
CANADA / JUDGMENT

Phillips v. Saunders

2018 BCSC 960

COURT

Supreme Court of British Columbia

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2018 BCSC 960 Phillips v. Saunders

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Phillips v. Saunders,

2018 BCSC 960

Date: 20180612

Docket: E048998

Registry: New Westminster

Between:

Dianne Kathleen Phillips

Claimant

And

Robert Charles Saunders

Respondent

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for Claimant:

J.B. Thompson

Counsel for Respondent:

E.C. Walker

Place and Date of Trial:

New Westminster, B.C.

December 4-8 & 11, 2017

Place and Date of Judgment:

New Westminster, B.C.

June 12, 2018

I. INTRODUCTION

- [1] The parties are both medical doctors who lived in a common-law relationship for just over 22 years. The claimant, Diane Phillips, is a general physician and at trial was 60 years old. The respondent, Robert Saunders, is an emergency room physician and he was 68 years old at trial. They had two children together, both of whom were adults at trial. In addition, Dr. Saunders has two sons from a previous marriage, both of whom are adults.
- [2] The parties agree that they separated on May 24, 2014 when the claimant chose to leave the family home. She filed a notice of family claim in June 2015 and Dr. Saunders filed a response in August 2015. The parties' adjourned their first trial date, set in May 2016, by consent. Unfortunately, due to insufficient court resources, the parties were forced to adjourn their trial (then set for July 17, 2017) a second time.
- [3] Dr. Phillips submits that she is entitled to a significant amount of spousal support. Her position is that she subordinated her career trajectory in favour of looking after the children and having primary responsibility for domestic duties. By doing so, she claims Dr. Saunders was able to pursue his career unobstructed. Dr. Saunders submits there is no entitlement to spousal support. In the alternative, his position is the amount is much less than the claimant is seeking.
- [4] With regard to the division of property, the parties dispute how to assess the value of one of the family assets (a professional corporation).
- [5] On September 20, 2016, Dr. Phillips was successful in her application for interim spousal support and Dr. Saunders has paid her \$2,500 a month since that time.
- [6] Only three witnesses testified at the trial before me: the parties themselves and David Rennie, who at one point was the accountant for both parties. In addition, the respondent adduced an expert report and brief addendum into evidence.

The Parties' Relationship

- [7] The parties met when they were both working at Burnaby Hospital in the mid-1980s, but their relationship did not start until about 1990. The couple's first pregnancy was unplanned. At the time, Dr. Phillips was living in a condominium she owned in Vancouver and she

remained there until about two weeks before their son was born when she moved in with Dr. Saunders, who owned a home in Langley. She had waited to move in with him because Dr. Saunders was just coming out of his first marriage; the parties were uncertain about the status of their continuing relationship. Dr. Phillips felt staying in her own home would be a good way for them to strengthen their relationship before living together. During this time, and throughout the parties' relationship, Dr. Saunders shared custody of his children from the first marriage with his first wife on an equal basis.

- [8] The parties' first child, David, was born in December 1991. Dr. Phillips ended up going back to work much earlier than she had planned, after about three months, working three days a week. Dr. Phillips' mother generally came to look after David on Saturdays if Dr. Saunders was also working. A woman Dr. Saunders and his first wife hired for housecleaning for many years would look after David on Fridays. The parties could not specifically remember who looked after the children on Thursdays.
- [9] Their second child, Mary, was born in April 1994. Dr. Phillips took about three months maternity leave.
- [10] In addition to the parties' children, Dr. Saunders had custody of his two sons from his first marriage for about 15 days every month. He was fortunate to have an amicable agreement with his ex-spouse such that the actual days his sons lived with him would vary according to his work schedule. Both parties agreed that the four children integrated well and they lived together as a family unit.
- [11] Dr. Saunders had primary responsibility for the duties related to his two older children, but Dr. Phillips would drive them to school and look after them in the same manner as their own children if Dr. Saunders was unavailable. The parties did not hire a nanny. The claimant testified it was Dr. Saunders' strong preference not to have a live-in nanny. However, they did eventually hire childcare for about three days a week. That ended when their youngest child started school. By that point, if Dr. Phillips could not pick up the children from school, her parents would assist.
- [12] Although there were some minor disputes in the parties' recollection of domestic chores, the evidence was clear that Dr. Phillips was the primary caregiver for the children and the person who looked after the household. She also volunteered at the school and took the children to their various appointments. She was happy with this arrangement. She did not want to have a full-time, intensive practice while she raised their young family. She admitted, however, that Dr. Saunders helped, occasionally driving the kids to school or taking them to appointments. She also agreed that Dr. Saunders had the primary role looking after his eldest sons, although she was also performing parenting roles for them when they lived with them half the time.

Dr. Phillips' Career

- [13] Dr. Phillips had established a family practice in Burnaby starting in 1983. At that time, there was a shortage of billing numbers and she paid \$30,000 to join a family practice with other colleagues, \$25,000 of which she estimated was for goodwill. She ran a family practice including obstetrics. She worked full-time, which meant that she was generally in the clinic for four out of five days. She attended her own obstetric patients, but she also had to be on call for other colleagues every fourth weekend and every Tuesday. In addition, at that time, in order to have hospital privileges at Burnaby Hospital, physicians were required to be the "doctor of the day" for patients who were admitted to hospital but did not have their own family physician. She was also required to sit on one of the hospital's committees. She started out on the medical audit committee and eventually became its chair.
- [14] After their son's birth, Dr. Phillips planned to be on maternity leave for six months, but the locum who had taken over her practice got injured, so Dr. Phillips went back to work on a part-time basis for about three days a week starting in March 1992. However, because she was now living in Langley, she could not maintain her Burnaby obstetrics practice. At that time, the Burnaby Hospital would not give obstetrics privileges to a doctor unless she lived within 30 miles. In addition, the commute was quite long so she began looking for someone to take over her practice. She was not interested in sharing a practice and she did not want to be a locum herself. Even though it was starting to get difficult during this time to sell a medical practice, she was able to do so for \$95,000, which represented about \$80,000 goodwill and \$15,000 fixed assets.
- [15] After the sale of her Burnaby practice, Dr. Phillips continued to work there Thursday afternoons, Fridays and two Saturdays a month. She paid 20% overhead.
- [16] Late in the summer of 1994 (after Mary's birth), Dr. Phillips returned to work doing some locum work, first in Burnaby and then in Langley. She wanted to establish a locum practice similar to what a locum did for her medical practice in Burnaby with two other colleagues. They hired a locum who would work one day a week for each doctor, giving that doctor that day off. She aspired to have three days regular work as a locum. However, locum work in Langley was not the same as in Burnaby in that she could not practice obstetrics. That was because in Langley at that time, physicians who wanted obstetrics privileges at the Langley Hospital were required to take shifts in the emergency room. Dr. Phillips did not have the appropriate experience to do that, so she was unable to practice obstetrics.
- [17] Because she was unable to find her ideal practice of working three days a week as a locum, she "fell into" doing surgical assists. An orthopedic surgeon who specialized in hand-surgery asked her if she would be his assistant on a regular basis.
- [18] However, she also developed a type of specialization in women's health. This started around 1999. She was doing a locum for a doctor when a specialist took over the office space. The specialist spent a lot of time in the hospital and allowed Dr. Phillips to use the office space any day of the week she wanted. Because many people at that time did not have a family

doctor, and walk-in clinics would not perform PAP tests, over time she built up a practice doing PAP tests for female patients of local male doctors. She received certification with the North American Menopause Society (NAMS), which meant she had the capacity to specialize in a medical practice dealing with hormonal therapies and osteoporosis, among other things.

- [19] This grew into what became the Langley Women's Health Center (Health Centre). She continued with the surgical assist work with the orthopedic surgeon, although she was not doing as much because she wanted to devote more time to the Health Centre. She no longer did any locum work. This arrangement worked very well for the family because she could book her hours at times when Dr. Saunders was home and she was still available to drive the children to and from school. In addition, she did not have to be on call and she had no responsibilities at the hospital.
- [20] She recalls that she was paying about 40% overhead for the office space, which was standard in those years. She found nurse practitioners who could do gynecological ultrasounds and IUD insertions, which helped improve her practice. As the Health Centre got more popular, however, she became very busy. The receptionist who was working for her became overwhelmed, and around 2006 or 2007, Dr. Phillips was asked to leave that office space.
- [21] She then worked about one day a week at a walk-in clinic at the Glover Medical Clinic (Glover Clinic). She tried to maintain the Health Centre, but that proved to be challenging because of various administrative arrangements at the Glover Clinic. She found the receptionists' method of scheduling did not suit her practice and they were not able to accommodate her practice. In addition, the clinic would not store the charts of the patients who followed her to the Health Centre. She had about 3,000 patients, had to keep the charts at home and was required to know which ones to bring to the clinic based on bookings. She also found that this clinic required her to do much more administrative work than she was accustomed to. She found it challenging to become familiar with the software program.
- [22] By 2007, she ceased operating the Health Centre as she found it was not working well for the preceding reasons. She also felt the need to take a bit of time to reassess her career. She had not really done a general family practice since 1999. As she said, she had not seen a male or child patient for many years. Coincidentally, the specialist with whom she had shared space, mentioned to an orthopedic surgeon that Dr. Phillips might be available for surgical assist work. That work fit their family schedule well at the time. By 2008 that was all she was doing three days a week.
- [23] In late 2010 or early 2011, the College of Physicians and Surgeons required all doctors to advise it of the type of practice for which they were registered. In early 2012, the College assessed Dr. Phillips and informed her that she had to maintain 40 days a year to maintain her license as a family physician. In addition, for six months she had to work in a clinic under supervision of another doctor. She decided to go back to the Glover Clinic and Dr. Matthews supervised her.

- [24] She worked at the clinic the minimum amount of time to remain licensed because it would have been too difficult to work more. In 2011, the children were still in school, and they now lived in Fort Langley. Schools were further away so her driving duties took more time. It was not practical for her to maintain a practice where she had to be on call.
- [25] She also described that her preferred method of practicing medicine differed from typical doctors at walk-in clinics. The government limits physicians to 50 patients a day. Many of her colleagues at the clinic are able to meet that quota by 2:00 or 4:00 p.m., at which time they could leave for the rest of the day. She testified that she could not practice medicine in a way she was comfortable with and see 50 patients in a day. She had a more cautious approach and asked patients many questions. She also found it challenging to work that quickly because she was not as familiar with prescribing new medications. She was not familiar with the computer software and technology. That was challenging, in part, because she was only in the office one day a week. She found this to be a barrier for her practising as efficiently as she could. Because of those factors, she did not want to continue with a general practice at a walk-in clinic.
- [26] She found the surgical assist work was easier to handle. Although each hospital was different, generally, she could sign up for particular shifts. She could also sign up to be on call during evenings and weekends. If she was called in, she was paid a premium in addition to the normal rate. However, she would not be paid if not called in. On some occasions, she was asked to work even though she was not on call, and she would earn even more than the premium. Because she did not have to pay overhead, her billings represented her income.
- [27] Dr. Phillips has not contemplated starting her own practice because she knows how much work that takes having done that in Burnaby. She says it takes several years to be established and she does not want to do that again at this stage of her career. She resists becoming a regular at the Glover Clinic. Some doctors will become a family physician for patients who they see at the clinic, and build up a family practice in that fashion. Dr. Phillips testified that she is not comfortable doing that because she is unsure if she would still be practicing at the same place, or at all, in three years. She does not want to welcome patients into a family practice only to then leave shortly thereafter. She also does not want to do full-time walk-in clinic work because she does not feel that she can see enough patients in a day. As a result, she continues with the surgical assist work.

Dr. Saunders' Career

- [28] Dr. Saunders graduated from medical school in 1975 and received his license to practice medicine the next year. He worked in the emergency room at a hospital in Victoria and then did a surgical residence for a year in Vancouver. In about 1983, the College of Physicians and Surgeons recognized for the first time emergency room medicine as a specialty. He was able to write the exam without taking additional training and then became a fellow in the College with a specialty in emergency room medicine. He has continued to work in that capacity at Burnaby Hospital since then.

- [29] In addition, he has had a position with the B.C. Coroner Service for about 11 years. He did have to take some courses for that position, and he is on call. He serves as an expert witness at inquests and he is the only physician consultant that the Coroner Service hires. He is on a three-year contract, which has a maximum annual billable amount of \$35,000.
- [30] Throughout their relationship, and even at trial, Dr. Saunders has maintained a successful practice as an emergency room physician, and has a good reputation in his profession. He described the stressful nature of his work; he routinely handles life and death situations and treats a variety of patients, including a large volume of homeless people, many of whom are addicts and/or mentally disturbed. He is on his feet for many hours on end, and sometimes gets few or no breaks during a shift. He testified that it is a very tough job, but highly rewarding.
- [31] As he has aged, however, the physical demands have started taking a toll on him. He stopped doing night shifts in 2016. He was diagnosed with peripheral neuropathy, which he started developing about four or five years ago. At trial, he was still exploring different treatments for the condition, but there is no cure. He takes medication to address the pain, but it is difficult to find the right dose that does not interfere with his mental focus.
- [32] Ideally, he would like to continue working in the emergency room, but perhaps at about half pace. He estimated that he works between eight and 13 shifts a month, down from 15 during marriage. However, he is still considered full-time because the same number of shifts are assigned to him, but he is able to give them away in order to take time off. As I understood it, he is generally in control of how much he works.

ISSUE ONE: Is Dr. Phillips entitled to Spousal Support?

- [33] The claimant seeks spousal support on a compensatory basis. There is no dispute as to what compensatory support is intended to achieve as set out in *Chutter v. Chutter*, 2008 BCCA 507 at para. 50:

Compensatory support is intended to provide redress to the recipient spouse for economic disadvantage arising from the marriage or the conferral of an economic advantage upon the other spouse. The compensatory support principles are rooted in the "independent" model of marriage, in which each spouse is seen to retain economic autonomy in the union, and is entitled to receive compensation for losses caused by the marriage or breakup of the marriage which would not have been suffered otherwise [cite omitted]. The compensatory basis for relief recognizes that sacrifices made by a recipient spouse in assuming primary childcare and household responsibilities often result in a lower earning potential and fewer future prospects of financial success

- [34] The claimant concedes that she is not entitled to non-compensatory support, which is needs-based. However, her position is the evidence is clear that she was the primary caregiver to their children, and that she sacrificed her potential career aspirations in support of Dr. Saunders pursuing his career. On that basis, she contends that she is clearly entitled to compensatory spousal support.
- [35] Dr. Saunders' position is that Dr. Phillips would have had a claim for compensatory entitlement, but for the roughly equivalent amount of their incomes and their difference in age. He acknowledges that compensatory support redresses the disadvantages experienced by the spouse who did not earn as much during the marriage, as measured against the economic advantages the higher earning spouse achieved. However, he claims that principle does not apply because at this stage of his career, he will not earn meaningfully more than Dr. Phillips will earn. He claims that his income has been on a downward trajectory since about 2014.
- [36] I do not agree. The focus is not only the parties' earnings post separation, but on the affect that the marriage, or its breakdown, had on each spouse's capacity to earn income as of the time of separation and into the future. There is a difference between the principles and factors guiding entitlement, and those guiding quantum. In my view, Dr. Saunders has intermingled the two.
- [37] There is little question that Dr. Phillips is entitled to compensatory spousal support. The reasons are simple. She gave up a lucrative family practice in Burnaby in order to live with Dr. Saunders and raise their children. The parties did not hire someone to live in the home to assist with childcare. This meant that it was impossible for both doctors to work full time. Dr. Phillips reduced her practice significantly. Not only did she give up her family practice, she could no longer practice obstetrics because of Langley Hospital's policies. To maintain an obstetrics practice in Langley she would have had to be on call and take shifts in the emergency room. Being on call would not be compatible with her being the primary caregiver for the children. This clearly limited her future career options. She testified that after being unable to find her ideal practice of working three days a week as a locum, she "fell into" doing surgical assists, and later part-time work at the Health Centre and the Glover Clinic as her parenting schedule permitted. It is that impact on her career and her capacity now to earn income that Dr. Saunders has failed to recognize.
- [38] Dr. Saunders enjoys a valued reputation having had extensive experience as an emergency room doctor. He is also the only physician consultant to the B.C. Coroner. He was able to achieve both of these statuses, in part, because of the support and career sacrifices made by Dr. Phillips.

- [39] Dr. Saunders submits I should impute additional income to Dr. Phillips. He submits her evidence was inaccurate about her capacity to work, and not reasonable in terms of her willingness to work. He submits that she "has not taken seriously her obligation to attempt to maximize her own earning capacity before calling on the earning capacity of [Dr. Saunders]".
- [40] I disagree. Dr. Saunders pointed to three innocuous, possible inconsistencies in her evidence that were not material. He alleges that what she does (primarily surgical assists) is not "real medicine" and that she could and should be earning more income by seeing many more patients per day at the medical clinic where she has been working. Thus, he argues I should impute annual earnings of \$155,320 to her. He calculates that figure based on seeing 40 patients a day at a walk-in clinic at an average of \$35 per visit, 46 weeks a year with approximately \$180,320 in expenses. While she testified that she generally saw about 20 patients a day, she agreed she might see about 30. Dr. Saunders alleges that is unreasonable and that she should see up to 40.
- [41] Dr. Phillips explained how she practices medicine, and how she has consistently practiced medicine. She described why she does not feel she can provide the professional standard of care with which she is comfortable if she saw up to 40 patients a day. She also described the challenges of the additional administrative tasks she has to complete at the clinic. It is for this reason that she has found earning income from surgical assists to be less taxing and more efficient.
- [42] Dr. Saunders' submission is that Dr. Phillips ought to change the way she practices medicine by rushing through more patients per day at a walk-in clinic and giving up her surgical assist work. I agree with Dr. Phillips that his contention amounts to a submission that since separation, she should increase her income by working harder and in a more stressful environment since separation than she did during their relationship. In other words, according to him, her only option to maintain the standard of living that she had before separation is to work harder than she did during the marriage. He submits that position is reasonable because Dr. Phillips is eight years younger than he is.
- [43] The problem with his position is that it would essentially mean that the career sacrifices Dr. Phillips made (especially only working part-time), which had the effect of greatly diminishing or eliminating her ability to develop other areas of practice (such as in obstetrics), would count for nothing. A fundamental aspect of compensatory spousal support is to recognize career sacrifices, and to ensure as best as possible, the spouse who did sacrifice does not suffer a lower standard of living following the breakdown of the marriage.

[44] Counsel for the respondent provided no cases in support of Dr. Saunders' position. Instead, I find Dr. Saunders' position is based, at least to some degree, on his fundamental opposition to the notion that he should have to pay any spousal support, revealed, among other places, in the following exchange from his examination for discovery at p. 131, l. 24-25 to p. 132, l. 1-17:

Q. Okay. Tell me, have you ever had any discussions with your [Burnaby Emergency Physicians Association] colleagues about cutting back your shifts because you really, really don't want to have to pay spousal support?

A. Oh, God. Um, yeah. I mean, I've said, you know - I said it's gettin' to the point where I'm coming - this is what annoyed - I go to work and I work hard; okay? And I won't get off track too much. Surgical assist is not medicine, it's easy. I do it. It's - I do it for fun. So the thought that I have to go through one of these things and go what I go through in a shift, uh, and then drive home in the traffic, you know, just like this, and then give it all to somebody else I find absolutely, uh - I'll end there. No point going on. So yes.

Q. You're philosophically opposed to the idea?

A. Philosophically, yes, I guess that's one way to put it, yeah.

[45] Dr. Saunders also submitted that the evidence supports an inference that "it is not unreasonable to expect" that Dr. Phillips will receive a significant inheritance from her mother in the future and that should be considered. That proposition is contrary to the legal principles governing compensatory support. He relies on *H.S.S. v. S.H.D.*, 2016 BCSC 1300 at paras. 307 and 308, but those passages do not address compensatory entitlement to spousal support; they are in the portion of the judgment regarding reapportionment of family property.

[46] Inheritances (or "windfall" benefits) are not relevant to a person's entitlement to compensatory spousal support "because the award is not focused primarily on need, but rather on the equitable sharing of the economic consequences of the marriage or its breakdown": *Murphy v. Murphy*, 2000 BCSC 974 at para. 30. In any event, I do not agree the evidence at trial was sufficient for me to conclude what amount of money, if any, Dr. Phillips will inherit from her mother even if that was a relevant consideration.

[47] For all those reasons, I conclude Dr. Phillips has easily met the burden of establishing that she is entitled to compensatory spousal support. Dr. Saunders has failed to meet the burden to persuade me that I should impute additional income to her. I discuss later in these reasons the duration and amount of support payable.

ISSUE TWO: Division of Family Property

- [48] In about 1997, Dr. Saunders established a corporation into which he channelled his earnings in order to gain tax advantages (Saunders Inc.). Prior to 1997, that option was not available to doctors in British Columbia. I acknowledge there have been different iterations of Dr. Saunders' professional corporation. For convenience, I refer to all as Saunders Inc.
- [49] He also established a family trust. The trust has three trustees: the parties and a mutual friend. The beneficiaries are Dr. Saunders' four children. There are three classes of shares: class A voting shares held by Dr. Saunders, class B non-voting shares held by Dr. Phillips and class C shares held by all three trustees. There were two purposes of the trust: estate planning and income splitting.
- [50] Two issues arise from these arrangements. The first issue is whether the increase in value of Saunders Inc. after separation is family property subject to equal division. Secondly, Dr. Saunders submits there should be an unequal division of the value of Saunders Inc. in his favour so that he can make a capital distribution of \$150,000 to each of his four children.
- [51] Saunders Inc. is a vehicle into which Dr. Saunders puts his earnings for tax advantages. Doctors must be members of the Burnaby Emergency Physicians Association (BEPA) in order to work full-time at the Burnaby Hospital's emergency room. BEPA distributes earnings and expenses amongst all its members. For many years, Dr. Saunders received his compensation by drawing a salary from BEPA, which he deposited into Saunders Inc. That salary was taxed at source. He also paid his personal (as opposed to BEPA-related) business expenses out of Saunders Inc.
- [52] Any excess fees owed to him by BEPA would go into an investment account that he established. He split that investment account into two investment accounts, one of which was intended to be under Dr. Phillips' management because the couple had different risk tolerances for investing strategies.
- [53] In 2017, Dr. Saunders incorporated another company. In the fall of 2016, he stopped receiving a salary and now receives dividends.
- [54] There is no dispute that Saunders Inc. and any investment accounts are family assets. The parties settled a number of issues in a consent order entered into during the course of the trial. That consent order stipulates the manner in which the parties will structure the division of corporate assets, except for the following issues.

A. What date should be used to assess the value of Saunders Inc.?

- [55] The parties disagree about how I should determine the value of Saunders Inc. Section 81(b) of the Family Law Act, S.B.C. 2011, c. 25 (FLA) states that subject to an agreement or order that provides otherwise, upon separation, each spouse has a right to an undivided half interest in all family property. Section 81(1)(a) of the FLA stipulates that on separation, each spouse is entitled to family property, "regardless of their respective use or contribution". The

respondent emphasizes the opening phrase "on separation". That is a very specific date. He says that the earnings deposited into the professional corporation by Dr. Saunders after the date of separation cannot fall into the definition of family property. That is because that "property" comes only from Dr. Saunders' professional services, and it is not derived from any family property. Thus, he says Dr. Phillips' undivided one-half interest applies only to the value of Saunders Inc. on the date of separation.

- [56] The claimant submits she is entitled to an undivided one-half interest in the value of Saunders Inc. as assessed at trial. Section 81(1)(a) of the FLA stipulates that on separation, each spouse is entitled to family property, "regardless of their respective use or contribution". Pursuant to s. 87(b)(ii) of the FLA, unless an agreement or order provides otherwise and except in relation to a division of family property under Part 6 [Pension Division], the value of family property must be determined as of the date of trial.
- [57] Section 95(1)(a) of the FLA permits the court to order an unequal division of family property if it would be "significantly unfair" to maintain the presumptive equal division. In determining significant unfairness, the court may consider "whether a spouse, after the date of separation, caused a significant decrease or increase in the value of family property beyond market trends" [s. 95(2)(f) of the FLA]. Dr. Saunders argues that subsection's characterization of significant unfairness should apply in this case to s. 87(b)(ii) to justify not using the date of trial as the date of valuation. Dr. Phillips contends s. 81(1)(a) prohibits the court from considering Dr. Saunders' contribution to Saunders Inc. at all.
- [58] In *Jaszczewska v. Kostanski*, 2016 BCCA 286, the Court of Appeal discusses the approach to the division of family property at paras. 35 to 44. The Court of Appeal agreed at para. 52 that, "the increase in value [of one of the assets] was significant and was caused by [the respondent] after the relationship had ended" and therefore, it was not a case of "reapportioning in light of relative contributions arising during their relationship" [which is precluded by s. 81(a) of the FLA]. Instead, it was grounded in s. 95(2)(f) of the FLA. The respondent says this reasoning applies to Saunders Inc. and supports his submission.
- [59] The claimant disagrees and submits the finding in *Blair v. Johnson*, 2015 BCSC 761, is applicable and binding. The claimant says Blair confirms there is little judicial discretion to depart from s. 87(b) of the FLA, which requires that the value of family property is the fair market value as of the trial date.
- [60] In Blair, the claimant created a holding company during the marriage into which he put shares from two companies, which he incorporated before the marriage. The claimant managed the companies and the respondent worked in another industry (she was a realtor). The Court received expert evidence as to the value of the shares in the holding company at three different points in time: the start of the relationship, the date of separation and the hearing date.

- [61] The companies that formed the assets in the holding company were going concerns. One had 13 employees and another 33. Between the date of separation and the date of trial, the value of the company increased significantly. The parties disagreed as to the date of valuation. The respondent wanted it to be the date of separation whereas the claimant wanted it to be the date of trial.
- [62] Madam Justice Fleming noted at para. 60 that the statute does not contain any criteria to guide the court's discretion to depart from the presumption in s. 87 of the FLA that the trial date is the date of valuation. She referred to *K.M.J. v. J.H.D.N.*, 2014 BCSC 1895 at para. 154 where the Court pointed out that the legislation provides two mechanisms to address significant unfairness that would arise from equal division of assets: s. 95, and s. 87 of the FLA. Justice Fleming then turned to the wording in s. 95 as an aid to interpreting s. 87, consistent with the modern approach to statutory interpretation. Section 95 reduced the scope of judicial discretion by changing the threshold to depart from the presumptive equal division of property from "unfair" (as it was in the previous legislation) to "significant unfairness".
- [63] At para. 64 of Blair, Justice Fleming examines extracts from the B.C. Legislative Assembly, Official Report of Debates (Hansard), 39th Parl., 4th Sess., Vol. 28, No. 8 (23 November 2011) at 1620. She found that the Legislature intended that s. 87 in the FLA would codify the common law that had developed under the previous legislation, which meant that the valuation date was presumptively the trial date. She also referred to *Blackett v. Blackett* (1989), 40 B.C.L.R. (2nd) 99 (C.A.). In that case Madam Justice Southin explained that it was significant that the legislation provided that the valuation was done at the date of trial because "[i]t is at that point that one spouse is having taken away a vested interest and the other spouse is paying for that vested interest" (quoted at para. 64 of Blair).
- [64] Other authorities cited in Blair made it clear that with regard to the issue of fairness, unless there is a reason to depart from the legislation, the valuation date for family assets, even the matrimonial home, is the date of trial. Justice Fleming summarized the case law under the previous legislation, stating that the court's discretion to depart from treating the trial date as the date of valuation was limited to grounds of "unfairness". However, s. 95 of the FLA now requires "significant unfairness" before the court interferes with the presumptive equal division. Accordingly, Justice Fleming stated (para. 69):

To the extent that s. 95 and s. 87 may provide alternate routes to address the substantial unfairness that would arise from awarding parties equal shares in family property valued at trial, it seems to me the significant unfairness threshold should also be met before the court departs from the date of trial as the valuation date pursuant to s. 87. [Emphasis added]

- [65] The respondent contends that the company in this case is not similar to the holding company in Blair because it does not have any assets. It is simply a vehicle into which Dr. Saunders puts his income to gain a tax advantage. Therefore, Blair is distinguishable because in that case, the increase in value was due to market forces.

- [66] I agree with the respondent that the determinative factor is whether the increase in the value of Saunders Inc. was due to market forces or not. There is no "market" for Dr. Saunders' earnings in the same way that other corporations' assets have a "market". Therefore, s. 95(2)(f) does not apply because it refers to an increase in the value of property "beyond market trends".
- [67] I also agree that there is a material difference between the corporation in this case and the one in Blair. In that case, the holding company was composed of two companies that had operations, assets and employees. Therefore, its value could fluctuate with the market and the success of the businesses within it. In contrast, the value of the professional corporation in this case depends solely on Dr. Saunders' earnings derived from his professional labour.
- [68] As I read paragraph 69 of Blair, a spouse has two routes to demonstrate "significant unfairness" to either value assets at a date other than the trial date, or depart from the presumptive equal division of a family asset. A non-exhaustive list of factors to consider in determining significant unfairness to allow reapportionment is contained in s. 95(2) of the FLA. Justice Fleming appears to equate ss. 95 and 87, but it is unclear if that also applies to the grounds for unfairness.
- [69] In this case that does not matter since no specific category in s. 95(2) fits the situation before me. Instead, given that the value of Saunders Inc. has always been completely dependant upon Dr. Saunders' professional fees, I do find it would be significantly unfair to value the parties' one-half interest as of trial. I rely on the alternate route of assessing the value as of the date of separation.
- [70] This route is reasonable in this case because Dr. Saunders structured his finances such that his post-separation earnings went into a different account. He wanted a clear separation between his earnings post and pre-separation. Accordingly, any portion of Saunders Inc. that can be traced directly to Dr. Saunders' post-separation professional income is not family property. That includes any profit/loss and any investments Dr. Saunders made with his post-separation earnings.
- [71] In my view, this is consistent with the legislative scheme when one looks to the definition of family property. Section 84(1) (b) of the FLA deems as family property after separation, any property acquired by only one spouse if it is "derived from" family property as defined in s. 84(1)(a). However, the post-separation income injected into Saunders Inc. is not "derived" from family property; it is "derived" from the professional services of Dr. Saunders.
- [72] Thus, I conclude that it would be significantly unfair to assess the value Saunders Inc. at the date of trial, and relying on the analysis of paragraph 69 of Blair, I find a different valuation date is necessary to avoid significant unfairness. I therefore order that Dr. Phillips is entitled to a one-half interest of Saunders Inc.'s value as of the date of separation.

[73] This does not mean that Dr. Saunders enjoys a windfall because his earnings are clearly relevant to the issue of spousal support. In my view, however, the post-separation value of his professional corporation is not subject to an equal division.

B. Would it be significantly unfair to divide the value of the corporation equally given Dr. Saunders' desire that each of his four children benefit equally from the family trust?

[74] Dr. Saunders submits that the value of Saunders Inc. should be unevenly reapportioned an additional 10% in his favour to permit him to make a capital distribution to each of his four children of \$150,000 each. Practically speaking, this amounts to attributing to him about \$180,000 of the claimant's pre-tax share of Saunders Inc. He has the onus of demonstrating that an equal division of the value of Saunders Inc. would be significantly unfair under s. 95 of the FLA.

[75] The respondent supports his position by pointing to the manner in which the parties structured their financial affairs throughout their relationship. His contention is that they created the family trust^[1] to benefit all four children precisely because he did not want his oldest two children to be deprived of any portion of his estate. He points out that the claimant took some steps to ensure that her wealth would not be dissipated by distribution to Dr. Saunders' older two sons, such as the 1993 cohabitation agreement they signed, her Will and life insurance policy, which did not include the respondent as a beneficiary. Most importantly, he points out that the trust was always used for the benefit of all four children.

[76] The respondent submits the testimony of David Rennie supports his position. Mr. Rennie was a Chartered Professional Accountant. He had been Dr. Saunders' financial adviser since the early 1980s, and he provided advice to Dr. Phillips around the time she began living with Dr. Saunders. Mr. Rennie retired in April 2006. He recalls advising both parties about the family trust, although he did not draft their trust documents. He testified he had set up as many as 200 family trusts that were similar in structure and purpose.

[77] However, the parties submitted their evidence differed on the intention behind the creation of the trust. Dr. Saunders contends that it was a tax-advantageous mechanism to transfer wealth to his four children, and part of his estate planning. Dr. Phillips emphasized that it was a vehicle primarily to reduce the couple's tax burden by "income splitting", and to pay for the children's expenses, such as tuition.

[78] It is not clear to me that the parties' evidence is contradictory. Clearly, the trust is an income splitting device, and clearly, it was a way of transferring wealth to the children. However, it is equally clear that all four of Dr. Saunders' children are beneficiaries. Nothing about the basic structure of the trust has changed over the last 20 years.

[79] However, none of that amounts to a factor that affects the division of family property under s. 84 or s. 95 of the FLA. There was never a legal requirement that Dr. Saunders was obliged to contribute any specific amount to the trust from his earnings. He did so but it was at his discretion.

- [80] Dr. Saunders relies on *Nowak v. Nowak*, 2014 BCCA 409 to support his position. He submits the Court of Appeal recognized the importance of one of the parties' estate planning intentions in approving a significant re-apportionment of a major asset.
- [81] Nowak does not assist the respondent. One of the main issues in the case was the proper interpretation and application of s. 58(3)(b) of the Family Relations Act [the current equivalent is s. 84(2)(f) of the FLA]. The dispute centred on a corporation and a family trust created by the respondent just prior to the end of the marriage. The shareholders of the corporation were the respondent, and the family trust. The respondent was also the sole trustee and mandated primary beneficiary of the trust, and his three children from his first marriage were the secondary beneficiaries. The corporation owned an interest in a commercial building the respondent purchased before the marriage. The building increased in value significantly during the marriage. The trial judge looked at the value of the building and ordered it divided equally.
- [82] The Court of Appeal held at para. 118 that was an error because the building was not a family asset; the corporation was. The claimant was entitled to an undivided equal interest in the shares of the corporation, but not to individual assets owned by the corporation.
- [83] None of the reasoning from that case is on point. As I understood it, the respondent argued that by implication, the Court of Appeal gave effect to Mr. Nowak's testamentary intentions by ordering a 90/10 split in favour of him. But the only reference to his testamentary intention is at para. 98, where the Court of Appeal noted that Mr. Nowak's children began to assume management responsibilities for the commercial property and they asked their father to formalize his estate planning arrangements with specific reference to the commercial building.
- [84] No similar factors are at play in this case. The argument here is simply that the family trust was always a vehicle to pass wealth along to all four children and therefore, Dr. Saunders should be allowed to continue to do so, but at the expense of Dr. Phillips' share of a family asset. Nowak does not stand for any proposition that supports this novel argument.
- [85] The only considerations for reappportioning a family asset are contained in s. 95(2) of the FLA. The respondent has failed to convince me that any of those factors, or any other relevant factor, supports his submission that it would be significantly unfair with regard to his four children to divide equally Saunders Inc. between the parties.
- [86] For those reasons, I do not find an equal division of the value of Saunders Inc. would be significantly unfair, and I do not order a reappportionment.

ISSUE THREE: Quantum and duration of spousal support

- [87] Dr. Phillips' tax returns revealed the following gross income: 2014, \$121,758; 2015, \$138,407; and 2016, \$134,684.66.

- [88] Counsel submitted a table summarizing Dr. Saunders' corporate and personal income as follows: 2014, \$364,399; 2015, \$339,594, and; 2016, \$272,023. The estimated figure for 2017 at trial was \$187,275. He submitted only this figure should be used as his income for calculating spousal support.
- [89] Dr. Phillips submits, if I only rely on the 2017 estimate, there should an adjustment to Dr. Saunders' income. She alleges that he has chosen to take less shifts, thus voluntarily reducing his income. She also submits that he changed the method of compensation from salary to dividends in order to reduce his income, not only for tax purposes, but also for spousal support purposes.
- [90] As to his reduction in shifts, I am not satisfied he has done so for any other reason than the expected and natural slowing down of his career commensurate with his age. I find his testimony credible when he described how it is getting harder for him to keep up the same pace he did as a younger man, especially with his most recent medical complications. No adjustment to his income is warranted for his reduced capacity to work.
- [91] Dr. Phillips submits the court can gross up Dr. Saunders' dividend income for calculating support. She alleges that s. 19(1)(h) of the Federal Child Support Guidelines, SOR/97-105 (the Guidelines) encapsulates this principle and should apply. That section states that if a spouse derives a significant portion of income from dividends, which is taxable at a lower rate than employment income, the court may impute additional income. Although that is a child support guideline, Dr. Phillips submits the same principle should apply in cases of spousal support, where the court is satisfied a spouse has intentionally reduced income to avoid support obligations: *Vennels v. Vennels*, [1993] B.C.J. No. 378 (S.C.).
- [92] The situation in *Vennels* was very different to the case at bar. There the payer spouse wanted to terminate his spousal support obligations because he retired. The issue was whether the spouse's retirement at that time in the circumstances of that case amounted to a material change in circumstances allowing for variation in a support order; the Court held it did.
- [93] The claimant also refers to *Brown v. Brown*, 2014 BCCA 152 at para. 21. There is a line in that paragraph that states that under s. 19(1)(h) of the Guidelines, dividend income results in an increase to the Guideline income attributed to the payer. Ultimately, however, the Court held that section had no application on the facts before it because the tax treatment of the dividend income did not effect the resources available to the payer: para. 26.
- [94] The fairness issue as identified in the Guidelines is to ensure that any advantage gained from dividend income (by having more after-tax resources available to the parent because of lower taxation of dividends) be available for support of the parties' children. It is not clear to me that case provides useful guidance in the context of imputing income for the purpose of spousal support.

- [95] Dr. Saunders submits there should be no adjustment. He submits he had good reason to change his mode of compensation: to lower his tax liability to have more resources to maintain his standard of living while working less, and to pay for legal fees. His explanation is reasonable.
- [96] I see no reason to depart from the standard approach of determining income using parties' income as reported on tax returns, averaged over a period. In this case, the claimant's average earnings for the years 2014 to 2016 is \$131,616.
- [97] The respondent relied on tables prepared by counsel, which I presume are properly based on his income tax returns. His average income for the same period is \$325,338. However, he submits only his anticipated 2017 earnings of \$187,275 should be used. While I have accepted Dr. Saunders' legitimate reasons to slow down his practice and change his method of compensation, there is a stark reduction in his income between 2016 and his estimated 2017 income (\$272,023 and \$187,275). Given my findings above that Dr. Saunders' opposition to the notion of spousal support (see above para. 45), I am concerned whether this reduction may have been motivated to some degree by his animus about spousal support.
- [98] However, I have also accepted that it is reasonable for him to be slowing down. His income has declined from 2014 to 2017, although not at a steady rate. His 2015 income was about 6.8% lower than his income for 2014; his 2016 income was about 20% lower than his income for 2015. His estimate for 2017, however, represents about 31% decrease from his 2016 income. I do not find that the evidence supported that he would earn about 1/3 less in 2017, than in 2016, even taking into account all the factors I have mentioned here.
- [99] For that reason, rather than rely on his estimate, I prefer to use the figure suggested by Dr. Phillips: \$200,000. Using that estimate, and averaging over four years, comes to about \$294,000 annual income.
- [100] Looking to the difference between that average income, and Dr. Phillips' average income and relying on the basic formula under the without child, Spousal Support Advisory Guidelines[2], the range of support is roughly \$4,670 to \$6,225 per month. This roughly matches one of the DivorceMate scenarios provided by the claimant, and at the low end, is not too far off the average amount provided in the summary of the respondent's counsel.
- [101] I choose an amount at between the mid and high range and fix the spousal support at \$5,600 per month. That recognizes a 23-year-long spousal relationship with large differences in the parties' gross income, but also my acceptance that Dr. Saunders is entitled to a decreased trajectory of earnings since separation, and both of them are within a decade of a reasonable retirement age.

[102] As I understood it, the claimant submitted she would waive any right to retroactive spousal support, in exchange for not taking into account the parties' differing circumstances with the tenancies and maintenance costs in the matrimonial home. I find that to be a reasonable approach. I did not understand Dr. Saunders to object. Dr. Phillips also submitted that the parties are both close to a reasonable age of retirement and, therefore, spousal support for a period of three years from trial would be appropriate.

[103] Accordingly, from the date of trial, Dr. Saunders is obliged to pay Dr. Phillips \$5,600 per month in spousal support for a period of 36 months. I understood both parties preferred a lump sum award. Accordingly, Dr. Saunders must pay Dr. Phillips \$201,600, minus any amounts paid for support since trial. However, the parties are free to come to any other agreement regarding how to make that payment.

CONCLUSION

[104] Dr. Phillips is entitled to one half of the value, on the date of separation, of Dr. Saunders' professional corporation into which he deposited his professional fees. Dr. Phillips is also entitled to compensatory spousal support of \$5,600 for 36 months from the date of trial.

COSTS

[105] If the parties cannot agree on costs, they may seek a brief hearing before me, but they must make that request no later than 30 days after the date of this judgment.

"Sharma J."

[1] The parties both agreed that the trust would not be dealt with in this judgment and the only consideration was whether reapportionment of Dr. Saunders' professional corporation should be ordered.

[2] Between 1.5% and 2% of the difference between the spouses' gross income for each year of cohabitation.

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