

CANADA / JUDGMENT

Joshi v. Joshi

2017 BCSC 207

COURT

Supreme Court of British Columbia

DECIDED

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2017 BCSC 207 Joshi v. Joshi

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Joshi v. Joshi,

2017 BCSC 207

Date: 20170208

Docket: E140300

Registry: Vancouver

Between:

Raman Joshi

Claimant

And

Parveen Joshi

Respondent

Before: The Honourable Mr. Justice Kent

Reasons for Judgment

Counsel for the Claimant:

Sumandeep Singh

Pardeep S. Virk

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Edith Szilagyi

Homa Yahyavi

Place and Dates of Trial:

Vancouver, B.C.

December 5-9, 2016;

January 24-27 and 31, 2017

Place and Date of Judgment:

Vancouver, B.C.

February 8, 2017

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INTRODUCTION

- [1] This is a family law case. The claimant husband and the respondent wife were married in Punjab, India on March 5, 1999. They are now the parents of two boys, 15 and 13 years old respectively, and one girl who is 9 years old. The parties' relationship was characterized by incidents of verbal abuse and physical violence. They separated and reconciled on several occasions. The final separation occurred on December 4, 2011.

- [2] The present proceedings were commenced on October 24, 2012. A divorce order has already been granted. Issues to be determined in this trial include:
1. custody guardianship and parenting of the children;
 2. division of property and debt; and
 3. child and spousal support.

CREDIBILITY OF THE PARTIES

- [3] The parties gave conflicting evidence about various events, particularly as they related to the conduct of the parties both before and after the final separation. It should be noted that both the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.), and the Family Law Act, S.B.C. 2011, c. 25, require the court not to consider the conduct of the parties except to the extent that it is relevant to the parenting abilities of the party or affects the factors that must be taken into account in determining the best interests of the children. Accordingly, I will not be resolving each testimonial conflict regarding past events but only those directly relevant to the issues to be decided in this case.
- [4] In any event, the fact-finding role of the court is not usually reduced to simply choosing between two versions of events. It is not an "all or nothing process". In determining facts, i.e., making findings on the balance of probabilities as to what actually occurred in any given case, the court is free to reject some aspects of a witness's evidence and accept others and, indeed, to assign different weight to different parts of a witness's evidence.
- [5] Accepting all or part of the testimony of one witness over another involves an assessment of credibility (truthfulness/honesty) and reliability (accuracy) of both the witness and the evidence. That in turn involves consideration of many different factors including:
- Internal consistency of the witness's account of events;
 - Consistency with other evidence afforded by witnesses, documents or physical evidence;
 - Whether the evidence is reliably corroborated or contradicted by other evidence;
 - The demeanour of the witness and whether the questions are answered in a frank and forthright fashion without evasion, speculation or exaggeration;
 - Whether the witness has any interest in the trial outcome or has any motive to fabricate;
 - The witness's ability/opportunity to observe the events in question and to reliably recall/communicate same;
 - Whether (based on properly admissible evidence) the witness has "poor character for truthfulness"; and
 - The inherent plausibility of the evidence and its consistency with the probabilities affecting the case as a whole.

- [6] I have serious reservations respecting the credibility and reliability of the husband's evidence. He accuses the wife of making false accusations of violence even though he has been arrested for and convicted of assault. In his interlocutory affidavits, he describes the incidents with his wife as a small "tiff" even though at trial he admitted he did not know the meaning of the word. He fails to appreciate the significance of an oath when he swears inaccurate financial statements to be "true and complete to the best of [his] knowledge". He admitted to signing and authorizing a mortgage application containing falsely-inflated statements of income on both his part and that of his parents. He failed to disclose rental income on tax returns.
- [7] Although her demeanour as a witness was more frank and forthright than her husband, I also have reservations about certain aspects of the wife's evidence. She too has sworn inaccurate financial statements which failed to disclose assets such as property in India, bank accounts, et cetera, as well as disposal of jewellery. She is unable to explain substantial transfers of funds from bank accounts. She too failed to disclose rental income on tax returns.
- [8] I do not, however, simply reject either party's evidence as a whole. Rather, I have approached both parties' evidence, as well as that of the other witnesses in this case, in accordance with the framework set out above, with particular reference to whether otherwise questionable matters have been reliably corroborated.

BACKGROUND FACTS

- [9] The parties did not provide the Court with any formal admissions of fact. However, much of the background which follows is largely uncontroversial and represents my findings of fact based on the evidence adduced. Any significant factual controversy underlying the issues in dispute will be more specifically addressed later in this judgment.
- [10] The husband was born in India on February 17, 1974 and is currently 42 years old. The wife was also born in India on November 20, 1974 and is also 42 years old.
- [11] In June 1992, the wife immigrated to Canada as a 17-year-old student entering grade 11. She was accompanied by her parents, three older sisters and two older brothers.
- [12] In 1998 the wife started working as a cashier at the Real Canadian Superstore and she continues to do so today.
- [13] On March 5, 1999 the parties were married in India. It was an arranged marriage. The parties did not know each other before it occurred.
- [14] The wife sponsored the husband to immigrate to Canada. He arrived in April 2000 whereupon the couple lived together in rented accommodations along with other family members.

- [15] In 2002 the parties sponsored the husband's parents (Surinder and Sudarshana Joshi) and brother (Navin Joshi).
- [16] The parties have three children:
- a. Ankit Joshi, born May 18, 2001 (15 years old);
 - b. Raghav Joshi, born August 31, 2003 (13 years old); and
 - c. Hania Joshi, May 21, 2007 (9 years old).
- [17] The parties' marriage has been fraught with difficulty over the years. Separations occurred in 2001, 2006 and again in 2008. The wife attributes these difficulties to alcohol-fuelled verbal and physical abuse by the husband. The latter acknowledges there were "problems", and that the police attended the parties' residence on some occasions but claims he is falsely accused by the wife of physical abuse. The 2008 incident led to a conviction for assault, a suspended sentence and a 12-month probation order.
- [18] Following the separation in 2008 a number of applications were made to the Provincial Court in New Westminster. After a family case conference in August 2009, a consent order was issued providing sole custody of the children to the wife, requiring the husband to pay child support in the amount of \$464 per month, and granting the husband unsupervised access to the children on alternating weekends. The parties reconciled in February 2010 and the previous Provincial Court proceedings became moot.
- [19] The final separation of the parties occurred on December 4, 2011. The wife alleges a further incident of physical abuse by the husband at that time and the police again attended the home. The husband has not lived there since. On March 23, 2012, the husband entered into a nine-month Recognizance as a result of charges arising from the December 4, 2011 incident. The conditions of that Recognizance included no contact with the wife and no attendance at the matrimonial home.
- [20] In October 2004 the parties purchased a home at 6933 Prince Edward Street, Vancouver. The purchase price was \$381,000. It was partially financed by a mortgage in the amount of approximately \$308,000 with the Royal Bank of Canada. Title to the home was put in the name of both the parties and the husband's father (Surinder) with their respective undivided interests allocated at 40% for the husband and wife and 60% for Surinder.
- [21] The Prince Edward Street property was renovated to create a basement suite and was thereafter rented to various third parties. The rent was collected by Surinder and was generally used in part to help defray the property expenses including the mortgage.
- [22] In October 2012 Surinder issued an action ("the Surinder Action") in the Supreme Court Vancouver Registry (Action number S127285) against both the husband and wife seeking the sale of the Prince Edward property and distribution of the sale proceeds.

[23] The husband filed a response to the Surinder Action consenting to all the relief sought. The wife filed a response and a counterclaim. In her pleadings, she claimed Surinder did not make any contribution to the original purchase of the house, that she only agreed to his name appearing on title as a result of "economic duress", and that her ownership interest in the property was 50% (as opposed to 20%, being half of the 40% interest of the husband and wife formally registered on title).

[24] A settlement conference in the Surinder Action was held before Madam Justice Gerow on June 30, 2014. A formal order was entered embodying a settlement to which all parties had consented and which required:

- the wife was to purchase Surinder's 60% share of the property by paying to him 55% of the appraised value minus the mortgage balance;
- a further \$18,000 to be deducted to account for Surinder's mortgage arrears obligation; and
- the money was to be paid to Surinder within eight weeks following the receipt of the appraisal.

[25] Difficulties arose with the mortgage proposed to be implemented to finance the purchase of Surinder's interest. These difficulties were ultimately resolved by the November 18, 2014 order of Mr. Justice Kelleher in the Surinder Action, including the following consent provisions:

- the husband was to transfer his 20% share of the property to the wife in consideration for the sum of \$170,000 (20% of the appraised July 2014 fair market value of \$850,000);
- after accounting for certain mortgage deductions, the net amount to be paid by the wife to the husband in that regard was \$140,000, which sum was to be put into trust at a law firm until further order of the court or agreement between the husband and wife;
- the husband was to sign all documents and do all acts reasonably necessary to transfer his 20% share of the property to the wife; and
- the deadline for the wife to pay the monies owed to Surinder pursuant to the earlier court order was extended to December 12, 2014.

[26] The transaction completed and as a result of transfer documents signed by all three of Surinder, the husband and the wife, title to the property was transferred to the wife (as to an undivided 99/100 interest) and to Pawan Tugmait (as to an undivided 1/100 interest).

[27] Notwithstanding the above transactions, the husband maintains that he is entitled to a 20% interest in the (increased) value of the Prince Edward Street property as at the date of trial.

[28] In the meantime matters in the family law action did not proceed smoothly. Multiple court applications ensued related to alleged contempt and production of financial documentation. Among other things, orders have been granted,

- imputing \$20,000 annual income to the husband and requiring the payment of child support in the amount of \$433 per month commencing December 1, 2013;
- divorcing the parties effective April 6, 2014;
- imposing a parenting regime whereby the husband as at the date of trial had access to the children on alternate weekends; and
- requiring a report to be prepared pursuant to s. 211 of the Family Law Act to assess the needs and views of the children as well as the ability and willingness of each parent to satisfy those needs.

[29] The husband has paid all of the court-ordered child support obligations to date and there are currently no arrears in that regard. Given the (frankly, outrageous) wait times necessary to obtain a s. 211 report from the (again, outrageously underfunded and backlogged) Family Justice Report Service administered by the provincial Ministry of Justice, the s. 211 report was not made available to the parties or the Court until November 23, 2016, just two weeks before the scheduled commencement of trial. This was not the fault of Ms. Callan, the family justice counsellor who prepared the report. It is simply one of the (completely unacceptable) realities of inadequate financial resources being devoted by the government to families and youth in need of assistance.

[30] In any event, the children have expressed some fear of and disdain for their father. Ankit in particular says he feels unsafe and "on guard" and suggests that his father does not really know how to be a parent. He does not wish to see him anymore. Raghav says his father expresses derogatory names for his mother and even though he has some fear that he may be struck by his father, he believes the latter loves him deep down and he is prepared to visit from time to time. Hania is less critical, although she observes that her father "gets mad easily", and says that she would prefer for parenting time to take place once a month. The family justice counsellor recommends that the father undergo alcohol or other counselling but also recommends continued contact between the children and the father at least once a month on weekends of their choosing provided he actively interacts with them.

[31] The father testified during trial that he has essentially given up drinking alcohol and that this ought not to be a concern insofar as any parenting regime is being considered.

CUSTODY, GUARDIANSHIP AND PARENTING

[32] During the course of the trial, the parties were able to agree on the following regime for custody, guardianship and parenting of the children. Accordingly, with the consent of the parties, I issue the following order:

1. The parties are to have joint guardianship of the children.
2. Ms. Joshi shall have primary residence of the children.

3. Mr. Joshi's parenting time with the children shall be:
 - a. Raghav and Hania shall have parenting time with Mr. Joshi on alternate weekends from Saturday at 12:00 p.m. to Monday morning at 8:00 a.m.;
 - b. Mr. Joshi shall have 10 days of uninterrupted parenting time with Raghav and Hani in the month of July or August of each year. Ms. Joshi is to provide Mr. Joshi with a list of any scheduled activities for the summer by June 7 of each year and Mr. Joshi is to provide the dates of his one-week parenting time by June 15 of each year;
 - c. Mr. Joshi shall have generous telephone conversations with the children at all reasonable times;
 - d. Ankit, being 15 years old, is not bound by the order made at 3(a) and 3(b). He is free to visit Mr. Joshi at any time he wishes, if he wishes to do so; and
 - e. Any other time agreed to by the parents.
4. When Mr. Joshi takes the children for the 10 days' parenting time during the summer holidays, Mr. Joshi shall pay all expenses relating to the children's travel, accommodation and upkeep while he is exercising parenting time.
5. When the children visit Mr. Joshi, Mr. Joshi shall ensure that his home is safe and hazard free.
6. Mr. Joshi shall not consume any alcohol and/or controlled substance within the meaning of s. 2 of the Controlled Drugs and Substance Act, S.C. 1996, c. 19, except as prescribed by a licensed physician, during or within 12 hours preceding parenting time with the children.
7. Communication between the parties will be limited to emails and text messages.
8. The parties shall not remove the children from British Columbia, Canada, without the written consent of the other party, except that Ms. Joshi shall be able to take the children to the United States for up to seven days without the written permission or consent of Mr. Joshi.
10. Ms. Joshi shall have all parenting responsibilities with respect to the children as per s. 41 of the Family Law Act.
11. During parenting time, Mr. Joshi may exercise the parental responsibility of making day-to-day decisions affecting the children provided that Mr. Joshi must advise Ms. Joshi of any matters of a significant nature affecting the children.
12. Mr. Joshi shall have parenting responsibilities with respect to the children in s. 41(a), (d), (i), (j), (k), (l) of the Family Law Act. Mr. Joshi shall not have s. 41 (b), (c), (e), (f), (g) and (h) rights that relate to applying for a passport and respecting where the children will reside.

13. Ms. Joshi will have the obligation to discuss with Mr. Joshi any significant decisions that have to be made concerning the children; in the event that the parties cannot reach agreement on a significant decision despite their best efforts, Ms. Joshi will be entitled to make those decisions and Mr. Joshi will have the right to apply for directions on any decision he considers contrary to the best interests of the child, under s. 49 of the Family Law Act.
14. Each parent will have the right to obtain information concerning the child directly from third parties, including but not limited to teachers, counsellors, medical professionals, and third-party care givers.
15. Ms. Joshi shall be able to apply for passports for the children without requiring Mr. Joshi's written permission.
16. If the parties are to travel with the children internationally, with exception of paragraph 9, they will be able to do so with the written consent of the other party, and:
 - a. each parent shall seek consent from the other at least 30 days before the travel is planned; and
 - b. consent shall not be unreasonably withheld.
17. Each party who travels with the children outside of British Columbia, Canada, shall:
 - a. provide an itinerary for the children's travel that includes flight details, the address and telephone number of where they will be staying; and
 - b. ensure that the medical and accident insurance is in place to cover the children's medical care or treatment outside Canada and transportation home. If such insurance is not obtained, the travelling party will be responsible for the cost of such care and transportation.
18. Ms. Joshi will retain the children's passports when the children are not travelling and Mr. Joshi will return the children's passports to Ms. Joshi promptly upon the return of the children to British Columbia.

CHILD AND SPOUSAL SUPPORT

Spousal Support

- [33] In final argument, the wife advised the Court that she was abandoning any claim for spousal support. This was a recognition that her husband's income, whether as reflected in income tax filings or imputed at higher amounts, is insufficient to trigger spousal support in the circumstances of this case.

Husband's Income

[34] The wife claims retroactive and continuing child support and in that regard asks the Court to impute substantially more income to the husband than has been declared in his income tax filings over the years. In particular, the wife invokes s. 19(1) of the Federal Child Support Guidelines, SOR/97-175 ("Guidelines"), to argue:

1. the husband has been and continues to be "intentionally underemployed" such that additional employment income should be imputed to him for child support purposes (s. 19(1)(a));
2. alternatively, the husband is "adequately employed" but has been and continues to "unreasonably deduct expenses from his income" (s. 19(1)(g)); and, in any event
3. the husband has failed to provide income information when under a legal obligation to do so (s. 19(1)(f)).

In particular, the wife submits that income for child support purposes should be imputed to the husband in the range of \$45,000-\$65,000.

[35] The husband obtained his Class 1 driver's licence in 2004 and has been working as a truck driver ever since. In April 2005 he purchased his first used truck and conducted business as an owner-operator sole proprietorship. In 2010 he purchased a used Kenworth truck for U.S. \$18,000 and continues to operate that truck at the present time. In September 2012 he incorporated "Joshi Transportation Ltd.", although he testified that this entity did not start receiving income until the following year, 2013. Thereafter the husband's income was derived from Joshi Transportation Ltd.

[36] The wife points out that the husband's income tax filings consistently reflect net trucking income less than \$20,000 per annum even though gross income increases each year (except 2013). She relies on this to argue that the expenses attributable to the business must contain "an element of personal benefit" which should be taken into account. As well, she points to the personal expenses set out on various Form F8 financial statements filed by the husband to suggest that he must be making enough net income to cover the expenses claimed.

[37] The husband's income tax filings reflect the following income and expenses for the following taxation years:

Year

Gross Income

Net Income

Line 150 Income

2009

\$41,664.00

\$15,126.00

\$15,126.00

2010

\$53,590.00

\$16,703.00

\$16,269.00

2011

\$74,339.00

\$19,951.00

\$19,951.00

2012

\$58,806.00

\$11,699.00

\$12,560.00**

2013

\$34,799.00*

\$499.00*

\$10,635.00

2014

\$50,186.00*

\$14,069.00*

\$12,500.00

2015

\$48,258.00*

\$18,089.00*

\$16,800.00

*corporate income for fiscal year ended September 30

**includes gross/net rental income of \$10,200/861

- [38] The vast majority of the expenses incurred/applied to produce the net income figures above are grouped under "motor vehicle expenses" and comprise mostly fuel, repairs, maintenance, and insurance.
- [39] Neither the wife, nor anyone on her behalf, has undertaken any sort of auditing or forensic analysis to determine whether the expenses claimed were actually incurred and paid or whether they were in any other way unreasonable. She protests that, although such expenses do seem to be reflected in bank account and credit card statements produced by the husband, no actual receipts have been produced notwithstanding demand for same.
- [40] The husband claims that all the supporting documentation is with the accountant who prepared the tax returns and corporate financial statements, that he offered the wife an authorization permitting her to directly obtain the same from the accountant (who, incidentally, is the same accountant the wife uses for her tax returns) and that offer has not been taken up. While the receipt documentation has not been listed in the husband's List of Documents, the wife made no pre-trial application to compel production whether pursuant to Supreme Court Family Rule 5-1 or Rule 9-1.
- [41] The primary role of a trial court is to determine facts. Facts are determined with reference to admissible evidence. Accusations and expressions of doubt or cynicism are not admissible evidence of fact. Further, inferences which do not logically and reasonably flow from established facts are nothing but impermissible conjecture and speculation.
- [42] The wife referred to some decided cases in this Court where the net income of a truck driver was found to be substantially higher than that claimed by the husband in this case. That may be so, but it does not compel the same outcome here. Such cases are not evidence, nor are they facts.
- [43] There is simply no evidence before me that the husband is underemployed. No evidence has been produced to the effect that, based on his skills, experience and age, the husband could be employed on a more remunerative basis in an occupation other than truck driving. No evidence of alternative occupations or job market conditions was tendered.
- [44] Similarly, no evidence has been adduced respecting the average net income for truck drivers in the Lower Mainland nor any evidence which might otherwise provide rules of thumb for expenses as a percentage of gross revenue in that particular occupation. While the wife bluntly accuses the husband of fraud, i.e., falsely stating his income and expenses in his tax filings, presumably with the complicity of their mutual accountant, there is not an iota of evidence substantiating the claim.

- [45] I should perhaps point out at this juncture, that the only witnesses who testified at this trial were the parties themselves. While each party accuses the other of inadequate disclosure and hiding income or assets, neither called any witnesses to corroborate their claims, whether they be family members, accountants or others supposedly involved in the chicanery in question.
- [46] The husband purchased a property with his parents in December 2014. Together with his parents, he applied for a mortgage through a mortgage broker, EQ Lending Corp. The mortgage application, dated December 18, 2014, and signed by the husband, states the husband's income as approximately \$40,000. The application does not state whether this figure is on a gross or net basis. When confronted with the number at trial, the husband stated that it was incorrect and was inserted at the instance of the mortgage broker. The wife subpoenaed that broker to obtain a copy of the application document but did not call him as a witness at the trial.
- [47] In December 2013, this Court imputed annual income to the husband for interim child support purposes in the amount of \$20,000 and ordered the husband to pay child support in the monthly amount of \$433. There is simply no admissible evidence before me warranting the imputation to the husband of an annual income more than \$20,000. The husband accepts that figure as the basis of child support in this case even though his most recent Line 150 income in his tax return was less than that amount.
- [48] I therefore determine that the husband's income for child support purposes is \$20,000 per annum and direct that the monthly child support payments of \$433 continue subject to any variation that may hereafter occur by order of this Court.
- [49] I appreciate that in the past three years the father has made all payments of child support ordered by the Court in December 2013. Nonetheless, given the cynicism and suspicion pervading disclosure in this case, perhaps a blunt message will be of assistance as follows:
- parents have a joint and ongoing legal obligation to support their children;
 - it is the children, not the custodial parent, who have the right to support;
 - support payments are based on earning capacity and not just on what a parent actually earns ... a parent has a legal obligation to earn as much as he is reasonably capable of earning so that the children can receive an appropriate level of support;
 - a payor parent whose annual earnings increase beyond the amount determined by the court at first instance has an obligation to his children to voluntarily increase the amount of child support he is paying so that their children can benefit accordingly;
 - diverting monies that would otherwise be taken into income so as to reduce the level of child support payable is a serious breach of a payor parent's legal obligation to his children;

- so too is understating gross income or inflating deductible expenses to reduce net income for child support purposes;
- fulsome, accurate and current disclosure of a payor parent's financial information is mandatory;
- this includes a complete copy of personal income tax returns, notices of assessment and reassessment, statements of earnings from employers setting out rates of remuneration, financial statements for any business conducted by the payor properly and accurately recording income and expenses and, when requested, copies of receipts or other documents substantiating revenues and expenses; and
- lawyers, accountants or other professionals who knowingly assist payor parents in wrongfully breaching these various child support and legal obligations fail to meet the highest standards of integrity and ethical conduct expected of them.

[50] In addition to the continued payment of child support referred to above, and for so long as the children remain a "child of the marriage" as defined by the Divorce Act, I also direct that the husband will annually provide to the wife within 30 days of becoming available the following documentation:

- a complete copy of his filed personal income tax return along with a copy of any notice of assessment and reassessment issued to him by the CRA;
- a complete copy of the financial statements of Joshi Transportation Ltd., and any other corporation or business in which he is a shareholder, director or officer or in which he may have a beneficial interest; and,
- if requested, a copy of all receipts, invoices or other documentation substantiating the income received by and expenses incurred by Joshi Transportation Ltd. or any other businesses of the sort referred to above.

Special or Extraordinary Expenses

[51] Pursuant to s. 7 of the Guidelines, the wife claims contribution from the husband towards certain special expenses related to medical and dental treatment for the children as well as extraordinary expenses for extracurricular activities. Section 7 permits these expenses to be estimated if there is insufficient supporting evidence in that regard. However, the order will only be made after taking into account (1) the necessity of the expense in relation to the child's best interests, and (2) the reasonableness of the expense in relation to the means of the spouses.

- [52] In this case the husband's annual income has been determined to be \$20,000. The wife's annual employment income is approximately \$43,000 (2015) and she also receives rent from the downstairs suite in her home (not declared on her income tax return but over \$900 per month at the present time), i.e., an annual total of approximately \$50,000. Both parents are of relatively modest means. There is no reasonable basis for endorsing any extraordinary expenses for extracurricular activities beyond what the household budget may permit.
- [53] The children's health issues are a different matter altogether. Ankit requires medication for his ADHD. As well, the two eldest children evidently require orthodontic treatment estimated to cost \$6,000 each.
- [54] The father recognizes that he should be making contribution to the children's medical treatment but suggests that the proposed cost of orthodontics is excessive and that further estimates from alternate treatment providers should be obtained. Given the expense involved, it is not unreasonable for at least one other estimate to be obtained and I therefore direct the mother to do so before any orthodontic treatment is rendered. However, in accordance with s. 7(2) of the Guidelines, I order that all health-related expenses exceeding any available insurance reimbursement by \$100 annually, including expenses related to orthodontic treatment, prescription drugs and optical needs of the children, shall be shared by the parties in proportion to their respective annual incomes stated above (\$20,000/\$50,000).

DIVISION OF ASSETS

The General Principles

- [55] The parties agree that any division of assets and debts in this case is governed by the former Family Relations Act, R.S.B.C. 1996, c. 128 ("FRA"), rather than the current Family Law Act.
- [56] Section 56 of the FRA provided that each spouse has an undivided half interest as a tenant in common in each "family asset" that exists as at the date of the first "triggering event". That triggering event is not the date of separation of the parties but rather one of four specified matters in s. 56(1) of the FRA. In the present case, the parties agree that the triggering event is the granting of the divorce order on March 5, 2014, some two years and three months following the final separation of the parties in December 2011.
- [57] The concept of a "family asset" was defined in s. 58 of the FRA to mean "property owned by one or both spouses and ordinarily used ... for a family purpose". Such property included the husband's trucking venture inasmuch as the wife made an indirect contribution to its development through her effective management of the household and child-rearing responsibilities.
- [58] Section 65 of the FRA permitted reapportionment of the parties' shares in family assets should an equal division be considered unfair having regard to:

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

[59] The concept of "family debt" was not expressly provided for in the FRA, however it evolved in the case law considering fairness in property division at marriage breakdown. A spouse's debts incurred for a family purpose could be taken into account under sub-factor (f) referred to above, whereas debts incurred for purely personal rather than any family purpose would generally not be taken into account in any property reapportionment consideration.

[60] The FRA did not contain any reference to valuation and had no provisions for a valuation date or dates to be applied for division or reapportionment purposes. While it was the date of the triggering event which crystallized the parties' interest in family assets, the common approach was to use the trial date for valuation and reapportionment of those interests inasmuch as that date resulted in the formal disposition of same.

[61] Generally, the parties were entitled to share equally in any increase in value of family assets between the date of the triggering event and the date of disposition i.e., trial. If, however, an undivided interest in an asset was taken away before trial, e.g. a sale of the asset to third parties, value could be determined at the time of that disposition or sale.

The Matrimonial Home

[62] The primary asset in dispute in this case and, indeed, what appears to have been the primary litigation motivation for the parties, is the former matrimonial home at 6933 Prince Edward Street, Vancouver. It was purchased for \$381,000 in October 2004 and as of July 1, 2016 had an assessed value for property tax purposes of approximately \$1,450,000.

[63] The details respecting the acquisition and subsequent litigation over the Prince Edward Street property are set out above in paragraphs 20 through 27 of these reasons for judgment. The issue to be determined at this time is the legal effect of the November 18, 2014 order of Mr. Justice Kelleher and, in particular, its impact upon the property claims in this family litigation.

- [64] The difficulty is that the Kelleher order does not expressly provide that it represents a final disposition of property interests for the purposes of the matrimonial litigation. No releases were executed in that regard nor, however, were any documents signed expressly reserving the husband's rights to insist upon division of family assets at (increased) value determined at the date of the family trial.
- [65] In my view, this issue is determined by the principles discussed in *Vetter v. Vetter* (1994), 50 B.C.A.C. 14: the Kelleher order was essentially (1) a determination of the value of the matrimonial home (\$850,000), and (2) a court-ordered sale severing the joint ownership interests and transferring title at fair market value. The wife paid the consideration due to the husband (albeit into trust) and upon closing of the transaction, the former matrimonial home was no longer properly characterized as a family asset subject to division or reapportionment at any later trial of the family action. In short, the disposition ordered by Justice Kelleher represents the determination of value to be considered for any reapportionment claims in the family law action.

Reapportionment

- [66] In my view an equal division between the parties of family assets would not be unfair and in this particular case is best achieved by simply allocating to each spouse the various assets and debts they now have in their respective names.
- [67] Apart from the matrimonial home, the family assets in the husband's name at the time of the divorce order included a used Kenworth truck, an Acura MDX (or its sale proceeds retained by the husband), and Joshi Transportation Ltd. The truck is of modest value as, indeed, is Joshi Transportation Ltd. These values, together with the proceeds the husband retained from the unilateral sale of the Acura MDX, offset the amount of family debt he claims to have existed on the line of credit at the date of the parties' separation (approximately \$15,000).
- [68] I place no value upon, and give no consideration to, the alleged debt that the husband claims to owe his brother. That debt is supposedly evidenced by a handwritten document dated 02-12-2012 purportedly signed by Navin Joshi and tendered by the husband at trial. It turns out, however, that the document was handwritten by the husband and not Navin Joshi, a fact the husband did not reveal when the document was produced at trial and marked as an exhibit. Like his father, Navin Joshi was on the husband's witness list for trial purposes but neither party was called as a witness, whether to corroborate the existence of debt or any other transactions in which they may have been involved.
- [69] As of the divorce order, the wife owned a piece of property in India (purchased in late fall 2012), a 2006 Honda Odyssey motor vehicle, and perhaps some jewelry which had been gifted to her at the time of the couple's wedding but which she acknowledged was for family purposes. The Honda was listed as an asset in both of the wife's November 19, 2013 and March 7, 2015 Form F8 financial statements sworn in this matter. The jewelry was disclosed

in the 2013 statement and valued at \$2,000 but was neither listed as an asset or disposition in the 2015 statement. The property in India was not listed in either statement.

- [70] The background is that the wife had been involved in a motor vehicle accident and her personal injury claim was settled in late fall 2012 at which time she received a cheque from her personal injury lawyers for approximately \$42,000. The property in India, which had a value of approximately \$16,000, was purchased a month or two before the wife received her settlement cheque; she testified that her sister loaned her the necessary funds in anticipation of imminent receipt of the settlement and quick repayment of the loan. She testified that the loan was in fact repaid and that a portion of the balance of the settlement proceeds was used to purchase the 2006 Honda Odyssey. None of these monies or transactions appear anywhere in the bank records produced by the wife, which is what led to the accusation by the husband that she had hidden assets.
- [71] It should be noted that on June 25, 2015 an order was issued in this action declaring that the ICBC settlement proceeds were not a family asset for the purposes of the present proceedings. The property in India does not fit the definition of "family asset" in any event inasmuch as it was not in any way used for family purposes but rather was acquired by the wife as an investment.
- [72] The value of the Honda and the "family" jewelry retained by the wife is modest.
- [73] Other debts and revenues were incurred/received by the parties at various times between the date of separation and the divorce order in 2014. The husband continued making payments on utilities and the mortgage on the family home until 2013 whereupon the wife was thereafter obliged to fund these outlays. Rental payments for the basement suite in the matrimonial home were collected by the husband or his father and were not paid to the wife even though an order was made in August 2013 which contemplated the latter collecting and disbursing the rental proceeds.
- [74] The evidence respecting these matters was uneven, disjointed and largely uncorroborated. I am generally satisfied, however, that at the end of the day the financial interests of the parties have been more or less evenly distributed.
- [75] That leaves the \$140,000 net proceeds owned by the husband as a result of the November 18, 2014 Kelleher order and which have been held in trust since the beginning of 2015 pending further order of this Court.
- [76] The wife claims reapportionment in her favour of these monies claiming a greater need for economic independence and self-sufficiency to discharge her duties as the primary custodial parent in this case. In my view this claim has no merit.

- [77] I recognize that the wife has taken on significant debt in order to acquire title to the Prince Edward Street property. She has a mortgage on the property in the amount of \$545,000 and she claims she also owes approximately \$120,000 to family members who loaned her the cash necessary to make the payments required by the Kelleher order. This debt load is no doubt a heavy burden, particularly when combined with the usual cost of maintaining a home and feeding and caring for the three children.
- [78] However, the wife has at least half a million dollars' worth of equity in the Prince Edward Street property and possibly significantly more. Her employment and rental income currently exceeds \$50,000 per annum. She receives a little over \$5,000 per annum as child support from her husband as well as universal childcare benefits, child tax benefits, and the BC family bonus. By no means is the wife wealthy or well-off, but by almost any measure she is better off than the husband in terms of "getting ahead".
- [79] In all the circumstances I exercise my discretion not to reapportion "family assets" pursuant to s. 65 of the FRA. I direct that each spouse shall retain their interests in all assets and debts presently in their name and I direct that the monies held in trust pursuant to the order of Mr. Justice Kelleher dated November 18, 2014 be paid out to the husband.

COSTS

- [80] Given the divided success in these proceedings, each party shall bear their own costs. If, however, there are circumstances that should be brought to my attention and which might result in a different costs award, the parties are at liberty to apply within 30 days.

"KENT J."

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