
CANADA / JUDGMENT

R.A.F. v. J.R.F.

2010 BCSC 552

COURT

Supreme Court of British Columbia

DECIDED

28 January 2010

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2010 BCSC 552 R.A.F. v. J.R.F.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R.A.F. v. J.R.F.,

2010 BCSC 552

Date: 20100128

Docket: E090130

Registry: Vancouver

Between:

R.A.F.

Plaintiff

And:

J.R.F.

Defendant

Before: The Honourable Madam Justice Beames

Oral Reasons for Judgment

Counsel for the Plaintiff:

L.M. Slater

Counsel for the Defendant:

D. MacKinnon

Place and Date of Hearing:

Vancouver, B.C.

November 23-27,

December 9-11, 2009

Place and Date of Judgment:

Vancouver, B.C.

January 28, 2010

Introduction

- [1] THE COURT: In this family law case, the issues to be resolved are the determination and division of family assets; a determination of the parties' respective income for support purposes; the amount of child support to be paid for the parties' child, C, including extraordinary expenses; and the quantum and duration of spousal support.
- [2] The parties agree that they should have joint custody and guardianship of C, and I make that order.
- [3] At the conclusion of the trial, I granted an order for divorce. I also ordered, by consent, that each party receive an interim distribution of property in the amount of \$50,000 from the proceeds of the sale of the family home, which proceeds are being held in trust.

Background

- [4] The plaintiff wife is 45 years old. She left school after completing Grade 10. She took a hairdressing course and has worked as a hairdresser since she completed her training in approximately 1981. The defendant husband is 55 years old. He left school after he completed Grade 11. He initially went up north to work. He returned to Vancouver at approximately the age of 19 after working on tugboats, the rail line, and the trucking business. He had saved enough money to buy a small delivery truck and he went to work for a delivery company as an owner/operator.
- [5] The parties started living together in February 1991, and married on June 8, 1991. At that time, the plaintiff was working full-time as a hairdresser in a salon in Vancouver. She had no significant assets. The defendant was driving a delivery truck full-time for the company he had started with after returning from the north. He owned a couple of vehicles and two houses, both of which were mortgaged. He lived in one and rented out part of that house, as well as renting out the second house.
- [6] After the parties married, they decided to move to Langley from Vancouver. They do not now agree as to the main reason for their decision to move, and nothing, in my view, turns on it in any event.

- [7] In order to buy property in Langley, the defendant sold one of his two houses and continued to rent out the other. He continued to work for the same company and the plaintiff initially commuted to Vancouver to work for the same salon, although she reduced her number of working days from five to four. She continued to work until shortly before the birth of the parties' daughter, C, on November 8, 1993.
- [8] The defendant continued to drive a truck for his original employer through its various name changes, and the plaintiff stopped hairdressing, except for friends and relatives, and perhaps some long-time customers. By the time C started preschool, the plaintiff had started to increase her client base, and when the parties built a new home in 1998, they designed and built a salon area from which the plaintiff could work and expand her business while still being home and providing the primary care for C.
- [9] While still delivery driving, the defendant added a part-time driving job with one of his employer's clients, which was a company then called Pacific Fresh Mushrooms. His original employer folded, and the defendant went from being a part-time driver to a full-time driver with Pacific Fresh Mushrooms, which later became Money's Mushrooms.
- [10] In 2001, the parties built another home, again installing a separate hairdressing salon from which the plaintiff continued to work on a part-time basis, working around C's schedule. In 2002, C started to work through a talent agency, acting and dancing, as I understand it. She had been taking dancing lessons since she was four, and the plaintiff was responsible for taking her to school, dance lessons, auditions, her jobs, and the like.
- [11] Also in 2002 or 2003, the defendant found an opportunity to do some additional trucking for one of his employer's customers, Crown Packaging. He bought a truck and employed a driver to drive it, while he continued to work for Money's. He operated the truck through a sole proprietorship that he established called J Trucking.
- [12] In 2005, Money's went bankrupt and the defendant lost his job. By that time, he had two drivers working for his sole proprietorship, providing services to Crown Packaging. He was able to get another shift driving for Crown Packaging, so he bought a second truck and drove one truck himself while keeping his driver and other truck working as well.
- [13] In 2007, the defendant made arrangements to lease two new trucks, both on five-year terms, at the end of which he will have an option to purchase. He had three shifts of driving with Crown Packaging, one of which he normally drove, and the other two of which he covered with hired drivers, either working as employees or on contract.
- [14] In 2007, the defendant's mother died. In August of 2007, before her death, she gifted the defendant \$10,000. She had gifted the defendant money from time to time in the past. After her death, the defendant received life insurance proceeds of approximately \$50,000. In February 2008, the defendant received \$170,000 from his mother's estate, \$5,000 of which he was to hold in trust for C. Most of the life insurance proceeds were gone by early 2008. Some was spent on a family vacation, some was used to purchase a trailer for J Trucking, some

went to pay an outstanding GST bill, and it appears the rest was simply absorbed into the family finances.

- [15] When the \$170,000 inheritance was received, \$60,000 was used to pay down the mortgage on the family home, \$10,000 was used to buy \$5,000 worth of RRSPs for each of the plaintiff and the defendant, \$20,000 was spent renovating and redecorating the family home, approximately \$14,000 was used to pay taxes, and approximately \$27,000 was used to pay off an outstanding Visa line of credit debt. The defendant had approximately \$26,000 left over, which he kept in an account in his name only.
- [16] In the fall of 2007, C had started a new school program in Vancouver, which involved her spending half the day doing academics and half the day dancing. The plaintiff drove her back and forth for school. In the summer of 2008, the plaintiff proposed that she and C stay Sunday night or Monday through until Thursday each week at her brother's home in Vancouver to reduce the amount of driving involved in having C attend school in Vancouver. The plaintiff says the defendant agreed with her proposal. The defendant says that he was not in agreement at all and that he was worried that the plaintiff and C were actually leaving him. I conclude that the defendant was not at all happy with the arrangement made for the plaintiff and C to spend several nights each week away from the family home. He may, however, not have clearly communicated that to the plaintiff.
- [17] Within a matter of weeks, the parties were having troubles, and by November 25, 2008, they had separated. The defendant remained in the family home and the plaintiff and C moved into a suite at the plaintiff's brother's home in Vancouver, where they had been living part-time since September. The plaintiff continued to run her hairdressing business from the family home, at first by informal agreement and arrangements between the parties, and then pursuant to an order made at a second judicial case conference which was held on April 27, 2009, which gave the plaintiff exclusive use of parts of the home on set days between certain hours.
- [18] At an earlier judicial case conference, an order had been made that the defendant would pay to the plaintiff support in the amount of \$2,000 per month, which was not broken down into separate amounts for child or spousal support.
- [19] On August 13, 2009, a consent order was made which required the defendant to pay spousal support in the amount of \$2,445 per month, child support in the amount of \$988 per month, and special and extraordinary expenses of \$885 per month. The support was to be effective September 1, 2009, for ongoing purposes, and was also made retroactive to January 1, 2009, with credit to be given for the payments made pursuant to the order which had been made at the first judicial case conference.

- [20] The consent order also provided for the listing and sale of the family home. The house was listed and it sold for \$1,035,000, with a completion date of October 29, 2009. The net sale proceeds, in the amount of \$676,221.97 less payments made by agreement from those proceeds since the closing, are still being held in trust. Included in the payments made from the proceeds was a payment in the amount of \$19,000 to C's trust account as repayment for monies withdrawn from that trust account to purchase a car.
- [21] After the sale of the family home, the defendant remained in the home on a rental arrangement with the new owner. The plaintiff and C, as of the conclusion of this trial in December, were still living in the suite at the plaintiff's brother's home. The plaintiff has made arrangements to carry on her hairdressing work from a home-based salon owned by another woman. She has access to the salon on set days of the week, and she has agreed to pay \$7 per hour for her use of the space.

Discussion

- [22] With that background, I turn to the issues, starting first with property. The plaintiff seeks an order for an equal division of the family assets. However, she also seeks orders that the defendant compensate her from his half of the assets for what she says was a dissipation of assets by the defendant leading up to the date of separation, debt she says the defendant unnecessarily incurred in joint accounts after separation, and half of a GST refund which the defendant received after separation that relates to an overpayment in 2007.
- [23] The defendant says that he should not have to compensate the plaintiff for any of the things she claims. With regard to property distribution, he submits that he should get some reapportionment on account of the inheritance he received shortly before the parties separated.
- [24] The starting point for the determination and division of family assets is the Family Relations Act, and particularly ss. 56 and 65. Section 56 provides a presumptive rule that family assets are to be divided equally. Section 65 provides that a court may divide assets unequally if an equal division would be unfair, having regard to:
- (a) the duration of the marriage,
 - (b) the duration of the period during which the spouses have lived separate and apart,
 - (c) the date when property was acquired or disposed of,
 - (d) the extent to which property was acquired by one spouse through inheritance or gift,
 - (e) the needs of each spouse to become or remain economically independent and self sufficient, or
 - (f) any other circumstances relating to the acquisition, preservation, maintenance, improvement or use of property or the capacity or liabilities of a spouse,

[25] As the Court of Appeal said in *S.B.M. v. N.M.*, 2003 BCCA 300 at para. 23:

The question is not whether an unequal division would be fair; that is not the obverse of the test in s. 65(1). The Legislature created a presumption of equality -- a presumption that can only be displaced by a demonstration that an equal division would be unfair. So the issue of fairness is not at large, allowing a judge to pick the outcome that he prefers from among various alternative dispositions, all of which may be arguably fair. He must decide, in accordance with the language of s. 65(1), that an equal division would be unfair before he considers apportionment. Otherwise, although an equal division would be fair, a reapportionment could be ordered on the basis that it is more fair, and that, in my opinion, is not what the statute intends.

[26] These parties had a long marriage. They were separated for less than a year by the time the trial started. Their major asset, the family home, was acquired in 2001, using proceeds from the sale of their previous family home, as well as proceeds from the sale of the second home owned by the defendant before the marriage. The equity in that home and, in fact, the net value of all of the family assets less debts, had been increased by virtue of gifts to the defendant from his mother and an inheritance the defendant received in the last year or 15 months of the marriage.

[27] The plaintiff worked less than full-time throughout the marriage, as she assumed primary parenting responsibilities for the parties' child, and she has a need to become and remain self-sufficient. Although the plaintiff says that the retention of the two leased trucks by the defendant is a benefit to the defendant which ought to be factored into a determination whether an equal division is unfair, I consider that the trucks are a negative or, at the very best case, a neutral factor, given the fact that the trucks in fact have a negative value at present.

[28] Taking into account all of the factors and the evidence in this case, I am satisfied that an equal division of family assets would be unfair. Although the plaintiff does have a need to be self-sufficient, which can be addressed, in part at least, through provisions with respect to spousal support, the substantial inheritance received by the defendant very late in the marriage satisfies me that there should be a modest reapportionment made in favour of the defendant.

[29] Before I deal with the specifics of the reapportionment, I will deal with the plaintiff's claims for compensation orders.

[30] The plaintiff says that the defendant dissipated assets before separation by making unusually large cash withdrawals and purchases of alcohol over the last several months or so of the parties' relationship. She extracted from the bank statements lists of cash withdrawals and debit card purchases at liquor stores. The defendant says, in response, that he has been a daily drinker since the parties met and that his drink of choice is Grand Marnier. He also purchases liquor to give as gifts to various of his business contacts. With respect to the cash withdrawals, he says that he has always made cash withdrawals to have spending money. He regularly uses marihuana, which he purchases, and which he has used

regularly throughout the parties' relationship, with the plaintiff's knowledge. He admits to some use of cocaine in 2008, during a period that he was regularly working in excess of one shift, often one and a half to two shifts a day, as a way to stay awake. He also says that he withdraws cash to play gambling card games with friends. Finally, he says that he has from time to time had to pay cash to drivers to cover shifts in instances such as where he has needed emergency drivers to fill in for shifts that would otherwise have been worked by his regular employee or contract drivers.

[31] It is clear that compensation orders can be made in some instances. In *Newson v. Newson*, [1986] B.C.J. No. 396 at para. 15, the Court of Appeal, after reviewing the case law and the provisions of the Family Relations Act, set out the following guidelines:

- (1) Where a spouse has disposed or of spent "potential" family assets shortly before the end of a marriage or after separation, a compensation order may be made in respect of such disposal or expenditure.
- (2) Compensation orders are not made in respect of every disposal or expenditure. There must be proof of "unfairness" having regard to the factors enumerated in s. 51 of the Act. For example, a disposal or expenditure that deprived the other spouse of a reasonable expectation that on the happening of the triggering event the 'potential' family asset would be available for division, might well be 'unfair'.
- (3) Depreciation or appreciation in value of 'potential' family assets, resulting from market forces between the date of separation and the triggering event, is unlikely to give rise to 'unfairness'.
- (4) The Wagner case and the Gourlay case [which I will note parenthetically are very distinguishable from the case at hand] are cases where 'potential' family assets have been disposed of or spent at or near the end of an 'uneasy' marriage (but before separation). But it is only in those or similar unusual circumstances that the court ought to make compensation orders in respect of disposals or expenditures made during the marriage.

[32] Further, in *Newson* the court said:

Sections 51 and 52 [as they then were] do not provide a trial judge with a roving commission to inquire into the spending habits of the spouses during the marriage. Moreover, sections 51 and 52 do not provide a basis for re-apportionment based on reckless, wasteful or improvident expenditures made by either of the spouses during the marriage. If the Legislature had so intended it would have made provision for such re-apportionment in clear and explicit language...

[33] Returning to the case before me, I am not satisfied that the plaintiff is entitled to a compensation order on account of cash withdrawals or liquor store purchases.

[34] With regard to debts, the plaintiff seeks compensation orders with regard to or effective reappportionment of the following debts:

1. A portion of the parties' indebtedness on a joint Visa line of credit which was secured against the family home and which was paid out of the proceeds on the closing of the sale of the family home;
 2. A portion of the parties' indebtedness on an overdraft in the parties' joint chequing line of credit account in the approximate amount of \$10,000; and
 3. 2009 property taxes.
- [35] The specific order sought for compensation is in the amount of \$7,085, which is half of the following amounts:
1. Three mortgage payments totalling \$3,537 paid by overdraft by the defendant in December 2008;
 2. \$1,000 from the joint account for a business Visa debt in December 2008;
 3. Business debts and cash withdrawals from the joint Visa line of credit account in October 2008 totalling just over \$6,700; and
 4. Half of the property taxes for 2009 paid on the closing of the sale of the family home.
- [36] I would not be prepared to make compensation orders for any of the transactions in October of 2008. I would similarly not be prepared to make any compensation order with regard to the 2009 taxes, and in fact the parties each had use of the family home in 2009 and all of the other expenses for the family home were paid by the defendant, except for the taxes. However, the plaintiff is entitled to a compensation order for the three mortgage payments and the payment on the business Visa in December 2008.
- [37] Finally, the plaintiff seeks compensation for a GST refund the defendant received in 2009, which, as I have said, was with regard to an overpayment in 2007. However, I note that the amount of the GST refund was less than the defendant was required to pay in 2009 for income tax on his earnings in the 2008 calendar year, the majority of which the parties were together as husband and wife. Consequently, I would not make a compensation order with respect to the GST refund.
- [38] I make the following orders with regard to property:
1. From the proceeds of the sale of the family home, the parties' overdraft in the approximate amount of \$10,000 will be paid.
 2. The defendant is entitled to 55 percent and the plaintiff is entitled to 45 percent of the balance of the proceeds. From the defendant's share, he shall pay to the plaintiff any arrears of support which have not been yet paid, and he shall also pay to the plaintiff the sum of \$2,268, which is 50 percent of the three mortgage payments and the \$1,000 business Visa payment made in December 2008.

3. All of the parties' RRSP accounts, including the defendant's locked-in plan, will be divided equally by way of tax-free rollovers.
 4. The defendant will be entitled to keep his tax-free savings account without claim by the plaintiff.
 5. The plaintiff will be entitled to the defendant's permanent whole life insurance. She may, at her option, either cash it and keep the proceeds or keep the policy intact and make the premium payments herself.
 6. The plaintiff will keep the Honda Civic and the defendant will keep all of the other vehicles and trailers. The defendant will pay to the plaintiff the sum of \$12,390 to equalize the division of vehicles and trailers, and that will be paid from his share of the monies held in trust.
 7. The defendant will cause to be transferred to the plaintiff one-half of his Aeroplan points as of November 25, 2008. The parties will bear equally any cost charged by the plan administrator to effect the division.
 8. Otherwise, each party will keep all property registered in his or her own name or in his or her possession, and each will be responsible for any debt in his or her own name.
- [39] I turn now to the support claims. Any consideration of support must start with a determination of the parties' respective incomes.
- [40] The plaintiff, as I have said, is a hairdresser. She has been since approximately 10 years before the parties married, and she continued to be a hairdresser, working a variety of hours throughout the marriage and to date. She testified that prior to the parties' separation, she reported, for tax purposes, all of the money she received by cheque but not the money she received as cash. She said that since separation, she has recorded all of her receipts, whether by cheque or cash. She says that she earns, on average, in the range of \$10,000 to \$12,000 per year, from which must be deducted the cost for the products that she requires in her business. She also says that her net earnings will now be affected by the fact that she will have to pay \$7 per hour for chair rental since the family home has been sold. She says that the chair rental arrangement was the best arrangement she could make, given that she does not have an extensive client base or up-to-date skills, and that she has had no formal training or upgrading of her skills since the date of the marriage.
- [41] She also says that she has been suffering some depression since separation, although she has not provided any medical evidence to support any reduction in her ability to work or earn income as a result of any depression.
- [42] She says that she has some ongoing obligations with regard to child care and that she is contemplating retraining of some kind in the future so as to improve her ability to become self-sufficient, although she has no specific or even general plans as of yet.

- [43] She submits that it would be reasonable, on all of the evidence, to find her income for support purposes to be \$10,000 per year.
- [44] The defendant says that the plaintiff is underemployed and that she should have income imputed to her. He says that the plaintiff is able to make \$10,000 per year working very part-time hours and that working very part-time in someone else's basement salon is not realistic or appropriate for a woman with her experience.
- [45] With regard to the plaintiff's current actual income, I am satisfied that the plaintiff has accurately set out her cash and cheque receipts for the 2009 year, up to November 23, on Exhibit 2 filed in these proceedings. Those receipts have varied month to month, ranging from a low of \$484 for the three weeks in November that were recorded, to a high of \$1,080 in July. However, I am also satisfied that the plaintiff is not earning as much as she could or should be earning, even given the role she assumed during the marriage and the fact that she has not worked in a salon environment nor upgraded her training since at least 1993. In November, for example, she only paid chair rental of \$105, which equates to 15 hours between the 1st and 23rd of the month. Just working 15 hours, she was able to bill and receive \$484. If the plaintiff is only able to generate sufficient clients to a home-based business to make \$10,000 per year, then she should be making changes. She may need to advertise, or upgrade her training, or explore working in a different environment. Alternatively, she may need to consider a different line of work. Even minimum wage full-time work would improve her earnings by over 50 percent.
- [46] The plaintiff does not need to be as available to C as she was in the past. C is 16 years old and in Grade 11. She can take public transit. She transferred to her current school, in part, so that she could be with her friends who are in the same dance program, so carpooling may well be available. C has not been working as much lately. Finally, she is nearing the age where she will be able to drive herself to her activities.
- [47] Clearly, the plaintiff cannot be expected to increase her income immediately. She can, however, be expected to do so within a reasonably short period of time. For 2009, I conclude that the plaintiff's income will be or has been \$10,000. For 2010 and 2011, I impute to the plaintiff income of \$12,000 per year, which is in keeping with her earnings of \$1,000 per month that she generated from July through October of 2009. Thereafter, barring agreement between the parties or further court order, I will impute to the plaintiff annual income of \$24,000.
- [48] With regard to the defendant's income, the plaintiff says that I should find that the defendant has been intentionally under-employed in 2009. She also says that there are numerous expenses deducted from the defendant's income for tax purposes which were personal or from which he receives a personal benefit, which should be added back to his taxable income for support purposes. She says that the defendant's and the family's lifestyle before separation and, indeed, the defendant's budget as shown in his Form 89s filed in this action, are consistent with the income she seeks to have imputed to him, namely, \$110,000 per year.

Finally, she says that the defendant agreed to a consent order setting his income at that level for child and spousal support purposes, and that that should be taken, in effect, as an admission by him as recently as August of 2009 that that is his income.

- [49] The defendant says that the court should find that his current income is in the range of \$65,000 to \$70,000 per year. He says that in 2008 he worked many more hours than he should have, sometimes up to two shifts in one day, to the detriment of his health and perhaps his marriage. He said that he cannot work like that again. Further, he says that his business has been affected by the economic downturn. His regular customer, Crown Packaging, has had to close some of its operations and has brought in at least one driver from one of those other operations. As a result, he says that he was told in January of 2009 that he would no longer have three guaranteed shifts, but rather two shifts and a third shift on call, with the assurance that when Crown Packaging's business picked up he would be the first one added back on so that he would be back up to three shifts again. According to him, he kept his two regular drivers and took the on-call shift himself, so that he would be ready and able to take the third shift as soon as it was offered, which he expected, based on past history, would be as early as March or April. However, he did not get a steady three shifts until the summer, and the third shift is still an on-call shift.
- [50] He also says that the nature of the trips his drivers, including himself, make for Crown Packaging have changed so that they are actually billing less for the same number of hours worked, because he is paid by the trip with certain amounts of unpaid loading and unloading time at each stop, though he must pay his drivers an hourly rate whether Crown Packaging is paying him or not. He also points to the costs he incurs, most particularly fuel, and says that his trip rates have not kept up with his increasing costs. Finally, with regard to the future, he predicts that his operating costs will increase in the next short while, as the special bumper-to-bumper warranties he obtained for his trucks when he leased them in 2007 either have expired or will be expiring very shortly.
- [51] The starting point for determining the defendant's income is his income tax returns. In some years, he split income with the plaintiff and with C, including the income from the business reported by all three of the plaintiff, the defendant, and C, but excluding a sum reported as wages to C by the company but not claimed by C in 2008, which I will deal with later. The defendant's income from J Trucking has been as follows:

Tax Year

Income

2005

\$49,375

2006

\$58,566

2007

\$79,622

2008

\$79,685

To those sums clearly must be added something for the personal benefits enjoyed by the defendant which, while deductible for tax purposes, are not reasonably deductible for support purposes.

- [52] The adding back of expenses is permitted pursuant to s. 19(1)(g) of the Federal Child Support Guidelines and is a logical consideration when considering spousal support as well. There is no question that the nature of the defendant's business requires that he incur very significant expenses for his trucks, including fuel, maintenance, insurance and, of course, his lease payments, and for his drivers. He also has, I accept, numerous other reasonable expenses. Those expenses include a personal vehicle, which he uses to do many work-related things such as delivering invoices to his customer, as well as using the vehicle for personal reasons. He has a cell phone, and he incurs meals, advertising, promotion and office expenses and the like. The question is how much, if any, of those claimed expenses are unreasonably deducted and should be added back to his income for support purposes.
- [53] I, unfortunately, have not had the benefit of any expert evidence in this case. The parties testified to a certain extent about the general ledgers for J Trucking, which were filed and made exhibits in these proceedings, and the nature and treatment of some of the expenses set out in the ledgers. I also heard some modest amount of evidence from the parties' bookkeeper about how she allocates expenditures between business expenses and personal drawings for the defendant, although she acknowledges that final allocations and reallocations are made by the parties' mutual accountant, who was not called to testify at the trial.
- [54] Doing the best that I can with the body of evidence that I have, I am prepared to find that the defendant, for support purposes, unreasonably deducts and obtains personal benefit from some of the expenses attributed to the business, and that to that extent those expenses are not reasonable deductions for support purposes. Using the 2008 year, which is the most recent full calendar year worth of business documentation I have, for illustration purposes, I conclude that the defendant's personal messaging service of \$1,210 per year; \$100 per month in total for a combination of cell phone, landline and Internet, for a total of \$1,200 for the year; as well as the \$3,200 paid for C's ballet, which was expensed as wages for C; one-half of the fuel for his personal car, or \$1,453; and the admittedly arbitrary sum of \$3,000 of those items expensed as advertising, meals and entertainment, are expenses that should be added back to the defendant's income for support purposes. In total, I would add to the defendant's 2008 income the sum of \$10,000, which would have to be grossed up for taxes. In other words, and using round numbers, I am satisfied that the defendant's income in 2008,

his last full year's worth of income and financial information which has been put before the court, would have been, for support purposes as opposed to tax purposes, in the range of approximately \$95,000 versus the \$79,685 he reported to Canada Revenue Agency.

- [55] In terms of 2009, it is impossible for me to know what the defendant's income will be. The plaintiff urges me to use the net draws the defendant has taken from the business as an indication of his expected income, while the defendant says that the draws are misleading as there have been times in 2008 and again in 2009 when the defendant received the interim and final distribution (approximately \$26,000 after separation) from his mother's estate, which has caused a fluctuation in cash in hand.
- [56] Before I express my conclusions about the defendant's income for support purposes, I will comment specifically on three of the plaintiff's submissions.
- [57] The first is that I should conclude that the defendant deliberately underemployed or unemployed himself in the first several months of 2009 by being on call to Crown Packaging rather than taking one of the regular shifts and laying off one of his drivers. I accept the defendant's evidence as to why he did what he did. I find that there was good reason for him to keep his drivers in place and to wait for business to pick up, and indeed his strategy did produce benefits in the way of the increased business revenues by the summer of 2009. The plaintiff herself admitted to the exceptionally long hours the defendant worked in 2008, to the point that the plaintiff testified that she thought that it would not make any real difference in the amount of time she and C saw the defendant if they spent three or four nights a week away from the family home and living in Vancouver. Had the defendant cut back to one driver in January 2009, he may well have found himself again in the situation he found himself in 2008 in terms of working more hours than were legal or healthy for him.
- [58] With regard to the plaintiff's submissions about drawing conclusions about the defendant's income from the lifestyle she says they enjoyed, I am mindful of several facts. The first is that the parties' lifestyle was at all times prior to separation subsidized by unreported rental income. It was further subsidized by gifts and then the inheritance from the defendant's mother. The parties had virtually no savings, particularly in view of their respective ages, with the exception of relatively modest RRSPs, other than the RRSP that was created through the defendant's employment before he worked full-time with J Trucking. The parties obtained funds by mortgaging or re-mortgaging, and then eventually selling the defendant's rental property in Vancouver. They drew money from C's trust account to buy one car, and they took advantage of special financing offers to buy another car. They essentially, I find, lived paycheque to paycheque, other than when they received gifts or other lump sums of money. I am not satisfied that I can draw conclusions about the defendant's income based on what the plaintiff says was the parties' lifestyle.

- [59] Finally, with regard to the defendant's consent in August to support payments based on an income of \$110,000, it is clear that the parties had a trial date pending within three months after the order was consented to. I would not be prepared to conclude that the terms of the consent order reflect an admission, for the purposes of trial, of what the defendant's income is. However, the defendant's consent is one factor I can and do consider in determining the proper income to attribute to the defendant.
- [60] I will also add that part of the difficulty in determining the defendant's income for support purposes is the fact that the parties had been separated for a relatively short time prior to the trial. I have not had one year's worth of financial statements for the sole proprietorship since the parties separated. Further, it is well known, and evident from the defendant's records, that the economy experienced a sudden downturn at almost exactly the same time the parties separated, which I find did impact on the defendant's business revenue. I also will say, however, that it appears from his recent billings, or at least recent as of the time of the trial, that the defendant's billings to his customer have or do indicate that his business has picked up again.
- [61] Taking into account all of the evidence, including the evidence set out in the defendant's financial documents for the period of January to September 2009, and the evidence of his earnings since he started devoting his full-time efforts to J Trucking, I conclude that it is appropriate to impute to the defendant income for support purposes of \$95,000 per year.
- [62] I turn now to child support. The table amount of child support payable for one child on an income of \$95,000 per year is \$864 per month. The defendant will pay to the plaintiff \$864 for child support for C, commencing on February 1, 2010, and continuing on the first day of each month thereafter until C is no longer a child of the marriage or until further court order.
- [63] In addition to basic child support, the plaintiff also claims special and extraordinary expenses for C, which she says in the future will be in the amount of \$10,000 per year for ballet school, additional coaching, dance clothing and shoes, competition fees, and the like. The defendant, by way of the consent order, has paid his proportionate share of special and extraordinary expenses in the amount of \$15,000 for the 2009 calendar year, which is what the plaintiff estimated C's dance-related expenses were in 2008 and 2009.
- [64] Section 7 of the Child Support Guidelines provides:
- In a child support order the court may, on either spouse's request, provide for an amount to cover all or any portion of the following expenses, which expenses may be estimated, taking into account the necessity of the expense in relation to the child's best interests and the reasonableness of the expense in relation to the means of the spouses and those of the child and to the family's spending pattern prior to the separation:

...

(f) extraordinary expenses for extracurricular activities.

[65] Section 7(2) provides:

The guiding principle in determining the amount of an expense referred to in subsection (1) is that the expense is shared by the spouses in proportion to their respective incomes after deducting from the expense, the contribution, if any, from the child.

[66] I do not consider it reasonable, for parties with the incomes these parties have had in 2008 and 2009, for them to spend \$15,000 of after-tax dollars on dance expenses for C. I accept that the family never had had that kind of dance expense before 2007, and that without the gifts and inheritance received by the defendant, the expenses could not have been born in 2007 and 2008 without incurring debt. Although the defendant may have been aware of some of the expenses as they were incurred, I am satisfied that he had no idea of the cumulative expenses until after the parties separated.

[67] I am also satisfied that C is in a position to contribute to her own dancing expenses. She, in fact, has done so in the past, to differing degrees, by way of the plaintiff paying for some of C's expenses from C's trust account, which has been built up from C's work as an actress and dancer. C's expenses have been written off against her business income on her income tax returns. Based on a statement from C's current talent agent, C's gross earnings from 2004 to 2009 were just over \$95,000, from which she had deducted agent fees. She reported gross income to the Canada Revenue Agency in 2002 of \$9,009, and in 2003 of \$11,721. As of December 1, 2008, the public guardian and trustee was holding \$13,499.35 in trust of her from her earnings, which will be paid to her when she turns 19. In two separate bank accounts, one in joint names and one in the plaintiff's name only, the parties hold in trust for C over \$35,000 now that the repayment has been made with respect to the money withdrawn from the account to buy a car. The difference between C's earnings, after deduction of agent's fees and payments to the public guardian and trustee, and the amount C currently has on deposit satisfies me that C has, in fact, contributed towards her own dance expenses, at least up until 2008. The amount of her remaining funds satisfies me that she can and should continue to do so, if, at age 16 and in Grade 11, she decides that she wishes to dance in the program and at the level that she has over the past two years.

[68] I will order that the defendant contribute pro rata to a maximum of \$7,500 per year of C's special and extraordinary expenses for dance. He will not be required to contribute to any expenses over and above \$7,500. He will pay his share of any expenditures up to the maximum cap forthwith upon presentation to him by the plaintiff of the bill or invoice or receipt for the expense. The contribution he made to special and extraordinary expenses on January 1, 2010, assuming he made the payment required by the consent order from August of 2009, will count towards his share of the maximum expenses this year. If counsel cannot agree upon the percentage or pro rata contribution required from the defendant, either may seek directions from me by simply calling the Kelowna trial coordinator and setting up a telephone conference with me. There will be no need for the filing of a formal notice of

motion or affidavit.

[69] I turn now to spousal support. There is no question that the plaintiff has established an entitlement to spousal support. Pursuant to the Divorce Act, the objectives of spousal support are to recognize any economic advantages or disadvantages to the spouses arising from the marriage or its breakdown, apportioning between the spouses any financial consequences arising from the care of any child of the marriage, relieve any hardship arising from the breakdown of the marriage and, so far as practicable, promote economic self-sufficiency for each spouse within a reasonable period of time. Having regard to those objectives, the court must consider the condition, means, needs and other circumstances of each spouse, including the length of the cohabitation, the functions each spouse performed during cohabitation, and any order, agreement, or arrangement relating to the support of either spouse (*Chutter v. Chutter*, 2008 BCCA 507 at para. 45).

[70] The two potentially applicable grounds for entitlement in this case are compensatory and non-compensatory. As the Court of Appeal said in *Chutter*:

[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...

...

[54] Where compensatory principles do not apply, need alone may be sufficient to ground a claim for spousal support...Non-compensatory support is grounded in the "social obligation model" of marriage, in which marriage is seen as an interdependent union. It embraces the idea that upon dissolution of a marriage, the primary burden of meeting the needs of the disadvantaged spouse falls on his or her former partner rather than the state...Non-compensatory support aims to narrow the gap between the needs and means of the spouses upon marital breakdown, and as such, is often referred to as the "means and needs" approach to spousal support. [citations omitted]

[71] In this case, while the plaintiff had been a hairdresser for 10 years before the marriage and remained one essentially throughout the marriage, she did suffer, I find, economic disadvantage by virtue of the functions she performed, primarily with regard to childcare. She left her work at a salon, and thereby limited her hours of work and limited her ability to build a clientele or a business base. By working from home, she has perhaps remained less current with hairstyling practices and procedures. She clearly has a claim for compensatory support. She also has a needs-based claim. She is not currently self-sufficient and she is unlikely to be able to put herself in a position to ever earn an income approaching that of the defendant's, or at least not any time soon.

[72] Having found that the plaintiff has an entitlement to support, the issues become quantum and duration. On these issues, the Spousal Support Advisory Guidelines are a "helpful guideline" and a "useful tool", which have been deemed to be consistent with the law in

British Columbia (Chutter at paras. 100 and 107). I have considered the means, needs and circumstances of each party. The numbers generated by way of the application of the guidelines are in keeping with what I consider to be an appropriate amount and duration of spousal support.

- [73] I will order that commencing February 1, 2010 and continuing to and including December 1, 2011, the defendant will pay to the plaintiff the sum of \$1,800 per month as spousal support. Effective January 1, 2012, unless otherwise agreed between the parties, the spousal support will be reduced to \$1,500 per month and will continue indefinitely. That does not mean permanently. I will not set a termination date. Rather, I will order that either party may apply for a review of either or both quantum and duration of spousal support any time there is a material variation between the income I have imputed to either party and the actual income earned by that party, and further, that even barring a material variation, either party may apply for a review of spousal support any time after January 1, 2013. I will say that I have chosen that date knowing that a review may well be an expensive process for the parties, but recognizing that where, such as here, there is a great deal of uncertainty about both parties' plans and/or financial futures, a relatively timely review is necessary.
- [74] I will also order that the parties will exchange complete copies of their previous year's income tax returns and notices of assessment by July 31, 2010, and each year thereafter for so long as child support or spousal support is payable. In the event notices of assessment have not been received by July 31, 2010, then they are to be provided to the other party within 14 days of receipt.

Summary

- [75] In summary, with regard to the orders I make today:
1. The parties will share joint custody and guardianship of C. C will be at liberty to choose her primary residence, which at present is with the plaintiff.
 2. From the proceeds of the sale of the family home, the parties' overdraft in the approximate amount of \$10,000 is to be paid in full.
 3. The defendant is entitled to 55 percent of the balance of the proceeds, and obviously, counsel, that is the balance as it was before the interim distribution I ordered at the conclusion of the trial or any payments with respect to arrears, and the plaintiff is entitled to 45 percent of the balance. From the defendant's share, he shall pay to the plaintiff any arrears of support owing, and he shall also pay to the plaintiff the sum of \$2,268.
 4. All of the parties' RRSPs shall be divided equally by way of tax-free rollovers.
 5. The defendant will be entitled to keep his tax-free savings account free of any claim by the plaintiff.

6. The plaintiff will be entitled to keep the defendant's whole life insurance policy. She may either cash it and retain the proceeds or pay the premiums to keep it in force, at her option.
7. The plaintiff will keep the Honda Civic, and the defendant will keep all of the other vehicles and trailers. The defendant will pay to the plaintiff from his share of the house proceeds the sum of \$12,390 to equalize the division of vehicles and trailers.
8. The defendant will transfer half of his Aeroplan points, as of November 25, 2008, to the plaintiff. The parties will share equally any cost charged by the plan administrator to effect that division.
9. Otherwise, each party will keep all property registered in his or her name or in his or her possession free and clear of any claims by the other, and each will be responsible for any debt in his or her name.
10. I find the defendant's income for support purposes to be \$95,000.
11. I find the plaintiff's income for support purposes to be \$12,000 per year for each of 2010 and 2011, and \$24,000 per year commencing 2012 and thereafter, unless otherwise agreed between the parties or ordered by the court.
12. Effective February 1, 2010, and continuing on the first day of each month thereafter until C is no longer a child of the marriage or until further court order, the defendant will pay to the plaintiff \$864 as basic child support.
13. The defendant will pay a proportionate share of a maximum of \$7,500 per year of C's special and extraordinary expenses. He will not be required to contribute to any special and extraordinary expenses over and above \$7,500. He shall pay his proportionate share of any expense up to the maximum forthwith upon being presented with a bill, invoice or receipt for the expense. The payment he made towards special and extraordinary expenses in January 2010 will count towards his 2010 contributions. If counsel cannot agree upon the percentage or pro rata contribution required from the defendant, either may set up a telephone conference with me through the Kelowna trial coordinator's office for direction.
14. Effective February 1, 2010, and continuing to and including December 1, 2011, the defendant will pay to the plaintiff the sum of \$1,800 per month as spousal support. Effective January 1, 2012, the amount of spousal support payable by the defendant to the plaintiff will be reduced to \$1,500 per month. No termination date for spousal support is set. Either party may apply for a review of quantum and/or duration of spousal support any time there is a material variation between the income I have found or imputed for either party and the actual income earned by that party. In any event, either party may apply for a review at any time after January 1, 2013.

15. The parties will exchange complete copies of their income tax returns for the previous year by July 31st, commencing July 31, 2010, as well as a copy of the notice of assessment received from Canada Revenue Agency, again by July 31, 2010, or if the notice of assessment has not yet been received, then within 14 days of the date of its receipt, and that exchange of income information will continue annually for so long as child support or spousal support are payable.
- [76] That concludes my decision. As I have indicated, I am going to order, and I will ask the clerk to do so now, a transcript of my reasons.
- [77] I will say to counsel two things. One, it is possible that you may wish to make submissions with respect to costs. If you wish to do so, I would ask you to contact the trial coordinator in Kelowna and she will, after receiving information from you, speak with me and she will give you directions as to whether the submissions with respect to costs should be made orally by telephone or in writing. If she has not heard from you within 30 days of today's date, then the default order will be that each party will bear his or her own costs.
- [78] The second thing that I will say is if there are any issues with respect to the finalization of the order or, as I previously indicated, with respect to the pro rata calculation concerning special and extraordinary expenses, or anything else arises, would counsel please, rather than taking formal steps and incurring additional costs, just contact the trial coordinator and let her know that you wish to have an opportunity to obtain direction from me, and she will make arrangements for that to happen promptly.
- [79] Is there anything arising?
- [80] MS. SLATER: My Lady, I have one question about -- oh, it's Ms. Slater. I have one question about the exchange of tax returns, and that's whether the defendant must also provide the plaintiff with the general ledger for his business so that she's in a position to assess the reasonableness of expenses on an ongoing basis.
- [81] THE COURT: I am satisfied that that would be appropriate. Is there any concern on your part, Ms. MacKinnon, with respect to that?
- [82] MS. MACKINNON: Well, it wouldn't be a normal requirement under the Child Support Guidelines, but I suppose if it is mutual and Ms. F would also provide the equivalent of a general ledger for her business, although I would expect she doesn't have accounting software, but something that sets out in detail her every expense.
- [83] THE COURT: Under the circumstances of this case, for so long as each party obtains their income through a sole proprietorship sort of arrangement, the income information to be exchanged between the parties will include a general ledger or something that includes a detailed listing of income and expenses.
- [84] MS. SLATER: My Lady, I have one other question as well. The \$7,500 for extraordinary expenses, I just want to confirm that that's intended to be the total expenses to which --

- [85] THE COURT: Yes.
- [86] MS. SLATER: -- [inaudible/overlapping speakers] not his share.
- [87] THE COURT: Yes, not his share. That is right.
- [88] MS. SLATER: Thank you.
- [89] MS. MACKINNON: Wasn't the figure \$7,000?
- [90] THE COURT: \$7,500.
- [91] MS. MACKINNON: Yes, or \$7,500. Okay. I have two questions, My Lady. Number one, the child's account, my client has no way of determining whether Ms. F will actually be paying her proportionate share from the child's account as opposed to through her own money without having access or control over those two accounts. There's one account in joint names. That's the Coast Capital account.
- [92] THE COURT: That is the smaller account now, yes, and the other is at ING and it is in Ms. F's name only.
- [93] MS. MACKINNON: Yes, so could there be an order that that be transferred into joint names and that either myself and other counsel discuss a mechanism with which monies get withdrawn from that account, or if you're in a position to make a direction on that right now.
- [94] THE COURT: I am of the view that counsel should discuss that issue, at the same time that you are dealing with the issue of proportionate sharing of the expenses and what that number actually is once you take into account the spousal support that has been ordered and use whatever calculator the two of you prefer to use with respect to determining proportionate share. However, if you end up in a dispute with respect to whether or not both accounts should be joint, and I certainly would not anticipate a requirement that both sign or authorize any withdrawals, but for the purposes of being able to view what is happening in the account, if one takes the position they should be joint and the other says, "I disagree," you are welcome to come back and make brief oral submissions by telephone on that point.
- [95] MS. MACKINNON: Thank you. I have one confusion, the earliest date in which a review of child support can be made, given your direction that you've based your figures on last complete year being 2008, can I have clarification that Mr. F would be at liberty to review the child support after the filings in relation to his 2009 income?
- [96] THE COURT: I have expressly said that either party can seek a review, and I am contemplating with respect to child or spousal support, if there is a material variation between earnings I have imputed and earnings actually received.

Beames J.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/SC/10/05/2010BCSC0552.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/r-a-f-v-j-r-f-2010>

Prepared on 26 October 2026 · Esheria