
CANADA / JUDGMENT

R.M.B. v. B.H.B.

2013 BCSC 148

COURT

Supreme Court of British Columbia

DECIDED

1 February 2013

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2013 BCSC 148 R. M. B. v. B. H. B.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

R. M. B. v. B. H. B.,

2013 BCSC 148

Date: 20130201

Docket: 3665

Registry: Fort Nelson

Between:

R. M. B.

Claimant

And

B. H. B.

Respondent

Before: The Honourable Mr. Justice McKinnon

Reasons for Judgment

Counsel for Claimant:

In Person

Counsel for Respondent:

S. L. Specht

Place and Date of Trial:

Prince George, B.C.

June 5, 6, 7, 11, 12, 13, 14, 15, 2012

November 5, 6, 7, 8, 2012

Place and Date of Judgment:

Fort Nelson, B.C.

February 1, 2013

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- [1] This family case began with the claimant obtaining a without notice order from the Provincial Court in Fort Nelson on May 22, 2009 restraining the respondent from attending at the matrimonial home. Clearly he was blindsided by this precipitous action that seemed to stem from a minor disagreement the parties had experienced a few days earlier.
- [2] Although he promptly obtained the services of a lawyer who had the order vacated, this event marked the start of a long, expensive vendetta that has cost the respondent dearly in terms of money and emotional health. It has also adversely affected his relationship with his daughter A.F.B.
- [3] The Provincial Court Judge who vacated the order made a rotation order permitting each party alternating time in the matrimonial home, thus ensuring a regular regimen for A.F.B. and two step-children.
- [4] Eventually the parties agreed that the claimant could reside in the home and the respondent in a trailer set up on the property. This was documented in "Minutes of Settlement" dated April 16, 2010 ("Minutes"). Various other agreements were also recorded in the Minutes including: the respondent purchasing the claimant's interest in the home; the parties would share custody of A.F.B; and the claimant would receive the assets/shares of a company called Lynx Industries Ltd.
- [5] Although both parties were then represented by counsel, who appended their signatures to this document, most, if not all the various obligations and terms contained within the Minutes were never fulfilled.
- [6] According to the respondent, he was keen to reconcile and felt that by agreeing to these various terms, that prospect might be more easily attained. Reconciliation was never on the claimant's mind. Whether she was then having a relationship with another person is not clear although she soon began one with S.N. According to the respondent, whose evidence I accept, he and the claimant occasionally enjoyed a sexual relationship after signing this agreement which suggested to him the possibility of reconciliation. When the respondent discovered that the claimant was having a sexual relationship with Mr. N., it caused him great emotional turmoil that required professional help and a leave of absence from his employment.
- [7] I regret to observe that in my years on the bench I have seldom encountered a more devious, manipulative, scheming person than the claimant, R. M. B. Ms. B. has a long history of ignoring Court orders, blaming everyone but herself for her troubles and shamelessly using her children whenever it suits her purpose. Although he has his own issues, Mr. B. is akin to the lamb at the slaughter when it comes to dealing with Ms. B.
- [8] The following issues are raised in the pleadings and evidence at trial:

1. Divorce

2. Variation of the Minutes of Settlement (referred to above)
3. Custody and guardianship of A.F.B., born January 8, 2006
4. Care and control schedule for A.F.B.
5. Child support for two step-children
6. Spousal Support Claimed
7. Determination of income for the claimant and respondent
8. Division of Property and reapportionment claimed by both
9. Wasting of family assets by the claimant
10. Compensatory payments from the claimant to the respondent
11. Preservation orders in respect to assets

I. Facts

A. History of the Parties

- [9] At the time of trial, the claimant was 44 years of age and the respondent was 48. She has been employed variously as a bookkeeper and manager of the family company, Lynx Industries Ltd. The respondent has a company which contracts his services as an Environment, Health and Safety Officer in the Oil and Gas fields.
- [10] Mr. B. is originally from Saskatchewan but came to the Fort Nelson area in 1994 after a failed marriage, presumably to "start afresh." He has three sons from that marriage who are all now independent.
- [11] Ms. B. has four children from different relationships. One child was given up for adoption and two, K. and D. were in her custody at the time the parties met in 1999. The parties married July 15, 2000. The parties' child, A.F.B. was born January 8, 2006. The marriage was marked by difficulties with occasional periods of separation. They separated for the final time in May of 2009. The claimant commenced her action in this Court in September of 2009. At trial, K. was 19 years old and D. 18.
- [12] When they met, Ms. B. was employed as a bookkeeper but had no appreciable assets. She was not receiving any child support for her children. Mr. B. owned what is now referred to as the "matrimonial property" which he purchased in 1994, six years prior to their marriage. He also owned a trap line which the parties enjoyed during their marriage.
- [13] For a brief time the marriage worked well. Mr. B. embraced the role of "step-father" to K. and D., though deferred decision making issues to Ms. B. He was then employed as a supervisor in a mill but opted for a lower paying job with the Ministry of Transportation in order to avoid shift work which he felt was not conducive to family life. Later he obtained employment with Encana Corporation but had to work in camps that kept him away from

home for eight days but this was followed by six days at home. Eventually Encana offered him a position in Fort Nelson where he worked for three years as a safety coordinator. Encana offered good remuneration and benefits and the Fort Nelson location permitted him to be home every night.

- [14] Unfortunately, Ms. B.'s boyfriend, Mr. N. also worked for Encana, and the respondent's mental health breakdown following his discovery of the relationship, was such that he simply could not carry on working alongside Mr. N. He then incorporated a company, retrained and was able to contract his services to oil and gas companies. For the past year or so he has primarily been employed by Quicksilver Resources on a schedule that allows him to care for A.F.B. when she is in his care.
- [15] His income was reduced considerably with the change in employment, a fact that the claimant refused to acknowledge and which caused multiple court applications that finally resulted in a child maintenance award commensurate with his income.

B. Alcohol Abuse

- [16] I had no difficulty concluding that the core issue in respect to the parties' deteriorating relationship was Ms. B.'s alcohol abuse. She has consistently refused/failed to address this major issue, simply denying she has any problems.
- [17] Mr. B. was so concerned with her drinking and how that could impact upon the safety of his daughter that he obtained a court order requiring Ms. B. to submit hair samples for testing, after his repeated requests that she provide samples on a voluntary basis were ignored. This Court ordered that Ms. B. provide samples and make the result known to the respondent. Notwithstanding that the order made August 18, 2011 required her to provide these samples, "forthwith", she did nothing until October of 2011 and then did not produce the results until after trial commenced in June of 2012. The respondent was obliged to bring numerous court applications, including contempt, to ensure compliance with the court order.
- [18] The claimant tested 1.907ng/mg. According to the analysis provided at trial, anything over 1.00 indicates chronic alcohol abuse. In March 2012, she was ordered to provide another sample as trial was pending and a current assessment was felt appropriate. She has never produced these results, which permits an inference that she continues to profile as a "chronic alcohol abuser". A very extensive custody and access report, prepared by Dr. Robert La Torre, included expressions of concern in respect to Ms. B.'s alcohol consumption as it related to the care of A.F.B. At page 67 of that report he commented:

The issue of Ms. B.'s possible excess alcohol use or alcohol misuse has not been resolved. A hair analysis needs to be completed [the results were not known at the time of Dr. La Torre's report] to ascertain her actual alcohol use as well as her history of illicit substance use. If alcohol is a problem, the couple and the Court may need to consider

- (a) substance use counseling or rehabilitation,

- (b) condition that Ms. B. is not to consume any alcohol while she has access with A.F.B.,
 - (c) condition that Ms. B. only drive A.F.B. in her vehicle and that that vehicle be equipped with an ignition interlock breathalyzer (a device that will not allow a car to be started if a person's breathalyzer reading is above a pre-set limit) and
 - (d) urinalyses or serum analyses at random intervals to insure alcohol is not consumed during periods of access. If there is a problem and if it escalates, supervised access will need to be considered.
- [19] At trial, Ms. B. called her mother, H.R., and her two children, K. and D. to testify. I believed almost nothing they told me. The children had clearly been coached by Ms. B. notwithstanding their assertions to the contrary. Mrs. R.'s claims in her examination in chief in respect to her critical assessment of Mr. B. were mostly refuted by a very effective cross examination. Mrs. R. was either untruthful in her answers in chief in respect to Ms. B.'s alcohol abuse or was wilfully blind to it. Much of her criticism of Mr. B. depended upon what others told her, including her daughter. She had no first-hand knowledge of many events described. Her evidence had little value insofar as it purported to support Ms. B.'s many claims.

C. Relationship between Respondent and Step-children

- [20] The children demonstrated a nasty, mean-spirited assessment of the respondent that has no factual basis. I did not believe their evidence insofar as it related to their descriptions of the respondent. I noted the following description after both had testified: "You can see the venom dripping from them." Both have rejected any relationship with the respondent.
- [21] Despite repeated requests and orders for production of the children's employment records and earnings, including amounts paid them by Lynx Industries Ltd., the claimant has never complied. I infer from their evidence and from adverse inferences available to me consequent upon the claimant's repeated refusal to disclose the childrens' financial status, that they require no financial assistance. The claimant is not providing them any financial support.
- [22] K. testified that at the time of trial, she had travelled to Switzerland, got an oil field ticket to work in the gas field, operated a National Car Rental in Fort St. John for a time and was presently operating heavy equipment and "making good money".
- [23] D. has obtained fairly advanced welding tickets and at the time of trial had worked for several companies as a welder and equipment operator. He testified that he had worked in several different oil/gas company camps, worked operating heavy equipment and worked as a welder. He spoke of earning \$18 an hour. He also conceded that he owns or has owned equipment and vehicles and that he has access to loans, should he wish to upgrade his skills.

II. A.F.B.

- [24] The central issue in this trial was the custody/access of A.F.B. The respondent seeks sole custody and sole guardianship and the ability to move with A.F.B. to Saskatchewan.
- [25] In her pleadings, the claimant sought sole custody and guardianship of A.F.B. Although her trial testimony was rambling and often unfocused, her descriptions of the respondent as a very bad person seemed to suggest that she continues to advance this claim.

A. Section 15 Report - Dangerous Parenting

- [26] As indicated earlier in this judgment, Dr. Ronald La Torre prepared a section 15 report which was received by the parties in February 2012. It is an extensive report which I found to be very helpful. His conclusions and assessments track many of the conclusions that I was able to reach after listening to the various witnesses.
- [27] At page 45 of his report, Dr. La Torre offered "Provisional Opinions Regarding Issues". He defined that phrase as follows:

In this section I provide provisional opinion regarding the issues raised or otherwise evident in this matter. It is important to note that my opinions are not findings of fact as in a Court of Law. They should be considered hypotheses with which I work in recommending custody and access. They may also be considered assumptions I make in arriving at my recommendations.

- [28] He then examined some of the issues raised. The first was a complaint by the claimant that the respondent had exposed A.F.B. to a potentially dangerous gas poisoning situation by taking her to a location where his company had a gas field. After interviewing a number of people, including experts in the gas industry, Dr. La Torre concluded that;

I do not consider that Mr. B. acted recklessly in this matter nor do I consider that Ms. B.'s concerns were unreasonable. I believe that Ms. B. acted appropriately to protect her children.

- [29] In another incident complained of by Ms. B. where a skidoo went through the ice, Dr. La Torre concluded that: "There is no evidence, therefore, to suggest that Mr. B. committed any wrongdoing on this occasion."
- [30] Dr. La Torre was critical of Ms. B. taking A.F.B. river boating if, as claimed, she was then consuming alcohol. He also noted with criticism, from photographs of this trip, that Ms. B. was not wearing a life vest.
- [31] Dr. La Torre dismissed the claimant's concerns about Mr. B.'s unfulfilled plans to take A.F.B. fishing on the ocean in a large craft. In respect to that proposed trip he noted: "I do not consider that A.F.B. would have been at undue risk of harm on such a trip she more likely would have been at risk of boredom being on board for such a period of time."
- [32] Dr. La Torre assessed several other incidents in respect to the safety of A.F.B. and ultimately concluded that while he had no concerns in respect to Mr. B., he had considerable reservations about the claimant. At page 54 under "Safety Issues Conclusion" he stated:

....the major safety issue that clearly relates to possible undue or unacceptable risk appears to be Ms. B.'s driving under the influence likely driving impaired, with K. Her use and possible of (sic) abuse of alcohol more generally is, therefore, a concern. The concern of Ms. B.'s alcohol use is a major factor considered in this assessment. I understand that a HAT was requested and Ms. B. reported she has provided a sample but there have been delays in the analysis and in her receiving the report; without some evidence that alcohol is not or is no longer an issue, I cannot dismiss it as a significant concern.

[33] Insofar as the many complaints made by Ms. B. about the dangers A.F.B. and her two other children faced at the hands of Mr. B., Dr. La Torre concluded at page 55 as follows:

The children have been subject to a number of accidents. Unfortunately, two of them have been rather serious for D. While in hindsight one can see how the parents might have prevented the accidents, I did not see gross recklessness in the behavior reported by the parents. D. went to hospital both times. There is no indication that any report was made to the Ministry by hospital staff who are required by law to report suspected abuse or neglect.

These parents have hopefully learned from any mistakes they have made. I have seen no evidence of wantonly reckless behavior that should impact on the parent's access. If there were such a concern, the recommendation would likely be for supervised access visits and, likely, reduced access time. Nothing, in my opinion, warrants the necessity of either parent having their access supervised due to safety aside from the issue of alcohol use.

[Emphasis added]

[34] The concerns of Dr. La Torre in respect to the claimant's alcohol abuse and how that impacts upon the safety of A.F.B., have, unfortunately been realized. In addition to the test results, various witnesses testified to the claimant's alcohol consumption when A.F.B. is in her care. Some claimed the consumption was merely social and did not lead to abuse while other evidence suggested a very cavalier attitude toward consumption that would give the disinterested viewer great concern about A.F.B.'s safety.

[35] The evidence disclosed an incident in 2004 when the claimant, when intoxicated, drove home from an office party with her then 11 year old daughter K. The respondent testified that they got into an argument about this and police were called. Dr. La Torre commented about this incident, having discussed it with C.H., a friend of the claimant whom she named as a "collateral source." According to Dr. La Torre, although Ms.H. made light of the claimant's alcohol consumption, she did agree that on this occasion she was called to the home by the claimant and observed her to be "drunk", "impaired", "intoxicated". Ms. H. took Ms. B. to her home so that she could "sleep it off" there.

[36] Ms. B.'s trial testimony was that she was not intoxicated but had had only a drink or two and that she called police because Mr. B. had sexually assaulted her. I did not believe a word of that version. Even Ms. B.'s good friend conceded that she was then "drunk".

[37] D. has a history of alcohol abuse that seems to continue, notwithstanding his assertions to the contrary. Pictures filed during the trial show many instances of D., while underage, consuming alcohol and at times consuming it with his mother, the claimant. Ms. Specht, counsel for the respondent, listed the following instances of his alcohol related issues:

passing out drunk in a snow bank in the middle of winter and nearly dying

getting into an accident and destroying a Lynx Industries vehicle while drunk

getting arrested while driving in another Lynx vehicle when he admitted he had been drinking that day

multiple photos of house parties (some at the Matrimonial Home with A.F.B.'s playthings visible in the picture) depicting him drinking

defacing the parties' garage while having a drinking party

posting multiple messages on Facebook about his drinking exploits

B. Problems with Shared Parenting and Court Orders

[38] The historical pattern of access is so littered with the claimant's manipulative misbehaviour that any shared parenting is doomed to failure.

[39] Although the claimant characterizes herself as a "victim", in my view she is the abuser and the respondent is the victim. She has managed to turn K. and D. from step-children who had a loving relationship with the respondent to having an irrational hatred of him. She has sent hundreds of emails and created social media stories depicting the respondent in a most unfavourable light. She has no regard for Court Orders. When pressed about her misconduct she either lies or makes excuses to justify her misbehaviour.

[40] Dr. La Torre commented in his report at page 64 that:

Disregard of Court Orders and Agreements may suggest disrespect for the Court. Disregard of past Court Orders can be considered a risk factor for future disregard of Court Orders. Disregard of Court Orders and Agreements may suggest of (sic) level of irresponsibility. Responsibility is an important consideration in custody and access matters as it related to the parent's ability to care for the child.

[41] In her submissions to this Court at the conclusion of trial, counsel for Mr. B. made the following assessment of the claimant in regard to her (in)ability to abide by Court orders.

114. The claimant has treated her contempt of Court Orders without concern. Only when called upon in front of the Court would she claim innocence or apologize but she never rectified her behaviour. Examples of her failure include:

- a. Failure to follow the initial order of the Provincial Court not to consume alcohol while any of the children were in her care;

- b. Failure to adhere with the Order of the Provincial Court not to remove A.F.B. from Fort Nelson without the consent of the respondent;
- c. Order of Justice Watchuk (Exhibit 52, tab 45):
 - i. Failed to provide hair sample to Motherrisk forthwith;
 - ii. Failed to provide the results of her testing to counsel within 72 hours of receiving same;
 - iii. Failed to pay her equal share for the Section 15 Report and delayed the Section 15 Report by her misrepresentations of payment being "in the mail";
 - iv. Failure to provide contact information for the biological fathers of K. and D.;
 - v. Failure to provide extensive document disclosure set out in the Order for both her personal accounts and Lynx Industries;
 - vi. Failure to adhere to the property access provisions for the respondent;
- d. Order of Justice Blok pronounced January 16, 2012 (Exhibit 52 tab 45):
 - i. Failure to provide copies of any documents received by her from Encana, Homewood, etc. within 72 hours of her receiving same;
 - ii. Failure to provide an accounting of assets disposed of by her from the date of separation to the date of the Order;
- e. Order of Justice Blok (pronounced January 17, 2012 (Exhibit 52, tab 45);
 - i. Section 67 restraining order for non-disposal of assets;
- f. Order of Justice Fitch pronounced March 2, 2012 (Exhibit 52, tab 45);
 - i. Failure to pay the respondent \$1,736.00 on or before March 11, 2012;
- g. Order of Master Caldwell pronounced March 26, 2012 (Exhibit 52 tab 45);
 - i. Failure to forthwith list the Matrimonial Home for sale;
 - ii. Failure to allow the respondent to walk through the matrimonial home upon 48 hours notice with his realtor;
 - iii. Failure to produce the results of her second hair analysis from Motherrisk;
 - iv. Failure to provide financial documentation for K. and D.;
 - v. Failure to provide (all) account statements for joint account statement between R.M.B. and A.F.B. from May 2009 to the present;
 - vi. Failure to provide the general ledger for Lynx Industries for 2011;
- h. Order of Justice Truscott pronounced April 17, 2012 (Exhibit 52 tab 45);

- i. Failure to be off of the property when the respondent attended the home with his Realtor;
- ii. Failure to provide full accounting of any assets disposed of by her from the date of separation to the present, such documents to be provided by April 18, 2012;
- iii. Failure to listing of property again;
- i. Order of Justice McKinnon pronounced June 15, 2012;
- i. Failure to provide full accounting of assets disposed of from January 2012 to the present;
- ii. Failure to provide list of items she sought to remove from the Matrimonial Home within 14 days of leaving home.

[42] I agree with those submissions and also with the submission that:

Every order made by the Court is disregarded by the claimant. There is no indication that she will change and no indication that she will take any future (order) of the Court with any seriousness.

C. Best Interests of the Child

[43] While the parents agreed to joint custody in their Minutes of Settlement, this agreement is not paramount when assessing the best interests of the child. In any event both parties have rejected joint custody as each claimed sole custody.

[44] In *A.L. & J.L. v. D.K. & M.W.*, 2000 BCCA 455, Finch J.A. addressed a custody appeal with a prior agreement between parents. While the agreement was an important factor, it was not considered the only factor:

[11] In *Kamimura v. Squibb* (1988), 13 R.F.L. (3d) 31, Mr. Justice Hinds (as he then was) said at p.36:

An agreement between the parents concerning the custody of their children cannot oust the jurisdiction of the court to determine the issue of custody. The court must base its decision with respect to custody on the overall best interests of the children. That is not to say, however, that an agreement between the parties of children concerning their custody is not an important factor to be taken into consideration.

[12] This passage was cited with approval by Mr. Justice Bauman in *Linnell v. Linnell*, [1997] B.C.J. No. 1579 (B.C.S.C.).

[13] In my respectful view, Hinds, J. put the issue correctly. Where no prior order for permanent custody has been made, a court's order for custody must be based on a full and balanced consideration of all factors touching on the best interests of the child. An agreement concerning custody between contending parties is an important factor to take into consideration, but it is only one factor.

- [45] I have also concluded that the many instances of disruption caused to A.F.B. by the claimant's actions, suggests she does not consider what is in A.F.B.'s best interests. Notwithstanding the parties had always taken A.F.B. to the Pentecostal Church where she was enrolled in Sunday School, Ms. B. unilaterally took her to another church and another Sunday School. All the respondent's efforts to resolve this issue were rejected by the claimant.
- [46] Enrollment in school was another issue. The parties could not agree and despite joint custody and joint guardianship, the claimant enrolled A.F.B. in the school the respondent felt was not suitable. Between October 2011 and February 2012, A.F.B. was late for school 32 times and all but once was when she was in the claimant's care. The claimant offered no rational explanation for this problem.
- [47] In the summer of 2012, A.F.B. lost a filling while in her mother's care. Ms. B. waited two weeks before she took A.F.B. to the dentist. When queried about this she offered the excuse that an "assistant" to the dentist told her A.F.B. could wait until her next cleaning.
- [48] The sum of these concerns suggests that the claimant doesn't put A.F.B.'s best interests first, she puts her own interests first.
- [49] It is for the above reasons that I must award the respondent sole custody and sole guardianship of A.F.B.

D. Mobility issue

- [50] The claimant is applying for an order to move A.F.B. from Fort Nelson to Saskatchewan.
- [51] Section 9 of the Divorce Act, R.S.C., 1985, c. 3 (2nd Supp.) sets out the importance of maximum contact between each former spouse and the child:
- (9) In making a variation order varying a custody order, the court shall give effect to the principle that a child of the marriage should have as much contact with each former spouse as is consistent with the best interests of the child and, for that purpose, where the variation order would grant custody of the child to a person who does not currently have custody, the court shall take into consideration the willingness of that person to facilitate such contact.
- [52] The leading authority on mobility is *Gordon v. Goertz*, [1996] 2 S.C.R. 27 [Gordon]. In this case the Court stated that while the principle of maximum contact cited is relevant, it is not determinative in mobility cases; Gordon at para. 24. The best interest of the child is the primary concern. In *Gordon*, McLachlin J., as she then was, summarized the key factors in determining mobility cases:
1. The parent applying for a change in the custody or access order must meet the threshold requirement of demonstrating a material change in the circumstances affecting the child.

2. If the threshold is met, the judge on the application must embark on a fresh inquiry into what is in the best interests of the child, having regard to all the relevant circumstances relating to the child's needs and the ability of the respective parents to satisfy them.
3. This inquiry is based on the findings of the judge who made the previous order and evidence of the new circumstances.
4. The inquiry does not begin with a legal presumption in favour of the custodial parent, although the custodial parent's views are entitled to great respect.
5. Each case turns on its own unique circumstances. The only issue is the best interest of the child in the particular circumstances of the case.
6. The focus is on the best interests of the child, not the interests and rights of the parents.
7. More particularly the judge should consider, inter alia:
 - a) the existing custody arrangement and relationship between the child and the custodial parent;
 - b) the existing access arrangement and the relationship between the child and the access parent;
 - c) the desirability of maximizing contact between the child and both parents;
 - d) the views of the child;
 - e) the custodial parent's reason for moving, only in the exceptional case where it is relevant to that parent's ability to meet the needs of the child;
 - f) disruption to the child of a change in custody;
 - g) disruption to the child consequent on removal from family, schools, and the community he or she has come to know.
- [53] The respondent has consistently demonstrated that while he is frustrated, angry and incurring heavy legal costs due to the claimant's obstructive behaviour, he has always tried to ensure that A.F.B. maintained a safe and healthy relationship with her mother. He recognizes that Ms. B., whatever her faults, does love A.F.B. and that it is important for both that their relationship continue.
- [54] Having reached this conclusion, I found it strange that Mr. B. would want to move A.F.B. to Saskatchewan where the claimant has no roots or employment opportunities and would therefore be unlikely to move. A move to Saskatchewan would essentially deprive Ms. B. of access.
- [55] I was also concerned that Mr. B. has only a vague notion of what he might be able to do in Saskatchewan. He spoke of moving to Moose Jaw and getting whatever work was available. I contrast that with the parties' historical association with Fort Nelson.

- [56] Ms. B. came to Fort Nelson in 1997 where she got employment as an office manager and book keeper. She met the respondent in 1999 and as indicated, they married in 2000. Her parents live in Fort Saint John which is several hours away. At trial she testified that she had a number of employment opportunities in Fort Nelson including a plan to obtain a real estate licence. She disputed a suggestion that she could earn up to \$80,000 per year but left me with the impression that she should be able to earn a relatively good income.
- [57] Mr. B. arrived in Fort Nelson in 1994 where he has been ever since. His sister Brenda, with whom he has a good relationship also lives in Fort Nelson. His mother, who lives in Saskatchewan, testified that as she is now retired, she would be prepared to assist him with A.F.B.'s care, whether that was in Moose Jaw or Fort Nelson. Although the matrimonial home is subject to a Court ordered sale, Mr. B. has a trap line with a cabin that he uses year round and which, it appeared to me, was a source of much enjoyment.
- [58] I have already referred to his employment history and the fact that he presently has a company that provides services to the oil and gas industry. I was much impressed with his ability to get on with things, including employment. As indicated earlier, his plans, if permitted to move to Saskatchewan, are extremely vague. He has no employment prospects, merely some notion of working as a "handyman". He has no accommodations in mind and offered no idea as to how effective access might be afforded to the claimant. His plan has not been very well thought out and would inevitably lead to a loss of contact between A.F.B. and her mother.
- [59] For those reasons, I would not accommodate his request to move with A.F.B. from the Fort Nelson area.

III. ACCESS

- [60] A.F.B. needs to see her mother on a regular basis but she also has to be protected from possible harm. Obviously one condition of access is that the claimant does not consume alcohol or non-prescription drugs while A.F.B. is with her. Unfortunately, and as noted by counsel for the respondent, there is virtually no way this can be monitored and effectively policed. Until the issue of alcohol abuse has been adequately addressed, the access will be quite restrictive.
- [61] To address these issues I order the following:
1. The respondent, or his designate, is to convey A.F.B. to the claimant's residence for each visit and pick her up at the end of that visit.
 2. These visits will initially be day visits only and will be each Saturday from 10:00 AM to 6:00 PM and each Wednesday from after the close of school until 6:30 PM. The respondent may suspend this access for a period of no more than three weeks once during the months of June, July, August or September of each year to facilitate any holidays he may plan which would take him away from the Fort Nelson area.

3. The claimant will have access for not less than four hours on Christmas day, Easter Sunday, A.F.B.'s birthday, and Mother's day.
- [62] The onus must be on the claimant to address the alcohol issues. If she wants to be able to convey A.F.B. in her vehicle then she will have to have an appropriate device installed so as to prevent operation should her alcohol level be above a set limit. If she wishes to have expanded access including over night, weekends and extended summer and holiday access, she will have to supply evidence that alcohol is no longer a problem. This might include a hair analysis, similar to that provided for trial.
- [63] I encourage the respondent to facilitate access to the claimant's family insofar as he is satisfied it is safe to do so. I am particularly concerned that A.F.B. not lose contact with her step siblings, K. and D. and her grandmother H.R.

IV. CHILD SUPPORT

A. Retroactive Child support

- [64] Consequent upon separation, the respondent paid \$1,300 per month child maintenance based upon his income with Encana. As previously noted, he left Encana in 2010, striking out on his own through a company called G-CALD Services Ltd. This change caused a drastic reduction in his income in 2011, dropping from something in excess of \$130,000 p.a. to \$49,000 p.a. In September of 2010 he asked the claimant to agree to a reduction of maintenance, commensurate with his reduced income. She would not agree.
- [65] In October of 2010, the respondent applied to the Provincial Court for the reduction but the matter was adjourned when the claimant told the Court that mediation was planned. Although a form of mediation did take place, nothing was resolved. The clock continued to run on maintenance arrears. The claimant took enforcement measures through Family Maintenance Enforcement Program seeking to recover almost \$15,000 in claimed arrears. Eventually, the respondent was able to obtain a "stay" order from this Court preventing collection of the claimed amount until trial resolution. That order by Watchuk J. on August 18, 2011, also reduced child maintenance for both A.F.B. and D.B. from \$1,300 per month to \$328.
- [66] K. has reached the age of majority, is financially independent, requires no financial support from the claimant and has rejected any relationship with the respondent. For those reasons, I direct that she has no entitlement to financial support from the respondent effective May of 2010 when she left the home, striking out on her own.
- [67] Although D. has not yet reached his majority, he has also, unreasonably, rejected any relationship with the respondent and has been financially self sufficient since his graduation from high school in June of 2011. The claimant does not provide him with any financial support.

[68] The retroactive date in respect to calculations for A.F.B. shall be September 1, 2010.

[69] I accept that the following incomes for the parties should be used to calculate the amount of arrears actually due, if any, in respect to A.F.B., K., and D.

Date

Claimant Income

Respondent income

Maintenance payable

2009

\$100,000

\$132,550

Not payable

2010

\$100,000

\$105,472

Payable

2011

\$100,000

\$49,226

Payable

2012

\$50,000

\$49,000

Payable

[70] There will be an order that all claimed "arrears" in excess of the amounts calculated in accordance with the above incomes shall be cancelled.

B. Ongoing Child Support

[71] As indicated earlier in this judgment, Mr. B. has filed financial information that establishes his income at \$49,000.

- [72] Given my order that the respondent has custody and guardianship of A.F.B., the claimant has an obligation to pay child maintenance commensurate with her income. She has skills as a book keeper and a history of employment although at trial she appeared not to be working, claiming she had to get the court case behind her before getting employment.
- [73] The respondent seeks to have income of \$50,000 to \$80,000 imputed to her, given her failure to provide financial disclosure and given her historical earnings.
- [74] I will impute income to her of \$40,000 with a proviso that she disclose to the respondent in each year, her tax assessment for that year within ten days of its receipt. She will be obliged to pay to the respondent the sum of \$370 per month commencing February 1, 2013.

V. Division Of Property

- [75] The claimant is applying for a variation of the Minutes of Settlement. One term of the Minutes said that the claimant would get all the assets of Lynx and the respondent would purchase the claimant's interest in the home.

A. Legal Framework

- [76] To vary a settlement agreement dealing with property, the court must turn to s. 68 of the Family Relations Act, R.S.B.C. 1996, c. 128:

Variation of marriage settlements

68 (1) This section applies to an ante nuptial or post nuptial settlement that is not a marriage agreement under this Part.

- (2) The Supreme Court may, on application, not more than 2 years after an order for dissolution of marriage, for judicial separation or declaring a marriage null and void, inquire into an ante nuptial or post nuptial settlement affecting either spouse and, whether or not there are children, make any order that, in its opinion, should be made to provide for the application of all or part of the settled property for the benefit of either or both spouses or a child of a spouse or of the marriage.
- (3) The Supreme Court may, on application, if circumstances warrant, extend the period during which an application may be made or power exercised under this section.
- [77] The discretion under s. 68 is broad. The court may draw on the factors outlined in s. 65 of the Family Relations Act.

Judicial reapportionment on basis of fairness

65 (1) If the provisions for division of property between spouses under section 56, Part 6 or their marriage agreement, as the case may be, 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,

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

- (2) Additionally or alternatively, the court may order that other property not covered by section 56, Part 6 or the marriage agreement, as the case may be, of one spouse be vested in the other spouse.
- (3) If the division of a pension under Part 6 would be unfair having regard to the exclusion from division of the portion of a pension earned before the marriage and it is inconvenient to adjust the division by reapportioning entitlement to another asset, the Supreme Court, on application, may divide the excluded portion between the spouse and member into shares fixed by the court..

[78] In *Pavlis v. Pavlis*, 2000 BCSC 565, Meiklem J. set out the framework for varying settlement agreements.

37 Whatever the level of deference to contract should be, it makes no sense in my opinion to apply a policy of greater deference to agreements on applications under s. 68 than to those under s. 65. Given that the inquiry under s. 68 is not limited to the s. 65 factors, the discretion is broader, and s. 68 also applies to separation agreements which have not been reduced to writing and signed. It defies reason to suggest, for example, that greater deference should be given to an oral agreement evidenced by draft Minutes of Settlement than to a written agreement signed, witnessed and delivered by the spouses.

...

49 I think that the idea of establishing a range within which reasonable people might disagree, after a consideration of the characterization issues, the valuation issues, and an application of the s. 65 factors, is the correct approach to a review of fairness on an application under s. 68 of the FRA. This test maintains an appropriate level of deference to the bargains people make for themselves, yet operates to prevent the types of injustices that can occur even with competent advice and the absence of factors which could vitiate the contract under the common law. I will proceed on that basis to review the valuation issues in this case, and then to discuss an objective apportionment on the basis of the s. 65 factors, as a first step in determining a reasonable range.

[79] The test to be applied here is whether the agreement made by the parties is within the reasonable range of what the court might have ordered. The court may vary an unfair agreement.

B. Lynx Industries Ltd.

[80] Lynx was incorporated in March of 2004. The parties had equal share holdings and both were active in the operation of the business. The respondent worked mostly part time as he had regular employment elsewhere during the years they both operated the company business.

[81] Lynx contracted with various companies to supply a wide range of services including vegetative spraying, traffic monitoring and safety consulting. After its first year of operation it showed a small loss but by year end of 2006, it had a profit of \$70,647. It was able to pay wages of \$32,760 in that year and to acquire equipment and other hard assets having a value of \$143,177.

[82] In 2007 shareholders' equity was \$139,094 and in 2008 it was \$180,897. The company also showed a profit of \$23,270 in 2007 and \$33,263 in 2008. These figures were determined after all deductions were calculated, including wages of \$54,691. Lynx continued to accumulate hard assets.

[83] At year end 2009, the company recorded a value of \$120,512 for property, plant and equipment. Gross revenue for that year was \$310,947. Deducting salaries, amortizations, rent and travel, the net revenue was \$111,035.

[84] Although no valuation was done at the time when the parties entered into the separation agreement, there is considerable evidence to permit an inference that Lynx was then a thriving company with a good future. The respondent handed over control of the company and its operations to the claimant in April of 2010. Although the claimant has refused/neglected to provide complete financial information in respect to Lynx, the evidence at trial suggests that she was receiving approximately \$100,000 per year from 2009 to 2011.

[85] According to the claimant, the company has gradually lost many of its contracts since she took over sole operation. It is apparent from the evidence that the claimant began taking whatever cash and equipment sales she could from the company. At trial the company's assets appear to have been completely dissipated, leaving only debt. A shareholder's loan of \$52,769 has disappeared and I can only assume the claimant took these funds as she admitted to "living off company funds". bank statements indicate that \$53,496 was transferred from the company to the claimant's account between January and July of 2009.

- [86] All orders, demands and requests directed to the claimant to produce documents and to refrain from disposing of assets have been ignored. At trial it was established that there is a debt of \$29,154.46 owing to CIBC, \$6,835.85 owing to CRA for payroll deductions, and a further \$45,750.47 owing to CRA for HST. The respondent is equally liable with the claimant for repayment of these debts.
- [87] The respondent concedes that he is obliged to account for monies he took from Lynx in 2009. He took a total of \$20,600 of which \$6,000 was paid to a lawyer for legal services associated with his separation, \$12,000 was paid to a contractor for repairs and improvements to the matrimonial home and \$1,000 was used for personal expenses. Thus he says that he must account for \$7,000.
- [88] Unfortunately it is impossible to accurately calculate valuations for Lynx. The claimant has consistently refused/failed to provide documentation that might shed some light on the financial affairs of the company. She has been the sole decision maker for the company since 2010. The evidence indicates that she took funds whenever she felt like doing so and sold corporate assets but failed to account for them as required by court order. She has failed to make obligatory CRA and bank payments for which the respondent is liable.
- [89] The claimant asserted at trial in June and November, 2012 that she was actively working with CRA representative Debbie Taylor to resolve outstanding issues, including a claim that she had provided CRA with all necessary return documents.
- [90] A letter from Debbie Taylor dated October 31, 2012, clearly shows that the claimant has done nothing to resolve the concerns and claims of CRA. She is not credible on this and most other issues.
- [91] In the result, I accept the respondent's invitation to infer a value for Lynx of \$300,000.
- [92] Insofar as the debts for Lynx are concerned I make the following orders:
1. The claimant shall within ten days of this judgment being filed in the Fort Nelson Registry, provide to the respondent any remaining assets of Lynx Industries, and in particular, the Lincoln Navigator, such assets to be sold forthwith and all funds to be remitted to CRA towards the debts owed for payroll and HST deductions.
 2. In the event the claimant does not provide the assets as set out above, the respondent shall be at liberty to have a bailiff attend any location where it is believed the assets of Lynx may be located and seize same, with the claimant to be responsible for all costs associated with same.
 3. The balance of any debt due CIBC and CRA by Lynx shall be paid from any share of the matrimonial home to which the claimant is entitled by this judgment.
 4. The claimant shall be solely liable for all interest, costs, legal fees or other penalties associated with the CIBC debt and CRA debt.

C. Sale of Property

- [93] The parties own a home located at 7012 Old Alaska Highway which BC Assessment has valued at \$493,000 in 2012. It was apparent to Mr. B. when he left the property in August of 2010, that it should be sold as there were no funds to maintain the financial obligations associated with it. He was then not represented by legal counsel but tried to seek the claimant's cooperation for a sale. No cooperation was forthcoming.
- [94] On obtaining his present counsel in January 2011, concerted efforts were made to resolve the issue of sale. An application was brought in June of 2011 seeking interim sale but this was thwarted by the claimant who represented that she intended to purchase the respondent's interest. She told the Court that she could continue to pay the mortgage and line of credit in the interim but never did. Nor did she take any steps to purchase the respondent's interest. It is apparent in hindsight and given the evidence at trial, that she had no ability nor any intent of purchasing the respondent's interest. In January of 2012, the claimant finally conceded that the home should be sold but would not cooperate in effecting a sale. In March, the respondent brought an application to this Court which granted an order for sale.
- [95] Notwithstanding this order for sale, the claimant still refused to cooperate, necessitating a second application and an application for contempt which were brought in April. Again no progress was made and by the commencement of trial the property had still not been placed on the market.
- [96] Exhibit 53, tab 23A is a letter from a realtor, Myrna Blake who opined in May of 2012 that the home was in poor condition and not presentable, if maximum market value was to be obtained. She described in detail the extensive repairs and cleaning required and appended photos in support. Although she felt the home might command a sale price of \$525,000 if cleaned but not repaired, she offered the following comment:

With the present state of neglect and lack of maintenance, I am uncomfortable placing a value on the property if offered for sale. It would be necessary to know what repairs and condition the home will be in upon offering. In the current state the value will be seriously below comparable homes and will likely take considerable time to realize a sale. At the very minimum the home needs a serious cleaning throughout.

- [97] To this point, various court orders had given the parties joint conduct of sale with specific right of access to Mr. B. to attend to effect repairs and general cleanup. I accept that Ms. B. thwarted this access such that almost nothing was done to put the property into marketable condition.

[98] On June 15, 2012, after four days of trial testimony, the respondent applied for exclusive conduct of sale and immediate right of access. I granted his application which included the right to effect whatever repairs were necessary and to deduct his costs from the net sale proceeds. I set the listing price at \$600,000. The claimant and her children were directed to leave the property on or before 4:00 PM of July 31, 2012. She was also required to provide a full accounting of all assets disposed of from January 1, 2012.

[99] On resumption of the trial in November 2012, the respondent filed another "marketing report" from Ms. Blake dated October 23, 2012. On this occasion she made the following observations:

This home was placed on the market on August 27, 2012.....The home has been very well prepared for marketing with the old mobile removed and its location cleaned and levelled. The interior of the home has had damage repaired, has been cleaned and in good condition for showing. The house is always shown through the main upper entrance so the buyer has the "WOW" reaction when entering and seeing the great room and spectacular kitchen.

The grass has been lush and green plus freshly mown for each showing and the house very comfortable and warm inside with wood burning in the outside boiler on most occasions so that the heat system can be well demonstrated.

Overall, the reaction has been amazement at the size of the property, the attention to detail in areas such as the heat system, kitchen design, number of lights and outlets, etc.

[100] The realtor indicated that she had had four very interested parties but all had existing homes they would have to sell before buying again. She was optimistic that a sale would take place and that there was nothing further that could or should be done in terms of making improvements. At the time of writing this judgment I am not aware of the status of the home although I am satisfied that there is nothing further the Court can do to advance its sale.

[101] The order I made in June and referred to earlier, provides that the respondent is entitled to recover all sums expended to place the home in saleable condition. At the continuation of trial in November, he set out these expenses which totalled \$9,173.75 plus direct labour costs of \$1,560. He did not charge for the 153 hours of his own time nor 30 hours of time put in by friends. Given the allotment of assets hereinafter set out, this may be a merely academic exercise.

D. Unequal division of Property

[102] The respondent has submitted that he should be entitled to an unequal division of the home and trap line, something on the order of 55% to 65%. This is based upon the undisputed fact that he owned these assets some years before meeting the claimant. I am not prepared to effect an unequal distribution primarily because I have determined a value that each will receive and (hopefully) will permit both to "get on with their lives".

[103] In the result, I direct that of the family assets, the claimant receives the following:

Lynx Industries at a value of \$300,000

Household contents at \$20,000

Investor's Group RRSP \$1800

CIBC Mutual Fund Account at \$2406

Total \$324,206

[104] The respondent will receive:

Sale proceeds of the home less encumbrances which include the CRA and CIBC debt - estimate value \$250,000

Trap line at \$26,000

Stocks at \$20,000

Sunlife converted pension at \$21,500

Household contents at \$6,000

Total \$323,500

[105] On the above calculation, the respondent would owe the claimant \$706. However, the claimant owes the respondent \$1,793 for her share of Dr. La Torre's report, for costs awarded in two court applications and one half of the costs incurred by the respondent to effect repairs to the home.

[106] My sense of the submissions made by the respondent at the close of trial was that if resolution of financial matters proceeded as they have, he would be content with that resolution and would not be seeking recovery of other sums due.

[107] Costs follow the event. The respondent, having been primarily successful in this action is entitled to his costs.

VI. Summary of Order

1. Divorce

There will be an order for divorce.

2. The Minutes of Settlement are varied as set out in the judgment.

3. Custody and guardianship of A.F.B., born January 8, 2006.

The respondent is awarded sole custody and sole guardianship of A.F.B.

4. Care and control schedule for A.F.B.

The respondent is not to move with A.F.B. from the Fort Nelson area.

The respondent, or his designate, is to convey A.F.B. to the claimant's residence for each visit and pick her up at the end of that visit.

These visits will initially be day visits only and will be each Saturday from 10:00 AM to 6:00 PM and each Wednesday from after the close of school until 6:30 PM. The respondent may suspend this access for a period of no more than three weeks once during the months of June, July, August or September of each year to facilitate any holidays he may plan which would take him away from the Fort Nelson area.

The claimant will have access for not less than four hours on Christmas day, Easter Sunday, A.F.B.'s birthday, and Mother's day.

She will be obliged to pay to the respondent the sum of \$370 per month commencing February 1, 2013.

5. Child support for two step-children

There will be an order that all claimed "arrears" in excess of the amounts calculated in accordance with the incomes set out shall be cancelled.

6. Spousal Support Claimed

The claimant sought spousal maintenance in her pleadings but she has not established any need. She is capable of earning a good income. The claim for spousal maintenance is dismissed.

7. Determination of income for the claimant and respondent

The claimant has an imputed income \$40,000 with a proviso that she disclose to the respondent in each year, her tax assessment for that year within ten days of its receipt.

She will be obliged to pay to the respondent the sum of \$370 per month commencing February 1, 2013.

8. Division of Property and reapportionment claimed by both

The property has been divided equally. The claimant and respondent shall be equally responsible for the cost of the mortgage and the line of credit on the matrimonial home until such time as the home is sold.

9. Wasting of family assets by the claimant

Based on the division of assets, there is no need to make an order on the wasting of family assets by the claimant.

10. Compensatory payments from the claimant to the respondent

The balance of any debt due CIBC and CRA by Lynx shall be paid from any share of the matrimonial home to which the claimant is entitled by this judgment.

The claimant shall be solely liable for all interest, costs, legal fees or other penalties associated with the CIBC debt and CRA debt.

11. Preservation orders in respect to assets.

The claimant shall within ten days of this Judgment being filed in the Fort Nelson Registry, provide to the respondent any remaining assets of Lynx Industries, and in particular, the Lincoln Navigator, such assets to be sold forthwith and all funds to be remitted to CRA towards the debts owed for payroll and HST deductions.

In the event the claimant does not provide the assets as set out above, the respondent shall be at liberty to have a bailiff attend any location where it is believed the assets of Lynx may be located and seize same, with the claimant to be responsible for all costs associated with same.

Judgment accordingly

"The Honourable Mr. Justice McKinnon"

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Prepared on 29 October 2026 · Esheria