
CANADA / JUDGMENT

Eisele v. Eisele

2015 BCSC 2297

COURT

Supreme Court of British Columbia

DECIDED

9 December 2015

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2015 BCSC 2297 Eisele v. Eisele

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Eisele v. Eisele,

2015 BCSC 2297

Date: 20151209

Docket: 130784

Registry: Williams Lake

Between:

Bernd Michael Eisele

Claimant

And

Angelika Sylvia Eisele

Respondent

Before: The Honourable Mr. Justice R.S. Tindale

Reasons for Judgment

Counsel for claimant:

J.S. Tryczynski

Counsel for respondent:

K.F. Church

Place and Date of Trial:

Williams Lake, B.C.

May 25, 26, 27, 28, 2015

Place and Date of Judgment:

Williams Lake, B.C.

December 9, 2015

- [1] This is a matrimonial action where both parties seek an order for divorce, an order for the division of family property and family debts. The claimant seeks an equal division of family property and family debts while the respondent seeks an unequal division of family property and family debts in her favour. The respondent also seeks an order for spousal support.

BACKGROUND

- [2] The parties began to live in a marriage like relationship on or about January 1985. The parties were married on January 10, 1986 and separated on March 19, 2013.
- [3] The claimant is 57 years of age having been born on May 6, 1958. The respondent is 56 years of age having been born on May 29, 1959.
- [4] The parties have one child together Ben Eisele, who is currently 24 years of age and is no longer in the charge of his parents.
- [5] The former matrimonial home is located at XXX in Williams Lake, British Columbia ("Home").
- [6] The claimant filed a Notice of Family Claim on July 15, 2013.
- [7] The respondent filed a Response to Family Claim on December 13, 2013 as well as a Counterclaim. This Counterclaim included a claim for spousal support.
- [8] The claimant filed a Response to Counterclaim on December 18, 2013.
- [9] On April 21, 2015 a mortgage was registered against the Home in favour of Bettina Egert who is the current spouse of the claimant.
- [10] On the first day of the trial I granted the respondent's application to amend her counterclaim by adding three additional paragraphs seeking the following relief:
- 1) The mortgage registered against the Home on April 21, 2015 in favour of Bettina Egert be declared null and void.
 - 2) The Home be vested in the respondent.

- 3) The claimant be required to reimburse the respondent forthwith for the expenses for the preparation of the report of the expert, Paul Maarschalk in the amount of \$4,250.
- [11] At that time Mr. Tryczynski on behalf of the claimant advised the court that he had an originally signed discharge of mortgage for the mortgage registered on April 21, 2015 which he would file that day.
- [12] On May 28, 2015 I granted the following orders:
- a) an order of Divorce.
 - b) that the respondent's name be changed from Angelika Sylvia Eisele to Angelika Sylvia Engel.
 - c) that both parties be prohibited from disposing of, transferring, converting, or exchanging into another form, property in which either may have an interest pursuant to s. 91 (2) (b) (i) of the Family Law Act S.B.C. 2011, c. 25.
- [13] On September 30, 2015 Bettina Egert offered to purchase the Home for \$380,000. That offer was accepted by the claimant on September 30, 2015 and by the respondent on October 1, 2015.
- [14] On October 6, 2015 I made an order that the net sale proceeds from the Home are to be held in the trust account of Morelli Chertkow LLP until these reasons have been delivered.

EVIDENCE

The Claimant

- [15] The claimant was born in Germany and has a grade 12 education. He married the respondent on January 10, 1986 and they moved to Canada in 1988.
- [16] The parties initially settled in Vancouver, British Columbia. The claimant worked as a salesperson at a Volkswagen dealership until 1995. He then started a proprietorship importing and selling motor vehicles. The claimant for a number of years had income above \$200,000 per year selling these vehicles.
- [17] The claimant eventually operated his automobile importing business through a limited company called Skybridge Investments Ltd. ("Skybridge").
- [18] In approximately 1998 that business began to decline because of a change in the rules for importing vehicles and the claimant's income shrunk to approximately \$60,000 to \$70,000 per year.
- [19] The claimant launched a lawsuit against Ford and Chrysler as a result of his declining business. This lawsuit went on for approximately 8 years and the claimant was ultimately unsuccessful.

- [20] The respondent initially worked in a retail store. The parties' son Ben was born on September 20, 1990. The respondent stayed at home to care for Ben. In 2001 the respondent started a home design business known as "Design with Angie".
- [21] The claimant testified that he was involved in the respondent's business. He designed a website for the business, and he did her books.
- [22] In 2003 the claimant incorporated another company called Laketown Investments Ltd ("Laketown"). The claimant amalgamated Skybridge with Laketown to maximize his revenue and to take advantage of the companies' losses which he has carried forward for tax purposes.
- [23] The parties moved to Williams Lake, British Columbia in May of 2005.
- [24] In 2007 a number of lawsuits were initiated against Laketown and the claimant with regard to the claimant's automobile business.
- [25] On July 11, 2007 General Motors Acceptance Corporation of Canada Limited ("GMAC") obtained judgment against Skybridge in the amount of \$37,715.14 and against the claimant personally in the amount of \$17,942.64.
- [26] The claimant testified that in 2007 both of the parties declared bankruptcy.
- [27] The claimant also testified that on May 15, 2009 he borrowed \$52,208.73 from a family friend named Jurgen Grossman. This amount was secured by a promissory note. In September 2013 the parties granted a mortgage in favour of Mr. Grossman in the amount of \$52,208.73 as further collateral for the amount secured by the promissory note.
- [28] By 2008 the claimant was selling vintage internal combustion model engines made by Cox. Initially the plaintiff purchased approximately 25,000 engines and he testified that he has 1100 engines remaining to sell. The claimant testified that Cox stopped manufacturing these engines in approximately 2000.
- [29] The claimant also testified that a company named Hobby Co. has purchased the rights to Cox products and has sent a letter to the claimant telling him to cease and desist in the selling of his engines and related products.
- [30] The claimant estimates that by the end of 2015 he will no longer have any engines to sell.
- [31] Exhibit 6 in this proceeding is a joint expert report prepared by Paul Maarschalk who is a Chartered Business Valuator. Mr. Maarschalk opines that the fair market value of Laketown as of July 18, 2014 is \$162,100.
- [32] The claimant disagrees with the expert report saying that it is grossly flawed because the claimant is not able to replace the engines he currently sells with other products. The claimant testified that his business is a unique business that sells a particular vintage model engine which can no longer be replaced.

- [33] The claimant provided a number of spreadsheets outlining his current inventory to Mr. Maarschalk. The claimant testified that it was unlikely that he would be able to sell all of the inventory without the engines. The claimant acknowledges that he could purchase larger engines however he could not purchase them for the reduced price that he bought the Cox engines for. He also testified that his clientele would not purchase electrical engines.
- [34] The net income of Laketown for the years 2011 to 2014 are as follows:
- 2011: \$63,503.91
- 2012: \$48,483.85
- 2013: \$38,532.24
- 2014: \$ 3,044.42
- [35] The claimant testified that he works 50 to 60 hours per week.
- [36] The parties separated on March 19, 2013. The respondent shortly after the separation went to Germany for approximately one month.
- [37] The claimant testified that when the respondent returned to Canada he paid her \$1000 for spousal support. He then made another payment of \$1000 in June of 2013. He said he did not make any other payments to the respondent until March of 2014. This was after the parties attended a Judicial Case Conference in February 2014.
- [38] The claimant testified that after the Judicial Case Conference he paid the respondent \$750 per month.
- [39] The claimant testified that any income from the parties' businesses would go into business accounts and any profit would could go into the parties' joint bank accounts. The claimant denied that he ever prohibited or restricted the respondent from spending money.
- [40] The claimant also testified that the respondent's company did not have a lot of expenses so he would run her expenses through his company. He also testified that any child tax benefit or GST credits would go into the respondent's bank account.
- [41] The claimant testified that the information in his Form F8 filed January 28, 2014 is accurate.
- [42] The claimant also testified that in the year 2000 their home burned down. The parties were short of money to rebuild their home so the claimant says they borrowed \$10,000 from their son Ben. The claimant says the agreement was when their son Ben turned 16 they would double the money that they owed him and as such the claimant says the parties owe Ben \$20,000.

- [43] On cross-examination the claimant agreed that he was the controlling party of Laketown and that the respondent was the sole shareholder. He also agreed that the respondent was not involved in the sale of any of the products for Laketown, however she did assemble and disassemble some of the engines.
- [44] The claimant disagreed that his vehicle importing business was a "scheme". The claimant agreed that with regard to Mr. Grossman he had paid for a vehicle which the claimant did not deliver because the claimant used the money for another debt.
- [45] The claimant also agreed on cross-examination that since separation he has been on trips to Peru, Morocco and Germany. The claimant testified that Ms. Egert paid for those trips.
- [46] The claimant agreed that the respondent through her business Designs with Angie never earned over \$10,000 per year.
- [47] The claimant also agreed that Exhibit 9 tab 19 is a spreadsheet showing which furniture the claimant kept and which furniture the respondent kept. He agreed he has \$10,333 worth of furniture and the respondent has \$4,580 worth of furniture.
- [48] The claimant testified that he obtained \$1.5 million in Cox brand inventory for approximately \$50,000.
- [49] The claimant also agreed that the report of Mr. Maarschalk was based on information that he provided. The claimant did not however agree that the fair market value of the inventory at July 18, 2014 was \$98,315. The claimant disagreed strongly that the value of Laketown was \$162,100. The claimant also disagreed with Mr. Maarschalk that his discretionary earnings range was between \$64,063 and \$74,991.
- [50] The claimant testified that the Bridgewater Financial Mortgage is currently approximately \$247,000.
- [51] The claimant testified that in his view the respondent disposed of \$58,000 after separation. Exhibit 9 tab 8 are two photocopies of bank drafts in the amount of \$23,000 made payable to the respondent as well as a Bank of Montreal statement indicating an account balance of \$1,809.80.

Ben Eisele

- [52] Ben Eisele testified that he is 24 years of age and is the son of both the claimant and respondent. He confirmed that he made a deal with the claimant to lend him \$10,000 and that amount would be doubled when he turned 16. He testified that the claimant owes him \$20,000.

Paul Maarschalk

- [53] Mr. Maarschalk was qualified as an expert in business valuation. He provided a report dated May 22, 2015 which has been marked as Exhibit 6 in this proceeding.

- [54] Mr. Maarschalk opined that the fair market value of Laketown as of July 18, 2014 is \$162,100. He further opined that the discretionary earnings which could be attributed to the claimant are between \$64,063 to \$74,991.
- [55] Mr. Maarschalk disagreed that if the claimant were to pay to the respondent money that he received from the company that would change the value of the business.
- [56] Mr. Maarschalik opined that Laketown was a going concern however even if the business was wound up over the next few years the sale of the inventory would still allow for a substantial benefit. He also noted that Laketown could still operate even if it did not sell engines because it had a substantial tax loss which could be carried into the future.
- [57] Mr. Maarschalk explained that the records of Laketown were not properly maintained. For example, he noted that money spent to purchase inventory should be recorded as an asset not as an expense as the claimant has done.
- [58] Mr. Maarschalk assumed that Laketown will continue to operate as a going concern albeit on the assumption that replacement engines and other saleable products can be sourced. He based this assumption in part on the fact that the claimant renewed Laketown's lease.
- [59] Mr. Maarschalk in Appendix 6 of Exhibit 6 stated the following:

I examined Bernd's comments about the life of the inventory on hand at the valuation date. I also considered the possibility that other types of stock could be purchased as replacement items for the gas powered engines that Bernd says will run out by the end of 2015, thus allowing the company to continue to operate in a similar manner to the way it has done over the last 5 years. It is, in my view (although this view is disputed by Bernd) possible that the company could enjoy a continued profitable existence well into the foreseeable future, leveraging off its existing client base and market profile. I nonetheless recognize that there will be other items that will be redundant once the core stock is exhausted without the possibility of being replaced. These thoughts guided me as I drew up a pro forma for what I consider to be a reasonable estimate of the maintainable sales, gross profit, net income and discretionary earnings of the company in its current economic climate.

- [60] Mr. Maarschalk commented that Laketown was an unusual company because the claimant who is the controlling person was not a shareholder, and the respondent who is the sole shareholder has no control over the company.

Angelika Engel

- [61] The respondent testified that she married the claimant on January 10, 1986 and that they separated on March 19, 2013. She confirmed that for the first year before the birth of her son she worked for the Hudson Bay Company. After the birth of her son in 1990 she did not work until 2001.

- [62] In 2001 she started her business which is a proprietorship called Design with Angie or Home Design with Angie.
- [63] The respondent also testified that she helped the claimant with Laketown by assembling engines and cleaning them. She also redecorated and painted most of the office of Laketown when it moved into the Bank of Montreal building in Williams Lake.
- [64] The respondent testified that the claimant never discussed any business decisions with her regarding Laketown. The respondent was not able to testify whether the books for the years 2001 to 2012 for Design with Angie were accurate as the claimant was the one that prepared the books.
- [65] The respondent testified that she did most of the housework at the Home and she would also run errands for the claimant. She testified that the claimant prepared her income tax returns.
- [66] The respondent testified that she was not involved or aware of the promissory note which was granted in favour of Mr. Grossman. She found out about the debt later on and because she was a friend of Mr. Grossman she agreed to grant a mortgage over the Home.
- [67] The respondent also testified that she was aware that the GMAC order was registered against the home however she was not aware of the debt when it was incurred.
- [68] The respondent testified that she opened up a bank account at the Bank of Montreal. She agreed that she cashed two bank drafts in the amount of \$23,000 each from that account. That left a balance of \$1,809.80 in that account. The respondent testified that she used the money to support herself after separation.
- [69] The respondent testified that after separation she stayed with a number of friends and rented an apartment in February of 2015. She also testified that the claimant has been paying her \$750 per month for spousal support since February or March of 2015.
- [70] The respondent worked at the Loon Pub in 2013. She also worked for room and board at the Big Creek Lodge from September 2013 until February 2014. She then worked at Canadian Tire from February 2014 until May 2014. She left Canadian Tire because she was promised full-time hours which did not happen. She also had some medical problems with her hands. Finally she worked at the Fraser Beer and Wine Store from May 2014 until the end of June 2014 when she was fired after being injured at work.
- [71] The respondent's line 150 income for the years 2010 to 2013 are as follows:
- 2010 - \$7,673.92
- 2011 - \$7,725.43
- 2012 - \$7,609.87
- 2013 - \$1,108.07

- [72] The respondent in her Form F8 financial statement filed May 7, 2015 estimated that her present income is \$5,516.25. This consists of employment earnings in the amount of \$4,216.23 and self-employment earnings in the approximate amount of \$1,300. She also confirmed that the figures in her financial statement are accurate. Including the Bridgewater Financial mortgage in the amount of \$249,502 registered against the Home.
- [73] The respondent agreed that she received the amount of spousal support as found in Exhibit 5 Tabs 2.4.1 - 2.4 .40 save and except she disagrees that she received \$2,000 in September of 2014.
- [74] The respondent testified that she did not receive any spousal support payments from July 2013 until February 2014. And that since March of 2015 she has been receiving \$750 per month.
- [75] The respondent disagrees that she received all of the GST and child tax credits. The respondent also testified that since separation she lived on money that she withdrew from her Bank of Montreal savings account in the amount of \$57,731.28.
- [76] On cross-examination the respondent agreed that she and the claimant did a lot of traveling together as a couple. She also agreed that the claimant paid all of their bills.
- [77] The respondent testified that she did not feel any responsibility to pay the amount owing to Mr. Grossman or GMAC. She testified that she played no part in the claimant's vehicle business.
- [78] The respondent agreed that some of the guns in the possession of the claimant may have been sold when the parties were still together.
- [79] The respondent testified that she quit her job at Canadian Tire because she developed a rash on her hands.

POSITION OF THE PARTIES

The Claimant

- [80] The claimant argues that the two issues on this trial are the division of family property and debt as well as spousal support.
- [81] The claimant notes that the Home is subject to three charges namely the Bridgewater Financial mortgage, the Grossman mortgage and the GMAC judgment.
- [82] The claimant argues that the Grossman mortgage and the GMAC judgment are family debts as they were incurred by the claimant during the marriage as a result of him trying to earn a living for his family.
- [83] The claimant notes that the respondent left the marriage with approximately \$57,700 in cash.

- [84] The claimant acknowledges that he retained approximately \$10,000 in furniture while the respondent retained \$4,300 in furniture. The claimant argues that he retained approximately \$500 worth of jewelry and the respondent retained approximately \$6,900 worth of jewelry.
- [85] The claimant also argues that there is a family debt owing on a CIBC Visa card in the amount of \$16,830 as well as \$2,300 in property taxes on the Home for 2012.
- [86] The claimant argues that the respondent is equally responsible for the debt to Ben Eisele.
- [87] The claimant argues that the property division should be equal.
- [88] The claimant argues that the \$57,700 that the respondent took should be credited to her less an appropriate amount for any spousal support arrears.
- [89] The claimant argues that he has paid the mortgage and the upkeep on the Home since the date of separation. In terms of the valuation of the family property and family debts the claimant relies on *J. (K.M.) v. (J.H.D.)* 2014 BCSC 1895 at para. 155:

The process outlined here will hopefully assist in ensuring that the process of valuing family property and debts is clear and consistent and ultimately fair. If family property is disposed of after separation but before the hearing date, not in good faith (s. 95(2)(g) specifies good faith as a relevant consideration), that cannot deprive the other spouse of the value of their interest in the property. If it were disposed of in good faith, presumably s. 87 would be used to select the disposition date as the valuation date. Similarly, the good-faith retirement of all or some of a family debt post-separation but before hearing cannot relieve the other spouse of their obligation to share in that family debt. The Act specifies that we start with the value at hearing date, but provides tools in ss. 87 and 95 to adapt to the peculiar circumstances that might arise to achieve the intent of the legislation.

- [90] The claimant argues that his income for the purpose of determining spousal support is the total of the net income, management expenses, management wages, depreciation and vehicle expenses of Laketown. The claimant argues that using this formula his income for 2013 - 2015 is as follows:

2013 - \$51,530.35

2014 - \$30,179.42

2015 - \$26,826.15

- [91] The claimant argues that it is not reasonable for the respondent not to be working at least at a minimum-wage job. He also argues that she could still maintain her business even if she had a job. The claimant argues that income of \$20,000 per year should be imputed to the respondent.

- [92] The claimant argues that the stock of engines that he has been selling will be depleted by the end of 2015. Also because he had purchased the inventory at a reduced price his business would not be profitable even if he could obtain other engines.
- [93] The claimant also argues that there are outstanding judgments against Shybridge and Laketown which may be executed in the future. These judgments were not considered by Mr. Maarschalk in his valuation of Laketown.
- [94] These potential liabilities can be found at Tabs 2.3, 2.31, 2.32, 2.33, 2.34, 2.35 of Exhibit 5. The claimant testified that these are his sole responsibility.
- [95] The claimant argues there should be a discount on the value of Laketown because of the potential for the outstanding judgment creditors to execute on their judgments. Also if the claimant has to sell his remaining inventory it will flood the market and he will only receive a discounted amount for that inventory.
- [96] In summary the claimant is seeking an equal division of family property and debt. Also that the respondent's savings in the amount of \$57,700 be accounted for as of the date of separation and any arrears of spousal support be offset as against that amount. Finally if the court accept's Mr. Maarschalk's opinion as to the value of Laketown the claimant wants Laketown sold.

The Respondent

- [97] The respondent agrees that \$57,700 has to be accounted for and can be offset against any arrears of spousal support.
- [98] The respondent argues that the claimant has raided Laketown for his own benefit and that the company books of Laketown are so disparate that they cannot be properly reconciled.
- [99] The respondent argues that the only way to achieve fairness is to give her the one asset that has some value that being the Home.
- [100] The respondent argues that the claimant has not been forthright in his evidence about Laketown. The respondent notes of the claimant placed a \$52,000 mortgage against the Home just prior to the trial commencing. The claimant has continued to live in the Home which is a luxurious accommodation.
- [101] The respondent argues that this is a 29 year relationship and that she has never earned over \$10,000 per year. She is now 56 years of age.
- [102] The respondent notes that the claimant did not pay spousal support from July through December of 2013. Beginning in March of 2014 the respondent paid \$1,000 per month in spousal support. The respondent in February of 2015 then only paid \$750 per month.

- [103] The respondent argues that the claimant's discretionary earnings range between \$64,063 and \$74,991. Based on an income of \$10,000 for the respondent and an income of \$64,063 for the claimant the mid-range of the Spousal Support Advisory Guidelines ("SSAG") is \$1,971.
- [104] The respondent argues that if she is given the Home that will provide security for spousal support payments.
- [105] The respondent notes that Mr. Maarschalk was not challenged on his calculations with regard to his income calculations.
- [106] Mr. Maarschalk opines that the fair market value of the inventory of Laketown is \$98,315.
- [107] The respondent argues that the claimant has made no payments on the Grossman mortgage, the GMAC judgment or the CIBC Visa card. The respondent acknowledges that the claimant has paid down the mortgage on the Home however he has had the advantage of living there while she has lived in very modest accommodations.
- [108] The respondent argues that the claimant should be responsible for the Grossman mortgage and the GMAC judgment.

The respondent argues that there should be an unequal division of family property and debt pursuant to s. 95 of the Family Law Act ("FLA") S.B.C. 2011, c. 25.

DECISION

Family Property and Debt

[109] Family property is defined in s. 84 of the FLA as follows:

- (1) Subject to section 85 [excluded property], family property is all real property and personal property as follows:
 - (a) on the date the spouses separate,
 - (i) property that is owned by at least one spouse, or
 - (ii) a beneficial interest of at least one spouse in property;
- (2) Without limiting subsection (1), family property includes the following:
 - (a) a share or an interest in a corporation
 - (b) an interest in a partnership, an association, an organization, a business or a venture;
 - (d) money of a spouse in an account with a financial institution

[110] Family debt is defined in s. 86 of the FLA as follows:

Family debt includes all financial obligations incurred by a spouse

- (a) during the period beginning when the relationship between the spouses begins and ending when the spouses separate, and
- (b) after the date of separation, if incurred for the purpose of maintaining family property.

[111] The FLA addresses valuing family property and family debts in s. 87:

Unless an agreement or order provides otherwise and except in relation to a benefit under a pension plan,

- (a) the value of family property must be based on its fair market value, and
- (b) the value of family property and family debt must be determined as of the date
 - (i) an agreement dividing the family property and family debt is made, or
 - (ii) of the hearing before the court respecting the division of property and family debt

[112] In this case there is a dispute between the parties as to the value that should be attributed to Laketown. The claimant argues that Mr. Maarschalk's analysis is flawed because he did not take into account the fact that the claimant cannot replace the inventory of Laketown.

[113] The claimant is an experienced businessman and entrepreneur however he clearly did not keep proper financial statements for Laketown and I find that he did not inform the respondent nor include her in any of the financial decisions for Laketown.

[114] I accept Mr. Maarschalk's evidence that the claimant was entering as an expense items in the financial records that should have been entered as assets.

[115] I found the claimant to be vague with regard to his future plans with Laketown and as to why he renewed the lease for the premises of Laketown.

[116] In my view Mr. Maarschalk properly analyzed the information which was provided to him by the claimant with regard to Laketown. I also accept his opinion that the value of Laketown as of July 18, 2014 was \$162,100. He clearly took into account the issue of the availability of inventory in coming to his opinion.

[117] I accept Mr. Maarschalk's opinion that the discretionary earnings to management are in the range of \$64,063 to \$74,991.

[118] I am mindful however that Mr. Maarschalk's valuation is as of July 18, 2014. I must also consider the evidence of the claimant that Laketown is faced with some inventory challenges which may impact the value of Laketown. Taking into account the concerns of the claimant as of the date of this hearing I find that Laketown has a value of \$120,000.

[119] This is based on the fact that the inventory of Laketown will have been reduced over the course of the last year and a recognition that Laketown may have to transition into the sale of other products.

- [120] The \$57,700 that the respondent disposed of from her Bank of Montreal account is family property. It was acquired during the course of the marriage.
- [121] With regard to the vehicles, furniture, firearms and jewelry presently in the possession of each of the parties the evidence that have been provided for the value of these items is primarily estimations. It appears that each party has approximately an equal value of the above noted items.
- [122] The Home is family property. As I understand the current situation the Home has been sold for \$380,000. If that is not the case I order the Home sold and the parties are at liberty to address me with regard to any conditions relating to the sale of the Home.
- [123] The Bridgewater Financial mortgage is a family debt. The parties are in disagreement as to when that debt should be valued. The claimant argues that the mortgage should be valued as of the date of separation in the amount of \$271,600. The respondent argues that the mortgage should be valued as of the date of the hearing in the approximate amount of \$249,502.
- [124] Section 87 of the FLA states that family debt must be determined as of the date of the hearing before the court respecting the division of property and family debts. The decision in *J. (K.M.) v. N. (J.H.D.)* cautions against the possible prejudice that a party who has paid down the debt may incur if the debt is valued as of the hearing date.
- [125] The claimant has paid down the mortgage however he has also enjoyed the benefit of residing in the Home since the date of separation. In my view s. 95 of the FLA is applicable as it would be significantly unfair to the claimant to value the mortgage obligation as of the date of the hearing because of the payments he has made on the mortgage. It would also be significantly unfair to the respondent to make her responsible for one-half of the mortgage obligation as of the date of separation given the fact that the claimant has lived in the Home since then.
- [126] Section 95 of the FLA reads in part as follows:
- (1) The Supreme Court may order an unequal division of family property or family debt, or both, if it would be significantly unfair to
 - (a) equally divide family property or family debt, or both, or...
 - (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;
 - (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 the 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;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [127] Given the fact that the claimant has enjoyed the benefit of the Home and taking into consideration s. 95 of the FLA, I value the Bridgewater Financial mortgage as of the date of separation of \$271,600. However, I order an unequal division of that debt. The claimant will be responsible for \$141,600 and the respondent will be responsible for \$130,000 of the Bridgewater Financial mortgage.
- [128] The Grossman mortgage in my view is a family debt. It was incurred during the marriage, for the purpose of allowing the claimant to continue with his business and earn income for the family. Also the respondent agreed to the granting of the mortgage in favour of Mr. Grossman in the approximate amount of \$52,000.
- [129] I am also satisfied that the GMAC judgment in the amount of \$17,942 is a family debt as well. The claimant incurred this debt in an effort to maintain his business and earn income for the family. This debt was incurred during the marriage.
- [130] I do not accept that the loan in the amount of \$20,000 to Ben Eisele is a family debt. The agreement that the claimant made with his son is highly unusual and I do not find that the respondent in any way agreed to this debt. The claimant shall be solely responsible for this debt.
- [131] I also accept that the CIBC visa debt at the date of this hearing is \$16,830 and is a family debt. As is the \$2299.03 for the 2012 property taxes on the Home.

- [132] Taking into account the factors as set out in s. 95 of the FLA, including the history of the claimant solely managing Laketown and the \$57,700 that the respondent has already disposed of from her Bank of Montreal account, I find that Laketown should be divided in favour of the claimant. I assess the respondent's monetary interest in Laketown at \$31,150 and the claimant's interest in Laketown at \$88,850. I order that Laketown is the sole property of the claimant. I further order that the claimant forthwith pay the respondent \$31,150 for her interest in Laketown. This amount is to be paid at least in part from the claimant's portion of the net sale proceeds from the Home.
- [133] I order that the vehicles, furniture, firearms and jewelry currently in the possession of the claimant are the sole property of the claimant.
- [134] I order that the vehicles, furniture and jewelry currently in the possession of the respondent are the sole property of the respondent.
- [135] Considering the factors in s. 95 of the FLA, I order that the sale proceeds of the Home be divided equally between the parties after the payment of the Bridgewater Financial mortgage, the Grossman mortgage, the GMAC judgment, and any reasonable costs associated with the sale of the Home.
- [136] I order that each party is equally responsible for the CIBC visa debt and the 2012 property taxes.
- [137] I order that the claimant is solely responsible for the debt to Ben Eisele.

SPOUSAL SUPPORT

- [138] The factors and objectives of a spousal support order for set out in ss. 15.2 (4) and 15.2 (6) of the Divorce Act R.S.C. 1985, Chapter 3 (2nd Supp.). They read as follows:
- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabitated;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangements relating to support of either spouse.
- (6) An order made under subsection (1) or an interim order under subsection (2) that provides for the support of a spouse should
- (a) recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;

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

[139] The claimant concedes entitlement to spousal support.

[140] This is a long term marriage. The respondent primarily stayed at home to raise Ben. She traditionally has not made over \$10,000 per year in income. She is currently 56 years of age and has limited vocational skills.

[141] While the respondent has operated her proprietorship for a number of years she has limited knowledge on how to run a business as it was the claimant that took care of this aspect of her business.

[142] The claimant on the other hand is an experienced businessman and entrepreneur who has had considerable financial success in his various career endeavors.

[143] Mr. Maarschalk opined as to the income available to the claimant from Laketown. He was not challenged on his evidence in that regard. I do not accept that the claimant will earn a limited income because of Laketown's lack of inventory. In this regard I accept the evidence of Mr. Maarschalk.

[144] Taking into account the age, work history, earning capacity and experience of both the claimant and respondent I impute income to the respondent of \$10,000 per year. I further find that the claimant's income for the purpose of determining spousal support is \$64,063.

[145] Based on the above noted incomes the mid-range for spousal support pursuant to the SSAG is \$1971 per month.

[146] I order that the claimant pay spousal support to the respondent in the amount of \$1,971 per month commencing on December 1, 2013 and continuing on the first day of each month thereafter for an indefinite duration.

[147] This spousal support order may be reviewed in five years with regard to both quantum and entitlement or upon a material change in circumstances of either party.

CONCLUSION

[148] I find that Laketown, the Home, and the \$57,700 that the respondent removed from her bank account are family property.

- [149] I find that the Bridgewater Financial mortgage, the Grossman mortgage, the GMAC judgment, the CIBC visa debt and the 2012 property taxes on the Home are family debts.
- [150] I find that the \$20,000 debt to Ben Eisele is not a family debt and is the sole responsibility of the claimant.
- [151] I find that the potential liability found in Exhibit 5 at Tabs 2.30, 2.31, 2.32, 2.33, 2.34 and 2.35 are not family debts and the sole responsibility of the claimant.
- [152] I order that the vehicles, furniture, firearms, jewelry and other household items currently in the possession of the claimant are the sole property of the claimant.
- [153] I order that the vehicles, furniture, jewelry and other household items currently in the possession of the respondent are the sole property of the respondent.
- [154] I find that the value of Laketown at the time of this trial is \$120,000.
- [155] I order that Laketown be divided unequally pursuant to s. 95 of the FLA in favour of the claimant to compensate him for his interest in the \$57,700 that the respondent disposed of after separation. I find that the claimant's interest in Laketown is valued at \$88,850 and the respondent's interest in Laketown is valued at \$31,150. I order that Laketown is the sole property of the claimant and the claimant shall forthwith pay the respondent \$31,150 for her interest in Laketown from his share of the net sale proceeds of the Home.
- [156] I order that the sale proceeds from the Home be divided equally between the parties after payment of the Bridgewater mortgage, Grossman mortgage, GMAC judgment and any reasonable costs associated with the sale of the Home. If I am mistaken that the Home has been sold then I would order the sale of the Home. In those circumstances the parties have leave to address me with regard to the conditions of the sale of the Home.
- [157] I order that the Bridgewater Financial mortgage be valued at the date of separation at \$271,600 and divided unequally between the parties pursuant to s. 95 of the FLA. The claimant will be responsible for \$141,600 of the debt and the respondent will be responsible for \$130,000 of the debt.
- [158] I order that the claimant pay spousal support to the respondent in the amount of \$1,971 per month commencing December 1, 2013 and continuing on the first day of each month thereafter for an indefinite duration. This spousal support order may be reviewed in five years with regard to both quantum and entitlement or upon a material change in circumstances of either party.
- [159] As the parties have had divided success they will bear their own costs.

"R.S. Tindale, J."

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