

CANADA / JUDGMENT

L.A.K. v. S.J.A.

2022 BCSC 124

COURT

Supreme Court of British Columbia

DECIDED

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2022 BCSC 124 L.A.K. v. S.J.A. IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: L.A.K. v. S.J.A., 2022 BCSC 124 Date: 20220127 Docket: E201165 Registry: Victoria Between: L.A.K. Claimant And S.J.A Respondent Before: The Honourable Justice Giaschi Reasons for Judgment Counsel for the Claimant: B. Kendregan Counsel for the Respondent: A. Mujtabah Place and Dates of Hearing: Victoria, B.C. April 26, May 10 and September 7, 2021 Place and Date of Judgment: Victoria, B.C. January 27, 2022 Table of Contents Introduction.. 3 Suitability for Summary Trial.. 4 Pleadings.. 4 Facts.. 5 Issues.. 8 Legal Principles.. 8 What is the Family Property?.. 10 Family Home. 10 Other Property. 10 What is the family debt.. 13 What is the excluded Property?.. 15 Conclusions on Family Property and Debt.. 16 Should there be an unequal division of family property or debt? 18 Legal Principles. 18 Discussion. 21 Conclusions on Unequal Division. 27 Order.. 27

Introduction

- [1] This is a summary trial to apportion family property and debt.
- [2] The parties began living in a marriage-like relationship on June 1, 2012 and separated on October 15, 2018. There is one child of the relationship who is now five years of age. The respondent is the primary caregiver for the child. There are two separate court proceedings relating to the parties' relationship. Proceedings were commenced in the Provincial Court in relation to spousal support, child support and parenting. The only issues before this court are in relation to the division of family property and debt.
- [3] The claimant brings this summary trial application under Rule 11-3 of the Supreme Court Family Rules. The claimant specifically seeks:
- a) An apportionment of family property of \$102,367.61 to the claimant and \$2,568.93 to the respondent;
 - b) An order that the respondent is solely responsible for interest paid on family debt from June 1, 2019; and

- c) An order that the claimant is entitled to an equal share of the respondents' pension for the period from June 1, 2012 to October 15, 2018.
- [4] The respondent agrees to an order dividing her pension increase during the period from June 1, 2012 to October 15, 2018 but contests the other relief claimed. The respondent submits that the proceeds from the sale of the family home, the main asset of the parties, should be apportioned 70% to her and 30% to the claimant. The respondent also seeks various orders in her application response including:
 - a) an order that the increase in the value of the family home from October 2018 to March 2019 in the amount of \$11,400 be apportioned to her or, alternatively that the claimant pay 50% of the hydro costs, "municipal costs" and "house and mortgage insurance";
 - b) an order that the claimant's RRSP be included as a family asset;
 - c) an order that arrears of child and spousal support be paid out of the claimant's share of family property;
 - d) an order that the claimant reimburse her for 50% of medical travel costs in 2019; and
 - e) an order that each of the parties is entitled to 50% of the other party's CPP pension increase from June 1, 2012 to October 15, 2018. Suitability for Summary Trial
- [5] At the commencement of the hearing before me I raised the issue of whether this matter was appropriate for summary trial and also whether the Provincial Court proceeding ought to be consolidated with this proceeding. The matter was, in fact, adjourned after the first day of hearing to allow for a consolidation application to be brought. However, no such application was brought and when the parties re-appeared before me they both advised that they wished to proceed with the summary trial.
- [6] I am satisfied that it is appropriate to determine the issues by summary trial and that I can find the facts necessary to do so. Considerations of proportionality feature prominently in reaching this conclusion. The parties have few assets and significant debt. The issues are not complex. The amounts at issue do not justify a full trial. Pleadings
- [7] The relief requested in the notice of family claim is in relation to family property and debt. In the notice of family claim, the claimant requests an equal division of family property and debt and an order excluding certain amounts from family property.
- [8] In the response to family claim, the respondent disagrees with the property orders requested by the claimant in the notice of family claim. The respondent alleges she is the primary caregiver of the child of the relationship who has several severe medical issues. She also alleges that there is an action in Provincial Court relating to spousal and child support that has not yet been resolved.

- [9] In the counterclaim filed by the respondent she claims an unequal division of family property and debt. She claims a re-apportionment of 70% to her and 30% to the claimant. She claims an interest in the family home, the claimant's RRSP, vehicles, and any other assets owned by the claimant. Other relief requested in the counterclaim includes multiple disclosure orders, an order that the claimant's arrears of spousal and child support be paid to the respondent from the claimant's share of family property, and an order that the claimant continue to hold a life insurance policy designating the child as a beneficiary and the respondent as trustee. The response to counterclaim disagrees with the relief claimed in the counterclaim except for splitting hydro bills.

Facts

- [10] The parties began living in a marriage-like relationship on June 1, 2012 and separated on October 15, 2018, when the claimant moved out of the family home.
- [11] The parties have one child, H., born July 26, 2016. The respondent has been the primary caregiver of H. since he was born.
- [12] H. has a variety of medical issues and special needs. The respondent deposes that he has been diagnosed with Pallister Killian syndrome, is severely developmentally delayed, has epilepsy, and is autistic. The claimant does not dispute the medical problems H. has.
- [13] The claimant is a self-employed accounting & bookkeeping consultant. She operates her business through the vehicle of a corporation, Mountain Eleven Financial Corporation. Her net business income in 2019 was \$63,550.
- [14] The respondent was a teacher but has not worked since just before H. was born.
- [15] The respondent's annual income for 2019 was \$17,392.00, which is the income received for spousal support from the claimant.
- [16] The respondent deposes, and I accept, that the claimant was the primary breadwinner of the family and the person who looked after the family's finances.
- [17] The family home was purchased by the claimant on January 31, 2014 and was sold on May 31, 2019. From October 15, 2018 to May 31, 2019, the respondent and the child had the use and occupancy of the family home.
- [18] The parties disagree on the ability of the respondent to seek employment. The respondent deposes that H. requires a full time stay at home mother and that she is not able to work because of her responsibilities as H.'s primary caregiver. She deposes that she is "committed to remain a stay at home mother for H.". She deposes that due to H.'s needs she is "required to remain home and unavailable for employment". The claimant deposes that she wishes to have shared parenting of H., which she is pursuing in the Provincial Court. She also deposes that H. will start a program at a Distributed Learning school in September 2021 and that both parties will participate in the home learning aspects of this program. She further

deposes that H. will attend a regular school in September 2022, as recommended by professionals, and she expects that she will have equal shared parenting time by then. She deposes that the respondent will be able to pursue employment.

- [19] I pause to note that I have not been provided with any evidence by way of affidavit or a report from a medical professional that addresses H.'s medical issues or the type of care he is likely to require.
- [20] The claimant voluntarily paid child support to the respondent of \$616.00 per month from shortly after the date of separation. On October 15, 2020, pursuant to an interim order of the Provincial Court on that date, the claimant began paying increased child support of \$813.00 per month.
- [21] Since at least December 1, 2018, the claimant has been paying spousal support to the respondent in the amount of \$1,456.00 per month. Spousal support was not addressed in the Provincial Court order dated October 15, 2020 but the claimant has continued to pay spousal support at the rate of \$1,456.00 per month.
- [22] The evidence is confusing regarding the relationship between support payments and the payment of expenses on the family home from the date of separation to the date of the sale. The claimant says she paid the mortgage and other expenses and deducted one-half of the amounts paid from spousal support payments. The respondent deposes that the claimant deducted "the entire mortgage and insurance payments from support amounts leaving her with less than \$100 per week.
- [23] The former family home located in Royston, BC, was sold on May 31, 2019. The net proceeds from the sale of the family home, less agreed-upon interim distributions, are held in the trust account of Ives Burger Law. As of the date of the last appearance of the parties before me, the total amount held in trust was \$104,936.53 (the "Trust Funds").
- [24] The respondent remains the primary caregiver of H. However, in the Provincial Court action, the claimant seeks equal shared parenting arrangements. Also, pursuant to the Provincial Court order dated October 15, 2020, the claimant was given parenting time of three or four days per week for 3.5 to 5 hours per day. The respondent deposes to another more recent Provincial Court order in which the claimant was granted three periods of parenting time per week of eight hours duration. The claimant, without referring to this more recent Provincial Court order, deposes that, on average, her parenting time has been 24 hours per week.
- [25] I find the current parenting arrangements are that the claimant exercises parenting time three days per week for eight hours per day or, 24 hours per week in total.

- [26] The respondent deposes that the claimant is in arrears of child and spousal support. However, she has provided no actual evidence that the claimant is in arrears. Her statement seems to be based on her belief that support payments have not been properly calculated and that the claimant should be paying more support than she has been. I will leave issues of support to the Provincial Court. For the purposes of the present summary trial, I find that there are currently no arrears of support.
- [27] I am advised that there is to be a trial in the Provincial Court in March of this year.

Issues

- [28] The issues to be determined are:
- a) What is the family property?
 - b) What is the family debt?
 - c) What, if any, property or debt is excluded?
 - d) Should there be an unequal division of family property or debt?
- [29] I note that both of the parties have requested various orders that do not expressly deal with division of family property and debt. The claimant has asked for an order that the respondent is solely responsible for interest paid on family debt from June 1, 2019. I will address this issue under the rubric of family debts and unequal division of family property. The respondent has asked for an order that arrears of child and spousal support be paid out of the claimant's share of family property and for an order that the claimant reimburse her for 50% of medical travel costs in 2019. Neither of these orders relate to the division of family property and debt and I decline to deal with them. Issues of support and special or extraordinary expenses are before the Provincial Court. In any event, there is insufficient evidence before me to address either of these issues. Legal Principles
- [30] Part 5 of the Family Law Act, S.B.C. 2011, c. 25 [FLA] addresses "Property Division". Pursuant to s. 81 of the FLA, upon separation, each spouse is presumptively entitled to a one-half undivided interest in family property and is presumptively responsible for one-half of the family debt, regardless of their respective uses or contributions.
- [31] Pursuant to s. 84 of the FLA, "family property" is all real and personal property owned by one or both spouses at the date of separation. Family property also includes property acquired after separation if derived from the disposition of property owned at the date of separation. Family property specifically includes: a share or interest in a corporation or business (s. 84(2)(a) and (b)); property owing to a spouse (s. 84(2)(c)); money in a financial institution (s. 84(2)(d)); and entitlement under a pension plan or retirement savings plan (s. 84(2)(e)).

- [32] Specific types of property are expressly excluded from family property by s. 85 of the FLA. Excluded property includes:
- a) Property acquired by a spouse before the relationship [s. 85(1)(a)];
 - b) Inheritances [s. 85(1)(b)]; and
 - c) Gifts to a spouse from a third party [s. 85(1)(b.1)].
- [33] Pursuant to s. 84(2)(g) of the FLA, increases in the values of excluded properties during the relationship are not excluded from family property. In other words, it is only the value of the excluded property when it is brought into the relationship that is excluded. Any increase in the value during the relationship up to the date of separation is part of family property.
- [34] Section 86 of the FLA defines family debt as all financial obligations incurred by a spouse during the period from the beginning of the relationship to the date of separation. It follows from this that a debt incurred by a spouse prior to the relationship is not family debt. Similarly, debt incurred by a spouse after separation is generally not family debt. However, s. 86(b) of the FLA contains an exception to this, namely, that a debt incurred by a spouse after separation for the purpose of maintaining family property is considered to be family debt.
- [35] Under s. 87 of the FLA, all family property and family debt is to be valued according to its fair market value at the date of the hearing respecting division of family property and debt. Using a different valuation date requires a finding of significant unfairness (*Eisele v. Eisele*, 2015 BCSC 2297; *Blair v. Johnson*, 2015 BCSC 761).
- [36] Section 95 of the FLA permits an unequal division of family property if an equal division would be "significantly unfair". I will address these provisions in more detail below, when I consider this issue. What is the Family Property?
- [37] The nature and identity of the family property is not really in dispute between the parties.
Family Home
- [38] The main asset was the family home which was purchased by the claimant in February 2014 for \$325,000 and was sold on May 31, 2019 for \$549,900. The net proceeds from the sale after deduction of the mortgage, taxes, utilities, legal fees and real estate commission was \$199,936.54. This amount was paid into trust. There have been four agreed upon distributions from the funds held in trust. Specifically, there have been three distributions to the parties, in equal proportions, totalling \$75,000 and an additional \$20,000 was withdrawn to pay for a s. 211 report. The balance remaining in trust is \$104,936.53, although that amount may now be diminished as I was advised during the hearing that there may be a further agreed payment out. Other Property
- [39] Other assets of the parties as of the date of separation were:
- a) three vehicles;

- b) the claimant's RRSP;
- c) the respondent's pension; and
- d) three bank accounts. Vehicles

[40] The parties owned three vehicles at the date of separation, one of which had no value and was given to a charity. The other vehicles were a 2002 Honda Acura and a 2006 Honda CRV.

[41] The 2002 Acura was retained by the claimant. It was appraised by Carfax in early 2019 for \$960. The claimant deposes that it was donated to a charity in or about July 2020 and that she received a \$300 tax receipt for the donation.

[42] The 2006 Honda CRV was retained by the respondent. The claimant deposes that the respondent refused to have this vehicle appraised. The claimant estimates that it has a fair market value of \$6,612 based on an internet search done through autotrader.ca. The respondent does not list the 2006 Honda in her F8 financial statement or in her statement of assets and debts. She does, however, depose that she has a Honda CRV which she values at \$5,523. The respondent provides no basis for this valuation.

[43] The evidence of the values of the two vehicles is less than perfect. Nevertheless, doing the best I can on the evidence before me, I find that the value of the 2002 Acura is \$300 and the value of the Honda CRV is \$6,600. RRSPs

[44] The claimant has an RRSP with TD Bank. On June 1, 2012 the amount in this account was \$3,200.46. From June 1, 2012 to April 16, 2013, the amount increased to \$8,000. On April 16, 2013, all of the funds in this account were transferred to a GIC and were later redeposited back into the RRSP on November 26, 2013. After the re-deposit, the amount in the RRSP stood at \$9,676.53. From this amount, \$7,500 was withdrawn under Canada Revenue's Home Buyers Plan and used to purchase the family home. The amount in the RRSP after the Home Buyers Plan withdrawal was \$2,176.53. As of the date of separation, the amount in the RRSP was \$5,314.70. This is the amount that is to be prima facie divided between the parties, subject to the claim that \$3,200.46 of this amount is excluded property, which I will address below. Pensions

[45] The respondent had a teacher's pension at the date of separation. The evidence of the amount of this pension is, again, less than ideal. In a list of assets and debts attached to her affidavit made April 15, 2021, the amount contributed to the pension is stated to be \$18,477.42. In her Scott Schedule filed at the hearing, the respondent attributes the amount of \$6,213 as being the increase in the value of the pension during the period of cohabitation.

[46] Based on the foregoing evidence, I find that the increase in the value of the respondent's pension during the period of cohabitation was \$6,200, which amount is to be divided. Bank Accounts

- [47] The claimant has a personal bank account with TD Bank ending 3991 that had a balance of \$298.18 at the date of separation. The respondent does not dispute this amount in her Scott Schedule.
- [48] According to the respondent's statement of assets, she had two bank accounts at the date of separation; one with TD Bank and one with Coast Capital Savings. She claims both had no funds on the date of separation. I accept her evidence. Mountain Eleven
- [49] As I have indicated, the claimant operates her business through the vehicle of Mountain Eleven.
- [50] The bank statement for Mountain Eleven for the month of October 2018 states that the balance in the bank account as of the date of separation was \$2,031.82.
- [51] A draft Balance Sheet for Mountain Eleven dated as of October 15, 2018, lists assets of \$4,261 (the aforesaid bank account and accounts receivable) and liabilities of \$27,844.90. The liabilities include wages payable of \$35,000, which amount is partly offset by a shareholder loan of \$17,378. Other liabilities are: accounts payable of \$579; TD Visa of \$4,700; corporate tax payable of \$1,600; and GST payable of \$3,300.
- [52] The claimant deposes that she retained Laura Morgan of Grant Thompson to provide an informal valuation of Mountain Eleven as of the date of separation. She further deposes that Ms. Morgan advised that the business had a negative to nominal/minimal value as of the date of separation.
- [53] I give no weight to the so-called opinion of Ms. Morgan. She has not been qualified as an expert witness and the evidence of her opinion is hearsay.
- [54] Nevertheless, in my view it is reasonably clear that there is minimal, if not a negative, value in Mountain Eleven. It has minimal assets and its liabilities significantly exceed the value of those assets. What is the family debt
- [55] The debts of the parties are many and the claimant has deposed that she has personally paid in excess of \$14,000 of interest on the family debt.
- [56] The claimant's F8 financial statement made March 11, 2020 lists her debts as:
- a) 2017 personal income tax owing of \$5,229.23;
 - b) 2018 personal income tax owing of \$133.33;
 - c) Scotia Bank Line of Credit of \$23,540.39;
 - d) Scotia Visa of \$1,644.10;
 - e) TD visa of \$7,405.37;
 - f) TD Line of Credit of \$14,944.88; and

- g) Van City visa of \$31.72
- [57] In addition to the above amounts, the claimant has included as debts in her F8 financial statement the following amounts:
- a) Homebuyer's plan RRSP repayment obligation in the amount of \$5,562.50;
 - b) Mountain Eleven corporate income tax liabilities in the amounts of \$1,679.79 and \$2,083.38;
 - c) Mountain Eleven corporate GST liabilities in the amounts of \$616.37 and \$3,324.74; and
 - d) TD business visa for Mountain Eleven in the amount of \$4,705.58;
- [58] Concerning the Homebuyer's plan RRSP repayment obligation, this amount is not a debt owing to a third party. It is merely an obligation to return amounts to the claimant's RRSP that were withdrawn to purchase the family home. Responsibility for this amount is not to be divided between the parties.
- [59] Concerning the tax liabilities and visa debt of Mountain Eleven, I appreciate that in certain circumstances debts of a corporation have been included as family debts. This was the case in *Unger v. Conrad*, 2018 BCSC 507, in respect of a corporation described as a family enterprise in which both spouses were involved as shareholders and employees. In the same case, however, the debts of another corporation, in which only one spouse was involved, were held not to be family debt. Mountain Eleven was not a family enterprise. The claimant was the sole shareholder and the respondent had no involvement with the corporation. The claimant has not referred me to any authorities that suggest such debt is family debt within the meaning of the FLA. These amounts are not family debt and are not to be divided between the parties.
- [60] The claimant has included in her F8 financial statement and her Scott Schedule additional debts alleged to be owed to her by the respondent. These relate to the respondent's use of credit cards post separation, special expenses, costs of repair of the family home, interest charges on debts post separation and other matters. Pursuant to s. 86(b) of the FLA, debts incurred after separation are not family debt unless incurred for the purpose of maintaining family property. The only debts incurred post separation that meet this test are referred to in paras. 61-62 of the respondent's affidavit sworn February 19, 2021. She deposes that she paid the sum of \$1,548.75 to repair the family home and \$437.95 in relation to hydro charges. These amounts are family debt.
- [61] The debts in the name of the respondent at the time of separation consisted of a student loan in the amount of \$16,776.84 and an FMEP debt relating to unpaid support payments in respect of a previous relationship. In the respondent's F8 financial statement filed April 15, 2021, this FMEP debt is valued at \$47,093.95. The respondent concedes that these are not family debts. What is the excluded Property?

- [62] The claimant makes several claims of excluded family property. She claims to have purchased the family home using excluded funds, namely: \$27,854 which was a final distribution of a trust set up by her grandparents that she claims is a gift; \$2,171.75 being the portion of the tax refund she received that relates to that part of 2012 before the parties began cohabiting; and \$3,200.46 being funds used from her RRSP to purchase the family home that were deposited into the RRSP prior to the commencement of the relationship.
- [63] The respondent does not dispute that the claimant used trust funds and a portion of her RRSP to purchase the family home. She does, however, dispute the excluded property claims on the basis that there was a gift of these amounts to her. The respondent offered no evidence in support of her submissions that there was a gift to her. Moreover, given the family home was owned solely by the claimant, there is no presumption of advancement.
- [64] I am satisfied that the amount of \$27,854 is excluded property. Disbursements received from a family trust are not family property: *Frobb v. Miller*, 2021 BCSC 1467, at para. 61. The claimant in her affidavit #3 sworn made February 19, 2021, has clearly traced these funds from the family trust set up by her grandparents through her various bank accounts and, ultimately, to the purchase of the family home.
- [65] Concerning the tax refund in the amount of \$2,171.75, the claimant deposes that she received a tax refund in the amount of \$5,212.19 in March 2013 that related to her 2012 taxes. She submits that a portion of this refund, \$2,171.75, relates to overpayment of taxes during the first half of 2012 while the parties were not cohabiting. She submits that this is property acquired before the relationship began and is therefore excluded by s. 85(1)(b.1) of the FLA. However, s. 85(1)(b.1) of the FLA requires that the excluded property be acquired by the spouse before the relationship. The tax refund was not received by the claimant until March 2013 which is after the parties began cohabiting. It was therefore not "acquired" by the claimant before the commencement of the relationship and is not excluded property.
- [66] The final contested excluded property claim relates to the claimant's RRSP. The claimant submits that the sum of \$3,200.46, being the balance in her RRSP at the commencement of the relationship, is excluded property pursuant to s. 85(1)(a) of the FLA. I agree that this amount is excluded. The account statement establishes that the RRSP had a balance of \$3,200.46 when the parties began cohabiting. Further, the claimant has traced those funds to the purchase of the family home using Revenue Canada's Home Buyers Plan.
- [67] The total excluded property is therefore \$31,054. Conclusions on Family Property and Debt
- [68] The total value of the family property, before deduction of excluded property, is \$123,640.41, comprised as follows: Asset Amount Proceeds from Sale of Family Home (after withdrawals) \$104,936.53 2002 Acura (L.A.K.) \$300.00 2006 Honda CRV (S.J.A.) \$6,600.00 TD Chequing Acct (L.A.K.) \$289.18 RRSP (L.A.K.) \$5,314.70 Teacher's Pension (S.J.A.) \$6,200.00 Total \$123,640.41

- [69] The total value of family property after deduction of the excluded property of the claimant is \$92,596.41 (\$123,640.41 - \$31,054).
- [70] The total value of the family debt is \$54,915.72, comprised as follows: Debt Amount
Scotiabank Line of Credit (L.A.K.) \$23,540.39 TD Line of Credit (L.A.K.) \$14,944.88 VanCity
Visa (L.A.K.) \$31.72 Scotiabank Visa (L.A.K.) \$1,644.10 TD Visa (L.A.K.) \$7,405.37 2017
personal income taxes (L.A.K.) \$5,229.23 2018 personal income taxes (L.A.K.) \$133.33 Debt
incurred post separation to repair family home (L.A.K.) \$1,548.75 Payment of Hydro charges
post-separation (L.A.K.) \$437.95 Total \$54,915.72
- [71] The net value of the family property after deduction of excluded property and family debt is \$37,680.69 (\$92,596.41 - \$54,915.72).
- [72] To give effect to the excluded property of the claimant and to an equal division of the family property and debts (assuming the pension and RRSP are not separately divided), the funds in trust would be paid out as follows:
- a) \$31,054 to the claimant for excluded property;
 - b) \$54,915.72 to the claimant or the respective creditors of the parties for family debt;
 - c) The administrative charges of Ives Burger Law, the holder of the trust funds; and
 - d) The balance to be divided equally to the parties. Should there be an unequal division of family property or debt? Legal Principles
- [73] The presumptive equal division of family property is subject to an order for reapportionment under s. 95(1) of the FLA 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).
- (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.

[74] The meaning of "significantly unfair" was recently addressed in *Singh v. Singh*, 2020 BCCA 21, at paras. 128-134 [Singh]. Justice Garson wrote that the threshold was 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.

[75] 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.

- [76] In *Cook v. Cook*, 2021 BCCA 19 [Cook], Justice Wilcock held that a financial disparity because of an inheritance, or other excluded property, does not give rise to unfairness justifying an unequal division of family property. He also confirmed that a financial advantage, or disadvantage, unrelated to the economic characteristics of a spousal relationship is not a relevant consideration.
- [48] The principle that animated the judgment of this Court in *Pasch* is still valid. We ought not to find unfairness in the outcome contemplated by the legislation and that is, therefore, presumptively fair. Under the current Family Law Act regime, "[t]he starting point in the division of property analysis already applies significant exclusions": V.J.F. at para. 10, citing *Slavenova v. Ranguelov*, 2015 BCSC 79 at para. 60. An unequal starting point suggests that an unequal end point is similarly contemplated by the statutory regime.
- [50] In my opinion, the trial judge erred in law in finding that it would be significantly unfair to equally divide family property because of a disparity arising from events unrelated to the parties' marriage. Financial advantage alone, unrelated to the economic characteristics of a spousal relationship, does not justify a departure from the usual rule. Unless necessary to give effect to an order for compensatory support, neither the unequal division of family property, nor the division of excluded assets, was called for by the Act.
- [77] The Court may also make an order for unequal division of family property or debt pursuant to s. 95(3) of the FLA, which provides as follows:
- (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.
- [78] An order for unequal division of family property or debt under s. 95(3) can only be made where compensatory spousal support has been ordered and it has been determined that the objectives of spousal support are served by a lump sum allocation as opposed to periodic spousal support payments. In *Cook*, at para. 51, Wilcock J. wrote:
- [51] Subsection 95(3) of the Family Law Act clearly contemplates orders for the division of property as a means of providing compensatory spousal support where the objectives of the Act cannot be achieved by an order for periodic payments. Such an order hinges upon findings that compensatory support is warranted and that allocation of a lump sum for the purpose will more effectively serve the objectives of the Act than an order for periodic payments: *Parton* at para. 47. After a judge determines that a spouse is entitled to spousal support, the Spousal Support Advisory Guidelines can assist the judge to determine the quantum and duration. Though the Guidelines are not mandatory, the judge can use the resource to calculate an appropriate lump sum support award based on the parties' incomes. See, e.g., *Venables v. Venables*, 2018 BCSC 1736. [Emphasis Added.] Discussion Section 95(3)

- [79] The respondent attempts to rely on s. 95(3) of the FLA as justifying an unequal division of family property. However, unequal division pursuant to s. 95(3) is not available in the circumstances because the conditions for such an order are not met. The respondent's entitlement to compensatory support and the amount of such support has not yet been determined by the Provincial Court. It is, therefore, not possible to determine whether periodic payments will satisfy the objectives of spousal support. Section 95(2) Factors
- [80] I will now address an unequal division of family property under s. 95(1) of the FLA with reference to the various factors outlined in s. 95(2). Duration
- [81] The first factor is the duration of the relationship between the parties. Here, the relationship was six years in duration. This was not a particularly lengthy relationship. Agreement
- [82] The second factor is any agreement between the parties. Here, there is no agreement. Contributions to Career
- [83] The third factor is the contribution of one spouse to the career or career potential of the other. This is a relevant factor. The respondent ceased her employment just prior to the birth of H. If the respondent had not done so, the claimant would have had to spend more time looking after H. and less time on her career and business. In other words, the respondent has contributed to the claimant's career. Debt Incurred in Normal Course
- [84] The fourth factor is whether family debt was incurred in the normal course of the relationship between the spouses. I am satisfied that this is the case. The parties appear to have lived beyond their means but it does not appear that either party accumulated family debt for non-family purposes or other than in the normal course. Ability to Pay
- [85] The fifth factor is the ability of each spouse to pay a share of the family debt. This would be a relevant factor if not for the proviso that this factor only comes into play "if the amount of family debt exceeds the value of family property". That is not the case in this matter and, therefore, this factor is not relevant. Increase or Decrease in Value
- [86] The sixth factor is whether a spouse caused a significant decrease or increase in the value of family property or family debt after the date of separation. Both parties rely on this factor.
- [87] The claimant submits the respondent was difficult to communicate with and unreasonably delayed in settling this dispute with the result that she has had to pay high interest on the family debt. The respondent makes a similar but inverse submission. She says that she advised the claimant to pay off the family debts from the sale proceeds of the family home but the claimant neglected to do so and thereby increased the value of the family debts. I do not accept either submission. It is clear that tensions ran high and the parties had difficulty communicating. This is not unusual after a separation. However, there was not an unreasonable delay in the sale of the family home. In fact, it sold relatively quickly after the separation. Moreover, after the sale of the family home, either of the parties could have applied for the family debt to be paid from the proceeds of sale but neither did.

- [88] The claimant further says that her ability to earn income has decreased because of the time she has had to spend addressing the court proceedings. I do not accept this submission. Both parties have had to spend time addressing the various court proceedings which, again, is something that merely follows from the breakdown of the relationship.
- [89] The respondent submits that due to her actions the value of the family home increased. She says that she remained in and maintained the family home from October 2018 to March 2019 and that the home increased in value during this time. She further says that the claimant abandoned the family home during this period.
- [90] The evidence relied on by the respondent as supporting an increase in the value of the family home is a one-page extract from MLS purporting to show single family home benchmark prices for Vancouver Island. This is not proper evidence upon which I can rely for an increase in value.
- [91] Additionally, the evidence fell far short of establishing any actions of the respondent, post separation, that increased the value of the family home. If there was an increase in value, it was merely due to the passage of time and not due to anything the respondent did.
- [92] Similarly, the submission that the claimant abandoned the family home is unsupported by the evidence. The parties merely separated, which necessitated that the claimant move out of the family home. The evidence of the claimant, which I accept, is that she continued to pay the mortgage payments and insurance during the period in issue and deducted one-half of these amounts from her support payments. The claimant's actions did not cause a significant decrease in the value of family property.
- [93] In all, I am not satisfied that either party caused a significant decrease or increase in the value of family property or family debt after the date of separation. Good Faith
- [94] The seventh factor concerns whether a spouse failed to act in good faith and thereby substantially reduced the value of family property or defeated or adversely affected the other spouse's interest in family property. There is no evidence before me of any reduction in the value of family property due to the acts of one of the parties and no evidence that either party's interest in family property was defeated or adversely affected due to the acts of the other party. Additionally, I am not satisfied that either party failed to act in good faith. Tax Liability
- [95] The eighth factor is 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. Although there is evidence before me that the claimant has an obligation to deposit funds into her RRSP to satisfy the requirements of the Home Buyer's plan, this is not a tax liability. There is no evidence of any other tax liability. Other Relevant Factors

- [96] In addition to the above factors, s. 95(2)(i) of the FLA requires that I consider any other factor that may lead to significant unfairness. As set out in Singh and Cook above, it is not every factor that can be considered but only factors relating to the economic characteristics of a spousal relationship.
- [97] The respondent submits that there should be unequal division of property and debt because:
- a) She has no money;
 - b) The claimant has excluded property claims;
 - c) She has significant debt;
 - d) The claimant incurred significant debt;
 - e) The claimant failed to keep her advised of the family debt;
 - f) She is entirely dependent on the claimant financially due to lack of work in her specialized field; and
 - g) Her caregiver duties for H. preclude her from returning to work full time or part time.
- [98] It is not entirely accurate to say that the respondent has "no money". The evidence of the claimant, which I accept, is that she has paid and continues to pay both spousal support and child support to the respondent. From the evidence before me, the claimant currently pays to the respondent \$813 per month in child support, as ordered by the Provincial Court, and \$1,456 per month in spousal support. In addition, the claimant currently pays 80% of special and extraordinary expenses when she is provided with receipts by the respondent. Thus, the respondent has a monthly source of funds. In any event, as set out in Singh at para. 50, the fact that the claimant may have more money than the respondent is, by itself, not a relevant consideration.
- [99] The fact that the claimant has excluded property claims is also not a relevant consideration. This was clearly set out in Cook, at paras. 48-50, as quoted above.
- [100] Similarly, the fact that the respondent has non-family debts of over \$60,000 is not a relevant factor. The analysis undertaken in Cook in respect of excluded property is equally applicable in respect of non-family debt. The court must be reluctant to find unfairness in a result that was contemplated by the legislation and is presumptively fair. The respondent's non-family debts are in relation to an unpaid student loan and arrears in support payments to a prior spouse. These are unrelated to the economic characteristics of the spousal relationship with the claimant.
- [101] I do not accept that the claimant incurred significant debt. As stated elsewhere, it does not appear that either party accumulated debt for non-family purposes.

- [102] Concerning the allegation that the claimant failed to keep the respondent fully advised of the family's finances, I accept that this was the case but only to a limited extent. It is reasonably clear that it was the claimant who managed the family finances. This is reflected in the fact that the claimant was the sole owner of the family home and most of the debts were in her name. However, the respondent was not unaware that there were problems with the family finances. She acknowledged that she was told by the claimant they were struggling to make ends meet and were living beyond their means.
- [103] I do not accept the respondent's bald statement that there is a lack of work in her specialized field. It is clear from the respondent's affidavit evidence that she has not looked for work and has no intention to look for work due to her belief that she needs to be a full-time caregiver for H., a factor to which I now turn.
- [104] The respondent submits that she is entitled to an unequal division of property because her caregiver duties make it impossible for her to work full-time or part-time.
- [105] It is clear that the respondent has been the primary caregiver of H. since his birth and that he has needs that go far beyond those of a normal child. Until recently, it would have been impossible for the respondent to seek any type of employment. Once the claimant was given 24 hours of parenting time per week, the possibility existed for the respondent to secure some part-time employment. However, the effects of the COVID-19 pandemic must also be considered. The respondent has deposed that due to H.'s various medical conditions he is extremely vulnerable and is at risk of severe infection and lifelong complications should he contract the virus. This has led her to isolate as much as possible, which negates the possibility of working. The claimant has not disputed this evidence.
- [106] I accept that the respondent's concerns about COVID-19 are valid and that these concerns combined with H.'s multiple medical issues have, to date, effectively prevented the respondent from seeking any type of employment. However, I am not satisfied that this is a factor that I should take into account. The respondent is essentially saying that her financial means and earning capacity have been adversely affected by the relationship. These are factors that are to be considered under the rubric of s. 95(3) of the FLA, not under ss. 95(1) and (2). Moreover, I have determined that relief under s. 95(3) is not available in the circumstances. Conclusions on Unequal Division
- [107] Upon consideration of all of the above factors, I am satisfied that the family property should be divided equally between the parties. Put differently, I am not satisfied an equal division of family property will result in significant unfairness. There will be a discrepancy between the financial circumstances of the parties after an equal division but this discrepancy is due to the claimant's excluded property and to the respondent's financial obligations that pre-existed the relationship. The financial disparity at the end of the relationship is mostly due to the respective financial positions of the parties at the commencement of the relationship. As in *Cook*, the unequal starting point leads to an unequal end point, which is contemplated by the statutory regime. Order

[108] I make the following determinations and orders:

- a) The total value of the family property, before deduction of excluded property, is \$123,640.41;
- b) The value of the excluded family property belonging to the claimant is \$31,054;
- c) The value of the family property after deduction of the excluded property is \$92,596.41;
- d) The total value of the family debt, all of which is in the claimant's name, is \$54,915.72;
- e) The net value of the family property (after deduction of excluded property and family debt) is \$37,680.69 less the fees of Ives Burger Law related to the maintaining of the trust account; and
- f) The net value of the family property less the fees of Ives Burger Law related to the maintaining of the trust account, shall be divided equally between the parties.

[109] As I am not aware of the claimant's RRSP and the respondent's pension have yet been divided, and as this can impact the orders necessary to divide the funds in trust, I leave it to the parties to agree on the appropriate means by which to give effect to the determinations and orders made herein. If they cannot agree, they have leave to speak to me.

[110] The parties also have leave to speak to me regarding costs, should that be necessary.
"Giaschi J."

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