is used primarily for business purposes and if the spouse who does not own the property made no direct or indirect contribution to the acquisition of the property by the other spouse or to the operation of the business, the property is not a family asset.

- (2) In section 58 (3) (e) or subsection (1) of this section, an indirect contribution includes savings through effective management of household or child rearing responsibilities by the spouse who holds no interest in the property.

60 The onus is on the spouse opposing a claim under section 56 to prove that the property in question is not ordinarily used for a family purpose.

Declaration Family Assets

[49] The former family residence on Abbott Street is, obviously, a family residence. So too is the parties' furniture in the residence, their RRSPs, their vehicles, the airplane parts, and Ms. B's teacher's pensions.

Division and Apportionment

[50] The Act decrees that equality is the default principle for division of family assets:

56 (1) Subject to this Part and Part 6, each spouse is entitled to an interest in each family asset on or after March 31, 1979 when

- (a) a separation agreement,
- (b) a declaratory judgment under section 57,
- (c) an order for dissolution of marriage or judicial separation, or
- (d) an order declaring the marriage null and void

respecting the marriage is first made.

- (2) The interest under subsection (1) is an undivided half interest in the family asset as a tenant in common.
- (3) An interest under subsection (1) is subject to
 - (a) an order under this Part or Part 6, or
 - (b) a marriage agreement or a separation agreement.
- (4) This section applies to a marriage entered into before or after March 31, 1979.

[51] However, under certain circumstances, the court may order reapportionment of the family assets:

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

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

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

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court.

[52] In the present case, Mr. T seeks reapportionment of the family home in his favour on the theory that the parties' equity was enhanced by the loan made to him and his wife by his late father in early 2003. He also argues that he does not have a pension, and his need to achieve economic independence will be impaired if he is not allowed the larger portion of the house's value.

[53] Ms. B also seeks reapportionment. She argues that the house should be reapportioned in her favour because she cannot rely on Mr. T to make court ordered support payments. Of course, this argument depends primarily upon her contention that spousal support must be paid.

[54] Mr. T did not specifically plead a claim for reapportionment. His wife did, and having opened the door to the argument, I think it cannot be said that she is taken by surprise that Mr. T's defence to her claim includes a claim of his own.

[55] There is some merit to Mr. T's argument that he does not have a pension whereas Ms. B does. By the time Ms. B retires from teaching at age 65, she will have accrued a complete or nearly complete pension. The evidence established that Mr. T does not now and never has

worked in an occupation that provides a company pension plan. That said, Mr. T has a greater opportunity to earn a significant income than does Ms. B. That is because as a commissioned sales person, Mr. T's income is geared to his sales effort and the popularity of his employer's products. Ms. B, on the other hand, is essentially a civil servant. Her workplace effort might lead to greater job security, but it is unlikely to result in, say, doubling her income. In my view, that fact balances out the pension factor.

- [56] There is little merit in Mr. T's argument that he should have a larger share of the house because the mortgage was paid off in 2003. That is because the funds for that payment came to the family, not to him alone; and when the couple paid down the house mortgage, they simply converted a debt to the mortgagee into a debt to Mr. T's father. That is to say, the family was in the same amount of debt, but their creditor had changed from the bank to Mr. T's father. After Mr. T's father died, Mr. T and his sister informally agreed to "square up" their respective takings. There was a private accommodation between themselves - it cannot be said to have flowed wholly from their late father's Will. However, even if it did and it was the estate that set off the \$110,000 loan, it was not, as Mr. T would have it, a benefit that accrued to him alone. The fact remains that the estate set-off was with respect to a loan for which both Mr. T and Ms. B were liable. While it is true that the equity in the house was increased as a result of Mr. T's father's money, it was money provided to the family. That fact obviates application of s. 65(1)(d) in this case.
- [57] In any event, Mr. T eroded the family's overall net worth between June 2003 and February 2004 when he decided to quit working. During that period, the family accumulated debt by drawing on its line of credit to meet daily expenses. In the result, Mr. T's decision to look after his father effectively offset the benefit the family received from the estate's theoretical largess in forgiving the loan.
- [58] I find, therefore, the \$110,000 that Mr. T's father provided to the family in early 2003 cannot provide the foundation for reapportionment under s. 65 of the Act. I am not satisfied that the \$21,500 Mr. T received from his sister in September 2003 was used in such a way as to affect the family's equity in the house. That transaction, whether it was a gift or a trade or an inheritance, cannot be a ground for reapportionment either.
- [59] Ms. B's argument for reapportionment was based on the proposition that the court should have little confidence in Mr. T's willingness to make periodic support payments. She says that Mr. T's past failure to pay support as ordered, and his flouting of the restraining order by selling his pickup truck and cashing in RRSPs, indicates that he is a scofflaw.
- [60] It is beyond argument that Mr. T behaved badly with respect to payment of support. He should not have unilaterally reduced his child support payments in the early summer of 2006. He should not have stopped making those payments in September that year. However, it is apparent to me that Mr. T stopped those payments in order to exert financial leverage on Ms. B. He wanted to force her to bring the matrimonial litigation to a conclusion. Despite Ms. B's arguments, I cannot find that Mr. T was chiefly motivated by contempt for legal

process.

- [61] The release of these Reasons will conclude the action. I predict that when the former family home is sold and the proceeds are distributed at last, the major lis between the parties will disappear. Mr. T will have no reason to want to bring financial pressure upon Ms. B. Further, given the potential future fluidity of the parties' earnings, I do not think it would serve their interests to order what would amount to lump sum maintenance.
- [62] I am, therefore, unconvinced by either party's case for reapportionment of the former family home. The value of that house will, therefore, be equally divided between them. The balance of the family assets must be divided equally as well. It makes little sense to require the parties to sell their cars so as to raise some cash which can then be split. I will, therefore, make the various orders below which will vest title of certain assets in one party or the other. There will be a single equalization payment required at the end of the account.
- [63] The parties must equalize their RRSPs as of the date of the s. 57 declaration. Their holdings then were Ms. B \$91,000 and Mr. T \$66,000. Equalizing the RRSPs as of the s. 57 declaration renders irrelevant the fact that the parties each cashed in some of their RRSPs after the declaration.
- [64] Ms. B should retain the furnishings and the Toyota car. Excluding the \$3,000 RRSP (which will be equalized), Ms. T has, since March 2005, had the benefit of approximately \$24,000. She drew those funds out of family debt which was later paid off from the sale of the family's second Big White condominium. On the theory that she would have been entitled to half of the equity in that condominium, she wound up with approximately \$12,000 that would otherwise have accrued to Mr. T.
- [65] Mr. T should retain the airplane parts and his current car. However, he cannot escape the proposition that when the s. 57 declaration was made, he was bound by the restraining order with respect to the pickup truck that he then owned. He must account to Ms. B for the value of that truck. The truck was purchased in September 2004 for \$22,900. The truck may have depreciated a bit between then and April 2005. I will, somewhat arbitrarily, fix its value at \$21,000 as of then.
- [66] I pause to note that the only family asset that has increased substantially in value since the s. 57 declaration is the house on Abbott Street, and that increase appears to be due to market forces. For that reason, I have chosen to value the other family assets as of the s. 57 declaration and to divide the value of the house as of whenever it is sold to a third party.
- [67] Mr. T abandoned any claim he might have for a share of Ms. B's teacher's pensions in Alberta and B.C. Mr. T's interest in that pension will, therefore, vest in Ms. B and she shall not be required to compensate Mr. T for it.
- [68] Leaving aside the furnishings for which there is no reliable evidence of value, the parties' property division will be thus:

Asset

Ms. B

Mr. T

RRSPs

\$ 91,000

\$ 66,000

Airplane Parts

10,000

Pickup Truck

21,000

Toyota Car

15,000

Cash

24,000

Furniture

Unknown

Sub-Total

130,000

97,000

Equalization

< 16,500>

16,500

TOTAL

\$113,500

\$113,500

Order for Sale

- [69] The former family home must be sold. There will be an order for sale with joint conduct to the parties. Either party may apply to the court for directions with respect to the sale process. Because my schedule will be dominated by other matters, I will not be seized of such applications.
- [70] At present, there are no circumstances which would preclude the parties from accepting an offer stipulating closing and possession dates earlier than the summer of 2007. In coming to that conclusion, I have specifically turned my mind to Ms. B's emotional state, her work schedule, and Q's interests. Any application for directions having to do with closing and possession dates must, therefore, be predicated upon a post-trial change in the parties' circumstances.
- [71] The parties will make their best efforts to cooperate with the listing agent to show the house to prospective purchasers.

Occupation Rent

- [72] As noted above, Mr. T did not make a pleading for occupation rent. That failing alone would dispatch his claim for rent, but in any event, Mr. T did not adduce any evidence of the amount of rent that the house could or should have fetched during the post-separation period. The value of rent foregone forms the very foundation of this sort of claim. Absent that evidence, the court cannot make conclusions of fact relating to the claim, and any award the court made in respect of it would be pure speculation. Mr. T's claim for occupation rent must be dismissed.
- [73] Ms. B sought contribution from Mr. T for the cost of maintaining the house since November 2004. The property tax and what might be termed protective or improvement disbursements for plumbing repair, painting and replacing the hot water tank are properly claimed. However, the claim to replace the garage door opener cannot, in the absence of better explanation of how it went missing, be allowed against Mr. T. The same is true of the repairs claimed for other doors in the house. The appraisal expense is, of course, a potential litigation disbursement and properly belongs on a Bill of Costs. It is difficult to conceive of how tuning D's piano could be characterized as a household expense. The pool costs, irrigation blow-out, carpet cleaning and gardening plants are all part of the everyday expenses relating to the operation of the household and are not recoverable. All in all, I allow Ms. B to recover from Mr. T one half of \$5,036.97 in respect of the properly claimed expenses for property taxes, plumbing repair, hot water replacement and painting that she has incurred since the separation. Ms. B shall recover that sum from Mr. T's share of the proceeds of sale of the former family home.

Support

Incomes

- [74] One of Mr. T's major complaints about Ms. B's behaviour after the separation was that she did right away get full-time work. The evidence at trial clearly demonstrated that Ms. B's work experience was focused in the education field. While she had done some work producing videos, her last remunerative job in that field was back in the late 1980s or very early 1990s. She had dabbled at running a flower shop, but that was not a successful operation.
- [75] Therefore, the highest and best use of Ms. B's talent and experience was then and is now to be a teacher. The evidence also demonstrated that Ms. B worked as a substitute teacher as often as she was called upon to do so. Mr. T did not adduce any evidence that Ms. B declined an opportunity to work full time after the separation. Specifically, Mr. T did not show that Ms. B could have obtained a full-time teaching position earlier than she did. It cannot be said that Ms. B was purposefully under-employed during the separation. It happened that she may not have been emotionally capable of working during that time; but since the evidence in the case has not convinced me that there was full-time work for her to do, her emotional status at the time was not relevant to her capacity to earn income.
- [76] I cannot, therefore, agree with Mr. T's assertion that Ms. B just sat around and made insufficient effort to support herself after the separation. Neither can I find that Ms. B was underemployed between the separation and the start of her full-time job in September 2006.
- [77] Ms. B's current income for the purposes of the Guidelines is \$50,000 per year. It is difficult to predict what her expenses will be after the former family home sells, but it is reasonably safe to assume that she is unlikely to have much surplus income.
- [78] Ms. B argues that Mr. T is under-employed. I find that an odd position for her to take. That is because she agreed with Mr. T's decision to go to work for Chelton in February 2004, and she supported him in that effort. It does not lie well in her mouth for her to have said then that Mr. T's career choice was fine with her, but after the marriage ended to turn around and assert that it was a lousy choice. So far as I can tell, the only material change that might lead Ms. B to say that Mr. T is under-employed is the breakdown of their relationship. That change does not in and of itself bear upon whether Mr. B is currently making the highest and best use of his income earning skills.
- [79] I accept Mr. T's evidence that being the owner and operator of a helicopter business is taxing and tiring, and that it entails considerable physical and financial risk. I accept his evidence that, overall, the industry offers a low return on a very substantial investment. It follows that I accept that Mr. T's decision to get out of the helicopter business was reasonable.
- [80] In his job with Chelton, Mr. T uses his expertise in the aviation industry and his experience with rotary wing aircraft in particular. Given that Mr. T's only meaningful work history has been in aviation, it was sensible for him to have done what he did by finding a sales job in that industry. While the Chelton job has not generated as much income as he (and Ms. B)

would have liked, that appears to be the result of market forces which are beyond Mr. T's control. There was no evidence at trial that Mr. T could or should be making more money in some other aviation related job. Therefore, I cannot find that he is under-employed.

- [81] Mr. T's estimates his 2006 income to be on the order of \$53,000 gross. He claims some work related expenses but has conceded that his total income for the purposes of the Guidelines will be \$50,000. I agree with that figure and accept that it represents Mr. T's current income.

Child Support

Table Amount

- [82] Q lives primarily with Ms. B. Mr. T must pay child support to Ms. B. His income is \$50,000, and so his child support obligation will be \$465 per month commencing March 1, 2007, and payable on the first of every month thereafter.

Special and Extraordinary Expenses

- [83] The only argument between the parties on this issue was with respect to extraordinary expenses for Q's extracurricular activities. In my view, Q's sporting activities are all reasonable extra-curricular activities, so are his attendances at science and bible camps in the summer. The same is true of his artistic interests in dancing and music.
- [84] Ms. B has to have daycare for Q while she is working, and she has to provide daycare for him on professional development days when he is out of school but she still has to work. Those are special expenses properly payable under s. 7 of the Guidelines.
- [85] Q's participation in extracurricular activities and Ms. B's daycare expenses may vary from time to time. It would be unfair for to require Mr. T to pay, say, \$200 per month for special and extraordinary expenses when it may turn out that Q does not actually go to all of the activities for which that payment was made.
- [86] I will, therefore, order that on April 1st of every year, commencing 2007 and on the first of every third month thereafter, Ms. B will deliver to Mr. T an itemized list of her best estimate of the cost of Q's special and extraordinary expenses for the coming quarter, together with receipts for the expenses she incurred in the preceding quarter. Mr. T will, by the 15th of that month, pay a lump sum to Ms. B comprising his pro-rated share of the anticipated expenses for the coming three-month period, and will adjust that payment to account for any over- or underpayment he may have made for the preceding three months. By this method, Ms. B will receive a regular flow of income for expenses, and Mr. T will be satisfied that he pays for only those activities that Q actually attends. Both parties will have to discipline themselves to budget for these expenses on a quarterly basis.

Retroactive Child Support

- [87] Ms. B sought support commencing the date of separation. The learned Master who heard that application in 2005 left the question of retroactive support to the trial judge. According to the Supreme Court of Canada in *D.B.S. v. S.R.G.*, 2006 SCC 37, it should no longer be the exception to award retroactive child support. A key consideration in determining how far back support orders should go is the date on which the person seeking support put the payor on notice of his or her demand. On my review of the file, Ms. B's motion for support was filed on April 4, 2005. I can see no reason to not make the support order retroactive to that date and at the same level of support as the learned Master ordered. Accordingly, Mr. B will be obliged to make up support payments from April 1, 2005 to the date when he began to pay support in November 2005. I make that to be seven months at \$600 per month, for a total of \$4,200.
- [88] I did not understand that Ms. B advanced a claim for retroactive special and extraordinary expenses other than daycare. Her evidence on the, to put it loosely, recreational special and extraordinary expenses she listed was generally prospective not retrospective. I have found that the daycare expenses are a proper special expense. Mr. T must contribute to those expenses on a pro-rata basis retroactive to April 1, 2005. For the purposes of calculating that contribution, I will somewhat arbitrarily fix his share at 50 percent. If the parties cannot settle upon the amount of that contribution, the issue will be referred to the Master or Registrar for a reference and certification pursuant to Rule 32(2) of the Rules of Court.

Arrears

- [89] Mr. T was bound by court order to pay child support in the amount of \$600 per month, but he unilaterally and improperly reduced that payment in July 2006 to \$530. His July and August support payments were, therefore, \$140 short of the mark.
- [90] In September 2006, Mr. T unilaterally and improperly stopped making child and spousal support payments altogether. Arrears of child support for the eight months between July 2006 and February 2007 total \$3,740 and arrears of spousal support between September 2006 and February 2007 total \$2,500.
- [91] Mr. T shall pay retroactive and arrears of support totalling \$10,580 plus whatever amount is determined to be payable for retroactive daycare. There will be a stay of enforcement proceedings relating to those arrears until the former family home is sold. The arrears sum shall be deducted from Mr. T's share of the proceeds of that sale and shall be paid to Ms. B. The arrears will accrue interest at the post-judgment prescribed by the Court Order Interest Act.

- [92] Before leaving this subject, it is important to note that Mr. T did not apply to vary or set aside either of the support orders, nor did he appeal them. Therefore, even though the original spousal and child maintenance orders may have been based upon Mr. T's receipt of corporate income but without consideration of Ms. B's receipt of a like income, those orders remain valid.

Spousal Support

- [93] I have applied the Spousal Support Advisory Guidelines to the parties' data. The Advisory Guidelines indicate that no spousal support should be paid by Mr. T to Ms. B. I agree with that result and would have made an order accordingly even without consulting the Advisory Guidelines. That is because at present Ms. B's earning capacity roughly equals Mr. T's capacity. Their living circumstances will likely be roughly equivalent once the former family home is sold and they settle into new accommodations. Ms. B could not, in my view, present a compelling case for need under those circumstances.
- [94] In accord with the court's direction in *Gill-Sager v. Sager*, 2003 BCCA 46, Ms. B's claim for spousal support is dismissed with liberty to apply upon a change of circumstances.

Section 92 Fine

- [95] Mr. T made application at the end of the trial for an order that the court fine Ms. B \$5,000 for having presented her application for support on misleading income data, and for having presented her defence to Mr. T's summary judgment motion (heard in early October 2006) without disclosing her new job to the court. Mr. T relies on s.92 of the Family Relations Act.
- [96] In my view, Mr. T's request more properly sounds in a motion for costs of the support and summary trial applications. That is because he maintains that what he characterizes as Ms. B's attempt to mislead the court goes more to the outcome of the applications than it does to her obligation to give financial disclosure. Accordingly, I will deal with Mr. T's application to sanction Ms. B in the context of the costs of the action as a whole.

Divorce

- [97] The evidence satisfied me that the parties were married at Kelowna on September 11, 1993. They separated on November 17, 2004, and have lived separate and apart since then. They have not reconciled. Subject to s. 12 of the Divorce Act, there will be an order for divorce; that order will come into effect on the 31st day after pronouncement.

Costs

- [98] The learned Master left the issue of costs on the original support application to the trial judge. The learned justice who allowed Ms. B's appeal and granted her spousal support ordered that the costs of the appeal be in the cause. In my opinion, Ms. B's failure to disclose her 2004 corporate income was material to the outcome of those applications. The support

orders might have been different had that data been put before the court. While the orders remain valid, I find that Mr. T should recover his costs of the original application and of the appeal.

[99] Mr. T's application for summary trial in October 2006 was, in my view, not well conceived and was doomed to fail. The court's decision to dismiss the motion for summary trial and to send the matter to the conventional trial list would not have been different had Ms. B advised the court of her new teaching job. Accordingly, the costs of that motion should be in the cause.

[100] As for how the cause ultimately turned out, the primary issue between the parties was reapportionment of the value of the former family home. Neither party achieved substantial success in that regard. For that reason, I order that, except for the support application and appeal, the parties will bear their own costs.

[101] The foregoing will determine the costs in this matter, subject only to applications the parties may wish to make with respect to formal offers to settle under Rules 37 or 37A.

"P.J. Rogers, J."

The Honourable Mr. Justice P.J. Rogers

April 19, 2007 - Revised Judgment

Please be advised that the attached Reasons for Judgment of Mr. Justice P.J. Rogers dated February 14, 2007 has been edited.

On page 15, paragraph 45, the reference to "Quinn" has been replaced with "Q".

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