
CANADA / JUDGMENT

M.F.R. v. B.P.R.

2010 BCSC 1063

COURT

Supreme Court of British Columbia

DECIDED

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IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

M.F.R. v. B.P.R.,

2010 BCSC 1063

Date: 20100728

Docket: 15858

Registry: Terrace

Between:

M.F.R.

Plaintiff

And

B.P.R.

Defendant

Before: The Honourable Mr. Justice Punnett

Reasons for Judgment

Appearing on his own behalf:

M.F.R.

Appearing on her own behalf:

B.P.R.

Place and Date of Trial/Hearing:

Terrace, B.C.

July 14, 16-17, 2009, September 29, 2009 and January 28-29, 2010

Place and Date of Judgment:

Terrace, B.C.

July 28, 2010

- [1] After nine years of marriage, the parties separated. They have resolved the issues of custody and access respecting their two children and the division of household goods and furnishings. They have been unable to reach an agreement on property division, spousal support and child maintenance.
- [2] The parties had entered into a prenuptial agreement. At the start of this trial, they agreed that neither would rely on it.

Background

- [3] The plaintiff, the husband, is 49 years of age and the defendant, the wife, is 39. They married in October 1998 and separated in August 2007. They have a ten-year-old son, A.P.R., born in March 2000, and a five-year-old daughter, C.B.R., born in October 2004.
- [4] When the parties met, the wife was employed as a bartender. She had been certified as a dental assistant in Ontario but her accreditation was not recognized in British Columbia. She ceased working approximately three months after they married, not wanting to continue to work in a bar. After the birth of their first child, the parties agreed that the wife would stay home and raise the child; that arrangement continued with the birth of their second child.
- [5] The parties initially resided in Kaslo, B.C., where the husband was self-employed as a consultant. He has a diploma in forestry and a degree in natural science from Lakehead University and is a licensed forester. In 2001, due to declining income, they moved to Gold River on northern Vancouver Island where the husband had secured employment with Western Forest Products. They cashed in their RRSPs and used money gifted to them by the husband's father, R.R., to purchase a home in Gold River. They resided there until the husband's employment was terminated.
- [6] In September 2004, they moved to Terrace where the husband had secured employment as a forester with B.C. Timber Sales. He is still with that employer.

- [7] In September 2005, they purchased a home in Terrace. The husband's father paid the entire purchase price of \$124,348.84 so they could mortgage the property to pay for renovations. The parties and the husband's father planned to substantially rebuild the home turning it into a four-bedroom, two-storey house with the attached garage converted into an in-law suite. The husband's father wished to have his own residence at his son and daughter-in-law's home, where he planned to live six or seven months of the year.
- [8] The initial mortgage of \$100,000 to finance the planned renovations was with the Toronto-Dominion Bank. However, the husband and his father decided instead to use those funds to purchase a motel, the Kermodei Bear Lodge. This purchase was arranged between the husband, his brother, and their father; the wife was not involved. In the end, they were unable to raise the necessary financing and litigation ensued resulting in the husband losing \$54,348 and the husband's father losing over \$240,000. I note that the wife was not a party to that lawsuit.
- [9] The balance of the mortgage funds was used to begin reconstruction of the home. The renovation costs exceeded the estimates so the parties borrowed against credit cards and arranged a line of credit with the Toronto-Dominion Bank.
- [10] They also turned to their respective families for assistance. The wife's mother lent them \$30,000, which they have repaid. They received a further \$50,000 from the husband's father plus the proceeds from the sale of a property in Kaslo, which had been transferred by the father to another one of his sons and thereafter to the husband.
- [11] When the parties separated in August 2007, the house was substantially completed but not the in-law suite. The husband left the residence in November 2007 while the wife has continued to reside there with the two children. She has made the mortgage and line of credit payments on the home since then.

Property Division

Alleged Family Debts

- [12] The issue of whether funds provided by a parent to a child are a loan or a gift has been addressed in a number of decisions. What is often not an issue when a couple is together becomes one on separation.
- [13] There is no dispute that the assets owned by the parties are family assets. The point of contention is whether the \$124,348.84 and the \$50,000 received from the husband's father were loans or gifts. The husband says they were loans and must be repaid before the assets are divided. The wife asserts that they were gifts and need not be repaid.

- [14] The husband says his father loaned them \$124,348.84 to purchase the Terrace home so that he would have accommodations during lengthy visits and possible living accommodations in his later years. The husband states that while in the past his father has gifted money to his four children, he has also given them unsecured loans, normally documented with a promissory note. He claims his father indicated that he would require this loan be documented at a later date.
- [15] The husband has produced four separate promissory notes.
- [16] The first note is handwritten and was apparently prepared by the husband's father. It is dated October 31, 2005, and provides that the husband will pay \$124,348.84 on demand by his father with no interest. It is signed by the husband and witnessed by a P.S.
- [17] The second note, dated January 10, 2007, is between the husband's father and the husband for \$50,000 payable on demand. There is no mention of interest. It too is signed by the husband and witnessed by a J.H.
- [18] The third note is a copy of a fax showing the parties as the borrowers and the husband's father as the lender. The husband states that he prepared this note in the fall of 2005 when his father advanced them the funds for the purchase of their home. The computer-generated date in the bottom left corner and the fax date on the top showing transmission from the husband's place of work to his father's phone number are both September 12, 2007. The execution date was typed in as September 15, 2005. The note has the husband's handwritten instruction to his father to fill in "Your address at the time". In addition to providing for a principal of \$124,348.84, it sets an interest rate of 5% per annum. The note is not signed. The husband asserts that his father refused to sign it because it was not his "style" of document. I note that, as it was purportedly a promissory note from the parties, the only signatures required were those of the husband and wife, not the father.
- [19] The wife denies ever offering to provide such a note and says she was unaware of it and would not have agreed to it since the funds were a gift not a loan.
- [20] The fourth note, also unsigned, is in essentially the same form as the third note except that the amount is \$50,000 and the husband is to be the sole signatory. The typed date of execution is January 10, 2007, but the printing and fax dates are again September 12, 2007. It has the notation:
- Dad, I am not sure that I can borrow \$ against the house without [B.P.R.] signing it. - The purpose of this \$ was to construct an inlaw suite for you. There are many people who would testify this to be true from conversations between [B.P.R.] & me (e.g. [D.C.]) - should probably reword this to clarify the purpose an [sic] repayment plan.
- [21] The husband appears to have prepared the latter two notes in 2007 after the parties separated. The first two, on their faces, appear to have been prepared and signed before the parties separated.

[22] The wife asserts that since both sums of money were gifts, they were not documented as loans when they were advanced. She claims this documentation was only created after the parties' separation. The wife has produced two documents to support her position.

[23] The first is a typed letter from the husband to "Dad". It lacks any transmission details, which is not surprising since this would have been what was faxed rather than received. In it, the husband informs his father that he and his wife are divorcing and writes:

Dad, I feel terrible that you have supported me so much and it has now come to this. What I need you to do is to put a lien on the house for the original \$121,000.00 purchase and the \$78,000.00 you gave in January. It was my understanding that this money was a gift so that I could build a house with an inlaw suite for you to retire to. Although you may have changed your mind since then I think it is a solid rational [sic]. I will draw up and sign promissory notes for the amounts. However I need your address to send them to you.

[...]

I am so sorry that I have let you down on this but let's get the paperwork going.

This letter appears to make clear that the funds were, in fact, gifts.

[24] The husband initially denied that he wrote the letter. On cross-examination, his wife put to him that she found it along with drafts of the promissory notes in his briefcase, which she says was hidden in the garage. His initial response was "I don't think I wrote this and it does not sound like my writing." However, under further questioning he conceded "I might have written and not sent it. It's possible I wrote it." He testified that he was "distracted" and "confused" at the time and had no recollection of the letter. He also implied that someone else may have prepared it.

[25] The husband's father denied receiving the letter. It may be that the husband never sent the letter, as he testified that he believed he phoned his father to inform him the marriage had ended. Based on the evidence of the husband and his father, their phone conversation was consistent with the contents of the letter.

[26] The second document is a handwritten and undated fax from the husband to his father:

"Hello father, following are (7 pages to follow)

1. Demand Note for purchase of house
2. Demand note for \$50,000.00 for house improvements.

I had made #1 up earlier but we never signed it as Kermodei Bear Lodge unfolded.

I have the same document under the title of "Promissory Note" but I am unsure of the difference.

I understand that you want to handwrite these out for me to sign.

Lets [sic] really think about the wording as no repayment ever occurred, e.g. payable to your estate?

Love, [M.F.R.]

- [27] The husband explained that the two handwritten promissory notes were, in fact, written and signed on the dates shown but when he and his wife separated, he was concerned that they might not hold up legally so he suggested to his father that the wording be "tightened" up. He claims that he faxed the typed demand notes to his father but his father did not wish to rewrite the notes that were previously signed. The letter, however, does not indicate that any promissory notes existed at that time. It states that the husband had prepared, but not signed, one of the typed demand notes earlier. The letter never mentions that these were to be replacement notes.
- [28] What the father remembers of the details, especially the timing of events, is unclear. To some extent, he appears to be basing his answers on what he assumes occurred. He says that he wrote out his own versions of the notes because he did not agree with the terms or with his daughter-in-law being a party. In his words, "I rejected these typed notes." He claims he dated them when he wrote them but could not swear as to when they were signed. When the wife asked him on cross-examination if there were signed promissory notes before the 2007 fax, he only mentioned notes pertaining to a property in Kaslo, which do not relate to the funds in dispute.
- [29] I am not convinced that the father's recollection is entirely accurate. He acknowledges that he is diagnosed as bi-polar and that, at the time of the first advance, he was recovering from the loss of his second wife. The husband confirms that his father was depressed at that time.
- [30] The father was clear, however, that all of his dealings were with his son. He did not deal with his daughter-in-law. While the husband insists that he discussed certain financial matters with his wife, she denies that. She says she had no knowledge that the funds were loans and she certainly never signed anything to that effect. I find that the husband and his father dealt only with each other and did not include the wife in their mutual financial affairs. For example, even though the jointly-held family home was mortgaged to finance the Kermoder Bear Lodge transaction, the wife was neither a party to the purchase nor a party in the ensuing litigation. I am satisfied that as far as the wife was concerned, the funds were gifts.
- [31] The husband also called J.H. who testified that he witnessed the January 2007 note. He could not, however, confirm when or where that occurred, other than it was in the forestry building where the husband worked. This was contradicted by the wife and L.V. who both testified that J.H. told them he had witnessed it in the husband's temporary home office. The husband apparently only used that office after the separation. This raises a doubt that the date on the note is the date it was signed, as does the fact that the note and the date were written by the husband's father who was not present at the signing.

The Law Respecting Loans and Gifts

[32] When a parent provides funds to an adult child, the presumption of resulting trust applies. The recipient must demonstrate, on the balance of probabilities, that a gift was intended: *Pecore v. Pecore*, 2007 SCC 17, [2007] 1 S.C.R. 795 at paras. 41, 43.

[33] In *Locke v. Locke*, 2000 BCSC 1300 at para. 20, Justice A. F. Wilson summarized the factors that the courts have considered when determining whether funds were a loan or a gift:

1. whether there were any contemporaneous documents evidencing a loan;
2. whether the manner for repayment is specified;
3. whether there is security held for the loan;
4. whether there are advances to one child and not others, or advances of unequal amounts to various children;
5. whether there has been any demand for payment before the separation of the parties;
6. whether there has been any partial repayment; and
7. whether there was any expectation, or likelihood, of repayment.

[34] In *Kuo v. Chu*, 2008 BCSC 504 at paras. 81-88, *aff'd* 2009 BCCA 405, 97 B.C.L.R. (4th) 203, Justice Ehrcke found that funds advanced by the husband's parents were a gift to both parties after taking into consideration the following facts:

1. there was no documentation of a loan;
2. the terms of repayment were not discussed with the wife;
3. no security was held for the advances;
4. the parents had also gifted real estate to their daughter;
5. there was no demand for repayment prior to the separation; none of the money had been repaid; and
6. if the parties had not separated, the husband's parents would not have expected repayment.

[35] Applying the *Locke* factors to this case, I find:

1. There were no contemporaneous documents evidencing a loan. For the reasons noted above, the husband has failed to establish that the promissory notes were entered into at the time the funds were advanced.
2. Even if the notes were accepted as evidence of loans, the manner of repayment is not specified other than that they are payable on demand. Further, as in *Kuo*, the terms of repayment were never discussed with the wife.

3. No security was given for the alleged loans. In fact, the father testified that his security was his son.
 4. There is evidence that the father has made advances to his other sons both as gifts and loans.
 5. There was no demand for repayment prior to the parties' separation. The father testified that he only planned to ask for repayment from all of his children if he needed financial assistance in his old age but that he might never request repayment. This is more consistent with a moral obligation than a legal one, particularly in light of his comment that his security was his son.
 6. No money has been repaid to the husband's father, whereas the parties repaid the \$30,000 the wife's mother had clearly loaned to them.
 7. Given the plan to have the father reside with them for six or seven months of the year, I find it improbable that there was any expectation or likelihood of repayment occurring.
- [36] Further, it is unlikely that the bank would have granted the parties a mortgage for the renovations had it been informed that the entire purchase price advanced by the father was a loan.
- [37] As a result, I am left with considerable doubt that these advances were intended to be loans. I am satisfied that upon the breakdown of the marriage, the husband was scrambling to turn gifts into loans in order to support his position that the wife should receive nothing from the house. Therefore, I find on the balance of probabilities that the advances of \$124,348.84 and \$50,000 were gifts.

Assets

- [38] The parties' primary asset is the family home in Terrace. The 2009 Property Assessment value was \$269,700. However, on August 13, 2008, an appraiser valued the home at \$365,000. A comparative market analysis performed by a local realtor on March 26, 2009, resulted in a valuation between \$312,000 and \$339,500. The realtor recommended a listing price of \$327,000.
- [39] The home is encumbered by a mortgage and a line of credit, both with TD Canada Trust, totalling approximately \$251,700. The mortgage balance as of December 31, 2009, was \$202,451.85. The balance on the line of credit as of January 21, 2010, was \$49,270.30.
- [40] The wife seeks a reapportionment of the Terrace property in her favour, proposing to accept a reduction in spousal maintenance in return. She wishes to retain the home to avoid disrupting the children. She claims the value of the home is likely around \$306,000, resulting in equity of approximately \$54,000; thus she seeks a reapportionment of \$27,000.

- [41] The husband seeks a reapportionment of the Terrace property in his favour on the assumption that the funds provided by his father were a personal loan to him and not a gift. He argues that the value of \$319,300 from a market analysis prepared by Re/Max of Terrace on September 28, 2009, and the 2009 Property Assessment value should be averaged, resulting in a valuation of \$294,500.
- [42] Valuing the Terrace property is difficult since the Terrace real estate market has been affected by the closure of the Eurocan pulp mill in Kitimat, B.C. The announcement occurred approximately one month after the comparative market analysis was done. It is undisputed that the value of the home has decreased since the 2008 appraisal and has further declined since the closure announcement. In light of the most recent market analysis, I find the wife's suggested value reasonable. Therefore, the net equity before any sale expenses is approximately \$54,000.
- [43] The other assets of value are four vehicles. The husband has three vehicles registered in his name: (1) a Toyota 4Runner worth approximately \$3,000, (2) a 2006 Kawasaki 650 motorcycle worth approximately \$4,000 and (3) a 1960 Norton motorcycle also worth approximately \$4,000. The wife has a Toyota Corolla registered in her name worth approximately \$2,000.

Debts

- [44] The wife acknowledges that the mortgage and the line of credit are family debts. She disputes that the Kootenay Savings Credit Union line of credit and the balances on the husband's two credit cards are family debts. She alleges that the Kootenay Savings Credit Union debt was not incurred for a family purpose and that the credit card debts were accumulated after the parties separated. She acknowledges that her TD Canada Trust Visa with a balance of \$6,490 as of September 2009 is her sole responsibility.
- [45] The Kootenay Savings Credit Union line of credit is in the husband's name alone. According to the husband, the debt was incurred during the marriage when they resided in Kaslo, B.C. and related to family purchases. As of October 30, 2009, the balance due was \$9,764.19 with interest accruing at \$1.20 per day. The credit union has demanded payment. The husband also owns shares in the Kootenay Savings Credit Union worth \$6,939. Given that the husband dealt with the family finances, I accept that the shares are a family asset encumbered by the line of credit, which is a family debt. When set off against the line of credit, the net balance due as of October 30, 2009, was \$2,825.19.
- [46] The husband has a CIBC Visa account and an MBNA Visa account. The husband acknowledges that both credit card debts were incurred after the parties separated, but he submits they should be considered family debts, in part, because he used the MBNA Visa to pay \$1,996.86 on a CIBC line of credit owing at separation. Further, he asserts that the wife contributed to the debts by failing to seek employment to support herself resulting in his spousal and child maintenance obligations leaving him short of funds. I find that the balances of both credit cards relate to the husband's personal expenditures, recreational

expenditures with the children and cash advances. The fact that the husband's support obligations may have caused him to rely more heavily on credit, rather than adjust his budget, does not make those debts to be shared. The CIBC Visa debt is his sole responsibility. The husband's MBNA credit card debt of \$10,000 is also his sole responsibility with the exception of the \$1,996.86 lump sum payout of the CIBC line of credit.

Asset Division Law and Analysis

[47] Given the length and history of the marriage, a request for reapportionment only invokes ss. 65(1)(e) and (f) of the Family Relations Act, R.S.B.C. 1996, c. 128:

65. (1) If the provisions for division of property between spouses under section 56, Part 6 would be unfair having regard to
- (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

the Supreme Court, on application, may order that the property covered by section 56, Part 6 be divided into shares fixed by the court.

[48] In *Lockhart v. Lockhart* (1989), 19 R.F.L. (3d) 359 at 362 (B.C.C.A.), Lambert J.A. addressed the application of s. 51(e) (now s. 65(1)(e)) as follows:

I say with respect to s. 51(e) that it is not intended that that paragraph should be applied to try to make the financial circumstances of each of the former spouses the same as each other. Nor is it intended, through the application of that paragraph, to destroy the economic independence and self-sufficiency of one spouse in order to try to bolster the economic independence and self-sufficiency of the other. It is only where leaving equality alone would be unfair, having regard to the need of one of the spouses or both of the spouses to become or remain economically independent and self-sufficient, that that section should be applied.

[49] Given my finding with respect to the funds received from the husband's father, the husband's justification for receiving the entirety of the former matrimonial home is negated.

[50] In effect, the wife's proposal that the home be reapportioned in exchange for a reduction in spousal maintenance is an acknowledgement that equal division is not unfair.

[51] The difficulty arising here is the limited amount of family assets. Any reapportionment of the house, the only asset of substance, will leave the husband with minimal capital assets. In my view, a reduced spousal maintenance obligation does not adequately compensate for this. For example, the husband's lack of capital may be fatal to his ability to acquire a new residence.

- [52] At the same time, I recognize that if the home is sold, the wife's ability to acquire another residence, given her current financial circumstances, will be poor. In addition, it is in the children's best interests that they remain in the home in which they have been raised.
- [53] Given the limited options available, I make the following order respecting the parties' assets:
- a. The husband shall retain the two motorcycles and the Toyota 4Runner and the wife shall retain the Toyota Corolla. The result is the husband retains assets valued at \$11,000 and the wife retains assets valued at \$2,000.
 - b. The wife shall be responsible for one half of the line of credit debt (\$998.43), which the husband paid after separation.
 - c. The Kootenay Savings Credit Union shares with a value of \$6,939 shall be applied to the Kootenay Savings Credit Union debt of \$9,764.19 for a net liability of approximately \$2,825.19 to be shared equally by the parties.
 - d. The wife shall have the right to purchase the husband's one-half interest in the former matrimonial home for \$153,000 less one half of the mortgage and the line of credit at the date of completion. The amount payable by the wife to the husband shall be decreased by \$3,501.57 less one-half of the outstanding Kootenay Savings Credit Union loan at the date of completion. This figure represents one half of the difference in the net value of the vehicles retained by the husband ($\$9,000/2$) less the \$998.43 the wife must contribute to the payout made on the line of credit, less the balance due at the date of completion with respect to the Kootenay Savings Credit Union loan.
 - e. The wife has apparently been pre-approved for a new mortgage and, therefore, shall refinance the former matrimonial home, releasing the husband from his covenants under the mortgage and the line of credit on title. The wife shall have 60 days from the date of this judgment to arrange for the refinancing and purchase of the husband's share of the former matrimonial home.
 - f. In the event that the wife is unable to refinance or chooses not to purchase the husband's interest in the property, the husband shall be entitled to purchase the wife's one-half interest in the home for \$153,000 less one half of the mortgage and the line of credit at the date of completion. The amount payable to the wife shall be increased by \$3,501.57 less one half of the Kootenay Savings Credit Union loan due at the date of completion to compensate for the difference in vehicle values after crediting the husband for the \$998.43 payment on the line of credit.

- g. If the husband does not purchase the home within 120 days from the date of this judgment, the property shall be placed for sale with a licensed realtor at the price recommended by the realtor. Should the wife remain in the home until its sale, she shall be responsible for the mortgage and line of credit payments. Upon its sale, the net sale proceeds shall be divided equally between the parties subject to a credit of \$3,501.57 to the wife less one half the balance then due on the Kootenay Savings Credit Union loan.

Child Custody

- [54] The husband currently has physical custody of the children from 8:30 a.m. on Fridays until 8:45 a.m. on Mondays. The husband works four days per week so has Friday to Sunday available for the children. The parties have agreed that this pattern shall continue and that the primary residence of the children will be with the wife. They have also agreed to joint custody and guardianship. Finally, they have agreed that neither shall consume, or be under the influence of alcohol or drugs in the children's presence.

Holiday Access

- [55] The parties shall divide the winter school break equally with each party having the children for Christmas Eve and Christmas Day in alternating years. The husband's 2010 winter break access shall include Christmas Eve and Christmas Day.
- [56] The parties shall alternate having the children for spring break with the wife having the children in 2011.
- [57] The parties shall alternate having the children for Thanksgiving Day commencing with the parent who did not have the children in 2009. The parent not having access on Thanksgiving Day shall have the children for Halloween.
- [58] The husband shall have the children on Father's Day and his birthday and the wife shall have the children on Mother's Day and her birthday.
- [59] The summer school break shall be divided equally between the parties.

Child Maintenance

- [60] The husband's gross annual employment income is \$64,258.73. He receives rental income of \$7,200 from a suite in his residence. No evidence was led of deductions from that rental income. Therefore, I include it for a total gross annual income of \$71,458.73.
- [61] The wife has an income of \$5,150 from a non-taxable grant received annually for her education.
- [62] If the wife was the primary caregiver so that s. 9 of the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines], did not apply, the husband would have to pay \$1,073.19 per month for child maintenance.

Undue Hardship

[63] The husband claims undue hardship under s. 10 of the Guidelines on the basis that he has responsibility for an unusually high level of debts.

[64] Section 10 of the Guidelines states in part:

10.(1) On either spouse's application, a court may award an amount of child support that is different from the amount determined under any of sections 3 to 5, 8 or 9 if the court finds that the spouse making the request, or a child in respect of whom the request is made, would otherwise suffer undue hardship.

10.(2) Circumstances that may cause a spouse or child to suffer undue hardship include the following:

(a) the spouse has responsibility for an unusually high level of debts reasonably incurred to support the spouses and their children prior to the separation or to earn a living;

[65] Given my finding with respect to the funds from the husband's father, the husband does not have responsibility for an unusually high level of debts. As a result, he does not meet the s. 10(2)(a) criterion.

Shared Custody

[66] The husband submits that s. 9 of the Guidelines applies and, therefore, the guideline amount is not payable. Section 9 provides:

9. Where a spouse exercises a right of access to, or has physical custody of, a child for not less than 40 per cent of the time over the course of a year, the amount of the child support order must be determined by taking into account

(a) the amounts set out in the applicable tables for each of the spouses;

(b) the increased costs of shared custody arrangements; and

(c) the conditions, means, needs and other circumstances of each spouse and of any child for whom support is sought.

[67] A court first must find that the 40% threshold has been met. Here, the husband has physical custody of the children from Friday morning until Monday morning each week or approximately 43% of the time. He, therefore, meets the initial test and I find that custody is shared.

[68] However, as Saunders J.A. noted in *Berry v. Hart*, 2003 BCCA 659, 233 D.L.R. (4th) 1 at para. 10:

It perhaps bears mentioning, further, that simply finding that a parental regime comes within s. 9 does not compel an automatic reduction in child support. That determination must be made considering all of the criteria in ss. (a) to (c) of s. 9.

In Berry, the mother was unemployed. The chambers judge had ordered that the father pay 100% of the guideline amount notwithstanding that he cared for the children 40% of the time. The Court of Appeal dismissed the appeal since the chambers judge had taken into account the s. 9 factors, including the mother's inability to contribute to expenses, the fact that the father's circumstances were not unduly pressed and the finding that it was in the children's best interests to have the father pay the guideline amount.

- [69] In the present case, the wife is currently in school and only has an income of \$5,150. The monthly amount payable by her under the Guidelines would be \$0. Other than some financial assistance she receives from K.M., as discussed below, her present means are extremely limited. Her annual expenses of approximately \$42,000 appear reasonable given her circumstances.
- [70] The husband asserts that in order to provide for the children, his housing costs an additional \$500 per month. Yet, presumably, this additional cost would exist whether he had the children 20% of the time or 43% given that he would be exercising access to his children in any event. He also claims increased food, utility and fuel costs as a result of the time the children are with him. In total, including the housing costs, he claims additional expenses of \$1,200 per month. However, while I accept that his food, utility and fuel costs are increased, he has not proved that they have increased by \$700 a month.
- [71] Moreover, as in Berry, the husband presently has the means to absorb the majority of the additional expenses arising from shared custody while the wife does not. It is also in the best interests of the children that they benefit, as far as possible, from a similar standard of living in both households.
- [72] Therefore, I am of the view that the guideline amount of \$1,073.19 per month should not be reduced to reflect some of the husband's additional expenses.

Extraordinary Expenses

- [73] Regarding extraordinary expenses, each of the parties has been expending funds on the children's extra-curricular activities. Any such expenses that the parties agree qualify as extraordinary expenses should be shared on a proportional basis in accordance with their respective incomes. Currently, the husband shall pay 93% and the wife 7%.

Spousal Support

Cohabitation

- [74] The husband contends that his wife is cohabiting with K.M. and that he is providing financial support to her. As a result, he submits that spousal maintenance should be reduced in amount and duration.

[75] Justice Huddart, dissenting in *Takacs v. Gallo* (1998), 157 D.L.R. (4th) 623, 48 B.C.L.R. (3d) 265 at paras. 46-47 (C.A.), accepted the list of criteria set out in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), for determining whether parties are in a marriage-like relationship:

46

1. Shelter:

- (a) Did the parties live under the same roof?
- (b) What were the sleeping arrangements?
- (c) Did anyone else occupy or share the available accommodation?

2. Sexual and Personal Behaviour:

- (a) Did the parties have sexual relations? If not, why not?
- (b) Did they maintain an attitude of fidelity to each other?
- (c) What were their feelings towards each other?
- (d) Did they communicate on a personal level?
- (e) Did they eat their meals together?
- (f) What, if anything, did they do to assist each other with problems or during illness?
- (g) Did they buy gifts for each other on special occasions?

3. Services:

What was the conduct and habit of the parties in relation to:

- (a) preparation of meals;
- (b) washing and mending clothes;
- (c) shopping;
- (d) household maintenance; and
- (e) any other domestic services?

4. Social:

- (a) Did they participate together or separately in neighbourhood and community activities?
- (b) What was the relationship and conduct of each of them toward members of their respective families and how did such families behave towards the parties?

5. Societal:

What was the attitude and conduct of the community toward each of them and as a couple?

6. Support (economic):

- (a) What were the financial arrangements between the parties regarding the provision of or contribution toward the necessities of life (food, clothing, shelter, recreation, etc.)?
- (b) What were the arrangements concerning the acquisition and ownership of property?
- (c) Was there any special financial arrangement between them which both agreed would be determinant of their overall relationship?

7. Children:

What was the attitude and conduct of the parties concerning children?

47 These organizing questions permit a trial judge to view the relationship as a whole in order to determine whether the parties lived together as spouses. Reference to them will prevent an inappropriate emphasis on one factor to the exclusion of others and ensure that all relevant factors are considered.

[76] Justice Newbury, for the majority in *Takacs*, also considered factors that indicate cohabitation and stated at paras. 53, 55:

[53] The starting point in this province for the analysis required in cases of this kind is the judgment of this court in *Gostlin v. Kergin* (1986), 3 B.C.L.R. (2d) 264, and in particular, the comments of Lambert J.A. at 267-8 which are quoted in Madam Justice Huddart's judgment. I read those comments as focussing first on the intentions of the parties to live "as husband and wife", or in a marriage-like relationship. Such an intention may or may not include financial dependence. The various "objective indicators" referred to in *Gostlin* were advanced as a means of divining those subjective intentions where the latter "prove elusive". By the same token, of course, subjective or conscious intentions may be overtaken by conduct such that whilst a person living with another might not say he or she was living in a marriage-like relationship, the reality is that the relationship has become such.

[55] In both *Gostlin* and *Fitton*, the question of whether persons were living together as spouses notwithstanding that they were not legally married involved the court in an examination of their intentions and not simply an objective assessment of whether their financial and living arrangements were "intertwined". If the Legislature had intended the latter, it would have been an easy matter to so state. Objective factors will of course be relevant to determine the parties' intentions as Lambert J.A. noted in *Gostlin* but those factors will rarely be determinative in and of themselves. Many combinations of people may live together and meet many of the criteria set forth in *Molodowich v. Penttinen* (1980), 17 R.F.L. (2d) 376 (Ont. Dist. Ct.), but without intending or in fact entering the kind of psychological and emotional union that one associates with marriage.

- [77] I have also reviewed *Bellis v. Innes* (1980), 21 R.F.L. (2d) 40 (B.C. Co. Ct.); *P.P.W. v. R.S.L.B.*, 2010 BCSC 58; and *Gostlin v. Kergin*, [1986] 5 W.W.R. 1, 3 B.C.L.R. (2d) 264 (C.A.).
- [78] The evidence establishes that the wife has an ongoing relationship with K.M. While he maintains a separate residence, it is minimal accommodation: a rented room in Thornhill just outside of Terrace. When he is in town, he usually stays with the wife. However, his work schedule frequently takes him out of town, up to 28 days at a time with a two-week break in between. He has not moved his possessions into her house and only keeps an overnight bag and toiletry bag there.
- [79] The wife and K.M. share meals together, they socialize together as a couple and he assists around the house. His two children stay at the wife's home when in his care and her children refer to him as their stepfather and to his children as their stepbrother and stepsister. He assists with food costs when staying with her. He has also purchased items for her and lent her money. However, as the wife points out, this was necessary, in part, because the husband had fallen into arrears with respect to the interim-ordered child and spousal support of \$1,075 and \$1,200 per month.
- [80] Notwithstanding the fact that the wife and K.M. do not concede that they are cohabiting in a spousal relationship, I am satisfied, based on the nature of their relationship and the factors referred to above, that in law they are.
- [81] However, even if they are cohabiting, that does not end the matter because this does not automatically disentitle the wife to support. In *G.(L.) v. B.(G.)*, [1995] 3 S.C.R. 370, 127 D.L.R. (4th) 385 at para. 69, L'Heureux-Dube J. wrote:

69 Finally, the fact that the appellant is living with a companion certainly does not mean that she can be presumed to be financially independent, no more than the fact that if the respondent had been in the same circumstances as the appellant at the time of the divorce, he could have been regarded as financially independent merely because he was living with a companion who was in the labour market and sharing common expenses, as well as giving him a gift and a loan. In short, the evidence discloses no change that would be sufficient to justify variation of the support order rendered four years earlier when the divorce was granted.

- [82] Justice Gow in *Lowther v. Lowther* (1986), 12 B.C.L.R. (2d) 158 at 160-61 (S.C.), stated:

the mere fact that the former wife lives in a common-law relationship with another man does not by itself disentitle her to continued maintenance. It is one of the circumstances which, along with all other circumstances, the court looks at in determining whether it would be fit and just to vary or rescind an order on the former husband to pay maintenance

where the former wife has entered into a new relationship the burden is upon her to demonstrate that, notwithstanding the new relationship, there is a continuing need on her part for maintenance from and by her former husband.

- [83] Thus, the issue is whether the wife has met the burden of showing a continuing need for maintenance, whether compensatory or non-compensatory.
- [84] I find that K.M. provides approximately \$350 per month in financial support to the wife, taking into account the fact that some of the charges incurred by the wife on his credit card relate to him as well. The level of financial support provided is not significant. The wife has established that she is not yet financially independent and has not yet recovered financially from the breakdown of her marriage. As such, her entitlement to spousal maintenance on a needs basis continues. Also, given the history of the marriage, the moves for the husband's career and the agreed upon role of the wife as a stay-at-home mother, the wife is entitled to compensatory maintenance.

The Wife's Efforts to Become Self-Supporting

- [85] The husband argues that the wife should either have gone to work as an uncertified dental assistant or made arrangements to update her credentials. He submits that this Court should impute income to the wife commensurate with a full-time dental assistant's wages.
- [86] The wife, on the other hand, claims that because she is uncertified, there is limited work available at low pay. To recertify, she would need to return to school outside of Terrace for 12 to 18 months. Her evidence is that even with recertification, local employment prospects would be limited and the rate of pay would be too low to allow her to become self-sufficient. She also notes that her qualifications are over 14 years old and from out of province.
- [87] The wife is currently enrolled at the local college and anticipates obtaining an associate degree by 2013 and her Bachelor of Arts in Criminology by 2015. She testified that she can complete the entire program in Terrace. Her reasons for pursuing this area of study are the local need for qualified persons in the areas of probation services and fish and wildlife services, the employment will be full-time and it will provide benefits and a pension, all of which will enable her to recover financially from the breakdown of the marriage. It will also permit her to remain in the Terrace area so the children will have the benefit of time with both parents.
- [88] The wife is required to make reasonable efforts to become self-sufficient. In my opinion, this does not mean that she should take a short-term view and accept any employment that is available. It is reasonable for her to look long-term with respect to her self-sufficiency. Given the wife's role in the marriage, immediate economic recovery is not to be expected. Just as her disadvantage from the marriage took time to create so too will her recovery. In my view, the wife's proposed education plan with its promise of secure employment is reasonable. I reject the husband's request that income be imputed to the wife.

Spousal Support Advisory Guidelines

- [89] The Spousal Support Advisory Guidelines (the "SSAG") show a range of \$932 to \$1,342 per month for spousal support when child custody is shared. If child support of \$1,073.19 per month and spousal support of \$950 per month is ordered, the parties will have approximately the same net disposable income.
- [90] Taking into account the SSAG, the length of the marriage, K.M.'s limited financial contribution and the husband's ability to pay, I order spousal maintenance of \$950 per month. The contribution by K.M., justifies a payment at the lower end of the SSAG range.
- [91] Spousal maintenance shall not be subject to review by the husband before May 1, 2013, even if K.M.'s financial contribution increases. By this time, the wife's compensatory claim will, in my opinion, have been satisfied as, pursuant to this order and the interim order, she will have received spousal maintenance for four years. In the event that K.M.'s financial contribution ceases, the wife may apply to have the spousal maintenance reviewed.

Pension Division

- [92] It is not disputed that the husband's employment pension plan and the parties' Canada Pension Plan benefits are family assets. The husband seeks an order that the wife's interest in his employment pension be determined as of the date of separation in 2007. However, the Division of Pensions Regulation, B.C. Reg 77/95, s. 1, defines "entitlement date" as "the date on which the spouse became entitled to an interest in family assets in accordance with section 56(1)". Section 56(1) of the Family Relations Act (the "FRA") lists four triggering events, one of which is a declaratory judgment made by the Supreme Court that the spouses have no reasonable prospect of reconciliation. Master Donaldson made an order to that effect on July 16, 2008.
- [93] The husband failed to plead for reapportionment of the pension pursuant to s. 65 of the FRA. It has been held that s. 65 cannot be relied upon unless pleaded: *Best v. Best*, 2009 BCSC 928, 71 R.F.L. (6th) 194.
- [94] Even if the husband could rely upon s. 65, I am not satisfied that the mere passage of time from the parties' separation to the triggering date justifies a different valuation date than that provided for in the legislation: *Wilson v. Wilson*, 1988 CarswellBC 866, [1988] B.C.J. No. 2541 (S.C.); *Shambrook v. Shambrook*, 2004 BCSC 872. It was open to the husband to have applied earlier for a declaratory judgment under s. 57 of the FRA. He chose not to do so.

Name Change

- [95] Pursuant to the Name Act, R.S.B.C. 1996, c. 328, s. 5, the wife requests that her surname be changed to her maiden name. That request is granted.

[96] The wife also seeks a change of name for the parties' children. However, s. 5(2) of the Name Act provides that the court can only make such an order with the written consent of the other parent. The husband refuses to provide that consent.

Costs

[97] The parties have requested that the matter of costs be the subject of further submissions. The husband shall provide his written submissions on the issue of costs within 21 days of the date of this judgment and the wife shall provide her written submissions within 42 days of the date of this judgment.

Orders

[98] The terms of the order shall be as follows:

1. The parties shall be divorced.
2. The plaintiff shall retain the two motorcycles and the Toyota 4Runner and the defendant shall retain the Toyota Corolla.
3. The defendant shall be responsible for one half of the line of credit debt (\$998.43), which the plaintiff paid after separation.
4. The Kootenay Savings Credit Union shares with a value of \$6,939 shall be applied to the Kootenay Savings Credit Union debt to of \$9,764.19. The net liability of approximately \$2,825 shall be shared equally by the parties.
5. The defendant shall have the right to purchase the plaintiff's one-half interest in the former matrimonial home for \$153,000 less one half of the mortgage and the line of credit at the date of completion. The amount payable by the defendant to the plaintiff shall be decreased by \$3,501.57 less one half the then balance due to Kootenay Savings Credit Union.
6. The defendant shall refinance the former matrimonial home, releasing the plaintiff from his covenants under the mortgage and the line of credit on title. The defendant shall have 60 days from the date of this judgment to arrange for the refinancing and the purchase of the former matrimonial home from the plaintiff.
7. In the event, that the defendant is unable to refinance or chooses not to purchase the plaintiff's interest in the property, the plaintiff shall be entitled to purchase the defendant's one-half interest in the home for \$153,000 less one half of the mortgage and the line of credit at the date of completion. The amount payable to the defendant shall be increased by \$3,501.57 less one half of the Kootenay Savings Credit Union debt.

8. If the plaintiff does not purchase the home within 120 days from the date of this judgment, the property shall be placed for sale with a licensed realtor at the price recommended by the realtor. Should the defendant remain in the home until its sale, she shall be responsible for the mortgage and line of credit payments. Upon its sale, the net sale proceeds shall be divided equally between the parties subject to a credit of \$3,501.57 to the defendant less one half of the Kootenay Savings Credit Union debt.
9. The parties shall have joint custody and guardianship of the children on the terms set out in the order of Master Donaldson made on July 16, 2008.
10. The parties shall have shared day-to-day care of the children who shall reside with the plaintiff from 8:30 a.m. on Fridays until 8:45 a.m. on Mondays.
11. The parties shall have the following holiday periods with the children:
 - a. The parties shall divide the winter school break equally with each party having the children for Christmas Eve and Christmas Day in alternating years. The plaintiff's 2010 Christmas access shall include Christmas Eve and Christmas Day.
 - b. The parties shall alternate having the children for spring break with the defendant having the children in 2011.
 - c. The parties shall alternate having the children for Thanksgiving Day commencing with the parent who did not have the children in 2009. The parent not having access on Thanksgiving Day shall have the children for Halloween.
 - d. The plaintiff shall have the children on Father's Day and his birthday and the defendant shall have the children on Mother's Day and her birthday.
 - e. The summer school break shall be divided equally between the parties.
12. The plaintiff shall pay to the defendant child maintenance of \$1,073.19 per month commencing on August 1, 2010, and continuing on the first day of each month thereafter for so long as the children are "children of the marriage" as defined by the Divorce Act.
13. The parties shall share agreed upon extraordinary expenses for the children in proportion with their respective incomes.
14. The plaintiff shall pay to the defendant spousal maintenance of \$950 per month commencing on August 1, 2010, and continuing on the first day of each month thereafter until the review hereinafter provided for is concluded.
15. The question of what spousal support, if any, shall be payable by the plaintiff to the defendant shall be reviewed upon application by either party anytime after May 1, 2013. The defendant may apply prior to that date if she is no longer supported by K.M.
16. The benefits accrued to the plaintiff (the "Pension") under the Public Service Pension Plan (the "Plan") are a family asset.

17. The defendant is entitled to a share of the Pension that accrued during the parties' relationship, determined and divided in accordance with Part 6 of the Family Relations Act and this Order.
18. For the purposes of determining the defendant's share of the Pension (the "Proportionate Share"), the defendant's entitlement date is July 16, 2008.
19. The plaintiff must designate the defendant to be the beneficiary of the defendant's Proportionate Share of preretirement survivor benefits under the Pension and maintain that designation until such time as the defendant's Proportionate Share of the Pension is registered in the name of the defendant and the plaintiff may designate any person permitted by law to be beneficiary of the plaintiff's share of the Pension, including preretirement survivor benefits under the plaintiff's share.
20. To the extent that the plaintiff's estate, or any person deriving entitlement through the plaintiff, receives any portion of the Pension representing the defendant's Proportionate Share, including preretirement or postretirement survivor benefits, the person receiving the benefits, upon receiving actual or constructive notice of the defendant's interest in those benefits, must hold those benefits in trust for the defendant and immediately pay them to the defendant.
21. The plaintiff or the defendant has liberty to apply for such directions and further orders as may be necessary to facilitate and enforce the division of the Pension.
22. The plaintiff and the defendant will share equally the administrative costs charged by the Plan for carrying out a pension division in accordance with the Family Relations Act and the Division of Pensions Regulation.
23. The plaintiff must provide a certified copy of his birth certificate to the defendant.
24. Pursuant to s. 5 of the Name Act, R.S.B.C. 1996, c. 328, the surname of the defendant shall be changed to her maiden name.
25. The plaintiff shall provide his written submissions on the issue of costs within 21 days of the date of this judgment and the defendant shall provide her written submissions within 42 days of the date of this judgment.

"Punnett J."

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