

CANADA / JUDGMENT

Jean Louis v. Jean Louis

2020 BCCA 220

COURT

British Columbia Court of Appeal

DECIDED

29 July 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 220 Jean Louis v. Jean Louis

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Jean Louis v. Jean Louis,

2020 BCCA 220

Date: 20200729

Docket: CA46421

Between:

Parisa Jean Louis also known as Parisa Firoozfam

Respondent

(Claimant)

And

Rosmy Jean Louis

Appellant

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated

October 3, 2019 (Jean Louis v. Jean Louis, Nanaimo Docket E-77121).

The Appellant, appearing in person

(via videoconference):

R. Jean Louis

Counsel for the Respondent

(via videoconference):

P. Cote

I. Tee

Place and Date of Hearing:

Vancouver, British Columbia

July 13, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 29, 2020

Written Reasons by:

The Honourable Mr. Justice Butler

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Willcock

Summary:

The appellant husband appeals numerous orders dividing family property and debt. He applies to adduce further evidence and argues that the judge erred by valuing the family residence as of the date of trial and by failing to reapportion family property in his favour given his greater contributions to the maintenance of the family residence post-separation. He also argues that the judge erred in valuing his claims for excluded property. Held: Application to adduce further evidence dismissed. Appeal dismissed except to the extent of increasing the amount of the appellant's excluded property claim for his RRSP. The judge properly instructed herself on the applicable law. The principle errors alleged by the appellant challenged the judge's exercise of discretion. He was unable to demonstrate that she misapprehended the evidence, made a material error or exercised her discretion on a wrong principle.

Reasons for Judgment of the Honourable Mr. Justice Butler:

- [1] The appellant, Rosmy Jean Louis, appeals orders dividing family property and debt. At trial, the respondent, Parisa Jean Louis, sought equal division of family property and the appellant sought an unequal division. The respondent's notice of family claim also sought orders respecting parenting and child support but those claims were resolved prior to trial. The appellant maintains the trial judge erred in valuing family property and debt, including in determining the value of his excluded property. He says the judge ignored or misapprehended important evidence. He also alleges the trial judge erred in using the date of trial to value most of the family property and in failing to order an unequal division of the property in his favour. The appellant also applies to adduce new and fresh evidence.
- [2] For the reasons that follow, I would dismiss the appellant's application to adduce new and fresh evidence. I would allow the appeal to the limited extent of increasing the amount of the appellant's excluded property claim for his RRSP account from \$19,395.23 to \$26,429.23. I would dismiss the remaining grounds of appeal raised by the appellant.

Background

- [3] The parties met in April 2005 and married on September 25, 2006. The appellant is a professor of economics at the Vancouver Island University. The respondent obtained her certified general accountant designation during the course of the relationship and was working as an accountant at Harmac Mill when the parties separated. At trial, the respondent contended the parties were in a marriage-like relationship by September 2005, but the trial judge rejected her position and concluded the marriage-like relationship began on the date of the marriage. That finding is not challenged on appeal.
- [4] The parties separated on September 28, 2015 following an alleged incident of family violence. Approximately one month after the separation, the respondent was forced out of the family residence. She initially lived in a shelter but eventually moved into a one-bedroom apartment. The appellant had sole possession of the family residence from November 2015 to the date of trial and was responsible for all of the expenses relating to that property. After separating, the respondent was primarily responsible for the care of the parties' child, who is now 13, until the parties entered into a comprehensive consent order in July 2018. Pursuant to that order, the parties have a shared parenting regime.
- [5] The parties disputed the division of a number of properties: the family residence; a condominium in Campbell River; an interest in three duplexes in Ohio; several bank accounts; a pension; and RRSP accounts. The properties in British Columbia were mortgaged and the parties also had credit card and credit line debts. They were unable to resolve any of the property or debt issues and were approximately \$300,000 apart in the positions taken at trial. The appellant, who was self-represented at trial, sought an unequal division of the family assets and wanted to retain the family residence which he had purchased approximately eight months before the marriage. The respondent sought an equal division of family property and debt, maintaining that she should be entitled to a compensation payment of at least \$270,000.

Trial Decision

- [6] The judge's oral reasons for judgment are unreported: *Jean Louis v. Jean Louis* (25 July 2019) Nanaimo Docket E-77121. The judge reviewed the facts of the parties' relationship and then considered the arguments about the commencement of the marriage-like relationship. She concluded the date of marriage should be used for the purpose of the property division analysis but stated that "when the relationship began does not make any significant difference to the outcome of this case": at para. 40.
- [7] The judge then considered the property valuation and division issues raised by the parties. She began by instructing herself on the principles applicable to property division under the Family Law Act, S.B.C. 2011, c. 25 [FLA]. In doing so, she quoted at length from paras. 32-42 of the decision of this Court in *Jaszczewska v. Kostanski*, 2016 BCCA 286.
- [8] The respondent had argued that static assets such as the chequing/savings accounts should be valued at the date of separation while the property that has increased in value due to market growth -- the investment accounts and real property -- should be valued at the date of trial. Referring to s. 87 of the FLA, the judge accepted this argument, rejecting the appellant's view that all of the family property should be valued as of the separation date and distinguishing the decision in *Slavenova v. Ranguelov*, 2015 BCSC 79.
- [9] The family residence was purchased by the appellant in January 2006 for \$310,500. The judge determined the value of the appellant's excluded property to be \$35,668.43. This was comprised of his equity in the property at the time of purchase plus an additional \$1,000 representing one half of the cost of minor renovations performed by the appellant after separation. In arriving at that determination, the judge was not satisfied that there was any appreciable increase in the value of the residence in the eight months between the date of purchase and the marriage: at para. 53. The judge also rejected the appellant's submission that his claim for excluded property should include other expenses incurred at the time of purchase of the property, the cost of renovations for a garage conversion and various settlement proceeds the appellant received during the marriage. The judge valued the family residence at \$620,000 based on the most recent appraisal. After the mortgage balance was deducted, there remained \$394,734.87 to be divided by the parties.
- [10] The judge concluded the Campbell River condominium was purchased during the marriage as a joint investment decision. It was sold prior to trial with the net proceeds held in trust. The judge found that the appellant had not "proven on a balance of probabilities that there are any expenses relating to the condominium purchase which should be excluded": at para. 59.
- [11] The judge found the evidence about the Ohio properties to be "entirely unsatisfactory": at para. 62. The appellant submitted that he should pay \$28,900 USD to the respondent as compensation for one half of the increase in value of those properties. The respondent sought a payment of in excess of \$56,000 plus some portion of rent that had been received over the years. The judge ordered a compensation payment of \$45,000 CAD, noting that it

was slightly more than the value proposed by the appellant, stating it was "the best I can achieve on the available evidence": at para. 64. The appellant does not challenge this conclusion on appeal.

- [12] The judge dealt with the various bank accounts in a summary manner stating her conclusions without detailed explanations. She set out the values of some of the accounts that are subject to division. Rather than setting out the amounts in the appellant's bank accounts and debts, she stated, at para. 70, "I am not going to set out all of these numbers in detail and I adopt the numbers on the Scott Schedule at Appendix 2 of the [respondent's] submissions." Appendix 2 was not included in the appeal record although the amounts determined by the judge are set out in the final order. The judge also referred to arguments of the appellant that she was not prepared to accept. In rejecting the appellant's position, the judge stated, at para. 71, the "evidence around [the respondent's] investment activities is difficult to understand and appears inconsistent."
- [13] Finally, the judge considered the provisions of s. 95 of the FLA, and concluded that it would not be significantly unfair to order equal division of the family property. She concluded the respondent had contributed both financially and non-financially throughout the relationship and rejected the appellant's submissions to the contrary. She also noted that the respondent was not claiming spousal support.
- [14] The judge recognized that it would be necessary for the parties to appear before her to settle the terms of the final order. At that hearing, the appellant asked the judge to reconsider some of the conclusions set out in the reasons for judgment. In a ruling dated October 3, 2019, she declined to do so. Of note for the issues raised on appeal, the judge rejected the appellant's submission that he was entitled to a larger excluded property claim for additional contributions made to his RRSP account before the marriage and after separation. She stated at para. 7:
- [7] I am not prepared to revise the RRSP contribution amount from \$19,395.23 to \$50,355. There was no evidence at trial as to the pre-marriage and separation contributions that Mr. Jean Louis now argues. I have considered the fact that Mr. Jean Louis is self represented, however, trials must have some finality, and I did explain to Mr. Jean Louis on several occasions during the trial that it was his responsibility to put all of the evidence before the court. I also explained to Mr. Jean Louis that I would not be reviewing his financial documents unless he specifically took me to them during the evidence. The reason for that is that I must make my decision on the evidence, and my role is not to be a forensic accountant.

Application to Adduce Fresh Evidence

- [15] The appellant applies to adduce fresh and new evidence in the form of an affidavit sworn June 12, 2020 to which he attaches more than 100 pages of documents. The new evidence is said to relate to an issue that was not before the trial court: the appellant's assertion that the

respondent committed mail fraud. This is the primary focus of the application although the appellant also seeks to admit fresh evidence that he says is relevant to four issues that were dealt with at trial. For the reasons that follow, I would dismiss the application for fresh and new evidence.

- [16] The admission of further evidence is governed by the test in *Palmer v. The Queen*, [1980] 1 S.C.R. 759. Four factors are considered to determine whether admitting the evidence is in the interests of justice. The first is that fresh or new evidence should not be admitted on appeal if, by due diligence, it could have been adduced at trial. In *Spoor et al. v. Nicholls et al.*, 2001 BCCA 426 at para. 16, this Court confirmed that the due diligence test should be applied more strictly in civil than in criminal cases. The second and third *Palmer* factors state that fresh or new evidence is not admissible unless it is relevant in the sense that it bears upon an important issue and credible in the sense that it is capable of belief. Fourth, to be admissible, the evidence must be decisive in the sense that if it is believed it might, along with other evidence from trial, be expected to have affected the result: *Palmer* at 775.
- [17] With the new evidence, the appellant asserts that the respondent wrongfully accessed his mail and misappropriated funds by taking a cheque that she deposited in her own investment account. He says it can be inferred from these circumstances that the respondent was able to access his personal mail throughout some portion of the litigation. He says the respondent did so in an effort to accuse him falsely of failing to produce documents, which had the effect of prolonging the resolution of the proceedings in order to increase the value of her interest in the family residence. He also makes serious allegations of professional misconduct against the respondent's trial counsel.
- [18] In response, the respondent filed an affidavit in which she details how she obtained the cheque in question (the appellant placed it in a plastic container in their daughter's backpack at a child exchange) and explains why this was done. She also attaches material to show what she did with the funds; they were placed in an RESP account opened for the parties' daughter. The appellant had been required by a court order to contribute a considerable amount (slightly less than the amount of the cheque) to an RESP. The respondent placed the full amount in the RESP account. She says she provided information about these transactions to the appellant by email. The respondent also denies ever improperly accessing the appellant's mail as alleged and denies the other allegations of "mail fraud" made by the appellant.
- [19] The appellant's allegation concerns events that occurred in November 2019 (many months after the trial judgment) and so the evidence is entirely new. However, it has no direct bearing on the issues on appeal. On that basis alone, it is not admissible as new evidence. To permit the admission of new evidence on appeal to prove a new set of circumstances that occurred after the trial judgment in order to reopen the trial would offend the principles of certainty and finality: *Fotsch v. Begin*, 2015 BCCA 403 at para. 21. The new evidence also fails to meet the third *Palmer* criterion: it cannot be said to be reasonably capable of belief in light of the respondent's strong denial of the allegations. While the allegation might form

the basis for a new action, it does not raise an issue that could be dealt with by this Court. I would dismiss the application to admit new evidence.

- [20] I would also dismiss the application to admit fresh evidence. All of the evidence the appellant seeks to admit existed prior to the trial. Some of the evidence, such as the detailed settlement offers made by the parties prior to trial, was clearly inadmissible. In addition, most of the evidence is equivocal and could not have been expected to change the result.
- [21] There is one piece of fresh evidence that could meet the decisiveness factor. The appellant has adduced a statement showing the value in his RRSP account as at December 31, 2006. It shows a balance of \$28,902, which is almost \$10,000 more than the judge allowed as excluded property for his RRSP account. It is also \$3,700 more than the appellant argued he was entitled to as excluded property. The appellant has not explained why he failed to place this evidence before the trial court. The evidence was clearly available at trial had the appellant sought to obtain it. The appellant has not met the due diligence requirement and on that basis alone, I would conclude that it is not in the interests of justice to admit the fresh evidence. This proceeding was before the court for years and is properly described as a high-conflict dispute. The respondent had to apply for disclosure because the appellant failed to produce documents. There is good reason for the strict application of the due diligence requirement in civil cases. A party should not be permitted to second guess strategic decisions made at trial or to effectively split his case by introducing new evidence on appeal: see *Hawkeye Power Corporation v. Sigma Engineering Ltd.*, 2015 BCCA 451 at paras. 61-64. In addition, it is important to have finality in family litigation.

- [22] I would dismiss the application to adduce further evidence.

Issues on Appeal

- [23] The appellant advances nine grounds of appeal in his factum. I would restate his grounds of appeal as follows:
- a) Did the judge fail to provide adequate reasons?
 - b) Did the judge err in valuing the family residence and investment accounts as of the date of trial?
 - c) Did the judge err in failing to find that it was not significantly unfair to divide the family property equally?
 - d) Did the judge err in determining the value of the appellant's excluded property claim in relation to the family residence?
 - e) Did the judge err in determining the amount of the appellant's excluded property claim in relation to his RRSP accounts?
 - f) Did the judge err in finding that the \$30,000 debt incurred by the appellant shortly before separation is excluded debt?

- 9) Did the judge err in her treatment of the respondent's claim that the parties were in a marriage-like relationship prior to the marriage?

Standard of Review

- [24] The standard of review in family law matters is highly deferential. This Court should not intervene unless it finds a material error, a serious misapprehension of evidence or an error of law: *Hickey v. Hickey*, [1999] 2 S.C.R. 518; *Hsieh v. Lui*, 2017 BCCA 51 at para. 38. This deferential standard of review applies to all family law matters, including issues of property division: *Van de Perre v. Edwards*, 2001 SCC 60 at para. 14; *Hallgren v. Fry*, 2013 BCCA 15 at para. 8. A high level of deference is necessary in family law cases to promote finality and to recognize the importance of the appreciation of the facts by the trial judge, who has had the benefit of hearing the parties directly: *Hickey* at para. 12; *Venables v. Venables*, 2019 BCCA 281 at para. 72.
- [25] It is worthwhile noting that the two principle errors alleged by the appellant challenge the judge's exercise of discretion: her decision to use the date of trial to value the family residence; and her decision to divide the family property equally. Such discretionary decisions are central to the task a judge must perform in resolving family property disputes and are always afforded considerable deference. To the extent that the appellant challenges the findings of fact, this Court can intervene only where there is a palpable and overriding error affecting the judge's assessment of the facts: *Housen v. Nikolaisen*, 2002 SCC 33 at para. 10.

Analysis

Did the judge fail to provide adequate reasons?

- [26] The appellant raises two issues as to the sufficiency of the reasons. First, he argues that in deciding to use the date of trial to value the family residence, the judge failed to provide a clear and well reasoned analysis of her basis for distinguishing *Slavenova*, and *Bamford v. Mulyati*, 2017 BCSC 945, from the circumstances of this case. This first argument is addressed below. Second, he says the judge's reasoning on some issues was conclusory and that she failed to explain how she arrived at her conclusions. He argues the judge's use of terms like, "I am not prepared to find," or, "I am not persuaded," without something more is inadequate to satisfy the obligation to provide reasons.
- [27] The function of reasons for judgment is to explain "what" the judge decided and "why" she reached that decision. Reasons are not to be read in isolation; they must be considered in the context of the evidence at trial, the live issues and the arguments of the parties: *Shannon v. Shannon*, 2011 BCCA 397 at para. 5. There is no freestanding right of appeal on the adequacy of reasons even where the logical connection between the evidence and the decision cannot be discerned. As long as the record permits meaningful review, appellate intervention is not required: *Shannon* at para. 9.

- [28] There is no merit to the assertion that the judge failed to provide sufficient reasons for deciding to use the date of trial to value the family residence. The judge set out the relevant statutory provisions, the relevant evidence and background circumstances. She set out and considered the parties' positions at trial. When read in context, the reasons readily explain the "what" and "why" of her decision.
- [29] It is not surprising that some of the judge's findings are conclusory in a case of this nature. Reasons do not need to refer to all of the evidence, nor dot every "i" and cross every "t". When the judge dealt with the less significant financial assets, her reasons were not extensive. However, she described and responded to the issues and the parties' positions. She explained that she found the appellant's evidence about investment activities, "difficult to understand and inconsistent": at para. 71. She reviewed the evidence and accepted the figures put forward in the respondent's Scott Schedule: at para. 70. When seen in context, the reasons are clearly sufficient to enable meaningful appellate review.

Did the judge err in valuing the family residence and the investment accounts as of the date of trial?

- [30] The appellant says the judge erred by using the trial date to value the family residence because the respondent made no contributions to maintaining and preserving the property for the period of almost four years from separation to trial. He says the law is clear that while contribution during marriage "does not matter" for the purpose of property division, upon separation, the failure of one spouse to contribute to the maintenance of property is significant and should lead a court to choose the separation date as the appropriate date to value the property. He says the separation date should always be used to value property where it is registered in the name of only one spouse and that the judge erred in law by failing to follow *Slavenova* and *Bamford* in which the date of separation was used to value real property.
- [31] There is no merit to this ground of appeal. The appellant's arguments are not supported by the jurisprudence and ignore the provisions of the FLA.
- [32] Section 81 of the FLA provides the general rule for property division:
- 81 Subject to an agreement or order that provides otherwise and except as set out in this Part and Part 6 [Pension Division],
- (a) spouses are both entitled to family property and responsible for family debt, regardless of their respective use or contribution, and
 - (b) on separation, each spouse has a right to an undivided half interest in all family property as a tenant in common, and is equally responsible for family debt.

- [33] Section 84(1)(a) provides that family property includes all real and personal property owned by at least one spouse on the date of separation. Section 87(b)(ii) provides that, subject to a court's discretion to otherwise order, family property must be based on its fair market value as of the date of the hearing before the court respecting the division of property and debt.
- [34] In *Jaszczevska*, Justice Harris explained that each spouse is presumptively entitled to an undivided interest in all family property independent of contribution or use, and independent of the parties' respective contributions to the post-separation increases in value:
- [38] It is safe, therefore, to conclude that the Legislature intended to limit the circumstances in which a departure from equal division of family property could be justified because of unequal contributions to its acquisition, preservation, maintenance or improvement. The FLA starts with the presumption found in s. 81 that family property is to be equally divided. As I read s. 81, each spouse is presumptively entitled to an undivided half interest in all family property, regardless of their respective use or contribution. I do not think the use of the words "regardless of their respective use or contribution" in s. 81(a), rather than in s. 81(b), is inconsistent with that view. Any potential uncertainty on this point would have been removed if s. 81(b) had read "on separation, each spouse has a right to an undivided half interest in all family property, regardless of their respective use or contribution". But as I read it, the phrase in s. 81(a) refers to the basis of entitlement to family property. Entitlement exists independent of contribution or use, and the extent of that entitlement on separation is defined in s. 81(b).
- [39] Also, because family property is generally valued on the date of the hearing, the parties will presumptively share in any post-separation increases in the value of family property. Once again, because of s. 81, this entitlement exists independent of the parties' respective contribution to the post-separation increase in value.

[Emphasis added.]

- [35] The appellant suggested *Slavenova* and *Bamford* established a principle that unequal post-separation contributions should result in unequal division of family property. This suggestion is misguided. Those courts exercised the discretion granted in s. 87 to order a different date of valuation because of the particular circumstances as determined by the trial judges. Here, the judge determined that there was no basis for her to depart from the presumptive date of trial for valuation as mandated by s. 87(b)(ii). This is an exercise of discretion that is entitled to considerable deference. This Court will not intervene unless it can be shown that the judge misdirected herself or came to a decision that is so clearly wrong it amounts to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27.
- [36] In *Rudyak v. Bekturova*, 2018 BCCA 414, this Court emphasized that absent compelling evidence, family property should be valued as of the trial date as provided in s. 87:

[35] The appellant's argument that the court should use the date of the transfer of the Home as the date to assess significant unfairness is without merit. Pursuant to s. 87 of the FLA, the value of family property must be based on fair market value determined as of the date of the hearing before the court respecting the division of family property. While the court retains a discretion to choose a different date, that should only be done where there is compelling evidence to depart from the mandated valuation date: *Slavenova v. Rangelov*, 2015 BCSC 79 and *Davie v. De Mark*, 2017 BCSC 872

[Emphasis added.]

[37] There is no basis on which to conclude the judge erred in principle or misdirected herself in concluding that the evidence did not compel a departure from the statutory valuation date. The judge concluded, at para. 50, that "the background facts in the case at bar are very different from *Slavenova*, and pursuant to s. 87 of the Family Law Act, valuation should be based on the date of the hearing on those assets that have increased in value." While she did not enumerate those differences, the judge clearly considered the appellant's evidence and arguments about his post-separation contributions towards the maintenance of the family residence and the Campbell River property. The judge neither misunderstood nor misconstrued the extent or duration of those contributions. She considered the length of the marriage, the contributions of each party to the family and the circumstances of the respondent after separation. The appellant's arguments completely disregard and attempt to minimize the respondent's contribution to the marriage. The trial judge found that the respondent contributed to the family in a manner that permitted the appellant to advance his career and the parties' joint interests: at para. 52. In addition, following the separation, the respondent had to move out of the family residence with the parties' young child and support herself in a one-bedroom apartment without receiving child support for a considerable period. Comparatively, the appellant enjoyed the benefit of living in the family residence. Those circumstances were, as the judge stated, "very different from *Slavenova*" where the respondent left British Columbia after separation and returned to Bulgaria. He had no child care or other family responsibilities as the parties did not have children.

[38] The judge did not treat the respondent's position as a claim for occupational rent. However, she considered the fact that the appellant enjoyed sole occupancy of the family residence as another reason to discount his claim for an unequal share of the equity in the family residence, and as a reason not to use the date of separation to value that property. There is no merit to the appellant's assertion that the judge could not have taken this approach unless the respondent established "fairness" with "mathematical certainty". This Court has repeatedly approved of the approach taken by the trial judge: *Storey v. Terry*, 2020 BCCA 30 at paras. 27-28; *Stasiewski v. Stasiewski*, 2007 BCCA 205 at para. 33; *Shen v. Tong*, 2013 BCCA 519 at paras. 47-49.

[39] There is no basis for this Court to interfere in the trial judge's decision to distinguish Slavenova and exercise her discretion to use the trial date to value the family residence. She properly instructed herself on the law and exercised her discretion judiciously.

[40] I would dismiss this ground of appeal.

Did the judge err in failing to find that it was not significantly unfair to divide the family property equally?

[41] The appellant advances similar arguments to support his claim for unequal division of family property as he made in support of his position to use the separation date to value the properties. His claim for unequal division is premised on the assertion that it would be significantly unfair to divide the family property equally because of the greater contributions he made to the maintenance of the family residence and the Campbell River property after separation. He argues that the date of separation would thus be the appropriate date to use to divide the property in a way that is not significantly unfair.

[42] As this Court explained in *Kumagai v. Campbell Estate*, 2018 BCCA 24 at para. 76, departing from the presumptive date for valuation effectively reapportions family property:

[76] A departure from the presumptive date for valuation of family property is effectively a reapportionment or unequal division of the family property, which can only be done under s. 95 of the FLA. Section 95 expressly provides for the reapportionment of net family property if an equal division would be "significantly unfair." Under the former FRA, a change in the valuation date from the date of hearing was determined to be an effective reapportionment of the family assets. The same reasoning, in my opinion, should be applied to the comparable provisions of the FLA. Any departure from the presumptive equal division of net family property under s. 81 of the FLA must therefore be made pursuant to s. 95(1) of the FLA, which imposes a threshold finding that an equal division of the net family property would be "significantly unfair" before any reapportionment of the net family property can be ordered.

[43] Section 95 of the FLA sets out the test for unequal division as well as the factors for a court to consider. The relevant provisions include:

95 (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

(b) divide family property as required under Part 6 [Pension Division].

(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;

...

- (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;

...

- (i) any other factor, other than the consideration referred to in subsection (3) that may lead to significant unfairness.

[44] As explained in *Jaszczywska*, the objective of s. 95 is to constrain the exercise of judicial discretion. There must be persuasive reasons for an unequal division. The unfairness must be compelling or meaningful having regard to the factors set out in s. 95(2): at para. 41. In *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 10, Justice Newbury emphasized that the phrase "significantly unfair" is intended to set a higher bar for the exercise of judicial discretion than the test of unfairness in the Family Relations Act, R.S.B.C. 1996, c. 128. In doing so, she referred with approval to the comments of Justice Savage (as he then was) in *Slavenova* at para. 60:

[60] The "significant unfairness" contemplated by s. 95 requires much more than differing financial contributions in a relationship. Exactly equal contribution is more likely exceptional than commonplace. The new regime under the FLA recognizes that partners will come to a relationship in differing circumstances and accounts for those in the concepts of "family property" and "excluded property". The starting point in the division of property analysis already applies significant exclusions.

[45] The appellant cannot point to any of the factors enumerated in s. 95(2) that would favour an unequal division of family property in this case. Unequal contribution post-separation is not an enumerated factor. The appellant's argument is essentially that it would be unfair for the respondent to share in the increase in the property values because she did not contribute to the increase that occurred after separation. This is the same argument that was rejected by this Court in *Kumagai* at para. 84:

[84] In my respectful view, the judge's decision in this case to value the property as of the date of separation is an error. His decision was based on his finding that it would be "unfair" for Ms. Kumagai to share in the increase in the market value of the Campbell Lands after separation because she did not contribute to that increase. "Unfair" does not rise to the standard of "significantly unfair" under s. 95, and, more significantly, contribution is not a requirement for an equal division of family property under s. 81 of the FLA

[Emphasis added.]

[46] In this case, the judge concluded that it was not significantly unfair to divide the value of the family residence equally (after deducting the appellant's excluded property). The appellant cannot demonstrate that the judge misdirected herself in approaching that question. I cannot say that the judge exercised her discretion improperly in concluding that equal division of the family property interest in the residence did not raise to the level of significant unfairness.

[47] The appellant also argues that the division of family property effected by the judge's orders gives him only 37% of the family property. His factum included a calculation to substantiate this submission. However, the calculation was based on inaccurate assumptions as to the division ordered by the judge. Contrary to the appellant's calculations, the order regarding the Ohio properties divided the family property equally, it did not leave him with a deficit of \$90,000. As he noted in oral submissions, he is not challenging the judge's order with respect to those properties. Further, his calculation improperly treated the requirement that he pay child support arrears as an order dealing with property division. There is no merit to his suggestion that he was left with only 37% of the family property.

[48] The appellant also argued that the respondent's share of family property should be discounted because she did not succeed in her claim that the parties entered into a marriage-like relationship before the marriage. There is no legal basis for that submission.

[49] I do not see any error in the approach taken by the judge to this exercise of discretion and I would not give effect to this ground of appeal.

Did the judge err in determining the value of the appellant's excluded property claim in relation to the family residence?

[50] The appellant advances a number of arguments to support this ground of appeal. As I will explain, I would not give effect to any of his arguments.

[51] Section 85(2) of the FLA provides that the spouse who wishes to claim excluded property bears the onus of proof. The appellant's arguments did not succeed at trial because the judge concluded that he had failed to prove his entitlement to the excluded property claims on a balance of probabilities. On appeal, the judge's conclusions on this issue are entitled to considerable deference. The appellant must show that the judge made a palpable and overriding error in arriving at her conclusions. In spite of the detailed arguments in the appellant's factum as supplemented by lengthy written submissions in support of his oral argument, I am not persuaded that he has identified any errors that are palpable let alone overriding.

[52] I will briefly explain why there is no merit to his arguments by referring to the various excluded property claims.

- [53] First, the appellant claims that the judge erred by failing to find that the family residence increased in value in the eight months between the date of purchase and the marriage. There was no reliable evidence of the value of the residence and the equity in the property at the date of marriage. The judge based her conclusion as to the amount of the appellant's excluded property on a calculation of the equity in the home based on the purchaser's statement of adjustments. This was not unreasonable given the lack of evidence. The onus was on the appellant to prove an increase in value and he did not present sufficient evidence in support of his argument that the value increased.
- [54] On appeal, the appellant refers to two appraisals contained in the large volume of materials before the trial court. He points to an appraisal dated May 10, 2018 that estimated the value of the residence as of September 26, 2006 as \$340,000. The appraisal is attached to one of the appellant's Form F8 Financial Statements. The appraisal was based on the assumption (provided by the appellant to the appraiser) that the garage that had been in existence when the home was listed in 2005 and purchased in January 2006 had been converted into LFA (livable floor area described as a large family room) at a cost of \$45,000 as of September 26, 2006. As set out below, the judge rejected the appellant's contention that that renovation had been carried out prior to the marriage.
- [55] The appellant also refers to an appraisal obtained in 2010 that estimates the value of the residence as \$390,000. The appellant argued that the increased equity in the property between the date of purchase and the date of marriage could be inferred from this appraisal. The judge did not accept that argument and the appellant's attempts to show how it would be possible to infer the value were not persuasive. The judge was "not satisfied that there was any appreciable increase in the home's value between January 2006 and September of 2006 when the parties married": at para. 53.
- [56] In short, the judge did the best she could with the available evidence. She concluded that the excluded property at the time of the marriage (the equity in the property) was \$34,668.
- [57] Second is the appellant's claim that amounts paid at the time of purchase for legal fees, property transfer tax and a CMHC insurance premium and application fee should be treated as excluded property. With respect, this argument is without merit. The appellant's excluded property claim was determined based on the judge's assessment of the value of the property at the time of marriage, less the mortgage debt. The suggestion that expenses incurred at the time of purchase should increase the excluded property claim is wrong in principle and not supported by authority. Just as a spouse's entitlement to property is based on the value of the property, the amount of a spouse's claim to excluded property must be based on the value of the excluded property, not on the expenses incurred to acquire property. In any event, as the respondent argues, the judge actually gave the appellant the benefit of those expenses because of the way in which she calculated his equity in the property using the statement of adjustments.

- [58] Third, the appellant claims that \$45,000 allegedly spent on renovating the garage before the marriage should be excluded property. The judge was not persuaded by the appellant's submission on this point: at paras. 55-56. A review of the record readily reveals why she rejected that argument. The appellant claimed that the renovation was performed before the marriage but the respondent testified it was not. An independent witness also testified that the garage had not been renovated at the time of the marriage. Moreover, the appellant failed to present any documentary evidence in support of his claim that he spent funds on the renovation. The claim failed for lack of proof.
- [59] Fourth is the appellant's claim that proceeds received from a CMHC insurance claim settlement and settlement amounts received from two personal claims advanced by the appellant should be excluded property. This claim also failed for lack of proof. The appellant bore the onus of proving that he received these funds and that they could be traced into an asset in existence at separation. He failed to present any reliable evidence to this effect and the judge was justified in summarily dismissing those claims.

Did the judge err in determining the amount of the appellant's excluded property claim in relation to his RRSP accounts?

- [60] The appellant says the judge made a palpable and overriding error in finding that his excluded property claim for RRSP accounts was limited to \$19,395.23. The judge determined this to be the value of his RRSP accounts as of the date of marriage. This was the amount shown on an RRSP statement dated in July 2005, about 14 months before the marriage. The judge used this figure as it was the only evidence of the value of the account prior to the marriage. The judge did not allow a deduction for excluded property for any contributions to his RRSP account after separation because of lack of evidence.
- [61] The appellant says the judge erred by failing to allow him a greater excluded property deduction (approximately \$25,000) for the period prior to the marriage. He argued that the value of his excluded property claim should equal the contributions made in the relevant period. He presented Canada Revenue Agency ("CRA") documents indicating he had made \$25,237 in annual contributions to his RRSP in the years prior to the marriage. Those documents also indicate the appellant contributed \$9,164 to his RRSP in 2015 and \$7,034 in 2016. He says the judge also erred by failing to allow a claim for excluded property for the post-marriage contributions.
- [62] This issue was raised by the appellant after the trial decision on the application to settle the terms of the order. The appellant's submissions resulted in the ruling dated October 3, 2019. There, the judge acknowledged the existence of the CRA documents in the binders of material before the court, but observed that the appellant had not given evidence about those documents. Accordingly, she concluded there was no evidence on which she could rely to establish the amount of his excluded property claim.

- [63] I would dismiss the appellant's appeal regarding the amount of his pre-marriage excluded property claim, but increase the amount of his excluded property claim for the post-separation contributions.
- [64] Regarding the pre-marriage contributions, the documents do not establish the value of the excluded property at the date of marriage. They merely indicate that the appellant made contributions over a number of years. The amount of the excluded property prior to marriage depends on the value of the RRSP at marriage, not on the total of the contributions in the years prior to marriage. The judge relied on the July 2005 statement as the only evidence of value and I cannot find that she made a palpable error by doing so.
- [65] Regarding the post-separation contributions, it appears that some reference was made to the CRA documents at trial. The judge's difficulties in dealing with the evidence is understandable given the shortcomings of the appellant's presentation of evidence and his confusing submissions. Nevertheless, I am of the view that the judge erred in failing to consider documented contributions post-separation.
- [66] The judge failed to give effect to the evidence, however limited, of the appellant's contributions. Although the appellant failed in his attempt to bring the court's attention to the post-separation contributions, there was some evidence before the court. Further, the amount of his contributions to the RRSP account post-separation is clearly excluded property. To the extent that the account was increased by those contributions, the respondent should not be entitled to any share of those monies.
- [67] I would increase the amount of the appellant's excluded property claim for his RRSP account by \$7,034, the amount of his documented 2016 contribution, all of which would have been made post-separation. I would not allow any amount of his contributions for 2015. There was no evidence before the court as to the timing of those contributions. Accordingly, the claim for an exclusion for the 2015 tax year fails for lack of proof.
- [68] In summary, I conclude that the judge erred by failing to allow the appellant's excluded property claim for the 2016 post-separation contributions shown in the CRA documents. I would increase the amount of the appellant's RRSP excluded property to \$26,429.23.

Did the judge err in finding that the \$30,000 debt incurred by the appellant shortly before separation is excluded debt?

- [69] The appellant argues the judge erred by not finding that the appellant's \$30,000 debt was family debt. The debt was created when he withdrew those funds from a Royal Bank Homeline (line of credit) account before the separation. As a result, he says the debt is family debt for which the respondent must be equally responsible pursuant to s. 81(b) of the FLA.
- [70] The respondent concedes that the judge erred in failing to find that the debt was presumptively a family debt. However, she argues that the judge arrived at the correct result. She notes that the debt was incurred two days before the parties separated and that it was

not used for a family purpose. She says this Court should accept the judge's findings of fact and characterization of the debt: it was incurred by the appellant for investment purposes that had nothing to do with family property or a family purpose. Accepting that finding, she says this Court should reapportion responsibility for the debt entirely to the appellant pursuant to s. 95 of the FLA. The appellant notes that she made the same argument in the court below and outlined the evidence in support of that argument. This is not an issue raised for the first time on appeal.

- [71] At para. 73 of the reasons, the judge stated that she did not accept that "the Homeline Royal credit line debt of \$30,000 incurred post-separation is a family debt." The judge clearly erred in concluding that the debt was incurred "post-separation". However, I accept the respondent's submissions that the judge did not err in concluding on the evidence before the court that the debt was not incurred for a family purpose. Further, as the judge found, the appellant's evidence about the alleged investment with "E. Ding" in 2015 and the alleged debt to "Ronald Colville", purportedly incurred in 2010 and repaid at the time of separation, was "difficult to understand and appears inconsistent": at para. 71. It is clear from the trial record, including the submissions of the parties and the reasons for judgment, that the judge completely rejected the appellant's testimony about the Homeline debt and the TD investment account that the appellant maintained was excluded property.
- [72] As discussed above, s. 95 of the FLA permits a trial judge to divide family property or family debt unequally if an equal division would be significantly unfair. Section 95(2) enumerates the factors a judge can consider when deciding whether to order an unequal division. One of the factors is whether the family debt was incurred in the normal course of the relationship between the spouses: FLA, s. 95(2)(d). Given the judge's conclusion that the debt was not incurred for a family purpose, s. 95(2)(d) would have permitted the trial judge in this case to order an unequal division of family debt with respect to this \$30,000 debt.
- [73] In these circumstances, I accept that this is an appropriate case in which to apply s. 9(1)(a) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 and make the order that could have been made by the court below. I would order that the \$30,000 Homeline Royal debt is family debt but would reapportion it so that the appellant is fully responsible for that debt.
- [74] For completeness, I note that the appellant's factum also raises other issues about smaller debts and bank accounts. However, the appellant has not been able to demonstrate that the judge made a palpable error in any of her conclusions.

Disposition

- [75] I would dismiss the appeal with the exception of the appeal in relation to the excluded property claim in respect of the appellant's RRSP accounts. On this point, I would allow the appeal to the extent of increasing the value of the excluded property for the appellant's RRSP to \$26,429.23.

Costs

[76] The respondent has been successful on most of the issues raised on appeal. The appellant was successful on his RRSP excluded property claim. In these circumstances, pursuant to Rule 65 of the Court of Appeal Rules, B.C. Reg. 297/2001, this Court may order that the more successful party receive a portion of their costs: *Meghji v. British Columbia (Ministry of Transportation and Highways)*, 2014 BCCA 345 at paras. 14-15. I would award the respondent 80% of her costs, setting off her success on the majority of the issues against the appellant's success on one discrete issue.

"The Honourable Mr. Justice Butler"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Willcock"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/02/2020BCCA0220.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/jean-louis-v-jean-louis-2020>

Prepared on 25 October 2026 · Esheria