
CANADA / JUDGMENT

K.B. v. J.B.

2016 BCSC 1904

COURT

Supreme Court of British Columbia

DECIDED

18 October 2016

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2016 BCSC 1904 K.B. v. J.B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

K.B. v. J.B.,

2016 BCSC 1904

Date: 20161018

Docket: E42999

Registry: New Westminster

Between:

K. B.

Claimant

And

J. B.

Respondent

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Claimant:

Jack J. Hittrich

Counsel for the Respondent:

Pawanjit Joshi

Place and Date of Hearing:

New Westminster, B.C.

April 27 & August 5, 2016

Place and Date of Judgment:

New Westminster, B.C.

October 18, 2016

I. Introduction

- [1] On December 1, 2015, I issued reasons for judgment in a family law dispute. Those reasons are indexed at 2015 BCSC 2217 (the "Reasons"). The parties have now applied to address several issues that they argue I failed to address in the first instance. The reality is that most of the central issues that were raised on this application seek to either revisit arguments that were made earlier or to address problems that have since emerged between the parties.
- [2] The central issues that have been raised pertain to:
- i) the valuation of the parties' properties;
 - ii) a property that is owned by the claimant's mother in India;
 - iii) the duration of spousal support; and
 - iv) costs arising from the trial.

II. Background

- [3] In the Reasons I said:
- [1] The claimant, Mr. K.B., seeks various forms of relief in the context of a family law dispute. In his opening statement, counsel for K.B. fairly described the dispute between the parties as one of "high conflict". The claims made by the parties include, inter alia, allegations of child abduction, parental abuse, spousal abuse, family violence, child violence/abuse, inappropriate sexual advances by K.B.'s mother, Mrs. H.B., against the respondent, J.B., and an assault by J.B.'s father, Mr. S., against Mrs. H.B.
- [2] The events in question span more than a decade and take place in both India and Canada. Mr. Colby, the author of a s. 211 report prepared under the Family Law Act, S.B.C. 2011, c. 25 [FLA] ("the s. 211 Report"), and who met several times with both the parties and their two children, accurately observed that the parties agree on virtually nothing, and that the histories they provide in respect of most relevant events are not only inconsistent, but widely divergent.
- [3] Ultimately, the central issues raised by this action devolve to the following questions:

- i) What parenting structure and schedule should be instituted for the parties' two children?
 - ii) How should the parties' various properties be distributed and what, if any, interest does J.B. have in the home of Mrs. H.B. in India?; and
 - iii) What spousal and child support should K.B. pay?
- [4] The following general facts are relevant and uncontested. K.B. and J.B. are now 44 and 39 years old respectively. They were both born in India. They were married on February 11, 2001. They have two children, a daughter, K., who is now 13 years old, and a son, H., who is now 10 years old. The parties and their children immigrated to Canada in December 2003.

III. Issues on This Application

A. Valuation of the Parties' Properties

- [4] The parties owned five rental properties. In the Reasons, at paras. 272-297, I addressed both the valuation, as well as the remaining debt and equity in those properties. I also concluded, at paras. 295-297, that those properties should be reallocated 60/40 in favour of the claimant, K.B., to "properly reflect the various payments and ongoing efforts that K. B. made post-separation to satisfy the parties' debts".
- [5] The various property valuations that I relied on were based on joint appraisals that had been prepared by the parties and accepted, at trial, without any issue. In the Reasons I said:
- [269] Throughout the trial, the parties agreed on the values that K.B. had ascribed to the various properties that were owned by the parties. These values formed the basis for much evidence and for various calculations. K.B. took the position that as many of these properties should be sold as would be required to give effect to the final calculations that flowed from this judgment. He did not wish, however, to sell properties unless it was necessary to do so, as each such sale would attract both capital gains taxes and real estate commissions.
- [270] On the last day of argument, however, counsel for J.B. said that his client now questioned some of the values that were being used for the various properties and that, accordingly, she sought to have all of the properties that were owned by the parties sold.
- [271] I do not consider that this would be appropriate. This trial occupied more than six weeks over six months and it was adjourned three times. J.B. is or was a licenced real estate agent. There was ample time and opportunity for J.B. to question property values or to develop different valuation evidence if she chose to do so. To accept such a shift of position after both parties had closed their cases would be inappropriate and has the prospect of causing unnecessary harm to the parties' financial interests.

- [6] J.B. now seeks to revisit the valuations that pertain to two properties that were described at trial as the "Stewart" and "Fairview" properties. J.B. argues that the 2015 British Columbia Property Assessments for these two properties indicate that the values for the Fairview and Stewart properties increased, in 2015, by \$482,800 and \$112,200 respectively from the previous year.
- [7] Both the relevant factual and legal framework are important to the issue J.B. now raises:
1. The Relevant Chronology
- [8] The following dates are relevant:
- i) Appraisals for the five properties were prepared in August and September 2014;
 - ii) The trial of this matter occupied 30 days between February, 2015 and July 2015. I issued the Reasons on December 1, 2015;
 - iii) The parties originally sought to return before me in April 2016 but the matter was adjourned until August 5, 2016; and
 - iv) It is relevant that the property assessments that J.B. seeks to rely on purport to value the properties as of July 1, 2015 and were made available to J.B. in January 2016. She thus argues that the two properties are valued as of the time when the trial was ongoing, but her receipt of the property assessments post-dates the date when the Reasons were released.
2. The Legal Framework
- a) Relevant Legislation
- [9] Part 5 of the Family Relations Act, R.S.B.C. 1996, c.128 ("FRA"), governed the distribution of the parties' properties; see Reasons at para. 242.
- b) Relevant Valuation Date
- [10] Though the presumptive valuation date under the FRA was the relevant "triggering date", the parties, through their evidence and submissions, appeared to rely on the valuation date at trial; see also *Blackett v. Blackett* (1989), 40 B.C.L.R. (2d) 99 (C.A.); *Gilpin v. Gilpin*, (1990) 29 R.F.L. (3d) 250 (C.A.); and *Halpin v. Halpin* (1996), 26 R.F.L. (4th) 30. Under s. 87(b)(ii) of the Family Law Act, S.B.C. 2011, c. 25, family property and family debt are now to be determined as of "the date of the hearing before the court".
- c) Reopening Proceedings and New Evidence
- [11] Counsel should proceed as quickly as is reasonably possible to have the decisions of the trial judge reduced to the form of an order and to have the order approved or settled and entered; see *Re Janke* (1977), 2 B.C.L.R. 378 (S.C.).

- [12] However, a trial judge retains discretion to re-open an issue before formal judgment has been entered. This discretion is unfettered but is to be used sparingly; see *Cheema v. Cheema*, 2001 BCSC 298 at para. 4; *Sykes v. Sykes* (1995), 6 B.C.L.R. (3d) 296 (C.A.) at para. 9; and *Clayton v. British American Securities Ltd.* (1934), 49 B.C.L.R. 28 at 66-67 (C.A.).
- [13] In *Lemare Lake Logging Ltd. v. British Columbia (Minister of Forests & Range)*, 2009 BCSC 902, Grauer J. reviewed the case law relevant to the discretion to re-open, and at para. 7, said:
1. This discretion should be exercised sparingly and with the greatest care to avoid unwarranted attempts to disturb the basis for judgment, or to permit a litigant to re-establish a broken down case.
 2. The onus is on the applicant to establish that a miscarriage of justice would probably occur if the matter is not reopened.
 3. New evidence is a usual, but not an essential, prerequisite; where it is offered, the onus is on the applicant to establish that it would probably change the result of the proceeding.
 4. The credibility and weight of the proposed fresh evidence is a relevant consideration in deciding whether its admission would probably change the result.
 5. Although the question of whether the evidence supporting the application could have been presented at trial by the exercise of due diligence is not necessarily determinative, it may be an important consideration in deciding whether a miscarriage of justice would likely occur if the hearing is not reopened.
 6. In general, reconsideration of an issue is not an alternative to an appeal.
- [14] In *Bronson v. Hewitt*, 2010 BCSC 871, Goepel J., as he then was, concluded:
- [33] From my review of the authorities I take the law to be that new evidence will only be admissible on a reconsideration application if it would likely change the result and, except in exceptional circumstances, the evidence could not have been obtained by reasonable diligence before the trial. In exceptional circumstances, in order to prevent a miscarriage of justice, fairness may dictate that new evidence will be admissible even though the evidence may have been discoverable prior to trial. New evidence will generally not be admissible in situations where the evidence was not called at trial because of tactical considerations.
- [15] Apart from new evidence, a judge may also properly re-open if satisfied, either because of the argument of one of the parties, or on the basis of his or her own reconsideration of the record, that the original judgment was in error because it overlooked or misconstrued material evidence or misapplied the law; *Sykes* at para. 10.

[16] The Court of Appeal recently considered the principles applicable to a reconsideration application in *Moradkhan v. Mofidi*, 2013 BCCA 132. The Court reviewed the law at paras. 28-32, relying heavily on the summary of MacKenzie J., as she then was, in *Mohajeriko v. Gandomi*, 2010 BCSC 60 at paras. 20-27, 31-32. Justice Garson said:

[31] I agree with, and adopt the comments of MacKenzie J. I would summarize the main principles applicable to such an application in the following way:

- it is generally speaking in the interests of justice to consider that a trial is complete when each side has closed their case and the judge has delivered his or her judgment;
- a judge's unfettered discretion to reopen a trial should be exercised with restraint;
- a party may not use the rule to re-argue, re-cast, or re-state his or her case, rather the rule is available to remedy what might otherwise be a substantial injustice;
- it is not intended that a party should be able to lead substantial new evidence, nor does the rule generally permit the leading of new expert evidence;
- the reasons that the evidence was not led or submissions not made in the first place may be relevant to the exercise of the judge's discretion, particularly where the failure to do so in the first place was a considered or pragmatic decision; and
- the discretion should only be exercised if the reception of the new evidence would probably change the result of the trial.

I would add to this list that a judge may reasonably exercise such discretion where a relatively discreet error in math or some mechanical consideration of the evidence is clearly in error. Finally, the overarching consideration is whether it is in the interests of justice that the court reopen the case. (See also *Brown v. Douglas*, 2011 BCCA 521, 314 B.C.A.C. 143.)

[32] From a procedural point of view it seems to me that fairness would dictate that an application must be made to the judge on notice to the other party with an outline of the evidence to be tendered. The judge will then decide to reopen or not, and may direct a further hearing, or if appropriate, decide the question concurrently with the application to reopen. Such an application must be governed by the Supreme Court Civil Rules, B.C. Reg. 168/2009, relating to interlocutory procedures and the conduct of trials.

[17] In concurring reasons for judgment, Ryan J.A., at para. 79, also emphasized that once the court had agreed to re-open the trial, the material that had been placed before the trial judge, specifically updated appraisal reports, required examination in court through cross-examination or full submissions.

d) Analysis

[18] Counsel for K.B. argues, in the first instance, that I had already determined, at trial and in the Reasons, at para. 271, that J.B. ought not, through requiring the sale of all the parties' properties, to indirectly revisit the various appraisals that the parties had relied on

throughout the trial and that had formed the basis of the various calculations and summaries that I was given at trial. Accordingly, he argues that the value of the various properties is "res judicata" and that it is not now open to J.B. to seek to rely on the new property assessments she has received for the Stewart and Fairview properties.

[19] I do not consider that I need address this narrow issue directly. This is because I do not consider the J.B. can meet the significant burden that rests with her. I say this for several reasons:

- i) J.B. was a trained and, at one point, licenced realtor. She, better than most, would have appreciated that the property values in the Lower Mainland of Vancouver had been increasing significantly over the last several years;
- ii) in a similar vein, J.B. could, with reasonable diligence, have obtained updated appraisal evidence at trial. This is particularly so because this trial was adjourned twice over the six-month period of time that the trial was conducted;
- iii) the assessed property values of a property are probative, but they form a less persuasive form of evidence than formal expert appraisal evidence pertaining to a specific property;
- iv) I do not say that my ruling, at trial, to prevent J.B. from seeking to compel the sale of all of the parties' properties, formally precludes the present application. It is clear, however, that both J.B.'s unsuccessful submission at trial (to have all of the parties' properties sold), and the present application seek to achieve the same purpose;
- v) the calculations that I undertook at trial, which were relatively detailed, gave rise to an unequal distribution in the parties' various properties. It is not clear what overall impact the use of new property values for some of the parties' properties would have on this issue; and
- vi) similarly, it is apparent from the materials that were filed for this application that counsel for both parties had, prior to J.B. seeking to rely on the new property assessments that she received, agreed on the figures or calculations that arose from the Reasons. Revisiting the values for two of the parties' properties, now more than a year after the trial has completed, does not advance the certainty or finality that the trial should have yielded and that the parties should now enjoy.

[20] It is also not clear that my declining to allow J.B. to introduce or rely on new property assessment evidence would give rise to a miscarriage of justice. Again, I say this for several reasons:

- i) it is clear from the various property assessments that I was provided that the property assessment for another of the parties' properties, the Reid Road property, decreased in 2015 - albeit by a modest amount. Similarly, I was told that the property assessment for another property also decreased, though I was not given the formal assessment printout for that property, nor was I told how significant that decrease was. Thus, the reality is that the values for some of the parties' properties decreased, while the values for other properties increased;

ii) the magnitude of the increases in the property assessments for the Fairview and Stewart properties is potentially misleading in several respects. For example, an unknown portion of the approximate \$110,000 increase in the value of the Stewart property, 40% of which would go to J.B., would be payable in capital gains taxes and sales commissions if the property was now sold. I was not provided with any calculations of what, if any, portion of the increased value of the property would ultimately make its way to J.B.;

Similarly, based on recent correspondence between the parties, it appears that 60-65% of the equity in the Fairview property belongs to K.B.'s mother. The balance is to be distributed 60/40 between K.B. and to J.B. respectively. Thus, perhaps only approximately 15% of the proceeds from the Fairview property would go to J.B.

Still further, at the time of trial, the Fairview property was to have been sold and the relevant calculations factored in both taxes and commissions; Reasons at para. 278. The materials and correspondence that were exchanged between counsel before the issue of the increased assessed value of the Fairview property was raised, suggested that that property might no longer be sold and, thus, presumably, the amount due to J.B. would have increased. If the property, as a result of the increased assessed value, were now to again be sold, the amount due to J.B. would be affected by the various costs that would attend that sale.

All of this is in aid of establishing that the bare figures contained in the property assessments are less significant than they would initially appear to be, and the specific portions of the remaining figures or the balance due to J.B. that would flow from the property assessments are uncertain and potentially illusory.

iii) Finally, K.B., on this application, seeks special costs of the trial. For reasons that I develop later in this judgment, I have not made that cost order. The reality, however, is that if J.B.'s financial circumstances were appreciably improved, I would have been more inclined to make that cost order.

[21] In summary, I consider that some form of the evidence J.B. now seeks to rely on was readily available, at an earlier time, with reasonable diligence. Reconsidering the property values for two of the parties' five properties has the potential to give rise to new uncertainty. It is not clear that my unwillingness to rely on the 2015 property assessments for the Fairview and Stewart properties will give rise to a miscarriage of justice. Accordingly, I do not consider it to be in the interests of justice that the matter be re-opened and that the property assessments in question be admitted into evidence.

B. The Property in India

a) The Issue

[22] Mrs. H.B. owns a property in India (the "Indian Property"). That property had, prior to the commencement of these proceedings, been registered in India in the names of H.B., J.B. and K.B. The pleadings filed by J.B. in the family law action that she had commenced, virtually at the same time as this proceeding was commenced, expressly sought an interest

in the Indian property as a "family asset". Indeed, she claimed a reapportionment of the Indian Property, and in the other family property that was owned by the parties, in her favour.

- [23] At trial, each of J.B. and her father, as well as K.B. and his mother, gave evidence about the Indian Property and the basis of J.B.'s claim.
- [24] I addressed and dismissed J.B.'s claim to or for an interest in the Indian Property at paras. 244-268 of the Reasons.
- [25] Following the trial, K.B.'s counsel delivered various documents to J.B.'s counsel which were intended to be filed in India, and which would serve to remove J.B.'s name from the title to H.B.'s home. J.B. has declined to sign those documents. Her counsel now argues that I should not have addressed her claim and, in particular, he asserts that she did not advance a trust claim in respect of the Indian Property in the Notice of Family Claim that she filed.
- [26] In the Reasons I said:
- [244] Since 2005, J.B. has held a one-third interest in Mrs. H.B.'s home. K.B. had held a similar one-third interest in that property from 1996 to October 2012 when he transferred that one-third interest back to his mother. K.B. and Mrs. H.B. argue that the full beneficial interest in the Chandigarh home has, at all times, been held by Mrs. H.B.
- [245] J.B. argues, as I understand it, that the one-third interests held by her and K.B. properly belonged to them rather than to Mrs. H.B.
- [246] J.B. also argues, however, that I should not address this issue, and that no ruling ought to be made in favour of a non-party whose property is situate in India. I do not agree. This issue, the documents relevant to it, and the evidence of each of K.B., J.B., Mrs. H.B., and Mr. S. were fully advanced at length before me. The ownership of the Chandigarh property, and J.B.'s claim of an interest in that property, were expressly raised by her in the claim she filed. This is a trial that took more than six weeks. The parties are not affluent. Their interactions are hostile and difficult. There is considerable merit in attempting to resolve all outstanding issues between the parties and their parents at this time. Still further, one aspect of J.B.'s claim pertains to J.B.'s interest in K.B.'s former one-third interest in his mother's home. This issue directly engages property division between the parties. There is no reason that the issue of J.B.'s interest in Mrs. H.B.'s property should be dealt with separately or in a different forum.
- [247] Finally, Mrs. H.B., who might be concerned about some unfairness arising from a determination in an action to which she is not a party, has no such concerns and seeks to have all issues resolved concurrently.
- [27] After dismissing J.B.'s claims to an interest in the Indian Property on the basis of the debt or contract claim that she advanced, or on the basis of H.B. having been given a gift, I also said:

- [262] The only remaining question is whether the formal transfer of that one-third interest to J.B., albeit on a gratuitous basis, transferred any beneficial interest in Mrs. H.B.'s home to J.B.
- [263] The decision in *Pecore v. Pecore*, 2007 SCC 17 is the leading authority on whether a joint owner of a property is entitled to that asset because there was a gift of the beneficial interest in the asset to them, or whether that joint owner holds the beneficial interest in the asset on a resulting trust for the other owner.
- [264] In *Gutierrez v. Gutierrez*, 2015 BCSC 185, I said:
- [63] *Pecore* significantly modified the law with regard to the presumption of advancement and the presumption of resulting trust. In a decision written by Rothstein J., the majority of the Court held that the rebuttable presumption of advancement, which presumes a gift in the case of gratuitous transfers between parents and children, is limited to transfers between parents and their minor children; *Pecore* at para. 40.
- [64] Based on the principle that equity presumes bargains and not gifts, Rothstein J. determined that in the case of a gratuitous transfer between a parent and their adult child, a rebuttable presumption that a resulting trust is created arises. The transferee bears the onus of proving, on a balance of probabilities, that the transferor intended the gratuitous transfer to be a gift; *Pecore* at paras. 24, 43-44.
- [265] In *Pecore*, at paras. 56-64, the court made reference to numerous factors that could potentially assist in addressing this issue. I do not consider that I need address those various factors in this case. J.B. does not assert that the transfer to her of an interest in Mrs. H.B.'s home was a gift. Rather, she says that she or her father paid money and gave consideration for that interest. I do not, as I have said, accept that evidence. Rather, I observe that Mrs. H.B. has always maintained powers of attorney to deal with J.B. and K.B.'s interests in the property and paid all maintenance, tax, and other expenses associated with her home. In the circumstances, I do not consider that J.B. has rebutted the presumption of resulting trust.

b) Conclusion

- [28] I do not consider that there is any basis to revisit the conclusions I expressed in the Reasons. It was J.B. who, in her pleadings, claimed an interest, under the FRA, in the Indian Property. Though it was likely open to H.B. to object to the claim being advanced by J.B., on the basis that H.B. was not a party to the action, she chose not to do so; see, for example, *D'Angelo v. Barrett*, 2016 ONCA 605. Instead, she was content to have J.B.'s claim determined by the British Columbia courts. It is relevant that H.B. had resided in British Columbia for extended periods of time since 2006 and she had, at the time of trial, resided in British Columbia since 2014. K.B. and H.B. advanced the detailed documentary and oral evidence that they required to defeat the claim advanced by J.B. at trial. J.B. and her father gave detailed evidence in support of J.B.'s claim, and each of J. B. and her father were cross-examined on the evidence

they led in relation to the Indian Property.

[29] It is important that though J.B. relied on the FRA in her pleadings, this was not the basis for her claim to the Indian Property at trial. I say this is important because it is clear that a claim under the FRA does create property rights; see *Tezcan v. Tezcan* (1992), 8 B.C.A.C. 276 at para. 62-63.

[30] Instead, J.B. argued that her father had either loaned or gifted money to H.B. Thus, in the Reasons, I said:

[253] J.B. and her father, on the other hand, gave very different evidence.

[254] At trial, J.B. said that her father gave Mrs. H.B. 12 lakhs or 1.2 million Indian Rupees (Rs.) in cash to help Mrs. H.B. because she had financial difficulties.

[255] This evidence is flawed in various ways. J.B. initially said that the payment to Mrs. H.B. was likely made in August 2001 and that it was to be a loan. Mr. S., however, had said that he stopped building his own home in 2001 to help pay for the parties' wedding that year. Where such a considerable sum of money would have come from is then not clear. I am satisfied that such an amount would have been significant, in the context of the parties, as J.B. referred to the 10 lakhs that were borrowed by her father to assist with the costs of the litigation in India in 2012 as a "very big amount". It is also not clear why the purported payment to Mrs. H.B. was made in cash.

[256] There were also no documents, of any sort, which established that either Mr. S. had borrowed money to give to Mrs. H.B., or that he had made this payment.

[257] Still further, the evidence of J.B. was inconsistent. In her direct evidence, she said she was not sure how the 12 lakh figure was paid but thought it was probably in cash. In her cross-examination, she was adamant that she had witnessed the payment from her father and certain that it had been made in cash.

[258] In her first affidavit, J.B. had said that she been given a one-third interest in Mrs. H.B.'s home because her father had given Mrs. H.B. 20 lakhs or Rs. 2 million for "the completion of the house and other needs". This reference can be found at para. 106 of these reasons. J.B. never referred to any such 20 lakh figure in her direct evidence, and it seems clear that Mrs. H.B.'s home was "completed" well before any such payments were made. Neither K.B. nor Mrs. H.B. were ever cross-examined on any such 20 lakh figure.

[259] When cross-examined about the 20 lakh figure, J.B. now said that there was originally a 12 lakh payment which was followed by a series of further payments. Mr. S., whose evidence followed that of J.B., also gave evidence of an initial 12 lakh figure, followed by further loans or sums that totalled 20 lakhs.

[260] J.B.'s first affidavit had also suggested that J.B.'s one-third interest had been transferred to her because "K.B.'s uncle insisted ". This was not part of J.B.'s direct evidence. Mr. S. never said this either. The proposition that an interest in Mrs. H.B.'s home was transferred to J.B. because an uncle had insisted that this be done was never put to either K.B. or Mrs. H.B.

[261] I do not accept the evidence of J.B. and Mr. S. on these issues. Specifically, I do not accept that any sum was loaned or given to Mrs. H.B. or to K.B., or that any such payments underlay the transfer by Mrs. H.B. of an interest in her home to J.B.

c) The Jurisdictional Issue

[31] J.B.'s counsel, on this application, raised several reasons why I ought not to have addressed her interest in the Indian Property. The first reason is that a British Columbia court has no jurisdiction to address title to a foreign immovable. This general proposition is correct; Castel & Walker, *Canadian Conflict of Laws*, 6th ed., looseleaf, vol. 2 (Toronto, Ont.: LexisNexis Canada Inc., 2005) at s.23-1[Canadian Conflict of Laws]; *Duke v. Andler*, [1932] S.C.R. 734.

[32] First, I observe that this submission recasts the argument made by J.B.'s counsel in his final submissions at trial. At that time, the focus of his argument, as I understood it, was that H.B. was not a party to the action, and that it would be inappropriate to determine issues that related to her home in such circumstances.

[33] Furthermore, the general proposition now relied on by counsel has no direct application to the circumstances of this case. In *Canadian Conflict of Laws*, the authors, at s. 23-2, state:

The recognition by Canadian courts of the exclusive jurisdiction of the courts of the situs over matters involving title to immovables has not prevented them from exercising equitable jurisdiction in personam over the owners of the immovables. Canadian courts will grant decrees imposing a personal obligation on a defendant with respect to a contractual or equitable obligation arising out of a transaction involving a foreign immovable. This approach is based on the distinction between interests in an immovable created directly by a transaction between the parties thereto and personal obligations arising out of a transaction, of which the foreign immovable is the subject matter.

The exercise of jurisdiction in personam with respect to a foreign immovable depends on the existence between the parties of a legal or equitable obligation. The exceptions to the rule that courts will not exercise jurisdiction in rem over foreign land "depend on the existence between the parties to the suit of some personal obligation arising out of contract or implied contract, fiduciary relationship or fraud, or other conduct which, in the view of a court of equity in this country would be unconscionable, and do not depend for their existence on the law of the locus of the immovable property". This view is based on the principle that the courts of equity have jurisdiction in personam in relation to foreign immovables against persons resident within the jurisdiction, in the case of a contract, fraud, and trust. The judgment operates in personam and does not adjudicate upon the title to the immovable, although it may have that effect incidentally.

It affects the foreign land only through the medium of a person, and this is why jurisdiction depends on the existence of some personal obligation between the parties to the suit. The obligation violated must have run from the defendant to the plaintiff, and the order of the court must be effective within the jurisdiction. Of course, the defendant must be amenable to the ordinary jurisdiction of the local court. In other words, the usual conditions for the exercise of jurisdiction in personam must be satisfied. . . .

[34] Similarly, in *Duke*, at 739 , the Court said:

There is, however, a long line of cases in which it has been held that English courts will enforce rights affecting real estate in foreign countries if such rights are based on contract, fraud or trust, and the defendant resides in England.

An early case of this kind is *Penn v. Lord Baltimore* [(1750) 1 Ves. Sr. 443.], where an agreement in reference to lands in Pennsylvania made in England was sought to be enforced, the residence of the parties being in England. It was held that there was jurisdiction. The Lord Chancellor says, p. 447:

The conscience of the party was bound by this agreement, and, being within the jurisdiction of this Court, which acts in personam, the court may properly decree it as an agreement, if a foundation for it.

See also *Deschamps v. Miller* [[1908] 1 Ch. 856, at 863.].

In numerous decisions, however, besides *Penn v. Lord Baltimore* [(1750) 1 Ves. Sr. 443.], it has been pointed out that, in exercising jurisdiction in such cases, the courts act in personam.

[35] The question of whether an action advances an in rem or an in personam claim is often a question of how the legal question at issue is framed. This issue was addressed at some length by Koenigsberg J. in *Minera Aquiline Argentina SA v. IMA Exploration Inc.*, 2006 BCSC 1102, aff'd 2007 B.C.C.A. 319.

[36] In *Minera Aquiline*, the defendant claimed title to mineral claims in Argentina and argued that the British Columbia court did not have jurisdiction to deal with immovables outside of its borders. Justice Koenigsberg, in addressing the competing submissions before her, said:

[164] The plaintiff disputes that the claim in this case is a claim of title over foreign land. The plaintiff submits that when characterizing the issues to determine the applicable choice of law, the courts must consider the true nature of the claim, not the nature of the remedy sought: *Castel & Walker*, s. 32.1. According to the plaintiff, the rule discussed above does not apply to this case because the claim is not properly characterized as an in rem claim affecting title to foreign land. Instead, the plaintiff describes it as an in personam claim in equity for the wrongful appropriation of the mining claims through a breach of confidence. As such, the plaintiff says, the claim fits into a limited but long-recognized exception to the rule prohibiting the court from dealing with a claim affecting title to foreign land: *Duke v. Andler*, [1932] S.C.R. 734 at 739, [1932] 4 D.L.R. 529.

[165] To understand the distinction drawn by the plaintiff, I find assistance in the words of John Stevens in *Restitution or Property? Priority and Title to Shares in Conflicts of Laws* (1996), 59 *Modern Law Review* 741 at 744-745, an article cited by the plaintiffs with respect to the appropriate choice of law for remedies, but one which is equally useful in determining the nature of the claim the plaintiff has advanced. Mr. Stevens wrote that, "[t]he real distinction ... is between claims which are founded on an autonomous principle of unjust enrichment and claims which are founded upon proprietary entitlement."

[166] A claim founded on proprietary entitlement, as described by Mr. Stevens, is a claim that the defendant holds property subject to a pre-existing right or interest in that property belonging to the plaintiff. In essence, it is a claim that the plaintiff has a right in the property that it wishes the court to recognize. The principle of territoriality prohibits this court from passing judgment on such a claim based on the general rule that the Argentine courts have exclusive jurisdiction to determine the validity of title to immoveables located in that country.

167] However, that is not the claim the plaintiff has advanced. It has advanced a claim "founded on an autonomous principle of unjust enrichment." The plaintiff does not say that the title to the mineral claims in the Navidad region truly belongs to it, nor does it ask this court to declare the defendants' title invalid. The plaintiff merely argues that the defendant should be ordered to give up its title because that title was obtained wrongfully through a breach of confidence.

[37] Ultimately, Koenigsberg J. concluded that title to the minerals in Argentina was held by the defendant on constructive trust in favour of the plaintiff.

[38] In *Pioneer Metals Corp. v. Pegasus Gold Inc.* (1990), 44 B.C.L.R. (2d) 79, the defendant applied for a declaration that the British Columbia Supreme Court had no jurisdiction in relation to mortgages granted by the plaintiff, in favour of the defendant, in respect of mining properties located in the United States.

[39] The defendant, who had commenced an action in Idaho, sought, inter alia, "a decree that all right, title, or interest of (the defendants) is subordinate to the mortgage lien and security interest of Pegasus in the Idaho mining property", at para. 9. Campbell L.J.S.C. determined, however, that the court:

"will be asked not to decide disputed title but determine whether the parties to that agreement have fulfilled their obligations. The court, in making this judgment, will be acting in personam. I do not, therefore, on the facts here, find supportable, the defendant's argument that the plaintiffs are seeking an in rem remedy on foreign immovables", at para. 23.

In any event, if the court found default on the part of the plaintiffs and then decided the obligations of Pioneer U.S. in relation to the Stibnite and Bonito Mortgages it would be proceeding, at most, in a quasi in rem manner. As noted in *Black's Law Dictionary*, 5th Edition, at p. 713 this is.

... a term applied to proceedings which are not strictly and purely in rem, but are brought against the defendant personally, though the real object is to deal with particular property or subject property to the discharge of claims asserted; for example, foreign attachment, or proceedings to foreclose a mortgage, remove a cloud from title, or effect a partition. *Freeman v. Alderson*, 119 U.S. 185, 7 S.Ct. 165, 30 S. Ed. 372. An action in which the basis of jurisdiction is the defendant's interest in property, real or personal, which is within the court's power, as distinguished from in rem jurisdiction in which the court exercises power over the property itself, not simply the defendant's interest therein.

[40] In *Pioneer*, Campbell L.J.S.C. also referred to *Kung v. Kung* (1990), 42 B.C.L.R. (2d) 145. In *Kung*, the Court addressed a dispute between two brothers over various properties, some of which were in Canada, and some of which were in Hong Kong. The plaintiff claimed that the lands in Canada were held in trust for him. The defendant claimed that the lands were part of a family partnership. Justice Southin, for the Court, at para. 22 said:

I will deal first with the point concerning title to land. Both the allegation of trust and the allegation of partnership raise not an issue of title, which is a common law question, but equitable issues. What both sides want this Court to do is to affect the conscience of the litigants - make decisions in personam and not in rem.

[41] These various considerations are present in this case. This Court has personal jurisdiction over J.B. The claim advanced by J.B. was not, in fact, based on the FRA. Instead, it was based on a purported personal obligation running between the parties. The legal basis advanced by J.B. and her father to support her interest in the Indian Property was, in the first instance, contract or debt. Alternatively, the claim appeared to be in trust. J.B. first said that her father had loaned H.B. money, and that she was placed on title as a consequence of that loan. Later, she appeared to say her father gifted K.B.'s mother a significant sum and she was placed on title on account of that gift. I did not accept the evidence of J.B. and her father on either account. There was then no basis advanced by J.B. to support the legal rights she asserted. Thus, again, I said:

[261] I do not accept the evidence of J.B. and Mr. S. on these issues. Specifically, I do not accept that any sum was loaned or given to Mrs. H.B. or to K.B., or that any such payments underlay the transfer by Mrs. H.B. of an interest in her home to J.B.

[42] The second issue raised by counsel for J.B. is more formal or technical. It is argued that J.B. did not, in her Notice of Family Claim, expressly raise or advance a claim in trust and that there was no basis for me to address that issue. It is correct that this cause of action was not formally or expressly found in J.B.'s pleadings. I do not consider, however, that this is significant either factually or legally.

[43] It is of no consequence factually because the evidence relevant to a claim of resulting trust was fully advanced before me. H.B. and K.B. explained why J.B.'s name was placed on title. They explained that the legal transfer of a portion of the Indian Property to J.B. was made gratuitously and as a "gesture of trust"; see Reasons at para. 251. They explained that J.B.

made no contribution to that property and did not, for example, contribute to the mortgage or taxes on the property; nor, for that matter, did K.B. make any such contributions. Again, J.B. and her father advanced different evidence and a different legal theory, neither of which I accepted. So, too, the case law relevant to resulting trusts was argued before me by counsel for K.B. without objection by J.B.'s counsel, or any reference to this cause of action not having been advanced by J.B. in the pleadings.

- [44] It is of limited consequence legally because the reality is that J.B.'s pleadings advanced no legal basis for an interest in the parties' various properties, including the Indian Property, other than under the FRA. Thus, for example, J.B. did not plead that her interest in the Indian Property derived from a loan, or from a debt or agreement, though that was one of the legal theories she relied on at trial. Instead, J.B.'s counsel was prepared, at trial, to deviate from the four corners of the pleading that had been filed on her behalf.
- [45] The central purpose of pleadings is to allow each side to know the case that they must meet. In this case, neither party was taken by surprise by the evidence or issues that were raised at trial. The evidence led at trial in relation to the Indian Property had been preceded by affidavits that had addressed similar evidence. Both parties conducted examinations for discovery. No objection was led when these issues and the evidence relevant to them was led. Still further, this trial was, as I have said, adjourned several times. There was ample time for J.B. to consider and address the evidence that was led by K.B. and his mother in their direct evidence. In such circumstances, it is, in my view, artificial for J.B. to now assert that the court was limited to addressing only their claims that were formally and expressly raised in the parties' pleadings.
- [46] It is also relevant that I do not consider that it would now be open for J.B. to separately seek to advance or raise a claim of resulting trust over the Indian Property in a new action. Such a claim would be foreclosed by the doctrine of issue estoppel and the principle in *Henderson v. Henderson* (1843) 3 Hare 100 at 115; see also D.J. Lange, *The Doctrine of Res Judicata* 4th ed. (Toronto: LexisNexis Canada, 2015) at 59-66.
- [47] Finally, J.B. never argued or established that the laws of India were relevant and would, in any respect, give rise to a different result than the laws of British Columbia. In *Corlett v. Hoelker*, 2012 BCSC 25, Harvey J. said:
- [68] Where there is no proof of foreign law, the *lex fori*, in this case, the law of Washington State applies. See Janet Walker, Castel & Walker: *Canadian Conflict of Laws*, 6th ed., looseleaf, vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2005), at s. 7.4:

If foreign law is not pleaded or, if pleaded, it is not proved or is insufficiently proved, the court will apply the *lex fori*. It was once said that in the absence of proof the court would presume the foreign law to be the same as the *lex fori*, but it is better to say that in all cases where foreign law is not proved, the *lex fori* prevails as it is the only law available.

- d) Can J.B. be Required to Execute the Documents that are Necessary to Give Effect to the Court's Order?

- [48] The final issue is whether J.B. can be required by this Court to execute the documents that would be required in India to remove J.B.'s name from the title to H.B.'s home. I consider that such an order should be made. The order or direction would operate in personam. It is the natural and logical consequence of the findings and orders that I made at trial.
- [49] Counsel for J.B. argues that J.B. cannot be compelled to agree to sign the documents that would remove her name from the title to Mrs. H.B.'s home. Such an order would, it is argued, be akin to being required to sign a consent order. Thus, for example, in *Rafferty v. Power*, [1993] B.C.J. No. 173 the Court, at para. 9., said "Consent is a voluntary act of will. Consent cannot be forced. Forced consent is a non-sequitur"; see also *Kobzos v. Dupuis*, 2006 BCSC 2047 at paras. 12- 13.
- [50] This submission is misconceived. Once again, J.B. argued, amongst other things, that her father had loaned or gifted money to H.B. and that she was placed on title as a result of those acts. These claims were dismissed at trial. The consequence of that determination is that there is no basis for J.B. to be on title to H.B.'s home. J.B. is not being asked to consent to anything. She is being required to sign those documents that will properly reflect the determination made by this Court.
- [51] There is little doubt that if H.B.'s property had been located in Vancouver, the court would have been able to compel J.B. to execute the documents that were necessary to have her name removed from title. Indeed, the court would have multiple tools available to it to achieve that end. For example, s. 66(1) of the FRA formerly gave the court the ability to make orders "necessary to give effect to its determination". Sections 222(b), 227 and 228 of the FLA provide similar powers to the court. The court's inherent jurisdiction also enables the court to make those orders that are necessary to do justice; see *Country Style Holdings Inc. v. British Columbia (Ministry of Transportation & Highways)* (1993), 51 L.C.R. 1 at para. 13.
- [52] The only remaining question is whether the fact that H.B.'s property is in India limits what the court might otherwise do. I do not consider that it does.
- [53] In *Catania v. Giannattasio* (1999), 174 D.L.R. (4th) 170 at para. 12, the Ontario Court of Appeal developed four criteria that must be satisfied before a Canadian court can exercise jurisdiction under the "in personam exception". Those criteria are: (1) the court has in personam jurisdiction over the defendant; (2) there is a personal obligation running between the parties; (3) the local court must be able to supervise the execution of the judgment; and (4) the court will not exercise jurisdiction if the order would be of no effect in the situs.

- [54] If the "exception to the general rule" applies in personam, then a court can compel a title holder to do something with foreign property that is incidental to a contractual, tortious, or equitable claim. In this case, it is the third and the fourth of the foregoing criteria that are relevant.
- e) Criteria 3: Supervision of Execution
- [55] Where both parties to the dispute reside or have a substantial connection to the forum, the local court is able to supervise the execution of its judgment; see *Schwarzinger v. Bramwell*, 2011 BCSC 283 at para. 17; and *Welsh v. Welsh*, 2011 ABQB 686 at para. 23.
- [56] In *Schwarzinger*, the parties entered into an agreement to purchase properties in Nicaragua. The plaintiffs alleged that they paid sums to the defendants but received nothing in return. In determining that the B.C. court had in personam jurisdiction, Justice Gray, at para. 83, applied the Catania criteria and held that the court could supervise the execution of the judgment because the defendants were B.C. residents.
- [57] In *Welsh*, Read J., at para. 23, stated that the local court's ability to supervise execution of judgment "depends upon [the husband's] presence in Alberta." Justice Read held that the court could supervise the husband's execution of the judgment despite the fact that he resided in British Columbia. The court considered various connecting factors. In *Welsh*, the husband had bank accounts in Alberta, family in Alberta, and his company was registered in Alberta.
- f) Criteria 4: Effect in the Situs
- [58] Local courts cannot take judicial notice of foreign law. Foreign law must be pleaded and established as a matter of fact. Absent proof of foreign law by expert evidence, foreign law is, as I have said, presumed to be identical to the *lex fori*; see *Schwartz v. Fuss*, 2015 ONSC 8143 at para. 17; *Yordanes v. Bank of Nova Scotia* (2006), 78 O.R. (3d) 590 at para. 50; and *Anand v. Rumpal*, 2014 ONSC 6030 at para. 47. Under that assumption or operating premise, no enforceability issue arises. The effect of the *lex fori* order is assumed to have effect in the situs.
- [59] With this in mind, Canadian courts have taken different approaches to crafting orders where in personam jurisdiction is engaged. Some courts have held that they lack jurisdiction to make vesting orders, but can order the sale of foreign property; see *Macedo v. Macedo* (1996), 19 R.F.L. (4th) 65 at paras. 18-19. Other courts prefer to craft an order for damages when possible; see *Wu v. Ng*, 2014 ONSC 7126 at para. 49. Still other courts have held that the *lex fori* cannot order the sale of a foreign property; see *Aning v. Aning* (2002), 30 R.F.L. (5th) 237 at paras. 23-24; and *Cork v. Cork*, 2014 ONSC 2488 at para. 86.
- [60] However, it is uncontroverted that when the court has in personam jurisdiction, the *lex fori* court can order the transfer of foreign title, assuming that no foreign law has been established that would render the judgment ineffective.

- [61] This is, in fact, what occurred in *Minera Aquiline*. The defendant parent company was based in Vancouver. Its wholly-owned subsidiary was based in Argentina. The Court, at para. 338, issued a mandatory injunction requiring the defendant subsidiary company to transfer the mineral claims in question to the plaintiff. The Court also ordered that the local parent company "take any and all steps to cause (the subsidiary company) to comply with the terms of the order".
- [62] So too, in this case, the third and fourth of the Catania conditions are satisfied, and the Court is exercising its in personam jurisdiction over J.B. to compel compliance with or adherence to the orders that were made at trial. Accordingly, J.B. is to sign such documents as are necessary to remove her name from the title to H.B.'s home.

C. Costs

- [63] K.B. argues that J.B.'s conduct at and prior to the trial would warrant an award of special costs, and that such an award would give rise to a cost award of approximately \$250,000 - \$275,000. He further argues, however, that he would be content with an order of special costs of approximately \$190,000 - that being the amount that K.B. owes J.B. on account of the property and support issues that arose at trial.
- [64] Counsel for J.B. argues that it was J.B. who enjoyed substantial success at trial, but acknowledges that J.B., on account of her conduct at trial and my findings in relation to that conduct, should not receive the costs that she would otherwise be entitled to. The consequence of this proposal would be that each party would bear their own costs.
1. The Usual Rule as to Costs
- [65] In the recent case of *Clarke v. Clark*, 2015 BCSC 1005 I addressed the general principles that govern cost awards. Specifically, I said:
- [7] Supreme Court Family Rules, R. 16-1(7) states, "[s]ubject to subrule (9), costs of a family law case must be awarded to the successful party unless the court otherwise orders." Subrule 16-1(9) permits a court to award costs for particular applications.
- [8] There are two leading cases on the interpretation of R. 16-1(7). In *Gold v. Gold* (1993), 82 B.C.L.R. (2d) 180 at paras. 18-22 (C.A.), McEachern C.J.B.C., for a five-member panel, held that "successful" means "substantially successful" and confirmed that the usual rule is that costs should be awarded to the substantially successful party unless there is reason to "otherwise order". In *Fotheringham v. Fotheringham*, 2001 BCSC 1321 at para. 46, Bouck J. set out a four-part analysis to determine which party was "substantially successful". Recent summaries of this analysis confirm that it remains applicable to the current Rules; *G.G. v. M.A.*, 2014 BCSC 2074 at paras. 20-22; and *Hu v. Dickson*, 2015 BCSC 218 at paras. 37-38.

- [9] In *Fotheringham* at para. 28, Bouck J. repeated that "all the costs should normally be awarded to the party who 'substantially succeeds' in the litigation" and then later commented that:
- [36] Time spent at trial on proving or disproving an issue is one method of fixing each party's cost liability: *Ferguson v. Ferguson* (1996), 28 B.C.L.R. (3d) 39 at 42-43. However, parties could spend a good deal of trial time on relatively unimportant issues while a more significant issue could be determined in a very short time. Giving each issue the same weight regardless of its importance could amount to an injustice. If it is necessary to determine the weight or value of a particular issue, it seems this assessment can only be made by the trial judge.
- [10] In terms of determining which party was substantially successful, Bouck J. said:
- [45] Gold now seems to say that substantial success in an action should be decided by the trial judge looking at the various matters in dispute and weighing their relative importance. The words "substantial success" are not defined. For want of a better measure, since success, a passing grade, is around 50% or better, substantial success is about 75% or better. That does not mean a court must descend into a meticulous mathematical examination of the matters in dispute and assign a percentage to each matter. Rather, it is meant to serve as a rough and ready guide when looked at all the disputed matters globally.
- [11] In conclusion, Bouck J. summarized, *inter alia*, at para. 60:
1. Under Rule 57(9) [now 16-1(7)], a party who substantially succeeds on the matters in dispute at trial is entitled to his or her costs unless otherwise ordered.
 2. Substantial success is measured objectively taking into account all the matters in dispute, their weight or importance to the parties and the parties' relative success or failure with respect to those matters.
 3. As a rule of thumb, substantial success occurs when the prevailing party succeeds on 75% of the matters in dispute looked at globally.
- [12] Though R. 16-1(7) is not approached with mathematical precision, the 75% success threshold raised in *Fotheringham* has often been applied as a "rule of thumb"; for recent examples see *L.A.I. v. K.B.Z.*, 2014 BCSC 652 at para. 138; *Firth v. Firth*, 2014 BCSC 193 at para. 12; *Watson v. Watson*, 2013 BCSC 1100 at para. 16.
- [66] I consider, having regard to the foregoing guidance, that K.B. enjoyed substantial success at trial.
- [67] This case had numerous issues and sub-issues. I identified some of those sub-issues in para. 1 of the Reasons. Distilled, the primary issues raised at trial are those that I described earlier at para. 3 of the Reasons.

- [68] Counsel for J.B. argues that J.B. had, in an offer of settlement, agreed to a joint parenting arrangement as recommended by the author of the s. 211 report that I was provided at trial. As this was the form of order that I ultimately made (Reasons at paras. 230, 322(b)(i)), counsel argues that J.B. was successful on this central issue. I do not consider that this narrow submission begins to describe what this trial was truly about. At trial, K.B. argued that J.B. and her father had unlawfully abducted the parties' two children while on a vacation in India. He further addressed the various allegations of spousal and child abuse that J.B. had made to various courts, as well as to the police and to various ministry and protection authorities over time.
- [69] These allegations had, in part, led to K.B.'s children being taken from him and to his having only supervised access with them for a period of time thereafter. His access, at all times prior to trial, was reduced from the access that he wished to have.
- [70] It was appropriate and necessary for K.B. to address these issues in order to set straight what had occurred between the parties, and to address the serious allegations of wrongdoing and abuse, to J.B. and to the children, that J.B. had made and to remove the cloud that he had laboured under for some years.
- [71] Various other events and facts, which called into question J.B.'s conduct and her ability to co-parent, which were raised by K.B., and which were also addressed in the s. 211 report, were again relevant and fairly raised by K.B.
- [72] In all of these matters, which occupied significant parts of the trial and which were hard-fought, K.B. was overwhelmingly successful. I also consider that it was these issues that were, in some senses, the most important and time-consuming matters that were raised at trial.
- [73] Similar conclusions pertain to the various property issues that were raised by the parties. Once again, it was overwhelmingly the evidence and calculations that were led by K.B. and his witnesses about the parties' properties, and the expenses associated with those properties, that I accepted. Furthermore, I accepted K.B.'s submission that there be a re-allocation in his favour. It was these property and valuation issues, in terms of both time and importance, that were the next most significant issues at trial.
- [74] The issue of child and spousal support were comparatively straightforward. I accepted aspects of each party's submissions in relation to these issues.
- [75] Counsel for J.B. argued that some issues, or some evidence, or some cross-examinations that were advanced or undertaken by K.B.'s counsel were unnecessary and unhelpful. Perhaps, with hindsight, this is so. Such considerations are, however, comparatively modest in consequence and do not detract from my central conclusion that K.B. enjoyed substantial success at trial. That conclusion, without more, would support an order that K.B. be awarded his costs and disbursements of the trial.

2. Special Costs

[76] The next question is whether K.B. is entitled to special costs under either or both R. 16-1(1) (b) of the Supreme Court Family Rules and the inherent jurisdiction of the court.

[77] The legal principles which underlie or support a special cost awards are comparatively straightforward.

a) Jurisdiction

[78] This Court has jurisdiction to award special costs under R. 16-1(1) of the Supreme Court Family Rules, B.C. Reg. 169/2009, as well as under its inherent jurisdiction to control its process: *Harrington (Guardian ad litem of) v. Royal Inland Hospital* (1995), 14 B.C.L.R. (3d) 201 (C.A.) at paras. 217-218 (addressing the former R. 57(1)); *Westsea Construction Ltd. v. 0759553 B.C. Ltd.*, 2013 BCSC 1352 at para. 25.

b) Threshold

[79] In *Westsea*, Gropper J. succinctly summarized the threshold required for an award of special costs:

[27] The award of special costs departs from the traditional approach to the award and assessment of costs.

[28] The leading authority for special costs in British Columbia is the Court of Appeal's decision *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 (C.A.). There, Mr. Justice Lambert, writing for the court, determined that the threshold for awarding special costs is "reprehensible" conduct.

[30] In the decision on special costs, Lambert J.A. noted that different terms had been used to describe the appropriate circumstances for awarding special costs. In particular, he drew attention to the finding of Madam Justice McLachlin (as she then was) in the Supreme Court of Canada decision *Young v. Young*, [1993] 4 S.C.R. 3 in regard to costs (with which the majority concurred) at 134:

Solicitor-client costs are generally awarded only where there has been reprehensible, scandalous or outrageous conduct on the part of one of the parties.

[32] Lambert J.A. decided to introduce clarity into the law of special costs by synthesizing the different variations on the standard for a special costs award into a single standard, that of reprehensible conduct. He held at para. 17:

Having regard to the terminology adopted by Madam Justice McLachlin in *Young v. Young*, to the terminology adopted by Mr. Justice Cumming in *Fullerton v. Matsqui* (District), and to the application of the standard of "reprehensible conduct" by Chief Justice Esson in *Leung v. Leung* in awarding special costs in circumstances where he had explicitly found that the conduct in question was neither scandalous nor outrageous, but could only be categorized as one of the "milder forms of misconduct" which could simply be said to be "deserving of reproof or rebuke",

it is my opinion that the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". As Chief Justice Esson said in *Leung v. Leung*, the word reprehensible is a word of wide meaning. It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

[37] More importantly, Garcia emphasizes that the purpose of a special costs award is to chastise a litigant. By rebuking reprehensible conduct, the court punishes bad behaviour and deters it. It also serves to distance the court from the conduct at issue.

c) Conduct that May Warrant an Award of Special Costs

[80] In *Westsea*, Gropper J. identified various categories or "thematic groups" of circumstances where courts have been prepared to make an award of special costs: paras. 42-75. A deliberate attempt to mislead a trier of fact through contrived, concocted or fabricated evidence can ground an order for special costs; *Webber v. Cdn. Aviation Ins. Mgrs. Ltd.*, 2003 BCSC 274 at para. 14; see also the authorities referenced in *Westsea* at paras. 65-72.

[81] However, a deliberate attempt to mislead must be contrasted with a simple finding that a court does not accept the evidence of a witness. There are many cases where a party's recollection may be poor or where a witness may be honest but mistaken.

[82] Thus in *Grewal v. Sandhu*, 2012 BCCA 26 at para. 107, leave to appeal ref'd [2012] S.C.C.A. No. 120, the Court remarked, "but special costs are not awarded based on the acceptance or rejection of testimony. If it were otherwise, instead of being an extraordinary measure, special costs could be imposed whenever credibility was an issue": see also *Kongrecki v. Rafael* (1994), 2 B.C.L.R. (3d) 196 at paras. 16, 18 (S.C.), aff'd 19 B.C.L.R. (3d) 301 (C.A.); *O'Cadlaigh v. Madiuk* (1994), 33 C.P.C. (3d) 117 at para. 6 (B.C.S.C.); *Bronson v. Hewitt*, 2011 BCSC 102 at paras. 144-146.

[83] Three further decisions of this Court are useful. Each of *Steinebach v. Fraser Health Authority*, 2011 BCSC 1369 at paras. 28-29; *Schwabe* at para. 25, and *Westsea* at paras. 65-72, discuss various authorities where courts have made awards of special costs, either on the basis that a party has deliberately misled the court or in circumstances where that factor is considered in combination with other reprehensible behaviour; see also *Marchen v. Dams Ford Lincoln Sales Ltd.*, 2010 BCCA 29 at paras. 70-73, and *Unternaher v. Wheat Sheaf Inn Ltd.*, (1998) 114 B.C.A.C. 299 at paras. 11-13.

[84] In *Behan v. Park*, 2014 BCSC 1982, I addressed several cost issues and, in relation to a number of the foregoing authorities, said

- [49] What flows from the foregoing discussions is a recognition that an award of special costs is an "extraordinary measure": Grewal at para. 107, and limited to "exceptional circumstances": Westsea at para. 39. Such an order is, however, warranted where a party gives:
- i) false evidence that has been contrived, concocted or fabricated;
 - ii) with an intention to mislead: Marchen at para. 70, Unternaher at para. 12;
 - iii) on an issue that is central to the matter before the court: Waters v. Michie, 2013 BCCA 441 at paras. 39-40, and, which if accepted, would "drive [the opposing party] from the judgment seat": Marchen at para. 73.
- [85] Based on these considerations, I am satisfied that J.B.'s conduct at trial supports an award of special costs. In the Reasons I said:
- [18] Overwhelmingly, I do not accept the evidence of J.B. and of her father, Mr. S. I consider the evidence of J.B. in particular, to be egregiously dishonest. This is so in a pervasive way and to quite an extraordinary degree.
- [20] However, the evidence of J.B. is of a different kind and of a different quality. It is fundamentally dishonest. This is apparent by virtually every means or measure that courts rely on to assess and weigh the credibility of a witness.
- [22] In this case, the evidence given by J.B. has been fundamentally and continually inconsistent. Her oral testimony is inconsistent with various affidavits sworn in this and other proceedings. In some cases, there have been numerous paragraphs in a single affidavit that are inconsistent in significant respects with J.B.'s evidence at trial. In other cases, virtually every sentence of a paragraph contained in an earlier affidavit has been rendered, based on J.B.'s own evidence at trial, a fiction. Such inconsistencies arise so frequently, and are so widespread, that there is no means by which to adequately describe them.
- [23] The evidence of J.B. at trial is also frequently inconsistent with other objective records. It is, for example, inconsistent with the records of the MCFD and of the RCMP, as well as with the evidence of the witnesses from these bodies. It is also inconsistent with J.B.'s own emails and letters.
- [24] Still further, there are instances where J.B.'s evidence changed from her direct evidence to her cross-examination and, when pressed on cross-examination, would change again.
- [86] I do not consider that I need to belabour or develop the numerous examples of J.B.'s dishonesty further. A review of the Reasons will achieve this result and support the conclusions I have expressed. Furthermore, I do not consider that I need, as K.B.'s counsel urged, to develop or rely on J.B.'s pre-litigation conduct. Her conduct at trial was so extreme that there is no need to go beyond that conduct.

- [87] Special costs are intended as a sanction. They are intended to express or signal the court's rebuke and to chastise a party. The consistent and pervasive dishonesty of J.B. at trial, in concept, warrants the court's condemnation.
- [88] I say "in concept" because an award of special costs remains a discretionary order. The question is whether that order, in all the circumstances, would be appropriate.
- [89] An award of special costs, in the amount and range described by counsel for K.B., would cause J.B. significant hardship. This remains true even if, as counsel for K.B. suggested, I fixed special costs (assuming I had the ability to do so), in the amount that K.B. owes J.B. on account of the property and support issues that were decided at trial. Even this reduced special cost award would leave J.B. without funds or assets of any substance.
- [90] In addition, J.B. is just starting a new job after not having been employed, in any meaningful way, in the past. A cost award that would so dramatically undermine and constrain her financial circumstances has the prospect of affecting her long-term self-sufficiency. Still further, the circumstances of J.B. and of her children, who are with her half the time, are, in a sense, indivisible. It is in the best interests of the children that they be in a more positive and financially-stable atmosphere when they are with their mother.
- [91] At the same time, it would be wrong to insulate J.B. from the consequences of her wrongful behaviour. It would also be worrisome to establish a precedent whereby parties with children, or whose means were modest, believed that they were immune from an order of special costs on account of such circumstances.
- [92] Other courts have identified the difficulty that can arise from an award of special costs in the family law context; see *Jackson v. Jackson*, 2011 BCSC 1148 at para. 7; and *McIvor v. McIvor*, 2014 BCSC 2337 at paras. 15 and 16.
- [93] In *Walker v. John Doe and Insurance Corporation of British Columbia*, 2014 BCSC 294, I addressed a somewhat similar set of circumstances and concerns. A lawyer's conduct warranted an award of special costs. I considered, however, that both the court's reasons, which chastised the lawyer, and award of 1.5 times costs, under ss. 2(5) and 2(6) of Appendix B of the Supreme Court Rules constituted an appropriate and adequate sanction in the circumstances; see paras. 57-66.
- [94] Appendix B of the Family Court Rules does not, however, enable courts to increase an award of costs to 1.5 times what they would otherwise be. A court is, instead, limited to either an award of ordinary costs (albeit with the potential for modest adjustment on account of difficulty) or, alternatively, an award of special costs. The relative inflexibility of these two regimes limits the options available to a court to address the disparate and competing concerns that I have identified.

- [95] In light of the foregoing considerations, and recognizing that an aspect of this order is, in some senses, unsatisfactory, I nevertheless consider that an order for ordinary or party-party costs is the more appropriate cost order.

D. Duration of Spousal Support

- [96] The parties were married in February 2011 and separated in January 2013. In the Reasons, I fixed K.B.'s income and J.B.'s imputed income at \$130,600 and \$25,000 respectively; Reasons at paras. 232, 235-236. The spousal support claim advanced by J.B. was both compensatory and needs-based in nature.
- [97] At trial, I observed that J.B. hoped to obtain a teaching position in 2016; Reasons at para. 234. This, for reasons that are not clear, has not materialized and J.B. has, instead, renewed her real estate licence. She has just recently commenced her employment.
- [98] Based on the relevant Divorcemate calculations, spousal support should be payable for a minimum of approximately six years and a maximum of approximately 12 years - the mid-range being approximately nine years. K.B. asks that spousal support terminate within three years of the date of the Reasons or in December 2018. This would effectively provide J.B. with spousal support for six years. K.B. also proposes that there be no further review of spousal support at that time.
- [99] I do not consider that spousal support for this length of time would be appropriate. It would not adequately recognize the compensatory component of J.B.'s entitlement to spousal support. It would also not adequately recognize that J.B. has not worked in the Canadian labour force in the past.
- [100] At the same time, it was clear, at trial, that J.B.'s efforts to secure employment had been very modest; Reasons at para. 234. Nearly a further year has elapsed without J.B. securing employment. Thus, more than three-and-a-half years have elapsed since the parties separated, during which time J.B. has not earned any income.
- [101] At trial (Reasons at para. 236), I emphasized that J.B. was bright, educated and spoke several languages. Her children are with her only half the time and they are both in school. It is important and necessary that J.B. focus on her career and employment in order to establish her economic independence. Furthermore, K.B. has deposed that his child and spousal support obligations, including s. 7 expenses, consume approximately 65% of his net monthly pay. Though this seems very high, these figures were not questioned before me.
- [102] Aspects of these considerations are addressed at s. 8.6.3 of the Spousal Support Advisory Guidelines where the authors observe:

Where the recipient has little or no income, she or he will have a greater need for increased support in the short run. But the shared custody arrangement will reduce the impact of ongoing child care upon the recipient's employment prospects, such that progress towards self-sufficiency should occur more quickly. In these cases, spousal support will likely be reduced in the near future on review or variation, and the duration of support may be shorter.

[103] In the circumstances, I consider that J.B. should be entitled to spousal support for a period of nine years, or until January 2022. I also consider that it would be inappropriate to order that a review take place at the end of that period.

[104] In *Leskun v. Leskun*, 2006 S.C.C. 25, the Court, at para. 39, confirmed that to the extent possible " . courts should resolve the controversies before them and make an order which is permanent subject only to change under s. 17 on proof of a change of circumstances."

[105] J.P. was 36 or 37 years old when the parties separated. There is no objective reason that she should not be able to achieve economic independence and self-sufficiency within the timeframe I have allowed. Still further, though her future employment and economic prospects are, at present, somewhat uncertain, aspects of that uncertainty are of her making.

E. Miscellaneous Issues

1. Parenting Time

[106] The parties agree that parenting time should be varied as follows:

- a) For the period up to the end of school this year, the respondent have the children from Saturday at 7:00 p.m. until she drops them off at school on Wednesday morning or 9:00 a.m. on days when there is no school. The claimant is to have the children for the rest of the time.
- b) For the summer holidays this year, the claimant is to have the children for the first three weeks of vacation and the respondent is to have the children for the following three weeks. After these six weeks, the parenting time is to be one week with the claimant and one week with the respondent, with the exchange to take place on Mondays.
- c) The week on/week off rotation is to continue throughout the school year subject to holidays as set out herein, with the exchange to take place on Mondays at school.
- d) For the summer of 2017, the respondent is to have the first three weeks and the claimant is to have the next three weeks. This rotation for the first six weeks of each and every summer is to alternate between the parties.
- e) For spring break, in even years, the respondent is to have the children for the first half of the break commencing the Friday that school closes, and the claimant is to have the children for the second half of the break. In odd years, the parties will switch.

f) For Christmas break, in even years, the claimant is to have the children for the first half of the break commencing the Friday that school closes and the respondent is to have the children for the second half of the break. In odd years, the parties will switch.

[107] In addition, some issues arose with respect to J.B.'s having care of the children when K.B. has to travel for work. As I understand it, the parties have agreed that each party is to give the other at least two weeks' notice, in writing, if they expect to be unable to adhere to their agreed-upon schedule. Each party will accommodate such requests subject to their availability or any pre-existing commitment.

[108] Finally, most exchanges of the children take place at the children's school. K.B. asks that the remaining exchanges take place at the parties' homes, rather than at an independent venue. J.B. has expressed an ongoing discomfort with having K.B. attend at her home. Whether there is an objective basis for this is immaterial. The affidavit materials filed by the parties indicate that there is an ongoing level of friction between them. In such circumstances, prudence dictates that separation of the parties, or in this case interaction in a public setting, is warranted.

2. Special Expenses

[109] The parties agreed that K.B. and J.B. should be responsible for 67% and 37% of their children's special expenses respectively.

[110] K.B. also seeks to collect some retroactive orthodontic expenses from J.B. I understand from the material that J.B. filed, that she paid a disproportionate amount of certain tutoring expenses for one of the children. Accordingly, I do not consider that any retroactive s. 7 or special expense award would be appropriate. J.B. is required, however, to pay her share of orthodontic expenses on a go-forward basis.

3. Passports and Travel

[111] J.B. has no plans to travel to India or elsewhere, and she accepts that she is not to have access to or possession of the children's passports. She seeks, however, to prevent K.B. from travelling to the United States or elsewhere with the children. There is no basis for any such restriction and I decline to impose one. K.B.'s roots and employment are solidly in British Columbia, and there is nothing in his history which gives rise to any concern about his future behaviour. Sadly, but simply put, the same is not true of J.B.

[112] J.B. is also required to sign whatever documents are necessary to renew the children's passports.

F. Costs of this Application

[113] I consider that the success of the parties on these various applications was divided and, accordingly, each party is to bear their own costs.

"Voith J."

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Prepared on 29 October 2026 · Esheria