

CANADA / JUDGMENT

Lamoureux v. Hedquist

2025 BCCA 438

COURT

British Columbia Court of Appeal

DECIDED

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2025 BCCA 438 Lamoureux v. Hedquist

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Lamoureux v. Hedquist,

2025 BCCA 438

Date: 20251210

Docket: CA49379

Between:

Leanne Lorraine Lamoureux

Appellant

(Claimant)

And

Thomas Donald Hedquist and 0867873 B.C. Ltd.

Respondents

(Respondents)

And

Robyn Gibson

Respondent

(Respondent by Counterclaim)

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Before:

The Honourable Mr. Justice Harris

The Honourable Justice Riley

The Honourable Justice Edelmann

On appeal from: Orders of the Supreme Court of British Columbia, dated September 1, 2023 and January 9, 2024 (Lamoureux v. Hedquist, 2023 BCSC 1539 and 2024 BCSC 32, Kelowna Docket E136834).

Counsel for the Appellant:

P.S. Jon

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Counsel for the Respondents, Thomas Donald Hedquist and 0867873 B.C. Ltd.:

J.W.T. Robinson

Place and Date of Hearing:

Vancouver, British Columbia

November 5, 2025

Place and Date of Judgment:

Vancouver, British Columbia

December 10, 2025

Written Reasons by:

The Honourable Mr. Justice Harris

Concurred in by:

The Honourable Justice Riley

The Honourable Justice Edelmann

Summary:

This appeal arises from a trial judgment in a family law case. The trial judge ordered that the increase in value of shares owned by the respondent in companies he operated during the course of the relationship be divided unequally. He ordered that the value be attributed 75% to the respondent, 25% to the appellant, because the respondent's efforts in growing the business rendered it significantly unfair to divide the property equally. The trial judge also made an order regarding child and spousal support which resulted in the appellant having to repay approximately \$90,000 in support she had received by interim court order. The appellant says the trial judge erred in ordering unequal division, imputing income to her, and failing to engage in a retroactivity analysis regarding the support orders.

HELD: Appeal allowed in part. The trial judge erred in grounding his analysis of significant unfairness in comparative economic contribution to the relationship. The order for unequal division of the increase in value of the respondent's companies is set aside and an order for equal division substituted. The trial judge did not err in making the support orders retroactive or in imputing income to the appellant, and the appeal is dismissed on those issues.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

- [1] This appeal centres around two principal issues. The first is whether the judge erred in reapportioning the increase in the value of certain family property during a marriage-like relationship 75% in favour of the respondent on the basis that the presumptive equal division of the increase in value between the parties would be significantly unfair. The second is whether the judge erred in making a final order that required the repayment of support that had been ordered to be paid on an interim basis pending trial.
- [2] The appellant says that the judge erred in his application of the principles governing the division of the increase in the value during a relationship of property that is excluded property at the start of the relationship. She argues the judge focused excessively on the relative contributions of the parties to that increase in value. She says also that in ordering repayment of support "retroactively" the judge failed to account for the economic hardship imposed on her by his order and his imputation of income to her.
- [3] For the reasons that follow, I would allow the appeal from the order reapportioning the increase in value of the property and substitute an order for equal division of the increase in value, but dismiss the appeal from the order requiring the repayment of support resulting from the final determination of the respondent's support obligations.

Background

- [4] Many of the material facts were not in issue. The parties agreed to equal division of much of the family property, except for the increase in value of the shares of some companies through which the respondent ran his businesses.
- [5] The companies at issue include Trademark Industries Ltd. ("Trademark"), Superior Septic Services Ltd. ("Superior Septic"), and 0867873 B.C. Ltd. ("086 Ltd.") (collectively the "Companies").
- [6] The respondent incorporated Trademark in 2004. Trademark initially focused on commercial construction, but later transitioned to dock construction and boat lifts. The respondent incorporated Superior Septic in 2017 for the portion of his business focused on porta-potty and event fence rentals, which previously operated under Trademark. The respondent incorporated 086 Ltd. in 2009 as a holding company for commercial real estate.
- [7] Importantly, the parties agreed to the value of the Companies at the beginning of the relationship and a subsequent date sometime after separation, but before trial. The fair market value of the Companies at the start of the relationship was agreed to be \$1.285 million and on May 31, 2022, was \$3.575 million. The parties agreed to an increase in value between those dates of \$2.29 million before taxes and of \$1.98 million when adjusted for taxes.
- [8] The parties entered a marriage-like relationship that lasted about five years starting in 2015 and ending in 2020. Each had been in a prior relationship and brought children into their new relationship.
- [9] The judge found the relationship to have been tumultuous, marked by periods of separation, followed by efforts at reconciliation.
- [10] At a high level of generality, he found that the respondent was a hardworking, enterprising businessman who built his businesses over time through his skills and reputation. The respondent financed the growth of the Companies as well as the acquisition of some real estate. At the time the relationship began, the Companies had momentum and were increasing in value, something that continued during the relationship and which would have continued in any event of the relationship.
- [11] Again, in broad strokes, the judge found that the appellant had made only minor contributions to the Companies. Her focus was primarily on running the family's domestic life. The appellant had mainly been living on disability benefits and some undeclared rental income from short-term rentals before the relationship began.
- [12] Although the parties discussed reorganizing their financial affairs to bring the appellant in as a "partner" in the businesses/corporations, these discussions did not lead to agreement.

- [13] I will defer to later a more detailed discussion of the facts the judge relied on in concluding that an equal division of the increase in value would be significantly unfair. Suffice to say that the judge concluded that the Companies were expanding rapidly and becoming more valuable when the relationship started and that momentum continued during the relationship, which it would have done in any event, all because of the respondent's business acumen, reputation, and lack of competition. As the judge saw it, the appellant, "hitched her wagon" to already growing and successful enterprises the respondent had spent years developing.

The judge's analysis of the division of the increase in value

- [14] It is common ground that, for the most part, the judge articulated the principles he had to apply correctly. In summary, he noted that under the Family Law Act, S.B.C. 2011, c. 25 [FLA], a spouse is entitled to keep excluded property they bring into a relationship (FLA s. 96), but spouses are entitled to share equally in family property existing at the time of separation (FLA s. 81). Any increase in value of excluded property during the relationship is family property and subject to division (FLA s. 84(2)(g)). Presumptively parties are entitled to share equally in the increase in value and that entitlement is not predicated on either spouse's contribution to the increase in value.
- [15] The purpose of the legislative framework is to provide certainty and predictability to the division of property in accordance with widely accepted principles of fairness. The scheme reflects the Legislature's intention to constrain the discretion of courts to depart from equal division, except where equal division would be significantly unfair. In finding significant unfairness, courts may rely only on the factors laid out in FLA s. 95(2). Those sections do not refer expressly to the relative contribution of either spouse to the acquisition of family property, but the courts have recognized that the discretion to rely on that consideration has not been entirely eliminated. Rather a test has developed which involves a high threshold before a court can conclude that equal division is unfair.
- [16] Given the issues on appeal, it is helpful to say a little more about this discretion. A court may depart from equal division where an equal division would be significantly unfair, but the discretion to do so is significantly constrained. As noted, the factors justifying unequal division must be rooted in the factors set out in FLA s. 95. The material parts of that section are:
- (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.
- [17] As explained in *Jaszczewska v. Kostanski*, 2016 BCCA 286, and confirmed consistently in subsequent cases:
- [38] It is safe, therefore, to conclude that the Legislature intended to limit the circumstances in which a departure from equal division of family property could be justified because of unequal contributions to its acquisition, preservation, maintenance or improvement. The FLA starts with the presumption found in s. 81 that family property is to be equally divided. As I read s. 81, each spouse is presumptively entitled to an undivided half interest in all family property, regardless of their respective use or contribution. Entitlement exists independent of contribution or use, and the extent of that entitlement on separation is defined in s. 81(b).
- [41] Clearly, the statutory intent is to constrain the exercise of judicial discretion. The test of "significant unfairness" imposes a more stringent threshold than the mere "unfairness" test of the FRA to allow unequal division by a court. As Mr. Justice Butler observed in *Remmem v. Remmem*, 2014 BCSC 1552, "significant" is defined as "extensive or important enough to merit attention" and the term refers to something that is "weighty, meaningful or compelling." He concluded that to justify an unequal distribution "[i]t is necessary to find that the unfairness is compelling or meaningful having regard to the factors set out in s. 95(2)": *Remmem* at para. 44. As the judge here noted at para. 162 of her reasons, the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result. I agree.

- [42] No doubt the nuanced meaning attaching to the test of "significant unfairness" will develop in the case law. No other province uses the same test, so there is no clear persuasive authority to look to. It would be unwise to attempt to define the test with too much precision in anticipation of circumstances arising in individual cases; however, one can say that reapportionment will require something objectively unjust, unreasonable or unfair in some important or substantial sense.
- [43] The determination of whether an equal division would be significantly unfair is also guided by a more precise identification of relevant factors than was found in the FRA. Importantly, the Legislature did not include in s. 95(2) the principle of relative contribution found in s. 65(1)(f) of the FRA. Under s. 65(1)(f), a court could consider circumstances relating to the acquisition, preservation, maintenance, improvement or use of property. Section 95(2), by comparison, refers rather narrowly to career contributions (95(2)(c)) and to post-separation increases in value beyond market trends caused by one spouse (95(2)(f)). I agree with the judge's view that if relative contribution to the acquisition, preservation, maintenance or improvement of family property during the relationship was intended to be a significant factor or one frequently relied on in justifying the conclusion that the equal division of family property is significantly unfair, the Legislature would have said so. Allowing relative contribution to become a regular consideration in the context of s. 95 would likely create uncertainty and complexity. This would be contrary to the legislative objectives discussed earlier that underlie the FLA division of property regime.
- [44] Having said that, in enacting s. 95(2)(i) the Legislature recognized that there may be factors other than those listed that could ground significant unfairness. Hence, while the Legislature intended to limit and constrain the exercise of judicial discretion to depart from equal division, it did not provide a closed list of factors and it did not eliminate the discretion. Accordingly, in my view, one cannot read the FLA as abolishing unequal contribution as a factor that may be relevant to reapportionment, although the circumstances in which it may be considered and relied on are intended to be much constrained.
- [18] This Court explained in *Banh v. Chrysler*, 2022 BCCA 74:
- [27] The term "significant unfairness" creates a "high threshold": *V.J.F. v. S.K.W.*, 2016 BCCA 186 at para. 81, leave to appeal to SCC ref'd, 37091 (13 October 2016). In *Singh*, Garson J.A. provided the following helpful summary of various descriptions of the term:
- [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: *Jaszczewska* 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.

[19] In *Khan v. Gilbert*, 2019 BCCA 80, this Court observed:

[31] In *Slavenova v. Rangelov*, 2015 BCSC 79, Justice Savage (as he then was) said:

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

[Emphasis added.]

[32] Cases in which unequal contribution to family expenses and burdens were found to make it significantly unfair to divide family property equally have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: *Nanara v. Nanara*, 2017 BCSC 1447; *E.H.H. v. C.L.M.*, 2017 BCSC 1299.

Analysis

Division of family property

[20] The central issue on appeal is whether the judge erred in principle in finding that it would be significantly unfair to divide the family property equally. The starting point involves accepting that the division of property involves an exercise of discretion to which this Court owes deference. In *Singh v. Singh*, 2020 BCCA 21, Justice Garson noted that, absent an error of law, discretionary decisions under s. 95 of the FLA are subject to a highly deferential standard of review. She explained:

[125] Absent an error of law, the standard of review to be applied to an appeal of a s. 95 order is deferential, because in large part the order is discretionary. In *Venables v. Venables*, 2019 BCCA 281, an appeal also involving an order under s. 95, Justice Griffin noted the highly deferential standard of review required in the exercise of discretion in family law cases in order to promote certainty and finality: at para. 72, citing *Hsieh v. Lui*, 2017 BCCA 51 at para. 38:

The standard of appellate review in family law matters is highly deferential. An appellant must show that there was a material error, a serious misapprehension of the evidence, or an error in law for an appeal court to intervene. This high standard recognises the discretionary nature of the trial judge's task and the benefits of having heard directly from the parties. It also promotes finality and limits expense in family law litigation: *McKenzie v. Perestrelo*, 2014 BCCA 161 at paras. 23-24, citing *Hickey v. Hickey*, [1999] 2 S.C.R. 518 at para. 12 and *Van de Perre v. Edwards*, 2001 SCC 60 at paras. 14-15.

- [21] The judge acknowledged the principles he had to apply and summarized them at the beginning of his analysis of whether equal division of the increase in the value of the Companies' shares during the relationship would be significantly unfair. He said:
- [165] It is settled law that the only relevant factors for determining significant unfairness are those set out in s. 95(2) of the FLA, and that the Court should only undertake an accounting of each party's relative contributions in very limited circumstances: *Banh* at paras. 30, 32. Judicial discretion to order unequal division of family property is constrained. The exercise of this discretion must be based on persuasive economic factors that lead to significant unfairness as that term has been defined in the jurisprudence. The unfairness that might arise from equal division must be weighed against the legislature's objective of establishing a predictable regime for the division of family property. The extent of the court's discretion to depart from equal division under s. 95(2) is not based on a list of closed factors and does not eliminate all consideration of unequal contributions relevant to reapportionment. It is a high threshold that requires something "objectively unjust, unreasonable, or unfair in some important or substantial sense" and must be related to the economic characteristics of the relationship between the parties. One such consideration can be the party's contributions to the acquisition, preservation, maintenance or improvement of family property during the relationship: *Sperring v. Shutiaik*, 2023 BCCA 54 at paras. 111-19.
- [22] It follows that the judge's reliance on the relative contributions of the parties, standing alone, is not a legal error. Whether the judge erred in principle turns on how the judge applied that consideration, which is only relevant in exceptional circumstances, in this particular case.
- [23] The judge analyzed those circumstances under the factors identified in s. 95(2). In brief, the judge gave some limited weight to the duration of the relationship because their actions and conduct suggested that the parties considered their relationship to be unstable and temporary with a lack of commitment towards one another. He concluded that there was no agreement affecting the fairness of an equal division of property. He concluded that the appellant had not contributed to the respondent's career in a way that affected the fair division of the increase in value.
- [24] The key factors driving his conclusion that equal division of value would be significantly unfair were that the respondent's post-separation contribution to the business had significantly increased the value of the shares beyond market trends, potential tax liabilities likely to be incurred by the respondent, and, the contributions made by the respondent before and during the relationship to the increase in value. About this matter, the judge said:

- [190] The fact is that the respondent owned two thriving and growing businesses for many years before the Relationship. I conclude that the Companies would have continued growing regardless of the Relationship, for a number of reasons including the respondent's business acumen, reputation and lack of competition. As a result of meeting the respondent and the Relationship beginning, the claimant in effect "hitched her wagon" to already successful and growing enterprises that the respondent had spent years developing.
- [191] On the one hand, the claimant did make direct and indirect contributions to the Companies over the five-year Relationship, as I have discussed. It would not be fair for her not to share in the increased growth of the Companies over that time. However, on the other hand, it was the respondent who started and built up the Companies for years prior to the Relationship and it would be unfair to him for the claimant to step in mid-way and equally reap benefits that she played little role in creating.
- [193] I accept that disproportionate contributions during the Relationship are not to be considered unless they are "marked, prolonged, and intentional or unexplained disparities in contribution to family burdens": *Khan v. Gilbert*, 2019 BCCA 80 at para. 32. However, the respondent's contributions coupled with what I consider to be significantly disproportionate resources brought both during and after the Relationship are factors that can be considered in determining whether he has met the threshold of establishing that it would be significantly unfair to divide all family property equally. These factors all relate to the economic characteristics of the Relationship and can be considered under s. 95(2)(i).
- [194] In my view, this is a significant factor that weighs heavily in favor of reapportioning the increased value of the shares in the respondent's favour.
- [25] The judge's summary of his conclusions is illuminating:
- [195] This is a case where the respondent brought significant excluded assets with growth potential into a tumultuous and relatively short relationship: *Li v. Liang*, 2021 BCSC 862 at para. 217.
- [196] The jurisprudence defines the term "significant unfairness" to mean such things as "extensive or important enough to merit attention" and "weighty, meaningful or compelling". The unfairness must be compelling or meaningful having regard to the s. 95(2) factors: *Remmem v. Remmem*, 2014 BCSC 1552 at para. 44.
- [197] Proving significant unfairness is a fact-driven process. It depends on each case's unique facts and must reach a high bar. I have concluded that the respondent has met that bar and shown that it would be substantially unfair to equally divide the increase in the share values of the Companies during the Relationship. 086 Ltd. had already acquired 150 Commercial Place and Trademark was operating as a going concern prior to the Relationship. Trademark had built up momentum by the time the Relationship began, with valuations approaching \$1.3-million.

- [198] In weighing the above factors, I conclude that an equal division would be significantly unfair. I have considered the relatively short duration and volatility of the Relationship, the Companies' momentum and the respondent's reputation, and balanced them against what I have determined to have been minimal contributions by the claimant to the Companies' growth and success. While I conclude that the claimant is entitled to share in the increase in value of the Companies during the Relationship, her share should be less than one-half. Considering all the circumstances, I find the fairest solution is, save to the equity in the Apartment Block owned by 086 Ltd., to divide the increased value of the Companies' shares during the Relationship 25%-75% in the respondent's favour. The exception to this, as will be discussed below, is the equity in the Apartment Block, currently owned by 086 Ltd., which is to be divided equally.
- [26] There are, in my opinion, several difficulties with the judge's analysis, leading to the conclusion that he placed undue emphasis on the importance of the relative contributions of the parties to the increase in wealth. In substance, the result is driven almost entirely by a focus on unequal contribution to an increase in value in a way that defeats the purpose of the legislative scheme, which is to provide for equal division of family property regardless of relative contribution, except in exceptional circumstances. On the facts found by the judge, there is nothing objectively unusual or exceptional to justify departing from the outcome contemplated by the legislature.
- [27] If the result is upheld on appeal, the door is opened to litigation routinely focused on relative contribution to family property. These facts do not describe an unusual situation. It is commonplace for spouses to establish a relationship at a time when one spouse is beginning to see earlier efforts to build a business bearing fruit and continues to build the business during the relationship, while the other spouse is uninvolved in the business and contributes to it not at all, marginally, or at best indirectly. The legislative intention is that the value the one spouse brings into the relationship is protected as excluded property based upon market value (which typically captures future growth potential), but that any growth in value is family property to be divided equally. It is only in exceptional circumstances that potential growth in value during the relationship as a result of pre- or during-relationship contributions justify a departure from equal division. These are not exceptional circumstances as contemplated by the legislative framework. In my view, it is contrary to the legislative policy to ground unequal division on a conclusion that one spouse "hitched [their] wagon" to an already successful and growing enterprise that the other spouse had spent years developing. This is exactly the kind of analysis the new statutory framework eschews.
- [28] Accordingly, I find that the judge placed undue emphasis on the pre-relationship contributions of the respondent to the increase in the value of the companies during the relationship. This is not to say that pre-relationship contributions could never be a relevant consideration, perhaps where it is evident that those contributions have clearly not been captured in a fair market valuation of excluded property. But those circumstances will surely be rare, and it would not be useful to speculate on them.

- [29] The judge relied on *Venables v. Venables*, 2019 BCCA 281, for the proposition that he could consider the pre-relationship contribution the respondent made to the Companies' increase in value during the relationship. The judge found that the increase in value was partially the result of the momentum generated by the respondent through his efforts in building the Companies before the relationship began. In short, the seeds of financial success were sown before the relationship began and the fruit reaped during the relationship.
- [30] *Venables* is not authority for that approach. In *Venables*, the issue was whether it would be substantially unfair to divide equally the value of a house that had been excluded property at the beginning of the relationship but became family property as the result of transferring title into joint tenancy as a gift by one spouse to the other at a time that unexpectedly turned out to be relatively short before separation. This Court's discussion of the relevance of the "origin" of property related it to the fact that it had previously been excluded property, but its legal status had been transformed. The case did not deal with the increase in value of excluded property as a form of family property. The Court rejected the argument that once a gift, always a gift. It accepted the judge's conclusion that to divide the value of the house equally would be substantially unfair because it would confer a substantial windfall on one spouse at the expense of the other by depriving that spouse of a significant amount of value in what had previously been his excluded property. There were, of course, many other material facts influencing the exercise of discretion.
- [31] I do not think *Venables* supports the judge's approach in this case. As noted, in that case, equal division would have deprived one spouse of substantial value which had previously been his excluded property. In this case, equal division would not have effectively transferred value of excluded property from the respondent to the appellant. What was at issue was sharing in an increase in value. The respondent retained and was not deprived of the fair market value of his companies at the date the relationship began.
- [32] As well, the parties agreed on the value of the excluded property at the date the relationship began. That valuation was, as the legislation contemplates, a fair market valuation which reflected the future earning prospects of the Companies and must be taken to capture, at least in principle, the financial momentum generated by the contributions to their growth made by the energy, drive, and reputation of the respondent. In substance, attributing growth in value during the relationship to pre-relationship contribution is an indirect attack on the agreed upon valuation.
- [33] The respondent says that this is wrong because in a business of this kind a fair market valuation of the Companies does not capture the value personal goodwill adds to the in-relationship growth in value because personal goodwill cannot be sold to an arms length third party buyer. Accordingly, his counsel submits, there is no error in taking the contribution to the in-relationship growth in value made by pre-relationship contributions into account in the substantial unfairness argument.

- [34] I would not accede to this argument. As I have said, I view it as an indirect attack on the agreed-on value of excluded property and inconsistent with the legislative scheme that values excluded property at fair market value. Moreover, in circumstances where a party comes into a relationship with a business that has some "personal goodwill" and then retains that business at the termination of the family law proceedings, that party will have retained any continuing value in the "personal goodwill" after the property division is complete.
- [35] I should add that the respondent's argument about "personal goodwill" was not advanced before the trial judge. The judge was not asked to factor "personal goodwill" into the unequal division analysis. This argument might charitably be described as a twist, or new perspective, advanced by the respondent in an effort to support the judgment below. However, as I have already explained, this argument is in reality an indirect attack on the agreed upon valuation of the excluded property.
- [36] On the facts of this case and in light of the parties' agreement on value, in my view, the judge erred in principle by relying on an irrelevant consideration, namely pre-relationship momentum of the business, in his analysis of the respondent's unequal division claim.
- [37] I turn now to the judge's reliance on post-separation contribution to value. This issue arises typically because the value of family property may have increased significantly post separation as a result of the efforts of one of the spouses, yet the valuation date for division is presumptively the date of trial. The statute recognizes this as a basis for unequal division, where it contributes or gives rise to significant unfairness
- [38] In my view, the judge's analysis rested on a clear error. The judge reasoned as follows:
- [180] While the parties did not obtain an additional business valuation after May 31, 2022, the available evidence shows a significant increase in Trademark's corporate revenue, which increased by some \$500,000 and \$300,000 in 2021 and 2022, respectively, over 2020. Superior Septic's revenue was over \$1-million higher in 2022 than in 2020. Both companies thus had substantially higher revenues after Separation than during the Relationship.
- [181] I conclude that, to a large degree, the respondent's post-Separation contributions to the Companies accounted for these revenue increases.
- [39] He went on to conclude that the unequal contribution to value justified unequal division, even allowing for the increase in value attributable to market trends.
- [40] One key problem with this analysis is that the judge relied on financial information about increased revenues that post dated the financial information on which the agreed-on valuation was premised. For example, he referred to the revenues of Superior Septic in 2022 as being over \$1 million higher than in 2020. However, the May 2022 fair market valuation only used financial information up to the end of 2021. The judge was assessing post-separation contribution to the increase in value as reflected in the agreed fair market valuation, but the 2022 revenues were not part of that analysis. To the extent the 2022 revenues contributed to Superior Septic's increasing values, the respondent took that value

as excluded property after May 2022. In the result, the judge overvalued the contribution made post-separation by relying on 2022 revenues which were not part of the valuation of the Companies at the valuation date.

- [41] Moreover, it is far from clear that either company enjoyed materially higher revenues after separation than during the relationship. For example, Trademark's revenue in 2018 was as high as \$2.46 million -- only \$56,717 less than in 2021 (and higher than in 2022). And, as noted, Superior Septic's \$1 million increase in revenue did not occur until 2022. The revenue in 2022 was irrelevant to the Companies' value for the purposes of division. In any event, revenue and value are different things, and it is value not revenue that is relevant to s. 95(2)(f).
- [42] Accordingly, the judge's reliance on s. 95(2)(f) rested on a misapprehension of relevant evidence and does not lend support to his overall conclusion that equal division would be significantly unfair.
- [43] The errors in pre- and post-relationship contributions undermine the judge's conclusion that unequal division would be significantly unfair. The judge's overemphasis on relative contribution also permeates his analysis of contribution during the relationship. He focused intensively on the relative contribution of each party to the success of the businesses. As he observed:
- [198] I have considered the relatively short duration and volatility of the Relationship, the Companies' momentum and the respondent's reputation, and balanced them against what I have determined to have been minimal contributions by the claimant to the Companies' growth and success.
- [Emphasis added.]
- [44] This is the exercise of weighing relative contributions that the legislative scheme discourages. Accepting the judge's findings of fact about relative contribution to the increase in value during the relationship, there is nothing exceptional or unusual about the facts of this case. I have already expressed the view that relationships in which the relative contributions to increased value are markedly uneven are not unusual and part of the objective of the legislative changes was to ensure that departures from equal division would be rare, even where one spouse had made no contribution to the increase in value. Approaching contribution as the judge did here frustrates the intention of the Legislature.
- [45] I would allow the appeal on this ground, set aside the order, and substitute an order for equal division of the disputed property.

Support

- [46] The judge made a final order for support. He made orders in relation to spousal support and child support by the respondent as a stepparent.

- [47] The judge found that the appellant was not entitled to compensatory spousal support but was entitled to non-compensatory support ending July 1, 2023. He imputed an income of \$91,852 to the claimant and \$200,000 to the respondent and directed the parties to calculate quantum using the mid-range of the Spousal Support Advisory Guidelines from the date of separation until July 1, 2023.
- [48] The judge refused to order stepparent support for the appellant's child from her previous relationship. The basis of her application was that they were a blended family, and the respondent supported the child for five years.
- [49] The appellant had been receiving spousal support of \$4,274 per month and child support \$1,193 per month from the respondent pursuant to an interim order pronounced by Justice Davies on July 28, 2021.
- [50] The judge made the following order which is under appeal:
- [305] For the purposes of calculating spousal support payments, the claimant's income is set at \$91,852 annually from the date of Separation to current, and the respondent's income is set at \$200,000 annually for the same time frame.
- [306] Using these incomes, the parties are to calculate the amount of spousal support the respondent was obligated to pay the claimant from the date of Separation up to and including July 1, 2023, when his obligation to pay spousal support ended. The calculations of spousal support will be based on the mid-range of the Guidelines. The respondent will receive a credit for all interim spousal support payments made under the Davies Order. If there is any overpayment or underpayment of spousal support, that over- or underpayment shall be made up by setting it off against other monies that may be owing under these reasons.
- [51] The effect of the order is that the appellant had to repay about \$90,000 in interim support she had received by court order.
- [52] The principal issue on this part of the appeal is whether the judge erred in ordering a "retroactive repayment without any analysis of the legal framework for retroactive variation of interim support orders". The appellant says the proper result is to set aside the order for retroactive repayment and to order only that support payments cease as of the order at trial.
- [53] Much of the appellant's argument focused on the principles engaged when a final order for support is varied. The appellant drew heavily on the principles discussed in *D.B.S. v. S.R.G.*, 2006 SCC 37 and *Colucci v. Colucci*, 2021 SCC 24. Those principles do not have a direct application to this case, because here the judge was making a final order to replace an interim order. He was not varying a final order for support. Several of the factors that drive a *D.B.S.* analysis when a final order is being retroactively varied do not operate in the same way when an interim order is replacing a final order. This is because interim orders are temporary orders designed to do rough justice on an incomplete record, to get the parties to trial where entitlement to support can be determined on a proper record. This obviously

affects the kinds of expectations the parties can reasonably have about the predictability and certainty of continuing support and when notice exists that appropriate levels of support are in issue.

- [54] The relationship between interim and final orders was helpfully described by the Alberta Court of Appeal in *Durocher v. Klementovich*, 2013 ABCA 115 at para. 20:
- [20] The general rule is that the trial judge will revisit and adjust the amounts of support provided for in any interim orders: *MacMinn v MacMinn* (1995), 1995 CanLII 6247 (AB CA), 174 AR 261 at para. 13, 17 RFL (4th) 88 (CA); *Lapp v Lapp*, 2008 ABCA 15 at para. 19, 425 AR 232, 93 Alta LR (4th) 1; *Hartley v Del Pero*, 2010 ABCA 182 at para. 9, 27 Alta LR (5th) 248, 487 AR 248. That is the expectation of the parties, and the assumption upon which interim orders are made. Interim orders are made to recognize that the children need immediate support, and that they cannot abide the amount of time it takes to prepare a case for trial. Such interim orders are often made on incomplete data, before full disclosure of all the relevant information by each party, based on estimates about future income, and after summary proceedings in chambers. It is almost inevitable that they will not be completely accurate. The trial judge, having a much better record, extends no "deference" to those interim orders. While there may be an element of "retroactivity" in the process, that is not generally an impediment: *D.B.S.* at para. 68. When an interim order is made, it is anticipated that it will be revisited at trial, and the perceived unfairness of any retroactive adjustment is considerably reduced. Further, since orders are presumptively valid, a parent who pays in accordance with an interim order, even knowing that it might be varied at trial, will generally not have engaged in "blameworthy conduct": *D.B.S.* at paras. 65, 108.
- [55] *Durocher* has been applied in Alberta many times, most recently by the Alberta Court of Appeal in *Strawson v. Strawson*, 2024 ABCA 126.
- [56] This analysis is reflected in the comments of Justice Frankel in *de Rooy v. Bergstrom*, 2010 BCCA 5:
- [43] [It] is clear from *Newson v. Newson* (1998), 1998 CanLII 6440 (BC CA), 65 B.C.L.R. (3d) 22 (C.A.), that interim support orders are a summary mechanism for imposing short-term solutions: para. 11. Such orders give the parties time to resolve matters either by agreement or, if necessary, through litigation. When, after an interim order has been made, a judge determines, following a hearing on the merits, the level of support that is appropriate, he or she is not varying the interim order, but making a new order. That is what, in substance, occurred here.
- [57] The differences between interim and final orders and how they may affect, for example, the availability of retroactive orders for support is also reflected in *Roeske v. Roeske*, 2023 BCCA 358 at paras. 29-35, in which this Court concluded that a trial judge had not erred in his analysis of the relationship between the two.

- [58] It follows that the D.B.S. factors need to be tailored to the different circumstances engaged when a final order is replacing an interim order. I accept that in deciding whether to order repayment of overpaid support as a result of a final order, a judge has a discretion informed by the circumstances of the parties. There may well be situations in which as a result of the hardship created, repayment should not be ordered. That analysis, however, would need to reflect the implications of the differences between interim and final orders described above.
- [59] At its core, in this case, the principal point the appellant makes is that the judge made an order without considering expressly what its financial consequences would be for her, particularly since the amount required to be repaid exceeded her annual pension and disability income. In part, this argument was supported by a contention that the judge erred in imputing income to her.
- [60] I would not accede to this argument.
- [61] In the first place, I see no error in the judge's imputation of an income of \$92,000 to the appellant. The judge made several pertinent findings of fact. He said, for example, that:
- [275] In the end, I am satisfied that the claimant is and remains multi-talented including most notably her self-professed talent for interior design that was a major part of her evidence respecting her contributions during the Relationship. She is skilled in interior design and professed her talents during the trial. Despite having marketable skills, the claimant has not sought to use them or work since Separation. I find that she functions at a high level and could easily work either for herself or others if she chose to do so. I conclude that the claimant is intentionally unemployed, her anxiety issues notwithstanding.
- [62] In addition to the above findings about the appellant's ability to host paid-admission events, marketable skills, high-level functioning, and ability to work for herself or others, the judge referred to other potential sources of income that the appellant had not pursued. These included rental income she could generate from the vacant rental suite and carriage house at one of the properties. The trial judge also criticized the appellant's financial disclosure. He concluded that her March 28, 2023 F8 Financial Statement suggested "artificially low income" and expressed that he had "no faith that her claimed income and expenses are reliable". In my view, all of these findings were open to the judge on the evidence. No palpable or overriding error has been demonstrated. There is no basis for appellate intervention.
- [63] Nor do I think it was an error for the judge not to engage explicitly in a discussion of "retroactivity". At issue here is whether the set-off order should be set aside. In light of the reasonable expectations of the parties arising from the interim orders and the financial resources available as a result of the division of property, I see no basis to interfere with the support orders and would not accede to these grounds of appeal.

Disposition

[64] I would allow the appeal only to the extent of setting aside the order dividing the disputed property 75% in favour of the respondent. I would substitute an order for equal division.

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Justice Riley"

I AGREE:

"The Honourable Justice Edelmann"

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