
CANADA / JUDGMENT

Kumar v. Nand

2022 BCSC 1145

COURT

Supreme Court of British Columbia

DECIDED

7 July 2022

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2022 BCSC 1145 Kumar v. Nand

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Kumar v. Nand,

2022 BCSC 1145

Date: 20220707

Docket: E60985

Registry: New Westminster

Between:

Elvin Kumar

Claimant

And

Selin Nand

Respondent

Before: The Honourable Justice Giaschi

Reasons for Judgment

Counsel for the Claimant:

J. Morneau

Counsel for the Respondent:

R.S. Gill

Place and Date of Trial:

New Westminster, B.C.

February 28 and March 1-7, 2022

Place and Date of Judgment:

New Westminster, B.C.

July 7, 2022

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Introduction and Overview

[1] The parties, both of whom are in their late 30s, were married on June 29, 2013 and separated on July 1, 2019. There are no children of the marriage.

- [2] Both parties were employed at the time of the marriage and they remained employed throughout the marriage. During the course of the marriage, the claimant earned marginally more than the respondent. However, since the parties separated the respondent has earned more per annum than the claimant. In 2021, she earned approximately \$17,000 more than the claimant.
- [3] Notwithstanding that the respondent earns more than the claimant, she submits that she is entitled to retroactive spousal support and to ongoing spousal support for a duration of six years. She says that she was the victim of family violence during the marriage, which caused her to be depressed and thwarted the advancement of her career. The respondent also submits that she is entitled to an unequal division of family property, primarily on the basis that the claimant engaged in excessive gambling during the course of the marriage.
- [4] The claimant denies the respondent is entitled to support and submits that family property should be divided equally.
- [5] The respondent additionally commenced a counterclaim against the parents of the claimant, alleging a portion of the house owned by the parents was family property. However, at the commencement of the trial, I was advised that the counterclaim is withdrawn.
- [6] Accordingly, the sole issues for determination are what constitutes family property, whether it should be divided unequally and whether the respondent is entitled to spousal support.
- [7] For the reasons that follow, I have determined that family property and debt is to be divided equally between the parties and that the respondent is not entitled to spousal support.

Facts

General

- [8] The parties were married on June 29, 2013 and separated on July 1, 2019. Hence, the marriage was of a duration of slightly more than six years.
- [9] There are no children of the marriage.
- [10] The claimant was born June 19, 1983. He was 30 years of age as of the date of the marriage, 36 years of age as of the date of separation and is currently 39 years of age.
- [11] The respondent was born on January 4, 1984. She was 29 years of age as of the date of the marriage, 35 years of age as of the date of separation and is currently 38 years of age.
- [12] Throughout the duration of the relationship, the parties lived in a house together with the claimant's parents. The house was at all times owned by the parents. The parties initially lived in the upstairs part of the house but, in or about 2016, after a brief three-month separation, they moved to a two-bedroom suite in the lower part of the house. Once they moved into the suite, they commenced paying rent to the claimant's parents of \$650 per

month. Prior to that time, they did not pay rent but the claimant paid the monthly Fortis bill for the house, essentially in lieu of rent.

- [13] Throughout the marriage, the parties maintained joint accounts at VanCity, namely, a chequing account and a "Jumpstart" high interest savings account. Although these were joint accounts, only the claimant's pay cheque was regularly deposited into the account. The respondent maintained her own bank accounts throughout the marriage into which her pay cheques were deposited. Once the parties commenced paying rent, the respondent made a monthly deposit to the joint account of one-half of the rent.
- [14] The VanCity joint chequing account, into which the respondent's pay cheques were deposited, was used to pay for groceries, and for daily living expenses.
- [15] With the exception of the monthly deposit of rent into the joint chequing account, the respondent kept her own finances separate. The claimant testified, and I accept, that he had little knowledge of the respondent's finances.
- [16] The parties gave significantly different versions of the nature of their relationship when married. The claimant testified that the relationship was initially "fine", however, as time passed they began to argue. The respondent testified to a multitude of problems during the marriage. She testified that the claimant engaged in excessive gambling and that he was physically and emotionally abusive, two matters which I will address in further detail below. She also testified that her relationship with the claimant's parents was "toxic" and that the claimant's mother mistreated her.

Incomes and RRSPs

- [17] The claimant has been employed by BC Liquor since 2004. At the date of the marriage he was a regular employee but, during the marriage, he received two promotions and is now a manager. The claimant earns no income other than his salary.
- [18] The respondent attended at Kwantlen University and Douglas College where she obtained a Bachelor of Arts degree. She later attended at Sprott Shaw College where she trained as a practical nurse. In 2010 she obtained her licence as a practical nurse and commenced practicing as a nurse in 2012. At the commencement of the marriage, the respondent held two jobs. She worked part-time at VanCity and part-time at Surrey Memorial Hospital as a practical nurse. In December of 2019, after the parties separated, she quit her part-time job at VanCity and began working full time as a practical nurse.
- [19] The table below sets out the incomes of the parties during the years 2014 to 2021.

Year

Claimant's Income

Respondent's Income

2014

\$43,955*

\$42,421*

2015

\$47,877*

\$41,447*

2016

\$52,449*

\$37,078*

2017

\$55,347

\$50,261

2018

\$63,452

\$45,571

2019

\$68,322.73

\$64,989

2020

\$70,411

\$74,836

2021

67,613.11

\$85,523

*Derived from 2017 Comparative Tax Summary attached to 2017 T1 General Form

[20] As can be seen from the above table, the parties had roughly equal incomes at the commencement of the marriage with the claimant earning slightly more than the respondent. In 2019, the year of separation, the claimant earned approximately \$68,000 per year and the respondent earned approximately \$65,000. However, at the end of 2019, the respondent quit her job at VanCity and began working full time as a practical nurse. Her

income increased as a consequence and since 2020 has exceeded that of the claimant. As of the time of the trial, the respondent earned approximately \$85,000 per year and the claimant earned approximately \$68,000.

Pensions

- [21] Both of the parties have pensions. They are agreed, however, that their respective pensions are to be divided equally pursuant to Part 6 of the Family Law Act, S.B.C. 2011, c. 25 [FLA].

Property and Debt

- [22] The parties are mostly agreed on what constitutes family property and family debt and have filed a Statement of Agreed Facts in this regard. They have further agreed that family property is to be valued as of the date of separation and not as of the date of trial, which is the normal valuation date under the FLA. The only contested item of family property is a Hyundai Tiburon vehicle which is registered in the name of the respondent's mother but which the claimant says is beneficially owned by the respondent.
- [23] Regarding the Hyundai Tiburon, the respondent testified that it is owned by her mother and the vehicle is, in fact, registered in the name of the respondent's mother. Nevertheless, the claimant submits that the true owner is the respondent. As evidence of this the claimant points to a series of monthly payments on the respondent's credit card to ICBC. During cross-examination, it was put to the respondent that these charges were periodic payments for the annual licence and registration fee for the vehicle. The Respondent denied this was so. She testified that the payments were for speeding tickets.
- [24] I do not believe the respondent that the ICBC charges on her credit card are for speeding tickets. First, she failed to provide any evidence of the alleged speeding tickets. Second, the various credit card charges were all for the exact same amount and were withdrawn on the same day of each month. It belies logic and common sense that these payments were for speeding tickets. I find the payments were periodic payments in respect of the annual licence fee and registration for the Hyundai.
- [25] However, although I disbelieve the respondent, it does not follow that she is the beneficial owner of the Hyundai Tiburon. She may have paid the licence and registration fees for the vehicle but that, by itself, does not make her the beneficial owner. The vehicle was registered in the name of her mother. There is no evidence suggesting that the vehicle was purchased by the respondent or with her funds. There is no evidence of a gift of the vehicle from the respondent's mother to the respondent. In fact, the registration in the name of the mother suggests otherwise. In my view, the claimant has failed to establish that the Hyundai Tiburon is beneficially owned by the respondent. I find as a fact that the Hyundai Tiburon is not the property of the respondent and not family property.

[26] The parties are agreed, and I find as a fact, that the family property consists of the following and that the values or amounts are as indicated:

Claimant

Respondent

Bank Accounts

VanCity Joint 5557

50.71

50.71

VanCity Joint 5565

1,141.83

1,141.82

BMO 7430

104.06

BMO 9559

1.78

BMO 7938

17.11

RBC 1277

424.95

RBC 3844

301.16

VanCity 3171

14.41

Investments

BMO 4970

2.37

BMO TFSA 4788

2.21

BMO RRSP 6528

23,076.30

VanCity TFSA 2298

11,838.42

TFSA VanCity 5771

8335.77

RRSP VanCity 5763

4579.40

Class B Member Shares 5849

12.52

TFSA VanCity 6423

1,048.00

TFSA RBC 3472

19,586.37

Totals

\$36,234.79

\$35,495.11

[27] The parties are further agreed, and I find as a fact, that the family debt is as set out below and that the values or amounts are as indicated:

Claimant

Respondent

BMO 6099 (RRSP loan, paid monthly)

1,985.05

BMO Mastercard 0718

1,555.46

VanCity Visa 5647

1,313.02

BMO Mastercard 3684

976.39

RBC Mastercard 3447

663.12

VanCity L/C 1871

350.26

Totals

\$5,829.92

\$1,013.38

- [28] The debt in the amount of \$1,985.05 for the BMO account ending in 6099 is for an RRSP loan taken out by the claimant. His evidence was that he annually takes out such a loan to make a deposit into his RRSP and that he then pays off the loan in monthly installments. I accept his evidence of this as it was not challenged in cross-examination and is corroborated by the various account statements.
- [29] From the foregoing tables, the total value of the family property is \$71,729.90 (\$36,234.79 + \$35,495.11) and the total family debt is \$6,843.30 (\$5,829.92 + \$1,013.38). The net family property is, therefore, \$64,886.60 (\$71,729.90 - \$6,843.30).
- [30] If family property and debt are divided equally, each party would receive \$32,443.30. The claimants net position is currently \$30,404.87 (36,234.79 - 5,829.92) and the respondent's net position is currently \$34,481.73 (35,495.11 - 1,013.38). To equalize family property and debt, the respondent will be required to pay \$2,038.43 to the claimant, unless an order for unequal division of family property and debt is made.

Gambling

- [31] A major point of contention between the parties concerned the gambling of the claimant during the course of the marriage. In essence, the respondent alleges that the claimant gambled excessively and wasted family property in so doing.
- [32] The claimant was candid in giving his evidence about his gambling. He testified that both prior to and during the course of the marriage he made online bets, mostly on football games but also on other sports. He also testified that he attended at the casino from time to time for the purpose of gambling. He testified that he engaged in gambling for entertainment and that he would sometimes win and sometimes lose. He admitted that he probably lost more money than he won. In cross-examination when asked if it was possible that he lost more than \$20,000 per year gambling he replied that he had no idea. He later said that he doubted his net gambling losses during the course of the marriage exceeded \$100,000.

- [33] The evidence of the extent of the claimant's on-line gambling consisted of bank account statements and various credit card statements which recorded the bets made by him and his winnings. The respondent submits that the statements produced show that the claimant bet at least \$124,000 over the course of the marriage and won approximately \$58,000. The respondent further submits, however, that the statements provided are incomplete and that the claimant must have bet much more than the produced statements disclose. Extrapolating from the statements provided, the respondent submits that the claimant probably made on-line bets of approximately \$250,000 during the course of the marriage.
- [34] The claimant's online gambling was conducted using primarily two credit cards, a Bank of Montreal credit card and a Visa card. Many but not all of the credit card statements for these two cards were in evidence. More specifically, statements for the two cards were not available for the period from the date of marriage to approximately mid-2015. Additionally, statements for the Bank of Montreal card were not available for October 2015 to November 2016, May and December 2017 and March 2019.
- [35] I have carefully reviewed all of the credit card statements produced, including the ones produced at the end of the trial. The statements produced record that the claimant placed on-line bets totalling approximately \$135,000.
- [36] The claimant's winnings, as with his bets, are also only partially recorded in the documents provided. The claimant's winnings were either deposited directly into the claimant's Bank of Montreal chequing account or to his Visa account. The relevant statements for 2013 and 2014 are not available and, therefore, his winnings in those years are unknown. Additionally, his winnings in 2015 and 2016 appear to be only partly recorded in the documents that have been produced. According to the statements that have been entered into evidence, the claimant's winnings were approximately \$900 in 2015, \$40,000 in 2017, \$35,000 in 2018, and \$5,000 in 2019, or approximately \$81,000 in total.
- [37] The documentary evidence before me therefore establishes that, during the course of the marriage, the claimant made online bets totalling approximately \$135,000 and had online winnings of approximately \$81,000. This means that over the course of the marriage the claimant lost at least \$45,000 in online gambling or approximately \$7,500 per year.
- [38] However, I agree with the respondent that the banking and credit card statements do not give the full picture of the claimant's gambling, as a number of statements are missing. To address the missing statements, the respondent has extrapolated the claimant's bets and submits that during the marriage the claimant must have made bets totalling at least \$250,000. This may well be the case but it is not proper or fair to calculate or extrapolate only the on-line bets made by the claimant during the marriage. His winnings must also be taken into account to determine the extent of the net losses from gambling and the impact that has had on the family's property and debt. If the claimant's winnings are extrapolated by the same extrapolation factor as used by the respondent for the claimant's bets, the extrapolated winnings during the term of the marriage would be approximately \$160,000

and the extrapolated deficit would be \$90,000 (\$250,000 - \$160,000) over the entire term of the marriage or \$15,000 per year.

- [39] It is impossible on the evidence before me to determine with any degree of certainty the precise extent of the claimant's net gambling losses from on-line gambling during the course of the marriage. Nevertheless, I am satisfied on a balance of probabilities that the net loss was somewhere between \$45,000 and \$90,000.
- [40] The claimant testified that he never went into debt because of his gambling and that he never defaulted on a bill payment because of his online gambling. He said that he gambled within his means.
- [41] The documentary evidence supports the claimant's assertions that he never went into debt as a result of his gambling. In fact, notwithstanding his gambling, and as indicated above in the findings relating to family property and debt, by the date of separation he had accumulated over \$36,000 in family property and his debts consisted of less than \$6,000, all of which were current debts. I therefore find, as a fact, that the claimant did gamble within his means in the sense that he used only current funds and did not incur gambling related debts.
- [42] The claimant further testified that the respondent shared in his gambling winnings. He testified that he used his winnings to pay for various vacations for the parties. He was not challenged on this during his cross-examination and I accept that he used some gambling winnings to pay for vacations. However, I do not accept any implication from this that his gambling was a net financial benefit to the parties. It clearly was not.
- [43] In summary, I find that:
- a) Over the course of the six-year marriage, the net loss from the claimant's gambling was somewhere between \$45,000 and \$90,000;
 - b) The claimant gambled within his means in the sense that he used only his current income to gamble. He did not incur gambling debts, did not sell or dispose of any assets to finance his gambling, and did not use funds of the respondent to gamble; and
 - c) Despite his gambling, the claimant accumulated savings of \$36,000 during the marriage, roughly the same amount of savings as accumulated by the respondent in the same time frame.
- [44] As indicated, in addition to on-line gambling, the claimant periodically gambled at casinos. He testified that he attended at the casino approximately once every couple of months and that sometimes the respondent attended with him, which the respondent confirmed. There is, however, no evidence of the amounts the claimant gambled at casinos. He was never asked, in chief or in cross-examination, how much he gambled and lost at casinos during the marriage. Accordingly, I find that the claimant's casino gambling had a negligible impact on the family's finances.

Family Violence

- [45] A second major point of contention between the parties concerns whether there was family violence during the course of the marriage. The respondent testified that she was the victim of family violence committed by the claimant whereas the claimant denied there was family violence with the exception of one incident where the respondent put her hands around his neck.
- [46] The respondent testified repeatedly of alleged emotional and physical abuse during the marriage. Much of her evidence was, however, very general in nature and totally lacking in specifics. For example, she testified that:
- a) There was a lot of physical violence during the marriage where the claimant physically hurt her;
 - b) The claimant "abused" her at home;
 - c) The claimant was "aggressive" towards her when they discussed his gambling, of which she did not approve;
 - d) She felt like she was "tortured" during the marriage;
 - e) There was a lot of verbal, physical and emotional abuse; and
 - f) The claimant's mother mistreated her.
- [47] The respondent further testified that, as a consequence of the family violence during the marriage, she became severely depressed and even suicidal by the end of the marriage. She testified that she was unable to work much during the marriage because of her mental health issues and depression. She testified that they had agreed that she would return to school to become a fully registered nurse but that because of the physical and emotional abuse suffered at the hands of the claimant she was unable to do so. She further testified that she had to quit her job at VanCity in December of 2019 because she was not mentally fit to be working.
- [48] As I have indicated, much of the respondent's evidence of family violence was very general and lacking in any kind of detail. However, she did give some detailed evidence. In particular, she testified to one occasion, when they lived in the upstairs part of the home, where the claimant choked her. She says that she cried out for help and that the claimant's parents came. She says she told the parents that she had been choked but they did not care. In cross-examination, she testified that after this particular incident she called her own parents who took her home. She also testified that she attended a walk-in clinic to address marks on her neck and shoulder.
- [49] The second specific incident of violence about which the respondent testified concerned an occasion where the claimant hit her in the stomach. She testified that she had to attend the hospital for a ruptured appendix, which she attributed to the claimant having hit her.

- [50] In contrast to the evidence of the respondent, the claimant testified that although the two argued, particularly towards the end of the relationship, the arguments were never physical and that there was no violence during the marriage. The only exception was a single incident that occurred when they had both been drinking. He testified that on this occasion the respondent put her hand around his neck. He could not recall when the occasion was.
- [51] In cross-examination the claimant testified that their arguments were mostly about family but sometimes were about finances. Also, when asked if there was ever physical violence he again replied there was no violence other than the one incident he identified where the respondent put her hands around his neck.
- [52] I do not accept the evidence of the respondent as to the various incidents of family violence to which she testified and prefer the evidence of the claimant.
- [53] I reject the respondent's evidence of family violence, first, because, for the most part, it was excessively vague and mostly lacking in specifics. Second, where her evidence was specific, it was inconsistent with the evidence of the other witnesses. More specifically, not only was her evidence inconsistent with that of the claimant, but it was also not consistent with the evidence of the claimant's parents, both of whom testified at trial.
- [54] The claimant's mother, Rohini Kumar, testified during her examination in chief that she thought the parties' relationship was fine, although she acknowledged that they argued. In cross-examination, she specifically testified that the arguments were never physical.
- [55] The claimant's father, Umesh Kumar, gave similar evidence. He testified that there were a few times where the parties argued but said it was nothing loud and that otherwise, their life was good.
- [56] Importantly, neither of the claimant's parents were cross-examined on the alleged specific choking incident testified to by the respondent and the evidence they did give is inconsistent with the respondent's version of this incident.
- [57] Additionally, the respondent's evidence of family violence and the consequences of the family violence was completely uncorroborated, although corroborating evidence was or should have been available. The respondent's evidence of the choking incident could have been corroborated, at least in part, by her parents or by evidence from the clinic she allegedly attended after the incident. Additionally, her evidence of having a ruptured appendix after being hit in the stomach by the claimant is something that could have been corroborated, in part, by evidence of her attendance at the hospital. No such evidence was forthcoming.
- [58] Similarly, the respondent's evidence of suffering from depression as a consequence of the alleged abuse and violence is also something that could have been easily corroborated. She testified that she sought help from her family doctor and that she had been prescribed anti-depressants. However, her family doctor was not called to testify and her PharmaNet records, which would have disclosed her prescription for anti-depressant medications, were

not put in evidence. She also testified that she had been granted medical leave for mental health reasons but did not provide any documentation of such leave.

- [59] Finally, the respondent's evidence of having to quit her job at VanCity in December 2019 due to mental health issues resulting from family violence is simply not believable. By the time she quit her VanCity job the parties had already been separated for six months. Additionally, and more importantly, her tax returns and employment records disclose that she did not reduce her working hours after quitting the VanCity job. Rather, she increased the amount of time spent working as a practical nurse. It makes no sense that she was mentally unfit to work at VanCity but was mentally fit to work as a practical nurse.
- [60] I have not neglected that the claimant testified that during the marriage the respondent took lots of days off from work and called in sick often. However, I do not consider this evidence as corroborative of the respondent's testimony that she was suffering from mental health issues. The claimant did not so testify.
- [61] Considering all of the evidence, I find that the parties did argue during the marriage and that the respondent was unhappy. However, the claimant did not engage in family violence. He did not physically, mentally or emotionally abuse the respondent.
- [62] I further find that the respondent has not proven, on a balance of probabilities that she suffered from depression or any other mental health issues during the marriage. I accept only that she was unhappy.

Disclosure Issues

- [63] Before addressing the outstanding issues of division of family property and support, I wish to address submissions made by the respondent concerning the claimant's disclosure.
- [64] The respondent submits that the claimant has failed to provide adequate disclosure of his credit card statements and other documents which, if produced, would have permitted a fuller and more accurate assessment of his gambling activities. The respondent submits that this failure to disclose was wilful and in breach of the rules relating to disclosure.
- [65] I am not satisfied that the claimant has wilfully avoided his disclosure obligations. He testified that he attempted to obtain his credit card records from his financial institutions but was told that he could not obtain records going back more than seven years. Additionally, an affidavit has been filed by the legal assistant of the claimant's counsel attesting that she likewise attempted to obtain records from the respondent's banks but was only able to obtain the limited records that were produced.
- [66] Frankly, in my view, the respondent, or more properly her counsel, failed to adequately address in a timely manner the documents that would be needed at the trial and failed to follow the procedures set out in the Supreme Court Family Rules to obtain production of additional documents. A formal demand for production of the additional documents should have been made in a timely manner and, if such documents were not forthcoming, then the

appropriate application should have been brought. It is not obvious to me that a formal demand was made for additional documents. In any event, it is clear that the respondent did not bring a pre-trial application for additional disclosure.

[67] In the circumstances, I find no fault on the part of claimant in relation to disclosure of documents.

Issues

[68] The issues, and the order in which I will address them, are:

- a) Should there be an unequal division of family property and debt?
- b) Is the respondent entitled to spousal support and, if so, what should be the amount and duration?

Unequal Division of Property

Legal Principles

[69] Part 5 of the FLA addresses "Property Division". Pursuant to s. 81 of the FLA, each spouse is entitled to a presumptive one-half undivided interest in each family asset as a tenant in common upon separation, regardless of their respective use or contribution. However, the presumptive one-half undivided interest under s. 81(b) is "subject to an agreement or order that provides otherwise".

[70] Family debt is defined in s. 86 of the FLA as including all financial obligations incurred by a spouse during the period from the commencement of the relationship to the date of separation, and also includes financial obligations incurred after the date of separation, if incurred for the purpose of maintaining family property.

[71] Pursuant to s. 95 of the FLA, the court may order an unequal division of family property or debt but only if an equal division would be "significantly unfair". The factors to consider in determining whether family property should be divided unequally are set out in s. 95(2) and (3).

(2) For the purposes of subsection (1), the Supreme Court may consider one or more of the following:

- (a) the duration of the relationship between the spouses;
- (b) the terms of any agreement between the spouses, other than an agreement described in section 93 (1) [setting aside agreements respecting property division];
- (c) a spouse's contribution to the career or career potential of the other spouse;
- (d) whether family debt was incurred in the normal course of the relationship between the spouses;

- (e) if the amount of family debt exceeds the value of family property, the ability of each spouse to pay a share of the family debt;
 - (f) whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property or family debt beyond market trends;
 - (g) the fact that a spouse, other than a spouse acting in good faith,
 - (i) substantially reduced the value of family property, or
 - (ii) disposed of, transferred or converted property that is or would have been family property, or exchanged property that is or would have been family property into another form, causing the other spouse's interest in the property or family property to be defeated or adversely affected;
 - (h) a tax liability that may be incurred by a spouse as a result of a transfer or sale of property or as a result of an order;
 - (i) any other factor, other than the consideration referred to in subsection (3), that may lead to significant unfairness.
- (3) The Supreme Court may consider also the extent to which the financial means and earning capacity of a spouse have been affected by the responsibilities and other circumstances of the relationship between the spouses if, on making a determination respecting spousal support, the objectives of spousal support under section 161 [objectives of spousal support] have not been met.
- [72] The meaning of "significantly unfair" was addressed in *Singh v. Singh*, 2020 BCCA 21, at paras. 128-134 [Singh]. Justice Garson wrote that the threshold is high. There must be persuasive reasons, i.e. something objectively unjust, unreasonable or unfair in an important or substantial sense before property will be divided unequally.
- [134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczywska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.
- [73] The scope of s. 95, in particular s. 95(2)(i), was also addressed in *Singh*. Although s. 95(2)(i) is worded broadly, Garson J. held that the meaning of the phrase "any other factor" was constrained by the ejusdem generis rule of statutory construction and allowed only a consideration of factors relating to the economic characteristics of a spousal relationship.

[138] Applying these requirements to the provision at issue, if the rule applies, the class cannot be any factor "that may lead to significant unfairness" as this would violate the second requirement as set out by Sullivan. The other factors enumerated in s. 95(2) suggest consideration of aspects of the relationship between the spouses, including its duration, the terms of any agreement, as well as the characteristics of family assets and debt and how the spouses have influenced their value. One of the considerations in s. 95(2)(g) includes an analysis of a spouse's good faith or motive. These factors are broad. Nevertheless, in my view, they all relate to a limited class, namely, the economic characteristics of a spousal relationship.

Analysis

[74] The respondent submits that the family property should be divided unequally. Her claim for unequal division of family property is based on the excessive gambling of the claimant and on the family violence allegedly perpetrated by the claimant. She requests an order that one-half of the gambling losses, which she submits exceed \$250,000, be paid to her by the claimant.

[75] I do not intend to address the respondent's submissions insofar as they relate to family violence. I have found as a fact that the claimant did not engage in family violence and that the respondent did not suffer from depression or any other mental or emotional issues as a consequence of any such violence. Accordingly, assuming family violence is a relevant consideration in the division of family property and debt, a matter upon which I offer no opinion, it is of no relevance to the circumstances before me.

[76] Of the various factors listed in s. 95(2) of the FLA, ss. 95(2)(g) and (i) are particularly relevant to the issue before me. The other factors listed in s. 95(2) are of minimal relevance and are not particularly relied upon by the respondent. Nevertheless, I address these other factors as follows:

- a) The duration of the marriage was six years (s. 95(2)(a));
- b) There is no agreement between the parties addressing division of family property (s. 95(2)(b));
- c) Despite the respondent's submissions to the contrary, which I will address more fully when I consider the claim for spousal support, the respondent did not contribute to the career or career potential of the claimant (s. 95(2)(c));
- d) The family debt is minimal and consists mostly of credit card debts which were incurred during the normal course of the relationship and were current (s. 95(2)(d));
- e) The amount of family debt does not exceed the value of the family property and, in any event, both parties have the ability to pay the minimal amount of family debt owing (s. 95(2)(e));

- f) There is no evidence that either party caused a decrease or increase in the value of family property or family debt post-separation and, in any event, the parties are agreed that family property and debt are to be valued as of the date of separation (s. 95(2)(f)); and
- g) There are no tax liabilities likely to be incurred as a result of a transfer or sale of property or as a result of an order (s. 95(2)(h));
- [77] Subsections 95(2)(g) and (i) of the FLA are particularly relied upon by the respondent. In essence, the respondent submits that the claimant's gambling amounted to disposal of family property and says it would be significantly unfair to her if she is not compensated for that disposal.
- [78] The respondent refers me to *Vitug v Vitug*, 2013 BCSC 405 [Vitug], as supporting the proposition that excessive gambling can give rise to an unequal division of family property and debt. In *Vitug*, one of the spouses had engaged in excessive gambling during the marriage and, as a consequence, incurred gambling debts in excess of \$65,000. The spouse also cashed in an RRSP to finance his gambling. In these circumstances, Justice Kelleher held, at paras. 134-136, that unequal division of family property was warranted:
- [134] The evidence establishes that Dennis cashed in RRSPs during the marriage and used that money for gambling.
- [135] Dennis has squandered family assets by gambling. Pursuant to s. 65(1)(f) this is a circumstance which should be taken into account on reapportionment.
- [136] It is unfair for one party to a marriage to amass debts, not disclose them, and then claim an equal division of the assets at the end of the marriage: *MacLellan v. MacLellan*, 2011 BCSC 644. In light of all of the foregoing, there should be a reapportionment in Francisca's favour of 55% of the net equity in the Blundell Home.
- [79] I note that *Vitug* was decided under the predecessor to the current FLA and that the test for an unequal division of family property under that legislation was less stringent than under the current legislation. (See *Singh*, at para. 134)
- [80] Another relevant case is *J.D.G. v. J.J.V.*, 2016 BCSC 2389 [J.D.G.], where Justice Fleming ordered that family property be divided unequally because of gambling by one of the spouses. In *J.D.G.*, Fleming J. found that the gambling spouse had withdrawn almost \$300,000 in cash from a corporation and used the money to purchase Keno tickets. She held that, in the circumstances, the family property should be divided unequally.
- [260] I take a very different view however of the claimant's cash spending. In addition to admitting that 75-90% of the cash he withdrew from ATM machines [of] approximately \$330,000, was used to buy Keno tickets, other evidence shows that most of the claimant's legitimate expenses were paid for by cheque, credit cards, or his debit card. The claimant's gambling behaviour involved the active disposal of hundreds of thousands of dollars which I find was in the amount of \$297,000.

- [261] The somewhat difficult question is whether all of that cash falls within the definition of family property. No submissions were made on this point but the evidence establishes that in addition to disposing of cash withdrawn from his own accounts, a significant amount of the cash was also withdrawn from the corporate accounts of Amadeus. The claimant testified that its shares had a value of \$100,000 at separation which I do not accept and zero value by the trial date, which I do. The balance sheet for Amadeus as of December 31, 2011 lists "Share Redemption" at \$98,209.00. It also lists total assets of \$465,944, very limited total liabilities of \$6,964.90, as well as significant retained earnings and net income. The claimant is the sole voting shareholder in Amadeus, with the respondent continuing to own the non-voting shares. The shares themselves are family property under s. 84(2)(a) but not the company's assets. In these circumstances, and absent other evidence, I view it as appropriate to value the shares based on the value of the company's total assets of approximately \$466,000. To the extent the claimant disposed of cash that formed part of the company's assets on gambling, his conduct reduced the value of family property, namely the value of the shares in Amadeus. All of his spending on gambling was clearly done in the absence of good faith and it deprived the respondent of her half interest in the personal funds and the value of the shares. I conclude therefore that all the claimant's cash spending of \$297,000 falls within the scope of s. 95(1)(i) and (ii).
- [265] Weighing all of the circumstances and applying s. 95(2)(g), I [find] it would be significantly unfair to divide the net family property equally and it should be reapportioned such that the respondent's share is equal to \$148,500 more than the claimant's.
- [81] In contrast to Vitug and J.D.G., the claimant refers me to Broda v. Morin, 2015 SKQB 240 [Broda], where a spouse was engaged in gambling but did not incur any debt and continued to contribute to an RRSP. In these circumstances, Justice Wilson held that gambling did not justify an unequal division of family property under the Saskatchewan family law regime. At paras. 48-49, he wrote:
- [48] Lise argues that Mary lost a significant amount of money during the parties' cohabitation. I agree with Lise that bank records reflect that withdrawals were being made on a consistent basis. However, there were jackpots won by Mary which have not been taken into account in the numbers presented by Lise. Lise acknowledges that Mary's winnings in the casino were utilized to buy a Frigidaire with a value of \$5,000 and also for a trip. Lise also acknowledges that when Mary first started gambling, she would share all of her winnings with Lise.
- [49] There is evidence that Mary never missed a payment on her vehicle loan and continued to contribute to RRSPs, which are now being shared as part of the distribution of property. Neither Lise nor Mary sold off liquid assets for gambling or took out any loans. On all of the evidence, I cannot find that Mary's actions amount to dissipation as I have determined the household financial security was not jeopardized. Further, even had I found dissipation, the Court in Phillips determined that it would be only a period of two years prior to the date of application that would be considered.

- [82] In my view, Broda is much more similar to the facts of the present case than are Vitug and J.D.G. Unlike the spouse in Vitug, the claimant did not cash in a financial asset or incur any debts to finance his gambling. Additionally, unlike the spouse in J.D.G., the claimant did not reduce the value of a family asset by almost \$300,000 because of gambling. Rather, similar to the spouse in Broda, the respondent financed his gambling through his regular income without incurring any debt.
- [83] In any event, none of the above cases are determinative of the issue before me. The overriding question to be determined is whether it would be significantly unfair in the circumstances to divide the family property and debt equally. I am of the view that the respondent has not met the high onus on her of establishing significant unfairness. There are several factors that lead me to this conclusion.
- [84] First, as indicated in my findings of fact, the claimant gambled within his means and, despite his gambling, he accumulated savings of \$36,000 during the marriage, roughly the same amount of savings as accumulated by the respondent in the same time frame.
- [85] Second, it is not for this court to determine how people ought to spend their money. Some people choose to save their money. Other people choose to spend their money on expensive cars or clothes or vacations. Yet other people choose to spend their money on gambling. This is what the respondent did and he was perfectly entitled to do so.
- [86] Third, the respondent was aware of the claimant's gambling prior to the marriage. She knew or ought to have known that this was a form of entertainment for the claimant. Additionally, during the course of the marriage, the claimant did not hide his gambling from the respondent.
- [87] Fourth, throughout the marriage, the parties kept their finances mostly separate. In particular, the respondent maintained her own bank accounts and her pay cheques were deposited into her accounts. Her earnings were not used to pay for the claimant's gambling or to pay a disproportionate share of the family expenses. In fact, with the exception of the respondent's monthly contribution to rent, the claimant paid the family expenses.
- [88] Fifth, although the respondent complains of the claimant's use of money for gambling, she has not explained how she spent the money that she earned during the relationship. Over the course of the marriage, she earned approximately \$280,000. Her only contribution to family expenses was \$325 per month for rent during the last three years of the marriage. She clearly spent substantial amounts of cash on items that are not accounted for. She was entitled to do this but so was the claimant.
- [89] For all of the above reasons, and considering the factors set out in s. 95(2) of the FLA, I am not satisfied that it would be significantly unfair to divide the family property and debt equally. Accordingly, the family property and debt are to be divided equally. To give effect to this equal division, the respondent is to pay \$2,038.43 to the claimant.

Spousal Support

Legal principles

[90] Spousal support is addressed in both s. 15.2 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.) [DA] and ss. 160-165 of the FLA. The objectives of spousal support are set out in s. 15.2(6) of the DA and s. 161 of the FLA, in essentially the same terms. The objectives are to:

- recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown;
- apportion between the spouses any financial consequences arising from the care of any child of the marriage over and above any obligation for the support of any child of the marriage;
- relieve any economic hardship of the spouses arising from the breakdown of the marriage; and
- so far as practicable, promote the economic self-sufficiency of each spouse within a reasonable period of time.

[91] The factors to take into account when making awards of spousal support are set out in s. 15.2(4) of the DA and s. 162 of the FLA, in essentially the same terms.

- (4) In making an order under subsection (1) or an interim order under subsection (2), the court shall take into consideration the condition, means, needs and other circumstances of each spouse, including
- (a) the length of time the spouses cohabited;
 - (b) the functions performed by each spouse during cohabitation; and
 - (c) any order, agreement or arrangement relating to support of either spouse.

[92] It is to be noted that pursuant to s. 15.2(5) of the DA, misconduct of a spouse in relation to the marriage is not a factor to be taken into consideration. Section 166 of the FLA is to a similar effect. It provides:

166 In making an order respecting spousal support, the court must not consider any misconduct of a spouse, except conduct that arbitrarily or unreasonably

- (a) causes, prolongs or aggravates the need for spousal support, or
- (b) affects the ability to provide spousal support.

[93] There are three grounds for entitlement to spousal support; compensatory, non-compensatory, and contractual.

- [94] Compensatory support is intended to address economic advantages and disadvantages arising from the marriage. The nature and significance of compensatory spousal support is discussed in *Moge v. Moge*, [1992] 3 S.C.R. 813 [Moge], and *Bracklow v. Bracklow*, [1999] 1 S.C.R. 420 [Bracklow], and summarized in *Chutter v. Chutter*, 2008 BCCA 507, at paras. 50-53 [Chutter].
- [50] Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise (*Bracklow v. Bracklow*, [1999] 1 S.C.R. 420] at paras. 24, 41). The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success ([*Moge v. Moge*, [1992] 3 S.C.R. 813] at 861-863; *Bracklow*, at para. 39). In *Moge*, the Supreme Court of Canada observed, at 867-868:

The most significant economic consequence of marriage or marriage breakdown, however, usually arises from the birth of children. This generally requires that the wife cut back on her paid labour force participation in order to care for the children, an arrangement which jeopardizes her ability to ensure her own income security and independent economic well-being. In such situations, spousal support may be a way to compensate such economic disadvantage.

- [51] In addition to acknowledging economic disadvantages suffered by a spouse as a consequence of the marriage or its breakdown, compensatory spousal support may also address economic advantages enjoyed by the other partner as a result of the recipient spouse's efforts. As noted in *Moge* at 864, the doctrine of equitable sharing of the economic consequences of marriage and marriage breakdown underlying compensatory support "seeks to recognize and account for both the economic disadvantages incurred by the spouse who makes such sacrifices and the economic advantages conferred upon the other spouse" (emphasis added).
- [52] The Court in *Moge* discussed the relevance of the parties' standards of living in the context of compensatory support at 870:

Although the doctrine of spousal support which focuses on equitable sharing does not guarantee to either party the standard of living enjoyed during the marriage, this standard is far from irrelevant to support entitlement. As marriage should be regarded as a joint endeavour, the longer the relationship endures, the closer the economic union, the greater will be the presumptive claim to equal standards of living upon its dissolution.

[Emphasis added by Rowles J.A., internal citations omitted.]

- [53] In *W. v. W.*, 2005 BCSC 1010 (CanLII), 19 R.F.L. (6th) 453, a frequently cited decision in trial decisions in British Columbia, Justice Martinson made the following helpful observation about the interpretation in this province of the emphasized portion in *Moge*:
- [11] In British Columbia this comment in *Moge* has been interpreted to mean that in long marriages the result will likely be a rough equivalency of standards of living. Doing so recognizes that the longer a marriage lasts, the more intertwined the economic and non-economic lives of the spouses become.
- [12] Throughout the marriage, each spouse makes decisions that accommodate the economic and non-economic needs of the other. The decisions include the way in which child care and other family responsibilities will be handled and the way careers will develop. These decisions can have a significant impact upon the income earning ability of each at the time of separation. Yet it is not easy to determine exactly the relationship between these decisions and the consequent benefits and detriments to each spouse. The rough equivalency of standard of living approach has operated as a workable substitute to assess compensatory claims. See for example, *Dithurbide v. Dithurbide*.
- [Emphasis added by Rowles J.A., citations omitted.]
- [95] Non-compensatory spousal support is grounded in the means and needs of the parties and was discussed in *Chutter* at paras. 54-55:
- [54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support (*Bracklow*, at para. 43). Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner, rather than the state (*Bracklow*, at para. 23). Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, it is often referred to as the "means and needs" approach to spousal support.
- [55] The concept of "needs" in the context of non-compensatory spousal support goes beyond basic necessities of life and varies according to the circumstances of the parties. As stated by Finch J.A. (as he then was) in *Myers v. Myers* (1995), 1995 CanLII 2274 (BC CA), 17 R.F.L. (4th) 298, 65 B.C.A.C. 226, at para. 10:

"Need" or "needs" are not absolute quantities. They may vary according to the circumstances of the parties and the family unit as a whole. "Need" does not end when the spouse seeking support achieves a subsistence level of income or any level of income above subsistence. "Needs" is a flexible concept and is one of several considerations which a trial judge must take into account in deciding whether any order for spousal support is warranted.

[Emphasis added.]

- [96] In assessing the "needs" of the recipient spouse, the standard of living enjoyed by the parties during the marriage must be considered as well as the standard of living of the payor spouse after the marriage (Chutter, para. 60).
- [97] The third basis upon which entitlement to spousal support can be established is through a contractual arrangement between the parties. This ground of entitlement is of no relevance to the present matter and I shall not consider it further.

Analysis

- [98] The respondent submits that she is entitled to spousal support on the basis that she contributed to the claimant's career and on the basis that due to family violence perpetrated by the claimant she became depressed and was unable to work as much as she otherwise would have and was unable to pursue further education to obtain certification as a registered nurse. The respondent seeks retroactive spousal support from the date of separation and ongoing spousal support for a period of six years. The respondent submits that support should be based on the 2018 incomes of the parties and should be in the amount of \$180 per month.
- [99] The claimant submits simply that there is no entitlement to support on either compensatory or non-compensatory grounds.
- [100] I agree with the claimant and conclude that the respondent has failed to establish entitlement to support on either compensatory or non-compensatory grounds.
- [101] Concerning compensatory support, as indicated, such support is intended to compensate a spouse for economic disadvantages arising from the marriage or for the conferral of an economic advantage upon the other spouse as a result of the marriage. The circumstances that give rise to a compensatory claim normally include one or more of the following: a spouse who stays home full-time or part-time to care for children; a spouse who takes a less demanding job to assume greater responsibility for a child or home care; a spouse who relocates to further the career or employment of the other spouse; a spouse who earns income to support the other spouse who is completing education, training or other qualifications to improve their income earning potential; and a spouse who is primarily responsible for child care after separation. None of these circumstances are present here. Both of the parties were employed at the time of the marriage and remained employed throughout the marriage. Their career paths were relatively established prior to the marriage and did not alter as a consequence of the marriage. There were no children so neither party had to take on child care responsibilities. The parties lived with the claimant's parents and there is no evidence that home care was significant. Neither party was supported by the other during the marriage.
- [102] The respondent specifically submits that she is entitled to support because she advanced the claimant's career to the detriment of her own career. The evidence does not bear this out. The claimant was employed with BC Liquor at the commencement of the relationship

and remains employed with BC Liquor to this day. His employment and position with BC Liquor had nothing to do with anything the respondent did or with any sacrifice made by the respondent during the marriage. I acknowledge that the claimant received a few promotions during the marriage, however, these were unconnected with anything the respondent did or with any sacrifices she made. In short, the respondent did not advance the claimant's career.

- [103] I also reject the submission that the respondent's own career was disadvantaged or interrupted as a consequence of the marriage. This submission is grounded in the allegations of family violence. Specifically, the respondent submits that the physical, emotional and mental abuse she endured during the marriage resulted in depression and other unspecified mental and emotional injuries which prevented her from working and prevented her from pursuing further education to obtain certification as a registered nurse. These submissions are not supported by the facts as I have found them to be. The claimant did not commit the acts of family violence to which the respondent testified and the respondent has not suffered the injuries alleged. I would add that in *B.S.D. v. S.K.D.*, 2021 BCSC 2327, at para. 353, Justice Schultes held that family violence is not a basis in itself for support. Further, at para. 354, he noted that evidence was required of an employment disability as a consequence of any proven family violence.
- [104] Concerning the respondent's claim for non-compensatory spousal support, this claim must also fail. As indicated, non-compensatory support is concerned with the means and needs of the spouse. The means of the parties are disproportionate but not in a way that would give rise to a claim for support by the respondent. In 2019, the year the parties separated, the claimant earned slightly more than the respondent. However, in 2020 and 2021 the respondent has earned more than the claimant. In 2021 the respondent earned in excess of \$85,000 whereas the claimant earned slightly less than \$68,000. Thus, the means of the respondent are greater than, not less than, the means of the claimant.
- [105] The needs of the parties similarly do not give rise to a claim for support. Neither party has significant debt. Both parties live with their respective parents. Both parties are self-sufficient. From the testimony and the documentary evidence submitted, neither party has significant expenses and both have substantially similar standards of living.
- [106] The objectives of spousal support also do not support entitlement. As addressed, the respondent did not suffer an economic disadvantage, and the claimant did not obtain an economic advantage, as a result of the marriage or its breakdown. There are no children and, therefore, is no need to apportion any financial consequences arising from the care of a child. Neither spouse has incurred economic hardship as a consequence of the marriage breakdown. Finally, both parties are economically self-sufficient without the need for support.
- [107] Accordingly, the respondent has wholly failed to establish that she is entitled to spousal support, either retroactively or prospectively.

Orders

[108] The request for an order of divorce is granted, with the divorce to take effect on the 31st day from the date of this order.

[109] I make the following additional orders:

- a) The respective pensions of the parties shall be divided equally pursuant to the provisions of Part 6 of the FLA;
- b) The family property and family debt, as identified herein, shall be divided equally between the parties;
- c) To equalize the family property and family debt, the respondent shall make an equalization payment to the claimant in the amount of \$2,038.43;
- d) The funds in the joint accounts as identified herein shall be divided equally between the parties;
- e) The parties shall each have sole and exclusive entitlement to the funds in financial accounts in their respective names;
- f) The parties shall each be solely responsible for the debts in their respective names; and
- g) All other claims are dismissed.

Costs

[110] The claimant has been substantially successful in this matter. Accordingly, the claimant is entitled to his costs of this action to be assessed as a matter of ordinary difficulty.

[111] Additionally, in respect of the withdrawn counterclaim, the respondents by counterclaim are similarly entitled to their costs from the respondent, to be assessed as a matter of ordinary difficulty.

"Giaschi J."

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