
CANADA / JUDGMENT

N.K. v. M.H.

2020 BCCA 121

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 121 N.K. v. M.H.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

N.K. v. M.H.,

2020 BCCA 121

Date: 20200430

Docket: CA45389

Between:

N.K.

Respondent

(Claimant)

And

M.H.

Appellant

(Respondent)

Restriction on publication: Publication ban under s. 206 of the Family Law Act, S.B.C. 2011, c. 25, prohibiting the publication of the full name of the parties, so as to protect the privacy of the parties' children.

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Abrioux

The Honourable Mr. Justice Grauer

On appeal from: An order of the Supreme Court of British Columbia, dated June 5, 2018 (N.H. v. M.H., 2018 BCSC 921, New Westminster Docket E49239).

Counsel for the Appellant:

R.S. Gill

K. Tiwana

Counsel for the Respondent:

R.L. Taylor

Place and Date of Hearing:

Vancouver, British Columbia

January 14, 2020

Place and Date of Judgment:

Vancouver, British Columbia

April 30, 2020

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Grauer

Summary:

The appellant, Mr. H, appeals various orders made in this high conflict family law case. He argues that the judge erred by: (1) reapportioning the family home 60/40 percent in favour of the respondent, Ms. K; (2) awarding lump sum spousal support of \$150,000 when none of the parties requested or made substantive submissions on such an order; (3) finding that Mr. H was solely responsible for a \$150,000 line of credit registered against the family home; (4) making a number of findings on miscellaneous property issues; and (5) making an arithmetic error in calculating the order for payment of past special expenses for the children. As a result of the judge's orders, the family home vested in Ms. K and Mr. H's entitlement to his share of the family home (approximately \$300,000) was satisfied by deducting the \$150,000 lump sum spousal support award and a \$150,000 line of credit debt. Held: Appeal dismissed. The judge erred in ordering lump sum spousal support without giving the parties an adequate opportunity to be heard on the

issue. However, this error of procedural fairness can be remedied on appeal in that the parties made submissions in this court on lump sum support and the record is sufficient to uphold the judge's order. Had a lower lump sum amount been ordered to reflect Mr. H's imminent retirement and the division of his pensions, the judge would have ordered a greater reapportionment of the home in Ms. K's favour and retroactive spousal support. As the end result would be the same, there is no benefit to be gained by remitting the matter to the trial court. All other grounds of appeal are also dismissed.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

I: Introduction

- [1] M.H. (Mr. H) appeals from the orders pronounced in this high conflict family case. The reasons for judgement are indexed as 2018 BCSC 921 (the "Reasons") and comprise 55 pages.
- [2] Many of the orders made by the judge are challenged on appeal including the reapportionment of the family home and debt pursuant to ss. 95, 96, and 97 of the Family Law Act, S.B.C. 2011, c. 25 [FLA], the date of valuation of the family home, lump sum spousal maintenance, past extraordinary or special expenses for the children, and certain miscellaneous property issues.
- [3] For her part, N.K.'s (Ms. K) position is that Mr. H has not identified any reviewable error.
- [4] For the reasons that follow, I would dismiss the appeal.

II. Background

- [5] The parties entered into an arranged marriage in India on July 17, 2002. Mr. H was 52 years old at the time, while Ms. K was 28. It was Mr. H's second marriage. The parties moved to British Columbia in 2003, where they had two children who were born in 2004 and 2009 and reside mainly with Ms. K. The parties obtained an Islamic divorce on February 17, 2015--the date of separation. They legally divorced on June 6, 2017. Mr. H is a Canadian citizen and has held well-paying jobs at the University of British Columbia ("UBC"), the federal government, and the City of Surrey. Ms. K was unemployed for the duration of the marriage.
- [6] From 2008 onwards, and for a brief time in 2003, Mr. H and Ms. K resided in a home in Surrey ("the family home") that Mr. H had bought with his former wife in 1996. It was valued at \$215,000 in 2002, with a mortgage totalling \$140,000, resulting in a net value of \$75,000. The mortgage was paid off in 2008. Between 2003 and 2008, the parties resided in a basement suite in New Westminister and collected rental income on the Surrey home. Ms. K was added to the title of the family home as a joint tenant in 2011, which likely assisted Mr. H in securing a \$300,000 line of credit against the home. The line of credit was used to provide a loan in favor of a friend of his, Mr. Ram. At the time of trial, the amount outstanding on the line of credit registered against the home was approximately \$150,000.

[7] On June 6, 2017, the parties entered into a "Final Consent Order" (the "Consent Order") which, inter alia:

- divorced the parties subject to s. 12 of the Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.);
- provided that Mr. H pay Ms. K "spousal support in the amount of \$1,520.00 per month, in equal installments payable on the 1st and 15[th] of each and every month, commencing on June 15th, 2017 and continuing on each and every month thereafter, pursuant to the Divorce Act, reviewable at the trial of this matter or upon a material change in circumstances";
- acknowledged that Mr. H "has a current Guideline Income of \$111,961.67 for child support purposes" and ordered child support in the amount of \$1,631 per month reviewable annually; and
- adjourned all outstanding corollary relief "to the trial of this matter which has been set for four (4) days on February 13, 2016 to February 16, 2018 on a pre-emptory basis".

III. Reasons for Judgment Below

A: Overview

[8] The judge made various orders relating to support and the division of family property, which included:

- that the family home vest in Ms. K at its December 2015 value of \$520,000;
- Ms. K compensate Mr. H for a \$75,000 interest in the family home that was found to constitute excluded property;
- Ms. K compensate Mr. H for half of the remaining value of the family home, being \$222,500;
- Ms. K compensate Mr. H for \$2,500 worth of furnishings in the family home;
- Mr. H be solely responsible for a \$150,000 loan secured against the family home;
- Ms. K compensate Mr. H \$4,500 for his half interest in a property in India;
- Ms. K keep a 2014 CRV and Mr. H keep a 2008 Dodge Caravan, with Ms. K paying Mr. H \$6,750 for the difference in value;
- Mr. H either return jewelry to Ms. K that counts as excluded property or else pay her \$7,000 in compensation;
- Mr. H pay Ms. K \$7,500 to compensate for a \$15,000 withdrawal from their joint bank account in May 2015;
- half of Mr. H's \$120,000 Registered Retirement Savings Plan ("RRSP") vest in Ms. K, while half of Ms. K's \$19,000 RRSP vest in Mr. H;
- Mr. H's Canada Pension Plan ("CPP") be divided based on a separation date of February 17, 2015;
- Mr. H pay lump sum spousal support in the amount of \$150,000;

- Mr. H pay Ms. K \$4,668 in retroactive child support, calculated from August 1, 2015, and based upon a monthly rate of \$1,556;
- Mr. H pay 75 percent of the children's special expenses on an ongoing basis, including a retroactive payment of \$19,635 for expenses incurred between August 1, 2015 to June 1, 2017; and
- Mr. H's monthly child support obligation be adjusted to \$1,714 beginning June 30, 2018, based upon an annual income of \$114,776.

B: Credibility

- [9] According to the judge, the issues raised at the trial hinged upon the credibility of Mr. H and Ms. K, who were the only witnesses called and which related to:
- [18] a number of contested areas, including the existence and degree of family violence in the relationship, the use of and income from the family home, Ms. K's opportunity to become self-sufficient, the circumstances of Ms. K signing a line of credit and its relationship to family debt, and the existence or nonexistence of additional bank accounts or savings.
- [10] Furthermore:
- [24] Another difficulty is that Mr. H's evidence often directly contradicted the evidence of Ms. K, asserting facts and events that were not put to Ms. K in cross-examination. This issue, and the potential for unfairness in relation to such evidence, was raised early on with counsel for Mr. H, who explained that this was not the evidence he was expecting to elicit. Nevertheless, this pattern persisted.
- [11] While the trial judge found Ms. K to be a credible witness, she had significant concerns with respect to Mr. H, finding that there were many examples of his providing evidence that was evasive and inconsistent with the documentary evidence. One example referred to in the Reasons was the disputed value relating to the jewelry.
- [12] The judge concluded that she was "unable to accept Mr. H's oral evidence at face value" and afforded it no significant weight where it was unsupported by documentary evidence: Reasons at para. 31. Where Mr. H's evidence was contradicted by Ms. K, she preferred the latter's.

C: Family Violence

- [13] The judge also found that Mr. H had been controlling and abusive throughout the marriage, allowing Ms. K little to no financial independence, refusing her opportunities to educate herself, and subjecting her to threats and physical punishment. She reasoned that Ms. K's economic self-sufficiency had been "significantly diminished" as a result and that the children had a "higher than ordinary" need for stability and security: Reasons at paras. 57-58.

D: Excluded Property, the Valuation of the Family Home and Reapportionment of Family Assets

- [14] The judge then turned to the issue of excluded property and noted that, as a matter of law, any increases in the value of excluded property over the course of the marriage constituted family property, relying on s. 84(2)(g) of the FLA; *J.D.G. v. J.J.V.*, 2016 BCSC 2389 at para. 129; and *M.C.V. v. F.V.*, 2018 BCSC 96 at para. 44; Reasons at para. 62.
- [15] The judge found that, as of July 2002, the family home constituted family property under s. 84 of the FLA in that although the parties had lived in a basement suite between 2003 and 2008, they only did so to help pay off the mortgage. She rejected Mr. H's contention that the mortgage had been paid off with pre-marriage funds, citing the lack of evidence in that regard. She concluded that the net-value of the home at the time of marriage--\$75,000, being the value of the home as of 2002 less the mortgage--was Mr. H's excluded property.
- [16] Having considered s. 95 of the FLA, the judge then determined that an unequal division of property in favour of Ms. K was necessary to avoid significant unfairness. She noted that the standard of "significantly unfair" under s. 95 was a high one and that a valuation date other than the date of trial amounted to an unequal division of property and required a finding of significant unfairness. She also noted that the non-disclosure of assets could support a finding of significant unfairness: Reasons at paras. 77, 85, 86, and 88.
- [17] Mr. H and Ms. K had each sought an order that the family home vest in them and be valued at its December 2015 value of \$520,000, being an amount based on a third party valuation, with the judge noting that:
- [109] While neither approached this as a reapportionment in their favour, it is clear that such an order would result in a reapportionment of the value of the home in favour of the party who receives the home.
- [18] The judge referred to other evidence of value relating to the home:
- [110] The evidence also establishes that the value has increased since December 2015. Mr. H tendered a second valuation (that was not commissioned jointly) stating that the value of the house in 2017 was approximately \$655,000. I do not have any reliable evidence of the value of the home since that date.
- [19] The judge rejected Mr. H's submission that his financial contributions to the home warranted reapportionment in his favour, finding that Ms. K was entitled to reapportionment on a 60/40 percent basis in that:
- Mr. H retained at least one undisclosed bank account: FLA ss. 5, 95(2)(i), and 213;
 - it was highly likely that Mr. H retained other assets in his name that were undisclosed family property;

· neither party would be able to purchase the other's interest at the home's present-day value, despite the children's heightened need--due to the family violence--for stability and continuity in housing: FLA s. 95(2)(i); and

· to a lesser extent, the family violence had affected Ms. K's economic self-sufficiency: FLA s. 95(3).

[20] Of significance on appeal was the judge's finding that Ms. K's self-sufficiency would be largely addressed by a lump sum spousal support award.

[21] The 60/40 apportionment would be effected by ordering a 50/50 apportionment based on the lower December 2015 valuation of the family home of \$520,000.

E: Reapportionment of Family Debt

[22] Turning to the question of family debt, the judge held that due to reasons of significant unfairness, Mr. H was solely responsible for a \$150,000 line of credit debt incurred during the marriage, finding that although Ms. K had signed the loan approval forms, she did so due to Mr. H's control over her. The debt was incurred as part of an investment scheme involving Mr. H's friend, Mr. Ram, was entirely for Mr. H's benefit, and Mr. H had complete control over its repayment terms and ultimate recovery. Accordingly, the judge concluded it fell outside the normal course of the spousal relationship.

F: Spousal Support

[23] The next issue related to spousal support. The notice of family claim, which was filed on July 22, 2015, sought:

An order that the respondent pay to the claimant lump sum and/or periodic spousal support retroactive to the date of separation and payable for an indefinite period of time.

[24] At the trial, Mr. H had sought the cancellation of his monthly spousal support obligation of \$1,520 owing pursuant to the Consent Order on the grounds of his imminent retirement. The judge agreed that his retirement amounted to a material change in circumstances, but found pursuant to s. 170(c) of the FLA that the circumstances instead warranted a lump sum spousal support payment of \$150,000, covering the next 11 years. In reaching this conclusion, the judge referred to Ms. K's forced financial dependence, limited English language skills, and lack of work experience.

[25] The judge's order of lump sum support, however, was made without any substantive submissions by the parties on this issue at the trial.

G: The Effective Result Regarding the Family Home

[26] The family home vested in Ms. K at its December 2015 value of \$520,000. The judge found that Ms. K should compensate Mr. H for his excluded interest in the family home of \$75,000 and half of the remaining value of the property as of December 2015 for a total of \$297,500.

- [27] From this amount, \$150,000 was deducted for the lump sum spousal support award. An additional \$150,000 was deducted because Mr. H was held entirely responsible for the underlying loan which was secured by the line of credit secured by the family home: Reasons at para. 139. The judge went on to find that this payment could be most conveniently made through a deduction of the amount Ms. K owed Mr. H for his share in the family home: Reasons at para. 141. Having decided to make this deduction, the judge ordered the removal of Mr. H from responsibility for the line of credit over the home and eliminated Ms. K's entitlement to share in the recovery of the line of credit funds loaned by Mr. H to his friend, Mr. Ram: Reasons at paras. 138-141. Finally, Ms. K was also to compensate Mr. H for \$2,500 worth of furnishings in the family home.
- [28] From a practical perspective, therefore, Ms. K's obligations to satisfy the compensation order for Mr. H's interest in the family home were satisfied by the deduction of Mr. H's line of credit debt of \$150,000 and the lump sum award for spousal support of \$150,000. The remaining \$2,500 owing from Mr. H to Ms. K was satisfied by accounting for her obligation to compensate him for the household furnishings. As a result, the house vested in Ms. K without any further amounts owing between the parties, save for unrelated miscellaneous property issues, which I will review below.

IV: Grounds of Appeal

- [29] The appellant raises a number of issues on appeal, which are summarized as follows. Did the judge err:
- a) in awarding the lump sum spousal support award of \$150,000?
 - b) in applying the "significant unfairness" test in s. 95 of the FLA and reapportioning the family home, by valuing it at the December 2015 value, that is, effectively 60/40 in favour of Ms. K?
 - c) by reapportioning family debt pursuant to s. 95(1) of the FLA and ordering that Mr. H is solely responsible for the \$150,000 line of credit debt?
 - d) in assessing various assets, including: the Honda CRV, Mr. H's RRSP, Ms. K's property in India, and monies withdrawn from a joint bank account? and/or
 - e) by making an arithmetic error in calculating the amount owed by Mr. H for retroactive special expenses for the children?

V: Analysis

A: Standard of Review

- [30] Recently, this court once again noted the highly deferential standard of review required for the exercise of discretion in family law cases in order to promote certainty and finality: *Venables v. Venables*, 2019 BCCA 281 at para. 72. Similarly, in *Hsieh v. Lui*, 2017 BCCA 51 at para. 38, Justice Dickson stated:

[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.

B: Arguments on Appeal

Introduction

[31] In light of my conclusion that a reviewable error occurred with regard to the manner in which the judge determined the issue of lump sum spousal support, I shall first address this issue. That is because the award of lump sum support played an important factor in the judge's decision regarding reapportionment of the family home in Ms. K's favour, and to a lesser extent, her decision not to make any award for retroactive spousal support.

Lump Sum and Retroactive Spousal Support

[32] I summarily reviewed the Reasons on this point at paras. 23-25 above, but it is of assistance in considering the issues and arguments on appeal to set out the judge's findings and reasoning in greater detail.

[33] The judge began by setting out the applicable legal framework for an application to vary or cancel spousal support pursuant to s. 167(2) of the FLA, which sets out a number of bases for changing spousal support orders, including a material change in circumstances. As to whether such a change occurred, the judge stated the following at paras. 145-148 of the Reasons:

[145] Retirement may be considered a material change in some circumstances, and gives rise to issues regarding double recovery of spousal support after pension division. Imminent retirement is also a reason that lump sum spousal support may be awarded pursuant to s. 170(c) of the FLA: *Rees v. Rees*, [1980] B.C.J. No. 1680 (S.C.) at para. 14. It also may be appropriate where the payor spouse lives abroad with a new family: *Wilson v. Wilson*, [1997] B.C.J. No. 723 (Q.L.), 27 R.F.L. (4th) 131 (C.A.) at paras. 16-19.

Determination of Spousal Support Variation

[146] Mr. H says his imminent retirement is a material change in circumstances that warrants cancellation of his spousal support obligation.

- [147] Ms. K argues that in addition to Mr. H's imminent retirement, with his remarriage he may choose to spend some if not all of his retirement with his new wife in Fiji. Although Mr. H says that he intends to bring his new wife here, he also admits that he has made several attempts to get permission for her to join him in Canada and that none of his applications have been successful. He allowed that it was a possibility that he could move to Fiji.
- [148] Overall, I find that Mr. H's imminent retirement is a material change in circumstances, but not one that warrants cancellation of spousal support.
- [34] Rather than cancelling the spousal support as sought by the respondent, the judge went on to assess Ms. K's entitlement to spousal support and award a lump sum payment. The judge made the following findings, leading to the lump sum award, at paras. 150-155 of the Reasons:
- [150] I find that her entitlement to spousal support should ordinarily continue for another 11 years based on the length of the marriage, the circumstances of her forced financial dependence, her English skills, and her lack of experience in the Canadian workforce.
- [151] I accept that Mr. H's imminent retirement is a material change in circumstances. I also consider that it will raise significant complications around double recovery for spousal support when Mr. H's income is largely based on pension income, some of which will be allocated to Ms. K.
- [152] In my view, this issue is one that is preferable to address here, rather than to postpone to a future variation application. In doing so, I recognize that the parties' income in 2018 is perhaps less certain than it would be if the application was made in a year's time. Nevertheless, I have enough information to conclude that Mr. H will be relying on his savings and pensions once he retires, that they may be considerable given his length of service with the federal government, that 13 years of those pensions were accrued during the course of this marriage, and that there may be other pension funds accrued before the marriage that would still be available to provide both child support and spousal support. However, recovery is more likely to be difficult after Mr. H's retirement, and it remains highly unlikely, even if Ms. K is successful in her education and employment plans, that she will have sufficient income in the next 11 years to meet the objectives of spousal support set out in the FLA.
- [153] I find that in all the circumstances, a variation should be ordered of the current spousal support award, from bi-monthly installments to a lump sum payment that takes into account the stated anticipated material change in Mr. H's circumstances and Ms. K's efforts and prospects to become self-sufficient over time.
- [154] In reviewing the SSAG and DivorceMate calculations based on the current ordered spousal support amount term that I find appropriate for the support to be paid, and taking into account the various tax benefits and liabilities to the parties of such an order, I order that Mr. H pay lump sum spousal support to Ms. K in the amount of \$150,000.

- [155] I therefore order that an adjustment of \$150,000 be made to the amounts Ms. K is required to pay to Mr. H for the Surrey home. Mr. H may cease to make spousal support payments upon the transfer of the home to Ms. K in accordance with this order.
- [35] The appellant advances several arguments on appeal, but I shall focus only on those that I consider to have some merit.
- [36] Mr. H's position at the trial was that spousal support should be cancelled in light of his imminent retirement and Ms. K's future work prospects. He says that Ms. K's initial position was that the amount should continue on a periodic basis as set out in the Consent Order. He argues that the issue of lump sum support was raised by the judge during closing submissions and that the parties were not provided with the opportunity to make substantive submissions on the issue. It was only when the judge raised lump sum support with Ms. K's counsel that she was prepared to "support" such a payment.
- [37] He submits that the judge erred in ordering reapportionment of the family home in favour of Ms. K and failing to properly consider his retirement as a material change in circumstances.
- [38] He further challenges the amount of the award in that it was based on an 11-year period at the \$1,520 per month amount contained in the Consent Order, notwithstanding the evidence that Mr. H, who was 68 years of age at the time of trial, was going to retire in the foreseeable future and the judge found this to be a material change of circumstances arising from the date of the Consent Order.
- [39] Mr. H says that the Consent Order provided for the continuation of periodic support "reviewable at the trial of this matter or upon a material change of circumstances", and yet it was only a material change of circumstances that was referenced by the judge at para. 143 of the Reasons.
- [40] He also points to a "double dipping issue"--that is, the fact that notwithstanding having ordered a division of Mr. H's pensions, the judge erred in taking his unknown pension income into account to provide for spousal support.
- [41] Simply put, he argues that the judge erred in deciding it was preferable not to postpone the determination of spousal support to a future variation application. Effectively, by ordering a lump sum payment, the judge eliminated any possibility of Mr. H being able to apply for variation of the Consent Order when his various sources of income had been determined following his retirement, which was anticipated to be later in 2018.
- [42] Ms. K submits that since the notice of family claim had sought lump sum support, it was entirely appropriate for the judge to consider the issue and make the award in question. Furthermore, the judge considered relevant factors in determining lump sum support was appropriate, that is: the length of the marriage, the circumstances of Ms. K's forced financial dependence, her English skills, and her lack of experience in the workplace.

[43] I will first deal with Mr. H's argument that the judge misread the Consent Order, which provided for the periodic support to continue "reviewable at the trial of this matter or upon a material change in circumstances".

[44] While it is clear from *Leskun v. Leskun*, 2006 SCC 25 at paras. 36-37 that a review application does not require proof of a material change of circumstances, in my view, nothing turns on that distinction on this appeal.

[45] The judge was entitled to proceed as she did in that:

- she found that Mr. H's self-described imminent retirement would constitute a material change in circumstances; and
- neither party apparently sought a review of spousal support.

[46] When I turn to the substantive arguments on appeal, however, I am of the view that the judge made certain reviewable errors in her approach to the award of lump sum support.

[47] The first relates to the manner in which the lump sum award was made.

[48] In my view, it is clear from the record that both parties approached spousal support within the context of the periodic payment provision in the Consent Order.

[49] The issue initially arose this way in an exchange between the judge and Ms. K's counsel:

THE COURT: And I just wanted to stop you there. Because there is a request for ongoing spousal support, but we've also heard from Mr. [H] that he is planning to retire at the end of this year. That just seems to be a recipe to me that we're going to have to be revisiting spousal support in the next 10 months after a property division has already been done. Are you -- do you have any concerns about the appropriateness of -- of doing a spousal support calculation now when there's a reasonable chance on the evidence right now that that's going to have to be adjusted and there won't be, presumably, any -- quite possibly any kind of division of property to address that left as that issue will already have been addressed?

MS. TAYLOR: Certainly, My Lady. That is in consideration. What my client hopes to do and -- and I give her great kudos in her real determination to pull herself together -- she does have severe anxiety and depression issues -- to get out, find a job that has not only stability, has full time, but leaves her a place to be with her children on school hours. I consider that very ambitious and very noteworthy. She does say that she hopes to start the course in March when it starts. Unlike what is in Mr. [H]'s submissions, she has, I understand, registered for the course. It's \$14,000. And she is hoping to be at the end of that year-long course able to support herself. So, I think there is -- what I'm asking for in light of those possible changes is a review giving her the year to become sufficiently educated. The reason we included the letter from the Surrey School Board was the fact that there's a very good chance of employment; that they are, in fact, looking for special teaching assistants for special needs children. So, that we would like something like a review in perhaps a year and a half and that would resolve both those issues.

THE COURT: I suspect, though, Mr. [H] is going to be able to review more than a year and a half -- earlier than a year and a half from now. I mean, he's asking for it right now, you know. And if he's unsuccessful in having it terminated now he would probably be looking for it to be terminated -- if he does retire at the end of 2018 for it to be reviewed then. And I haven't seen any kind of discussion of -- of whether that may be addressed somehow in some kind of lump sum payment. Have you considered that possibility?

MS. TAYLOR: No. There's only one answer to that one.

THE COURT: Okay. Well, I will ask the same thing to Mr. Gill as well.

MS. TAYLOR: Yes. It actually would be very beneficial to my client in terms of tax effects and so forth, but we haven't looked at that because we don't see a great deal of liquid assets in the hands of Mr. [H]. Because part of what is set out in my submissions are the difficulties of disclosure. But, certainly, that is open. What my concern is and my client's concern is, My Lady, is that -- his state of intention to relocate to Fiji upon his retirement. And that could be problematic for her in terms of child support. So, she is very anxious that she have some security for the children. That is the basis of virtually everything that she is before the court asking for.

[Emphasis added.]

[50] As the following exchange indicates, lump sum support was not raised specifically with Mr. H's counsel:

THE COURT: And I know this isn't in the pleadings, and I don't want to create problems that it's not, but it does seem to me that this is a situation where Mr. [H] is going to -- is saying quite clearly that his spousal support -- ability to provide spousal and child support is going to be diminished significantly within a year. That is, I understood, to be a pretty common factor in reapportioning a family home. That -- that isn't before me other than just a reapportionment of value.

MR. GILL: Yes.

THE COURT: But what's your position on that?

MR. GILL: I would like to add -- now, I - I understand that, but the court -- feel that the court must also consider the fact that though Mr. [H] -- now, I'm just -- I'm just responding to that specific argument here.

THE COURT: Yes.

MR. GILL: Mr. [H] will be receiving pension income that will continue for years to come. So, with regards to spousal support, should -- should a -- should Mr. [H] receive -- receive a ruling in his favour with regards to what he's asking for from the home, I'm sure my friend would - or whoever Ms. [K]'s counsel may be at a later time -- will -- will advise that, hey, these -- these matters were already ordered on. But he is receiving pension income, significant pension income, both at the end of this year and going forward.

THE COURT: So, he can pay support out of the pension income is your position.

MR. GILL: That should -- based on -- based on my response to your -- to your question there, yes.

THE COURT: You know, I have to say, this is not an area that I'm very familiar with and I - you know, once the pensions are split and he is still getting a pension income, I imagine there would be some argument that I've -- I have already given half my pension.

MR. GILL: Well, the thing about the pension also is that Ms. [K] needs to realize is that she is only 43 years old. Now, some of these pensions it's -- it's not simply you just cash them out and then distribute the funds. I don't know the exact particulars on it -- for example the UBC pension -- but I know it's a little bit more difficult than that.

[Emphasis added.]

[51] While spousal support was briefly discussed between Mr. H's counsel and the court, it was within the context of a potential reapportionment of the family home, not an award of a lump sum, let alone such an award based on the Consent Order for a duration of 11 additional years.

[52] It is not an answer, in my view, for Ms. K to point to the fact that a claim for lump sum support was advanced in the notice of family claim when, having been asked specifically by the judge whether Ms. K had considered advancing an argument regarding lump sum support, her counsel candidly answered "no".

[53] The judge found it to be preferable to address future spousal support in the Reasons, rather than to postpone the issue to a future variation application. She made this decision:

- notwithstanding the fact that the parties' income in 2018 "is perhaps less certain than it would be if the application was made in a year's time" (para. 152);

- finding she had enough information regarding Mr. H's pensions and savings accrued both before and during the course of the marriage to conclude that he had the ability to provide for both child and spousal support but that "recovery is more likely to be difficult" after he retired (para. 152); and

- acknowledging that Mr. H's imminent retirement "will raise significant complications around double recovery for spousal support when Mr. H's income is largely based on pension income, some of which will be allocated to Ms. K" (para. 151).

[54] The judge then made the \$150,000 lump sum award, having reviewed "the SSAG and DivorceMate calculations [and] based on the current ordered spousal support amount item and taking into account the various tax benefits and liabilities to the parties of such an order": Reasons: para. 154.

[55] Yet, to the extent there was evidence regarding Mr. H's pensions, it was to the effect that:

- his Municipality of Surrey pension entitlement of \$3,365.70 was, for the most part, transferred to an RRSP account when he retired in 2012; and
- his CPP pension benefit before division was \$2,788.93, and after division, \$2,375.50.

- [56] The judge does not identify what the "various tax benefits and liabilities" were that she took into account in making the lump sum award. However, it is clear that the award was based on an 11-year period from the date of trial at the \$1,520 per month amount set out in the Consent Order: Reasons at para. 38. Multiplying this amount and duration, the gross amount would be \$200,640. As lump sum and period payments are treated differently for tax purposes, often a discount to account for tax consequences is applied: *Robinson v. Robinson*, 2011 BCSC 1489 at paras. 129-130, *aff'd* 2012 BCCA 497 (where a 35 percent tax deduction was applied). In this case, it appears the judge applied a tax deduction of 25 percent, which resulted in a net amount of \$150,480 (rounded to \$150,000).
- [57] There was also no evidence as to what Mr. H's UBC pension would be, the only document in evidence regarding that entitlement being a form signed by Mr. H on February 5, 2018 at the commencement of the trial, in which he agreed to have the benefits divided pursuant to Part 6 of the FLA. As noted above, his counsel had stated to the judge during legal argument that the particulars of the UBC pension were not known. And yet, since it was Mr. H who was seeking to cancel the spousal support based on a material change of circumstances, it was his obligation to lead the required evidence on this point.
- [58] Having ordered division of the RRSs and the employment pensions, the judge acknowledged the imminent retirement "will raise significant complications around double recovery": para. 151. Yet this issue was not addressed in any substantive way in the Reasons, particularly as to whether it could or should impact the amount of the lump sum award.
- [59] This issue, in my view, needed to be properly addressed by the judge in that double recovery by a recipient spouse of a pension right both as an asset subject to equalization and as a source of income for spousal support after the pension-holding spouse's retirement ought to be avoided if possible: *Boston v. Boston*, 2001 SCC 43 at para. 64. There are exceptions to the general rule against double recovery including spousal support orders based on need rather than compensation: *Boston* at para. 65. However, these were not canvassed by the judge.
- [60] Section 12.6.3 of the Spousal Support Advisory Guidelines [SSAG] is clear that the general rule from *Boston* may require excluding a portion of the payor spouse's income from the formula to avoid double recovery of previously divided property: see also *Puiu v. Puiu*, 2011 BCCA 480 at paras. 17-18. More to the point, the failure to adequately address the potential issue of double recovery where it arises when making a spousal support order is a reviewable error: *Baryla v. Baryla*, 2019 BCCA 22 at paras. 45-47.
- [61] But it is not evident that "significant complications" related to double recovery would have arisen on Mr. H's retirement. In that regard, the appellant was afforded the opportunity and did in fact address the "double dipping" issue in this court. As I have noted, in the court

below, Mr. H led no evidence as to the value of the UBC pension, and in this court he did not seek to adduce fresh evidence regarding either his proposed retirement date, whether he had in fact retired, and the value of the UBC pension. Accordingly, in my view, to the extent the appellant submits there are deficiencies in the evidentiary record that would preclude a proper consideration of "double dipping" and whether any "significant complications" arose, it was incumbent on him to have that evidence before the Court.

- [62] In any event, I am of the view that this issue can be addressed by the Court on the basis of the evidentiary record as it exists within the context of its analysis of all the relevant factors pertaining to an award for lump sum spousal support in the circumstances of this case.
- [63] In *Boston*, double recovery was described as "inherently unfair" where the pension-holding spouse transferred real assets of equal value to the pension to the other spouse as part of the division or equalization of assets, and subsequently on retirement, also paid spousal support out of the pension income: paras. 35-36. In this case, Mr. H's pensions were divided pursuant to Part 6 of the FLA. There is authority to the effect that when a pension is divided pursuant to Part 6, rather than by a prior equalization payment or asset transfer, then no double recovery occurs: *Trewern v. Trewern*, 2009 BCSC 236 at paras. 19-20, citing *Bennett J.* (as she then was) in *Allen v. Allen*, [1999] B.C.J. No. 895 (B.C.S.C.). This is because each party's entitlement is received as income, which can be used to compare their respective positions and determine whether further support is warranted: see *C.P. v. K.W.A.*, 2018 BCSC 332 at paras. 334-337; *Pepper v. Pepper*, 2016 BCSC 1542 at paras. 87-89; and *T.(P.) v. T.(M.)*, 2016 BCSC 316 at paras. 83-86. Unfortunately, the reasons failed to disclose how the issue of double recovery was avoided by the lump sum award.
- [64] For these reasons, I would accept the appellant's submission that even if he were unsuccessful in having the spousal support terminated at the trial, the judge, by making the lump sum award, essentially deprived him of the ability to pursue a variation application once he had retired and his financial circumstances at that time were known. As discussed in *Davis v. Crawford*, 2011 ONCA 294, this is an inevitable consequence of a lump sum spousal support order.
- [65] I am mindful of Mr. H's counsel's comments to the judge that the appellant could pay support out of his pension income. Further, in this court, both parties were afforded the opportunity to address the propriety of an award of lump sum support.
- [66] The relevant factors in assessing whether lump sum spousal support is preferable to periodic payments were discussed in *Davis* at paras. 67-68:
- [67] The advantages of making such an award will be highly variable and case-specific. They can include but are not limited to: terminating ongoing contact or ties between the spouses for any number of reasons (for example: short-term marriage; domestic violence; second marriage with no children, etc.); providing capital to meet an immediate need on the part of a dependant spouse; ensuring adequate support will be paid in circumstances where there is a real risk of non-payment of periodic support, a lack of proper financial disclosure or

where the payor has the ability to pay lump sum but not periodic support; and satisfying immediately an award of retroactive spousal support.

[68] Similarly, the disadvantages of such an award can include: the real possibility that the means and needs of the parties will change over time, leading to the need for a variation; the fact that the parties will be effectively deprived of the right to apply for a variation of the lump sum award; and the difficulties inherent in calculating an appropriate award of lump sum spousal support where lump sum support is awarded in place of ongoing indefinite periodic support.

[67] The factors set out in *Davis* apply in this province when lump sum support is considered: *Parton v. Parton*, 2018 BCCA 273 at para. 48. Additionally, lump sum support has been deemed appropriate in circumstances where the payor spouse has insufficient income to pay spousal support on an ongoing basis, but has capital assets to satisfy a lump sum award: *Robinson* at para. 102.

[68] While I am satisfied that the judge considered several of the relevant factors and could have ultimately ordered lump sum spousal support as she did, in my view, the process was flawed by the absence of any submissions by counsel. As stated in *Davis* at para. 75:

[75] Irrespective of whether the proposed support is periodic or lump sum, it is incumbent upon counsel to provide the judge deciding the matter with submissions concerning the basis for awarding and the method of calculating the proposed support, together with a range of possible outcomes. Further, it is highly desirable that a judge making a lump sum award provide a clear explanation of both the basis for exercising the discretion to award lump sum support and the rationale for arriving at a particular figure. Clear presentations by counsel and explanations by trial judges will make such an award more transparent and enhance the appearance of justice. Over time, this approach will undoubtedly foster greater consistency and predictability in the result.

[Emphasis added.]

[69] Despite this breach of the principles of trial fairness, I am satisfied that the record and submissions in this court are sufficient to uphold the judge's order.

[70] This court has ordered lump sum maintenance based on the record and submissions on appeal: see e.g., *Santelli v. Trinetti*, 2019 BCCA 319. Having heard the parties' submissions on lump sum spousal support in this court, I conclude that it is warranted in this case based on the *Davis* factors, including:

- the lack of financial disclosure by Mr. H;
- the impact of family violence on Ms. K's ability to become self-sufficient, and on the children, heightening their need for stability and the consistency of remaining in the family home;

- the high conflict nature of the litigation between the parties, resulting in orders that all communication be in writing, respectful, and not abusive or threatening, and prohibiting both parties from exiting their vehicles at the pick-ups or drop-offs of the children;
- Mr. H's control over Ms. K, which included limitations on her educational and work opportunities, reducing her personal and financial independence;
- Ms. K's limited English skills;
- Ms. K's immediate need for capital to enable her to maintain her household and become self-sufficient, which she intends to do by taking courses and passing English exams;
- a real risk of non-payment in the future, particularly if Mr. H moves to Fiji. Although Mr. H says that he intends to bring his new wife to Canada, he has made several attempts to get permission to do so and has not yet been successful. He also regularly sends money to his wife in Fiji, immigrated to Canada from Fiji decades ago, and concedes that it was a possibility he may move to Fiji to be with his wife;
- Mr. H's ability to pay a lump sum order by way of an adjustment of his entitlement for his share of the family home; and
- Mr. H's potential inability to meet periodic payments at an appropriate amount after his retirement.

[71] These factors must, as the appellant submits, be balanced against any disadvantages that arise from a lump sum award: Davis at para. 66. I have already noted that ordering lump sum support effectively deprives Mr. H of the ability to seek variation in the future. The more important question, however, is whether his future self-sufficiency has been unduly impacted. In my view, the evidence he marshalled in support of his position that the Consent Order regarding spousal support should be terminated does not demonstrate a negative impact capable of outweighing the factors I have just identified. The appellant's history of non-disclosure--as well as the judge's other findings, including that he may have considerable savings and pension income once he retires, and that he may have other pension funds accrued before the marriage--support this conclusion. I am satisfied that, on balance, the factors favour a lump sum award.

[72] Most importantly, the judge, correctly in my view, found that Ms. K is entitled to spousal support on both compensatory and non-compensatory grounds. In such a case, despite the payor spouse's retirement plans, this court may uphold a significant lump sum award that meets the objectives of spousal support: see e.g., Parton at paras. 67-68.

[73] While the Consent Order provided for spousal support pursuant to the Divorce Act, the judge considered the application to vary spousal support under s. 167 of the FLA. Although the application ought to have been considered pursuant to the Divorce Act, both statutes require a distribution of resources to alleviate the economic consequences of the relationship or its breakdown: Bracklow v. Bracklow, [1999] 1 S.C.R. 420 (S.C.C.) at 440. The

objectives of spousal support, as set out in both s. 15.2(6) of the Divorce Act and s. 161 of the FLA, include:

- recognizing any economic advantages or disadvantages to the spouses arising from the relationship or its breakdown;
- apportioning between the spouses any financial consequences arising from the care of their child;
- relieving any economic hardship of the spouses arising from the relationship or its breakdown; and
- promoting the economic self-sufficiency of each spouse within a reasonable period of time.

[74] Where a spousal support order is insufficient to meet the objectives of spousal support, s. 95(3) of the FLA provides that this is a factor in assessing a claim for an unequal division of property. Furthermore, in *Moge. v. Moge*, [1992] 3 SCR 813 (S.C.C.), which dealt with an application to vary a support order made at the time of divorce, Justice L'Heureux-Dubé made the following oft-cited statement at 848-849:

[T]he purpose of spousal support is to relieve economic hardship that results from "marriage or its breakdown". Whatever the respective advantages to the parties of a marriage in other areas, the focus of the inquiry when assessing spousal support after the marriage has ended must be the effect of the marriage in either impairing or improving each party's economic prospects.

Equitable distribution can be achieved in many ways: by spousal and child support, by the division of property and assets or by a combination of property and support entitlements.

[Emphasis in original.]

[75] As this passage illustrates, a range of remedies is available to relieve the economic hardship of the relationship or its breakdown. In this case, even if the lump sum spousal support order could, arguably, have been lower to reflect Mr. H's imminent retirement and the prior division of his pensions, the result, based on the judge's findings, would have been the same. This is because the judge would have ordered a greater reapportionment of the family home in Ms. K's favour, as well as retroactive spousal support for a period of six months: Reasons at paras. 108 and 175.

[76] It is well-established that an appeal is from the order and not the reasons for judgment: *Henderson v. Mawji*, 2020 BCCA 43 at para. 10 (Garson J.A. in Chambers); *C.(K.K.) v. C.(A.P.)*, 2003 BCCA 295 at para. 19 (Newbury J.A., concurring).

[77] In my view, notwithstanding the procedural unfairness in the court below, since the outcome of the judge's reasoning on these issues would have been the same, the formal orders made and which are under appeal were appropriate in all the circumstances.

Reapportionment of the Family Home Using the Date of Valuation

[78] Reduced to its essentials, the appellant submits that the judge erred in:

- utilizing the December 2015 valuation of the family home, which had the practical effect of reapportioning the net equity 60/40 percent in Ms. K's favour once Mr. H's excluded property of \$75,000 was deducted;
- concluding that Mr. H had failed to disclose property, including at least one bank account and other investments;
- finding that the evidence demonstrated the high threshold of significant unfairness such that a reapportionment was warranted;
- considering family violence when there was "no evidence" of such conduct; and
- ordering reapportionment in light of the substantial separate lump sum spousal support award.

[79] Ms. K submits the unequal division was justified. She says the parties had agreed to use the December 2015 valuation date within the context of a "buy out" of the other's interest. Furthermore, the judge's conclusions regarding credibility, and in particular, the existence of family violence and undisclosed assets, were amply supported by the evidence.

[80] Subject to certain exceptions, the FLA statutory regime presumptively provides for the equal division of net property. Furthermore, pursuant to s. 87, unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6, the value of family property must be based on its fair market value, and the value of family property and family debt must be determined as of the date of an agreement dividing the family property and family debt, or of the hearing before the court respecting the division of property and family debt.

[81] Section 95 of the FLA provides the framework for unequal division, which Justice Garson recently summarized in *Singh v. Singh*, 2020 BCCA 21 at paras. 130-134:

[130] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, Justice Harris, for the Court, engaged in an extensive analysis of s. 95. He first noted that the Legislature sought to increase certainty, fairness, and predictability in property division matters with the FLA by reducing the discretion of the courts to depart from equal division: at para. 36. The test in the previous legislation (Family Relations Act, R.S.B.C. 1996, c. 128) only required unfairness, whereas the FLA requires "significant unfairness." In addition, the legislature more precisely specified the factors to be considered in applying this threshold.

[131] Justice Harris agreed with the analysis in *Remmem v. Remmem*, 2014 BCSC 1552, in which Justice Butler (as he then was) defines "significant" as "extensive or important enough to merit attention" and something that is "weighty, meaningful or compelling," concluding 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)": at para. 41, citing para. 44 of *Remmem*. Justice Harris then noted that it would be unwise to attempt to define the meaning of "significant unfairness" but found that reapportionment under s. 95 would

require "something objectively unjust, unreasonable or unfair in some important or substantial sense": at para. 42. He said:

- [144] 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.
- [132] Ultimately, Justice Harris held that unequal division was justified in the case under appeal given that the significant increase in value to one property in question was caused in part by the respondent after separation: at paras. 52-53.
- [133] In *V.J.F. v. S.K.W.*, 2016 BCCA 186, Justice Newbury described s. 95 as requiring a high threshold of "significant unfairness" to depart from equal division: at para. 81. Other cases have reached similar conclusions about the high threshold necessary to reapportion assets under s. 95. In *Khan v. Gilbert*, 2019 BCCA 80, for example, Justice Fenlon noted that cases in which unequal contribution was found to reach the significantly unfair threshold have involved marked, prolonged, and intentional or unexplained disparities in contribution to family burdens: at para. 32.
- [134] In summary, it is clear that the Legislature intended the general rule of equal division to prevail unless persuasive reasons can be shown for a different result: *Jaszczywska* at para. 41. Reapportionment will require something objectively unjust, unreasonable, or unfair in some important or substantial sense. This is in contrast to the previous legislation where courts had discretion under s. 65 to reapportion property or debt where it would be simply "unfair" not to do so. The threshold for "significant unfairness" is high. There must be a real sense of injustice that would permeate the result if the court did not deviate from the presumptive equal division.
- [82] The judge correctly summarized the authorities as they pertain to the threshold for significant unfairness under s. 95 of the FLA: *Reasons* at paras. 85-86. The issue then becomes whether the judge relied on appropriate factors in s. 95(2) in reapportioning the family home as she did.
- [83] I will first turn to the question of the valuation date.
- [84] In his factum, Mr. H argued that the judge erred in not valuing the family home at the time of trial. In oral submissions, however, his counsel conceded that the parties had agreed to use the December 2015 valuation date for the purposes of determining an appropriate "buy out" amount should the judge provide that opportunity to one of them.
- [85] Furthermore, the judge acknowledged that the increase in the family home's value between the 2015 and 2017 valuation "would result in a reapportionment of the value of the home in favour of the party who receives the home": *Reasons* at para. 109.

[86] With respect to the high threshold for significant unfairness, the judge made the following findings:

b. Undisclosed property

[97] Ms. K professed very little knowledge of the financial arrangements or assets of her marriage with Mr. H. Her knowledge of the banking was that she would accompany Mr. H to various banks at various times, including Vancity, CIBC and TD Canada Trust. He would pay for some services in cash, and would withdraw significant amounts of money for the purposes of things like purchasing the new Honda CRV in 2014. It appeared to her that he had significant reserves of funds for various purposes. However, in Mr. H's disclosure statements, he lists the bank accounts as holding no more than a few thousand dollars at the time of separation, and no investments were disclosed.

[98] Mr. H flatly denied having any additional bank accounts or assets other than those that are disclosed in his financial statements. In cross-examination, he admitted that he had other accounts, some at other banks, such as TD Canada Trust, which are not listed in his disclosure statements, but stated that these accounts have since been closed. It was not clear whether they were closed before or after separation.

[99] However, there is considerable evidence that such accounts or investments existed, and continued after separation. In bank statements put into evidence, it is clear that many transactions by Mr. H were transfers throughout the marriage. Some of those transfers were to mortgage accounts, but not all. In addition, not all of the accounts open during the marriage were accounted for in Mr. H's financial statements.

[103] On all the evidence, I find that Mr. H had at least one other undisclosed bank account and other investments at the time of separation that he used to provide funds to his now current wife, with whom he was having a relationship since at least 2012. I also find that it is highly likely, given his significant salary and lack of debt, that he continues to hold assets in his name that are family property and that were not disclosed.

[104] While I do not have specific evidence of the amounts in these accounts or investments, I consider it probable that Mr. H was directing family property to his current wife during his marriage to Ms. K, and I find that this supports a reapportionment of the value of the Surrey home in favour of Ms. K on the basis of significant unfairness.

[Emphasis added.]

[87] These findings are subject to a high degree of deference. Furthermore, the judge relied on s. 213 of the FLA--which expressly permits drawing an adverse inference based on non-disclosure--as well as the broad discretion in s. 95(2)(i) to consider any factor that may lead to significant unfairness in determining whether to order an unequal division of property. I see no error in the judge's approach.

- [88] Finally, the judge did not err by reapportioning the family home and ordering a "substantial separate" spousal support award, as the appellant argues. These two issues were clearly intertwined, as stated at para. 108 of the Reasons:
- [108] In this case, I have found that family violence was part of the "circumstances of the relationship between the spouses" that have and will continue to affect Ms. K's achievement of economic self-sufficiency. However, I also consider that this can be addressed through an award of lump sum spousal support. In the absence of the availability of such a lump sum, this factor would be very significant in this case and would support a substantial further reapportionment of the value of the home. However, as I have ordered lump sum spousal support, the achievement of the objectives stated in s. 161 of the FLA is a less significant factor with respect to the question of reapportionment more generally.
- [Emphasis added.]
- [89] As discussed at para. 75 above, absent the lump sum spousal support order, Ms. K would have received a greater reapportionment of the family home. Pursuant to s. 95(3) of the FLA, the court may order an unequal division of property where the spousal support order has not met the objectives of spousal support. At the same time, reapportionment of the family home, even if 100% in the recipient spouse's favour, does not defeat an additional spousal support claim: *Bodine-Shah v. Shah*, 2014 BCCA 191 at paras. 69-70.
- [90] The judge's determination of what constituted an appropriate reapportionment of the family home was informed by her decision to order lump sum spousal support. I have already concluded a lump sum support award is warranted in this case, in part due to concerns regarding the risk of non-payment of periodic support in the future. The judge's purpose in ordering the lump sum award was to meet the objectives of spousal support, even if the effect was a redistribution of property between the parties: see *Davis* at paras. 60-62. I can find no error in the judge's decision to reapportion the family home 60/40 in Ms. K's favour based on factors including Mr. H's lack of financial disclosure and the effects of family violence on the children, while meeting the objectives of spousal support separately.
- [91] It follows that even if the lump sum support of \$150,000 was higher than it would have been if the Consent Order amount had been affected by Mr. H's imminent retirement, there was a proper evidentiary basis for the judge to conclude that a greater apportionment than 60/40 percent of the family home would have been appropriate under the circumstances.
- [92] Accordingly, I would not accede to this ground of appeal.
- [93] I shall now turn to the other grounds of appeal, all of which I am of the view should be dismissed.

Family Debt and the \$150,000 Line of Credit Loan

- [94] Under s. 86 of the FLA, family debt includes all financial obligations incurred by a spouse from the commencement of the relationship until separation, and those incurred following the date of separation if incurred for the purpose of maintaining family property. Once a debt is determined to be a family debt, as with family property, the court may engage in a reapportionment analysis on the basis of significant unfairness under s. 95 of the FLA.
- [95] I have referred to the judge's conclusions regarding the family debt at para. 22 above. The framework to which she referred in her analysis on this point included, at para. 121 of the Reasons, the statement that:
- [121] Section 95 of the FLA provides the court with limited jurisdiction to reapportion family debt if equal division would be significantly unfair. This provision is "not an invitation to the parties to review every financial transaction that occurred during a marriage, to which one of the parties upon separation takes objection": *J.S.R. v. P.K.R.*, 2017 BCSC 928 at para. 296.
- [96] After her review of the evidence on this issue, the judge noted that the parties' evidence "diverges significantly on the events leading up to the loan": Reasons at para. 128. In the result, she concluded as follows at paras. 136-138:
- [136] I find that this is a rare case where debt incurred during the course of the marriage should be reapportioned entirely to one of the spouses, Mr. H.
- [137] Section 95(2)(d) of the FLA allows the court to order an unequal division of family debt if equal division would be significantly unfair, having regard to whether the debt was "incurred in the normal course of the relationship between the spouses".
- [138] There is no question that the [line of credit], now sitting at just under \$150,000, was incurred during the course of the marriage and qualifies as family debt. However, I find that the debt was taken out over the house for the purposes of an investment scheme that was entirely Mr. H's and not incurred in the normal course of the spousal relationship. This was not a debt that was incurred through mutual agreement or even forbearance, but as a result of the control that Mr. H had over Ms. K in this relationship. Finally, I find that Mr. H also has complete control over the repayment terms and the ultimate satisfaction of this debt, and has not included Ms. K or her counsel in the negotiations or legal proceedings involved in recovering the debt. It would be significantly unfair in all the circumstances to require Ms. K to be responsible for repayment of a debt that she did not willingly incur and which she is excluded from the process for recovering.
- [139] I therefore order that Mr. H is entirely responsible for repayment of the amounts owing on the LOC over the Surrey home in full.
- [97] The appellant argues that the judge erred in law in determining that the loan to Mr. H's friend "was not incurred in the normal course of the spousal relationship": Reasons at para. 138. He further submits that Ms. K's evidence on this issue "is simply not feasible".

[98] On a review of the Reasons as a whole, it is clear that the judge exercised her discretion to reapportion the entire \$150,000 family debt to Mr. H based on his conduct in securing the loan for an investment scheme that he had complete control over. As Ms. K has demonstrated, there was an evidentiary basis on the record for the judge to reach her conclusions on this issue. Furthermore, the judge's discretionary decision attracts significant deference on appeal.

[99] In my view, the appellant simply seeks to reargue the unsuccessful submissions made in the court below and, notwithstanding the judge's findings of fact and credibility, to have this court reach different conclusions. That is not the role of this court.

[100] I would not accede to this ground of appeal.

Other Issues Including: Vehicles, RRSP's, India property, Post Separation Withdrawals, and Retroactive Special Expenses for the Children

[101] Since the appellant challenges the judge's findings pertaining to the division of other assets, it is necessary to briefly review the Reasons as they relate to these issues. One alleged error relating to Ms. K's jewelry was essentially abandoned at the hearing of the appeal.

Vehicles

[102] Ms. K owned a Honda CRV, Mr. H, a Dodge Caravan. The CRV was worth significantly more than the Caravan. The judge stated in the Reasons that Mr. H did not provide any evidence with respect to the value of the CRV. The judge accepted Ms. K's evidence, finding that the value of the CRV was \$18,000 and the Caravan was \$3,600. She ordered that Ms. K should keep the CRV and Mr. H the Caravan. On the basis of the evidence, she ordered that Ms. K compensate Mr. H for the difference in the value between the vehicles, less one-half of Mr. H's \$900 ICBC payout, resulting in a total of \$6,750 owing.

Pensions and RRSPs

[103] Ms. K had sought an equal division of Mr. H's pensions with the Federal government and UBC. The judge ordered division in accordance with Part 6 of the FLA and no appeal is taken from that order.

[104] Ms. K also sought a 50 percent share in Mr. H's RRSP, which was valued at \$170,120 as of January 2017. Ms. K also had a spousal RRSP in the amount of \$19,000. The judge found that both RRSP's were family property and subject to the presumptive equal division under the FLA.

[105] Mr. H had argued that a portion of his RRSP constituted excluded property since he had the RRSP at the time of the marriage in India in 2002.

[106] Noting that Mr. H had the burden of establishing that a portion of the RRSP was excluded property, the judge dealt with these issues as follows:

- [194] Mr. H's evidence in this respect was to provide the court with a document showing his contribution record to his RRSP that he says indicates that he personally contributed approximately \$70,000 to his RRSP after 2002. However, he agrees this record does not show what amount of funds were in the account in July 2002 at the time of marriage, what the funds have been invested in, what income and interest has been generated by those funds and the funds deposited since 2002, or what other contributions may have been made during that period. For example, it was established that Mr. H received a payout to his RRSP in lieu of a pension from the City of Surrey. Given that Mr. H was recently divorced at the time of his marriage to Ms. K, some clearer statement as to what his share of his RRSP was in 2001 would have been expected.
- [195] Overall, Mr. H has not adduced the evidence necessary to determine what portion of Mr. H's current RRSP was excluded property at the time of his marriage. The court is therefore left without the evidence necessary to make a specific finding of excluded property. Nevertheless, I accept that it is improbable that contributions of \$70,000 since 2002, even with potential additional transfers from other sources, would account for an additional value of \$100,000. While my finding is necessarily imprecise, I find that half of that additional amount was more likely than not already held by Mr. H at the time of the marriage. I therefore find that Mr. H holds \$50,000 of his RRSP as his own excluded property. The remaining amount held in the RRSP account of over \$120,000 is family property and Ms. K is entitled to 50% of that amount. Mr. H is entitled to 50% of Ms. K's RRSP. The appropriate adjustments should therefore be made and arrangements made to vest the RRSPs accordingly.
- [107] As these passages illustrate, notwithstanding the absence of any evidence, the judge accepted Mr. H's claim that a portion of his RRSP was excluded property.

The India Property

- [108] The parties had purchased a vacant rural property in India during the marriage. It was registered in Ms. K's name with the funds provided by Mr. H. The deed indicated a purchase price of the equivalent of \$9,000 Canadian. Mr. H testified that the purchase price was in fact approximately \$30,000 and the present value approximately \$60,000.
- [109] The judge stated in the Reasons that "[u]ltimately Mr. H admitted he had no idea what the current value of the property was": Reasons at para. 179. Accordingly, she considered the best evidence of the value of the property to be what was shown on the deed.
- [110] Having noted that Mr. H was a Canadian citizen who emigrated from Fiji, at para. 181 of the Reasons, the judge said:

[181] This property is in Ms. K's name as she was an Indian citizen at the time and able to purchase the property. There is some evidence that Mr. H has a designation that might also allow him to own property in India. Overall, however, I consider that the evidence supports that it would be logistically very difficult for Mr. H to have conduct of the sale of the property. Ms. K is therefore required to buy Mr. H out of his interest in the India property at 50% of its value, or \$4,500.

Post-Separation Bank Account Withdrawals

[111] The judge ordered that Mr. H pay \$7,500 to Ms. K, being 50 percent of the \$15,000 Mr. H withdrew from the joint account post-separation in May 2015. The judge stated at para. 197 in the Reasons that "Mr. H does not recall what it was for".

[112] On appeal, Mr. H says he did not make the withdrawal in question. In the alternative, he seeks a set-off in relation to airline tickets purchased by Ms. K for her and the children post-separation.

Retroactive Special Expenses for the Children

[113] At para. 170 of the Reasons, the judge stated:

[170] In addition, Mr. H has not been paying any portion of the children's special and extraordinary expenses, which I accept to be \$770 on average since 2015, including child care and Islamic school tuition. Based on the CSG apportionment of after tax costs, I order that Mr. H must pay 75% of the children's special expenses on an ongoing basis. In addition, he must retroactively compensate Ms. K in the amount of \$577.50 per month since August 1, 2015. This amounts to an additional \$19,635 in child support owed to Ms. K. up to June 1, 2017.

[114] The appellant submits that the judge made an arithmetic error in calculating the retroactive special expenses for the children. He argues that the amount should have been \$13,282.50 based on \$577.50 per month for a period of 23 months from August 1, 2015 up to and including June 1, 2017.

[115] After reviewing the record and the judge's analysis on this issue, I have concluded that no reviewable error was made. The Reasons were delivered on June 5, 2018, which is when the order under appeal was made.

[116] In my view, the reference "since August 1, 2015 up to June 1, 2017" was an inadvertent error and the judge intended to award past special and extraordinary expenses from August 2015 up to but not including June 2018, a period of 34 months. There was no reason for the judge to terminate the retroactivity a year earlier. In fact, at para. 40 of the Reasons, she stated:

[40] I find that Ms. K is entitled to retroactive child support from the date that Mr. H left the matrimonial home in August 2015 to the date he began paying child support on November 1, 2015. These retroactive payments amount to \$4,668. In addition, Mr. H has not been paying any special expenses. I find that he is required to pay 75% of the children's special expenses retroactively and on an ongoing basis.

[Emphasis added.]

[117] Furthermore, using "up to June 1, 2018" as the material date in the calculation of arrears would provide the basis for the amount ordered, being \$19,635, based on 34 months at \$577.50 per month.

[118] Accordingly, I am satisfied that no substantive error was made.

Conclusion on the Other Issues

[119] Based on the above summary of the evidence and findings by the judge on these various issues, and considering the high degree of deference owed, there is no basis, in my view, upon which this court can interfere with the findings in question.

[120] Accordingly, I would not accede to any of these grounds of appeal.

VI: Conclusion

[121] For the foregoing reasons, I would dismiss the appeal.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Grauer"

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