
CANADA / JUDGMENT

S.C. v. D.A.

2012 BCSC 1061

COURT

Supreme Court of British Columbia

DECIDED

16 July 2012

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

2012 BCSC 1061 S.C. v. D.A.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

S.C. v. D.A.,

2012 BCSC 1061

Date: 20120716

Docket: E33757

Registry: New Westminster

Between:

S.C.

Plaintiff

And

D.A.

Defendant

Before: The Honourable Mr. Justice Armstrong

Reasons for Judgment

Counsel for Plaintiff:

S. Shivji

Counsel for Defendant:

D. R. Greig

Place and Date of Trial

New Westminster, B.C.

October 3 - 7, 2011

October 11 - 14, 2011

October 20, 2011

Place and Date of Judgment:

New Westminster, B.C.

July 16, 2012

Table of Contents

I. Background.. 3

A. S.C. 3

B. D.A. 5

C. Agreement Reached During Trial 6

D. Outstanding Issues. 7

II. Custody and Parenting.. 8

A. Dr. Colby's Section 15 Report 9

B. D.A.'s Alleged Use of Substances. 13

1. Conclusion on Substance Abuse. 14

C. Other Evidence. 14

D. Conclusion on Custody and Parenting. 15

III. Child Support. 17

A. D.A.'s Income. 17

1. Concert Income. 23

2. Conclusion on D.A.'s Income. 28

B. Conclusion on Child Support 28

IV. Spousal Support. 28

V. Family Home. 33

VI. Unjust Enrichment. 36

A. Findings of Fact 36

B. Legal Principles. 43

1. Enrichment / Detriment 45

2. Absence of Juristic Reason. 47

3. Defences. 54

4. Remedy. 54

5. Quantification of the Remedy. 54

6. Set-Off 55

VII. Summary. 58

A. Custody/Guardianship. 58

B. Child Support 60

C. Unjust Enrichment 60

D. Family Home. 60

E. Spousal Support 61

VIII. Costs. 61

[1] S.C. and D.A. lived together as a family for 14 years. They have a 14-year-old son, C., who is in high school. The parties have shared parenting responsibilities for C. with the arrangement that he lives in each of their homes for alternating weeks. Recently, C. has intermittently refused to return to his mother's home.

[2] The parties are in general agreement that C. should live with each parent for alternating weeks. The parties ask the Court to settle the details of their parenting roles and responsibilities. Moreover, S.C. seeks financial support for herself and C.. She does not make any claim against D.A.'s business but does seek a one half interest in the family home and one half interest in his financial assets including the RRSP contributions accumulated by D.A. during their relationship.

I. Background

A. S.C.

[3] S.C. is 45 years of age and resides in a basement suite in Fort Langley, British Columbia. She has been employed for 19 years with the British Columbia Automobile Association ("BCAA"), where she is currently responsible for maintenance of audit standards and performs some accounting duties.

- [4] S.C. met D.A. in December 1989 and they started dating in 1990. When they met, S.C. was renting an apartment in Surrey and D.A. was living in a two-bedroom condominium he owned. They decided to live together in October 1993. They had discussions about starting a family and she had an expectation that they would have a long-term future together.
- [5] When she started at BCAA, S.C. was a claims adjuster working in Burnaby on personal property damage files. She held this position for two years before residing with D.A. and had a plan to advance to new roles in the organization. She said her job as an adjuster was stressful and she did not think D.A. appreciated her stress levels in that position. She said that she gave up her career as an adjuster to take a position closer to their home and thereby sacrificed her career for the sake of her relationship with D.A.; he disagreed.
- [6] In 1993 she moved into the condominium D.A. had owned. At that juncture, she owned a 1993 pickup truck she purchased for \$18,000. She obtained a loan for the purchase of this truck, but was unable to recall the amount she borrowed. She did not own any real estate or other significant assets.
- [7] In 1994, the parties found that D.A.'s condominium was too small for their needs and they purchased a townhouse on 102nd Avenue in Surrey in joint names (the "townhouse"). Initially, they were unable to sell the condominium and rented it until it was sold.
- [8] She recalled contributing \$10,000 to the purchase of the townhouse, but did not recall how much D.A. paid towards the down payment. After moving into the townhouse, they reviewed their finances and created a budget. Based on their calculations, S.C. agreed to make monthly payments proportionate to her income to D.A. and he would pay the rest of the household expenses. S.C. began transferring \$900 per month to D.A.; she does not remember how they calculated that exact sum.
- [9] C. was born on June 15, 1997. S.C. was entitled to six months of maternity leave and preparatory to her return to work she located and arranged day care for him. S.C. did the majority of the domestic chores to maintain the home and care for C. before she returned to work. After her return to work, she transported C. to and from day care and attended to the details of his needs when in day care. She said that D.A. was working six days a week with very long hours and had limited involvement in the affairs around the home. He was involved in C.'s life to the extent his work schedule would allow.
- [10] The family remained in the townhouse until 2001 when they were required to leave because the strata did not permit children. They jointly purchased their house at 9147 Edal Street in Fort Langley, British Columbia (the "family home").
- [11] C. was five years old when he stopped attending day care and was enrolled in school full time. He has a good relationship with S.C.'s parents who supported him in his sporting and education activities.

- [12] S.C. has worked full time before and after October 1993 with the exception of her maternity leave. Her current work schedule includes weeks when she works Monday to Friday and other weeks when she works Saturdays with a random day off during the week. Her hours are usually 8 am to 4 pm or 9:30 am to 5:30 pm. She is entitled to five weeks of vacation and is provided medical and dental coverage, a pension, and an RRSP plan with her employer.
- [13] Her entitlement to the BCAA company funded pension plan has a pre-tax value of between \$44,500 and \$61,800. She can access her BCAA pension at a reduced rate in 11 years. She also has an RRSP that was funded by D.A.; she withdrew \$5,800 from this RRSP after separation. She also owns a BCAA voluntary pension valued at \$5,737 in February 2011.

B. D.A.

- [14] D.A. is 52 years of age. He operates an automobile repair business and gas station under the name Fort Horseless Carriage Services Ltd. ("FHCS") in Fort Langley. D.A. currently works from 8 a.m. until 5 p.m. daily. He resides in the family home, which is one block from FHCS.
- [15] He was born and raised in Alberta where he worked on his parents' farm. He moved on to become an agricultural service officer and later completed an auto mechanic apprenticeship.
- [16] He married in 1983 and worked as a mechanic at Goodyear in Calgary. When he was 24 years old, he saved sufficient money to buy a house. At that time, he also began saving money in an RRSP plan and in a whole life insurance policy. He continued to own these assets until the parties separated.
- [17] He sold his house in Calgary and moved to British Columbia in 1987. He acquired an OK Tire franchise store in Surrey. He liquidated all of his available assets and invested \$25,000 in this franchise. From 1987 until 2003, D.A. worked at the tire store six days a week.
- [18] He was divorced from his former wife in 1993 and received one half of the assets he owned with her. These included \$5,000 in cash, some Canada savings bonds, mutual funds and guaranteed income certificates. He purchased the condominium at 88 Avenue and King George Highway in Surrey in 1993 for \$92,000. He used some money inherited from his grandmother, other savings, and \$85,000 in borrowed money to make the purchase.
- [19] He confirmed meeting S.C. in 1989. He said they began dating around 1993 and eventually agreed to combine their homes in late 1993 when she moved into his condominium.
- [20] When they decided to purchase the townhouse, he recalled that S.C. contributed \$10,000 to the down payment and he paid \$12,000.

- [21] In 2003, D.A. disposed of his interest in the OK Tire Store; the parties sold the townhouse, and moved into the family home in Fort Langley. He took a sabbatical from November 2003 until April 2004, when he eventually acquired FHCS for \$30,000. He bought this business using \$12,000 he received from selling his interest in the OK Tire store and some of his RRSP money.
- [22] The parties lived together until February 27, 2009 at which time S.C. moved out of the family home. The parties had been in counseling up to her departure and S.C.'s decision to leave was a surprise to D.A.
- [23] D.A. does not have a pension, but had accumulated RRSP assets of \$154,326. Only a small portion of that account is intact as he has disposed of the balance.

C. Agreement Reached During Trial

- [24] During the trial, the parties reached agreement on the following:
1. C. should continue to live with each parent for alternating weeks.
 2. D.A. agreed to permit S.C. to recover certain items from the home in exchange for return to him of other specified items.
 3. The townhouse purchased by the parties was acquired for \$177,900. They borrowed \$157,850 of that purchase price.
 4. The family house was purchased for \$232,650 and the parties borrowed \$205,717 to complete the transaction. At separation, the first mortgage against the family house was approximately \$154,000. As of the date of trial, the balance owing under this mortgage was \$136,000 and there was an outstanding TD Bank line of credit of \$40,000.
 5. The family house is held in joint tenancy and is currently valued at \$457,500. The equity in this property will be divided equally subject to the argument that D.A. be entitled to compensation for the principal he has paid on the mortgage debt since separation.
 6. The Heritage Education Fund valued at \$27,690 is to be held jointly by the parties for C.'s benefit. In the event C. does not attend post-secondary school or is otherwise unable to utilize the fund, all credits and benefits are to be paid to him directly.
 7. The Mexican time share is to be purchased by D.A. from S.C. for the all-inclusive sum of \$6,250.
 8. The parties are to keep the motor vehicles in their possession and D.A. is to keep the jet boat without further accounting.
 9. S.C.'s BCAA company funded pension plan has a value between \$44,500 and \$61,800.
 10. S.C. takes no claim against D.A.'s auto repair business.

D. Outstanding Issues

[25] The following issues remained at the conclusion of this trial:

1. What parenting arrangements should be implemented for C.;
2. Whether D.A. was unjustly enriched by S.C. and whether she is entitled to a beneficial interest in D.A.'s RRSP and other financial assets by way of a constructive or resulting trust;
3. Whether D.A. is entitled to compensation for payments made toward the principal owing under the mortgage on the family home;
4. Whether S.C. has an obligation to pay her share of the balance owing on the parties' line of credit and the amount of that debt at separation;
5. Whether S.C. is entitled to spousal support under the Family Relations Act, R.S.B.C. 1996, c. 128 [FRA], and if so, how much should be paid;
6. Whether S.C. is entitled to child support under the FRA, and if so, how much should be paid; and
7. Whether either party is entitled to an order for special and extraordinary expenses.

II. Custody and Parenting

[26] The evidence of virtually all witnesses in this proceeding was that C. is a polite, respectful, well spoken, good-natured and responsible child. He appears to be a typical teenage boy who is functioning relatively well in the middle of this dispute between his parents. His academic performance is not strong and there was a suggestion he suffers from ADHD. C. is an accomplished lacrosse player and this sport appears to be an important activity in his life.

[27] It is a testimony to S.C. and D.A. that C. is so well-adjusted and socially capable. This is not to say that the actions of both parents have not created challenges for C. but he seems to have matured in spite of his parents' differences.

[28] On the other hand, the relationship between C.'s parents has become quite acrimonious. At trial, it became evident that the parties have not been able to manage their parenting responsibilities in a collaborative manner. Instead, as discussed below, a parallel parenting model was suggested.

[29] For example, D.A. is criticized for having produced copies of correspondence to him pertaining to the efforts he had made in attempting to resolve the issues with S.C. D.A. protested that this disclosure was necessary to confront untruths he believed S.C. was communicating to C. He acknowledged it was inappropriate but he believed it was important to be candid with his son.

[30] Furthermore, S.C. appears to have allowed her anger and frustration at the situation to influence her behaviour towards C. As an example, in a pique of anger with C., she sent out an email offering to sell C.'s bicycle to his friend. It is also clear that she behaved in an

unusual fashion on several occasions including when, during an argument with his mother, C. left her house; she followed him to D.A.'s business, sat outside in her car, and made inappropriate gestures to them. She said that she followed C. because she wanted to conclude the discussion they were having. I found her response to be irrational and unproductive.

- [31] S.C.'s poor impulse control was evident on yet another occasion, when she met D.A. in the company of a female friend; S.C. made offensive remarks about the friend of D.A. within earshot of his friend.
- [32] There was evidence of text messages sent by S.C. to D.A. that were offensive and inappropriate. It was clear to me that S.C. harbours a great deal of anger towards D.A. and has difficulty controlling her outbursts. D.A. seems irritated by S.C.'s demeanour toward him and C.
- [33] The parties have been involved in disputes about C.'s passport that has resulted in enormous litigation expense. There have been fractious issues about C.'s lacrosse equipment, and exchanges of C.'s things between their two houses. Each party blames the other for these problems; there is little value in finding blame at this stage. The parties are adults who are equipped to provide good care for their son and they must begin to find ways to solve these issues between themselves. C. should not be in the middle of their disputes.
- [34] In my view, there is an ongoing atmosphere of hostility between S.C. and D.A. that will erode C.'s chance to flourish in both homes. The parties should be able to collaborate on parenting issues, but without some improvement in their attitudes, they will not reach a place in their relationship where this can occur.

A. Dr. Colby's Section 15 Report

- [35] Dr. Robert Colby, a registered psychologist, was asked to prepare a custody and access assessment and make recommendations as to C.'s needs in the context of this family's issues. Mr. Justice Josephson ordered the s. 15 report.
- [36] Dr. Colby's report was submitted to the Court on August 29, 2011. It contained a chronicle of his investigation over ten days between June 27, 2011 and August 25, 2011. Dr. Colby attended the trial for cross-examination on his report.
- [37] Dr. Colby's observations included the following:

[C.] presents as a talkative, outgoing youngster. He reports that he wants to maintain the current access scheduling, which is spending half of his time with each of his parents, which he stated was the "right amount". [C.] says that he wants his parents to stop fighting with each other, and to be happy.

- [38] In his testimony, Dr. Colby suggested that the relationship and roles between C. and S.C. are dysfunctional. He commented that there has been a breakdown in the parental authority exercised by the mother such that C. believes he has authority to challenge and confront her. He indicated that C. assumed a role where he is parenting his mother whereas the healthiest and most productive structure would have S.C. parenting C. He opined that S.C. and C. will likely require professional help to repair their relationship.
- [39] The conflict is driven, in part, by C.'s understanding of the financial issues in the dispute between D.A. and S.C. C. believes he has a responsibility to punish his mother for not resolving the litigation and the features of the dispute that bring unhappiness to his father. Dr. Colby discussed S.C.'s reluctance to deliver his passport to his father as feeding the feeling that he is having to parent her rather than her exercising parental influence on him. He said that C. needs to see his mother as a parent exercising prudent and responsible relations with C. This is in contradistinction to the current situation where C. sees himself as a parent to his mother.
- [40] Dr. Colby was concerned about C.'s perception of the mother's non-cooperation with the father with respect to C.'s participation in lacrosse and other extracurricular activities, such as the band concert.
- [41] Dr. Colby opined that some evidence, including some text messages exchanged by the parents, indicate that S.C. experiences anger toward D.A. and C. He indicated that the breakup has created problem-solving issues between C. and his mother. He said it is not uncommon in marital breakup for people to resort to the same responses used in dealing with rejection. Inappropriate actions that people display in controversial circumstances are not necessarily evidence of a personality problem; rather, they are an explosive reaction to a hurtful circumstance. She has angry outbursts but is not an angry person.
- [42] Dr. Colby indicated that the incident wherein S.C. offered to sell C.'s bicycle to his friend when she was upset at C. likely exacerbated their problematic relationship.
- [43] Dr. Colby made 11 recommendations that can be summarized as follows:
1. The current access schedule should be maintained without further intervention being required;
 2. Both parents should continue to be responsible for decision-making in regards to C.'s needs. He recommended joint custody and guardianship but that the parenting process itself be engaged in as a parallel parenting process;
 3. S.C. should be primarily responsible for matters in relation to communication with the school and assuring C.'s academic progress;
 4. Communications between the parents should be by e-mail to ensure that relevant information is exchanged without C. having access to them;

5. C.'s passport should be freely provided with adequate notice in order to accommodate holidays and travels. Itineraries should be provided to the other parent in writing for any planned trips;
 6. Despite any other scheduling, C. should spend Father's Day with his father and Mother's Day with his mother;
 7. C.'s birthday should be spent with a parent who has access during the week of his birthday and Earth Day celebrations with the other parent to occur when that parent has access;
 8. School holidays, including spring break and Christmas should be shared equally between the parties. Accommodation for time missed with the other parent should be added to that parent's time following the holidays;
 9. During summer holidays, C. should reside with his parents on weekly or monthly rotations with the non-access parent having weekly telephone contact at a specified time;
 10. C. must not be engaged in any way in matters relating to the dispute between the parties and neither party should speak negatively of the other to C.; and,
 11. If C. and his mother are unable to maintain a level of trust and positive communication, they should enter into counseling to address issues in their relationship. A skilled counselor can play a significant role in modifying those behaviors.
- [44] Dr. Colby described C. as a tall athletic boy who is reaching a stage where he will be challenged to act independently of external authority. Dr. Colby suggested that an Order of this Court will have significant influence on C. if he understands that he has a responsibility to act in accordance with the Order. This will hopefully reinforce to C. his obligations to accept and comply with the parenting directions of both of his parents.
- [45] Dr. Colby reiterated that D.A. should make clear that he supports the sharing of parenting with S.C. and C.'s visits to his mother. He has a role to ensure the timely movement of C. to his mother's house at the appointed times. He comments that C. is 5'9" tall and weighs 155 pounds and D.A. should not physically force him to return to his mother's home. Rather, Dr. Colby suggests D.A. should make clear to C. that he supports the exchange since she is his mother, and that there are consequences for C. if he does not abide by the schedule requiring him to return to his mother's home. C. needs to understand that he is a 14-year-old boy and that his mother is obliged to exercise authority in important matters and it is not appropriate for the authority of one parent to be undermined by C. or by the other parent.
- [46] Dr. Colby concluded that it is important to keep C. out of the controversies between his parents. He said that the worst outcome from this litigation is for there to be a perceived winner and loser by C. S.C. and D.A. are bright people who ought to be able to sort through the acrimonious parts of this separation in a way their son will respect them both.

B. D.A.'s Alleged Use of Substances

- [47] S.C. tendered evidence to suggest that D.A. was a heavy drinker and regular consumer of marijuana. Some of this evidence seemed to be directed at informing me that he was not well equipped or capable of exercising prudent control and management of their son. It was suggested that he operated motor vehicles and boats when he was under the influence of intoxicants. She alleged that he regularly spent time in the household tool shed smoking marijuana. She alleged that he was often impaired when attending concerts at the Canucks Sport and Entertainment suites, an activity I will discuss below.
- [48] She suggested that D.A. was constantly drinking, both at work and when he returned home. At times she said he was a stumbling drunk.
- [49] Ms. Giesbrecht, a family friend, also reported seeing D.A. smoke marijuana before they moved to Fort Langley, but not after. She observed that D.A. drank heavily.
- [50] In reply, D.A. acknowledged that he had smoked marijuana in the past. He said he stopped smoking marijuana several years ago. He did not deny a history of drinking but said that several years ago, he began suffering from gout and has not consumed alcohol since.
- [51] With respect to his behaviour while attending concerts, D.A. denied heavy drinking and consuming drugs. He was supported in this by the limousine driver who did not observe the types of activity alleged by the claimant.
- [52] Mr. Roach is a long-time friend of D.A. He testified that he smokes marijuana for back pain and had smoked it with D.A. in the shed at the family home. The last time he was in the auto repair shop was four years ago, he claimed that D.A. did not smoke marijuana in the presence of C. Similarly, several years earlier he went on a trip on D.A.'s boat at which time they smoked marijuana but not near C. or S.C.
- [53] D.A.'s sister has never seen D.A. smoke drugs nor has she ever seen him drunk although she knew he did consume alcohol. She has been to concerts with D.A. and said that she had never seen patrons smoke marijuana or drink too much at those events.
- [54] I also heard evidence from E.F., who is D.A.'s current companion. She said she has not observed D.A. to smoke marijuana, drink or be drunk in the nine months that they have been seeing each other.

1. Conclusion on Substance Abuse

- [55] I do not accept the suggestion that D.A.'s history of alcohol and marijuana consumption is an adverse factor in the current circumstances of this family. Without making any finding on S.C.'s allegations of past conduct, the evidence satisfies me that historical events are not being repeated and will not impact C.'s current and future care. D.A. appears to have eliminated any habit of drug and alcohol consumption and, as such, they do not present any negative influence on C.'s life. S.C. has not argued that there is any risk in C. residing with his father. I am satisfied that C.'s father will do whatever is necessary to protect his son from

exposure to these substances in the future.

C. Other Evidence

- [56] D.A.'s sister testified that she is familiar with C. and visits D.A.'s house frequently. C. is affectionate and asked her to come to his lacrosse games. She described C. as a very respectful child who appears to have a good and warm relationship with his father. She sees no worrisome behaviors in C.
- [57] E.F. attended Mr. Colby's office and took tests requested by him. She described the S.C and D.A. house as being well-organized, neat and clean. She has positive interactions with C. She helps C. with his schoolwork, attends his games and tournaments, and views him as an even-tempered well-adjusted child. C. has confided in E.F.
- [58] D.A. said that he was involved in many aspects of C.'s educational and recreational activities. In particular, during his sabbatical in 2004 he was engaged in C.'s education and sporting activity.
- [59] D.A. agrees with Dr. Colby's conclusions that shared parenting is appropriate. He has two concerns, namely:
- C. has on at least two occasions, refused to stay at S.C.'s house. C. will be 15 years old and will likely choose his primary residence regardless of the Court Order or the wishes of his parents; and
 - He does not accept that S.C. should have sole control of C.'s academic life. He has been involved with C.'s education and sporting activities and would like to continue being part of these areas of his life.

D. Conclusion on Custody and Parenting

- [60] C. is, in my view, at an age where he might resist the obligation to reside with either parent for reasons that suit his purposes. S.C. and C. have had their differences; however, both need to strive towards building a better mother-son relationship between them. S.C. has made a few errors of judgment and self-control but overall, has been a loving and effective caregiver to C. D.A. may have become intoxicated and smoked marijuana in the past, but does not pursue those activities at the present time. S.C., although critical of D.A.'s past habits, said that it was in the best interest of C. that they share custody and guardianship of C.
- [61] The parties are in agreement that it would be in C.'s best interests for them to act as joint guardians and custodians. They also appear to be in agreement that the current schedule of C. spending one week in each home is in his best interests. It appears that this is C.'s wish and is supported by Dr. Colby.
- [62] S.C. asked the Court to approve Dr. Colby's 11 recommendations in his s. 15 report.

- [63] I am concerned that D.A. acted inappropriately when he discussed the litigation and his differences with S.C. with C. prior to this trial. Mr. Colby has said that this practice is not in C.'s best interest and he should not engage in any further discussions about the parents' differences with C. D.A. should try to support C. in repairing his relationship with his mother.
- [64] Equally important is the necessity for S.C. to obtain counseling with C. to address the issues in their relationship. Dr. Colby recommended these remedial measures if C. and his mother were unable to find the level of trust and positive communication necessary. In my view, that resolution is wanting and it is of the utmost importance that S.C. and C. begin the process with a skilled counselor to address the issues. That direction is included in the Order I will make.
- [65] D.A. must exert his authority to ensure that C. remains in his mother's house during those scheduled weeks. D.A. must be firm with C. and supportive of S.C.; if he fails, the matter will likely be returned to court.
- [66] Dr. Colby included a recommendation that S.C. be primarily responsible for matters in relation to C.'s schooling and academic progress. I have heard all of the evidence of the relationship between the parties and their respective interactions with the school. S.C. has played an important role in managing and monitoring C.'s school issues. D.A. has also been engaged in issues relating to C.'s education. It seems to me that in the context of their family dynamics, it would be helpful for C. and for the school authorities to be able to deal primarily with one parent on day-to-day issues. I accept that S.C. is the preferable parent to be the primary contact. However, this preference should not be misconstrued as denying D.A. the opportunity to speak with school personnel about C.'s education. Further, S.C. must communicate to D.A., by e-mail, the substance of her contacts with the school regarding C.'s issues and progress. This is a direction that also forms part of the Order in this proceeding.
- [67] S.C. also requested the exclusive authority to monitor and direct all of C.'s medical needs. In my view, C. resides with each parent for one half of the year. It would be inappropriate that one parent be vested with the sole authority and responsibility to look after his health care needs. I direct that each party communicate with the other via e-mail about all doctor's visits and other medical appointments within two days of the appointments and at the earliest possible time in the case of a medical emergency.
- [68] On the basis of the evidence I have heard, I conclude that it will be in C.'s best interest for him to be in the custody of both parents and that each of them be joint guardians. I conclude that C. should continue to spend alternating weeks in each parent's home.
- [69] With some minor exceptions, I will adopt Mr. Colby's recommendations regarding the details of the ongoing parenting program as detailed in paras. 248 to 254.

III. Child Support

A. D.A.'s Income

- [70] S.C.'s income for support purposes is \$39,889. She seeks retroactive and prospective child support on a lump sum basis. She asks that I impute income to D.A. of \$80,136; she says his line 150 income from his 2010 tax return is \$36,148.75 and that his other unrecorded income is approximately \$36,500 to \$44,500 per annum.
- [71] D.A.'s line 150 income for 2009 was \$33,114. His line 150 income for 2010 was \$35,705. The 2010 financial statement for FHCS reveals an operating net income of \$1,542. This profit is after the management expense of \$37,307 (D.A.'s income), amortization of \$2,950, and accounting and legal expenses of \$18,179.
- [72] S.C. asks to have income imputed to D.A. because he is the sole shareholder and operating mind of FHCS and controls the expenses of the company. As a result, I must look at the money available to provide support for their child, if any, with a view to examining which should be deducted from the operating costs to arrive at a fair measure of the amount of money available for support. Although the parties did not provide much argument or detail on this issue, this question of the child's entitlement to support compels me to review the Federal Child Support Guidelines, S.O.R./97-175 [Guidelines]. The analysis begins with s. 18 of the Guidelines which provides:

Shareholder, director or officer

18. (1) Where a spouse is a shareholder, director or officer of a corporation and the court is of the opinion that the amount of the spouse's annual income as determined under section 16 does not fairly reflect all the money available to the spouse for the payment of child support, the court may consider the situations described in section 17 and determine the spouse's annual income to include
- (a) all or part of the pre-tax income of the corporation, and of any corporation that is related to that corporation, for the most recent taxation year; or
 - (b) an amount commensurate with the services that the spouse provides to the corporation, provided that the amount does not exceed the corporation's pre-tax income.
- (2) In determining the pre-tax income of a corporation for the purposes of subsection (1), all amounts paid by the corporation as salaries, wages or management fees, or other payments or benefits, to or on behalf of persons with whom the corporation does not deal at arm's length must be added to the pre-tax income, unless the spouse establishes that the payments were reasonable in the circumstances.

- [73] The Guidelines also provide:

Determination of annual income

15. (1) Subject to subsection (2), a spouse's annual income is determined by the court in accordance with sections 16 to 20.

...

Calculation of annual income

16. Subject to sections 17 to 20, a spouse's annual income is determined using the sources of income set out under the heading "Total income" in the T1 General form issued by the Canada Revenue Agency and is adjusted in accordance with Schedule III. SOR/2000-337, s. 3; SOR/2007-59, s.4

...

Imputing income

19. (1) The court may impute such amount of income to a spouse as it considers appropriate in the circumstances, which circumstances include the following:

...

- (g) the spouse unreasonably deducts expenses from income;

...

Reasonableness of expenses

- (2) For the purpose of paragraph (1)(g), the reasonableness of an expense deduction is not solely governed by whether the deduction is permitted under the Income Tax Act. SOR/2000-337, s. 5.

[74] Section 11 of Schedule III to the Guidelines stipulates that:

Capital cost allowance for property

11. Include the spouse's deduction for an allowable capital cost allowance with respect to real property.

[75] The Court of Appeal in *Hausmann v. Klukas*, 2009 BCCA 32, addressed the issue of reconciling corporate income as a function of income for support purposes. They confirmed that the proper approach is to include in income for the purposes of child support corporate income where the sole shareholder of a corporation has control of the characterization and allocation of corporate expenses. The Court of Appeal settled the issue of the amount of pre-tax corporate income that should be added to the payor's income for Guideline purposes. They said:

[51] While the purpose and application of s. 18 were outlined in *Kowalewich* [v. *Kowalewich*, 2001 BCCA 450], this Court has not heretofore established an onus test. Some post *Kowalewich* authorities from this province, however, have concluded that there is an "emerging presumption" that pre-tax corporate income will be assumed to be available to a payor unless evidence is led to the contrary. These authorities state that the onus in the circumstances is on the payor. As discussed in *Jeffery v. Motherwell*, 2006 BCSC 140, 36 R.F.L. (6th) 377, at para. 13:

Kowalewich has been applied on other occasions by judges of this court and is binding authority. One of those cases *Bartkowski v. Bartkowski* (2003), 37 R.F.L. (5th) 242 (B.C.S.C. [In Chambers]), albeit dealing with very different factual circumstances in that the payor contended that his line 150 income was inflated to take advantage of tax benefits, the court said this about the authorities post *Kowalewich*:

I am of the view that these cases reveal an emerging presumption that the corporation's pre-tax income will be assumed to be available to the shareholder payor for the payment of child support unless compelling evidence is led by the payor spouse to support the conclusion that re-investment is necessary to sustain the company as a viable enterprise. ... (para. 51)

The onus is on the payor to provide the necessary evidence that the corporation's pre-tax income is not available to the payor. The court should not have to ferret out the necessary information from inadequate or incomplete financial disclosure. While *Bartkowski* says the evidence of the payor must be compelling, I prefer to use the word clear when discussing the necessary evidence of business circumstances as the former word might be taken to suggest a higher standard of proof than is called for by *Kowalewich*.

[Emphasis added.]

[76] In *Egan v. Egan*, 2002 BCCA 275, the Court of Appeal dealt with capital cost allowance issues. They said the court should consider the reasonableness of corporate expenses, including capital cost allowances:

[25] In my view, while it is clear that "an allowable capital cost allowance with respect to real property" must be included in income under the Guidelines, it does not follow that an allowable CCA with respect to personal property is necessarily deductible from income for Guidelines purposes. (In this regard, "allowable" means allowable under the Income Tax Act.) Rather, the absence of any reference in Schedule III to CCA relating to personal property permits the Court to assess the reasonableness of the deduction of these expenses pursuant to ss. 19(1)(g) and (2) of the Guidelines. Sections 19(1)(g) and (2) make it clear that the deduction is not automatically permitted for Guidelines purposes simply because it is permitted under the Income Tax Act. Rather, the court is entitled to look at the nature and extent of the deduction claimed to determine whether it is reasonable from a Guidelines, rather than an Income Tax Act, perspective. In many cases, it may well be that deductibility under the Income Tax Act and deductibility under the Guidelines will coincide.

...

[32] Mr. Justice Monnin, writing for the court [in *Andres v. Andres*, 170 D.L.R. (4th) 254] ... listed some of the factors the courts had taken into account in determining whether a particular CCA deduction should be "imputed" back into income under s. 19 of the Guidelines:

In summary, if one can extrapolate a summary, it would appear that the following are factors that have been considered in deciding whether or not CCA deductions should be imputed back into income:

1. Was the CCA deduction an actual expense in the year?
2. Was the CCA deduction greater than or less than the cost of acquisitions during the same time period?
3. Was the CCA deduction greater than or less than the repayments of principal with respect to the chattels in question?
4. Was the CCA deduction the maximum allowable CCA deduction?
5. Was it necessary to take the CCA deduction in that year?
6. How much of a loss in a business year resulted in that year?
7. Are the chattels for which the CCA was claimed truly needed for business purposes?
8. Do the chattels for which the CCA was claimed truly depreciated [sic]?
9. Is it foreseeable that future chattel purchases will not be required?
10. Is there a pattern of spending which establishes a greater real income than income tax returns indicate?
11. If the children were living with the spouse, would they benefit from the actual income earned by the spouse?
12. Is there a dire need for child support?

[Emphasis added.]

[77] Amortization expenses are those amounts properly deducted from taxable income to reflect the diminution in value of the capital asset during the course of the taxpayer's business in any given year. Amortization expenses relating to real estate are added into income for Guideline purposes due to the expectation that real estate is not regularly replaced and may not depreciate over many tax years. The expenses on less permanent capital assets are not added back into income when there is evidence that they more realistically reflect a business's needs to replace those assets on an ongoing basis.

- [78] In this case, D.A. is the sole shareholder and employee of FHCS. The full amount of amortization expenses may not be appropriate deductions from his income for Guideline purposes. Like the recording of retained earnings necessary for future company needs, it can give a distorted view of the actual income available, and some expenses may be charged against the company income when the benefit from those expenses accrues to D.A. personally.
- [79] I observe that D.A. claimed a total for amortization charges of approximately \$3,750 for 2009 and \$2,950 for 2010. He did not give evidence at all about the need for capital replacements in his business. During 2009 and 2010, it does not appear that the business made purchases of capital property. Although I recognize that the company needs to replace certain pieces of equipment over time, I am satisfied that the business's amortization does not reflect the ongoing expenses that might need to be incurred in replacing capital assets.
- [80] There was little evidence to inform me of the company's ongoing needs for capital or the extent to which other expenses constitute a personal benefit to D.A. Based on the limited evidence before me, I will impute an additional \$2,500 per annum to D.A.'s income representing an average of the capital cost allowance expenses of the company in the last two years.
- [81] Moreover, D.A. spoke about money he earns from renting his facilities to the movie industry. In this venture, he receives payments from movie companies for renting out his place of business and some money is paid to him personally. For example, he said that in September 2011 his facility was involved in two movies; he received \$1,000 personal income and \$2,000 was paid to his company. I observe that his 2008 to 2010 tax returns do not reflect any income from the movie industry paid to him personally.
- [82] Furthermore, the legal expenses incurred by FHCS for 2010 were dramatically disparate from those in previous years. I will also impute an additional \$12,000 in income reflecting the unusual legal and accounting expenses incurred in 2010 which was likely a personal benefit to D.A. and is unlikely to be repeated.
- [83] In 2010, FHCS disclosed income for automobile and travel expenses, a portion of which was for personal use. There was no evidence to assist me in apportioning that for Guideline purposes; however, counsel acknowledged that D.A. obtained some personal benefit from these. Accordingly, I will impute an addition \$1,000 for his automobile expenses that were for personal use.
- [84] Lastly, in 2010, the company had a profit of \$1,542 and that amount was available to support C. However, a three-year average of the company's income demonstrates a net loss and so I do not include an amount for profit in his imputed income.
- [85] There was evidence that D.A. employs C. to do odd jobs in his shop. He pays C. a wage and that money is or should be in a bank account to C.'s credit. I will not impute that money to D.A.'s income for the purposes of child support.

- [86] D.A. acknowledged that his overall annual income exceeds his line 150 income. For the reasons stated above, I am satisfied that the line 150 income shown on some of D.A.'s T-1 general forms does not fairly reflect all the money available to him for this payment of child support. I am aware that the Court of Appeal in Kowalewich said:
- [59] I do not recite these factors to suggest this Court should tinker with a trial judge's exercise of discretion, nor that a trial judge should second guess business decisions. I do say that a trial judge must have regard to the evidence of legitimate business needs in determining what portion of pre-tax corporate income to include in annual income for Guideline purposes.
- [87] I accept that D.A. may have legitimate business needs reflected in the expenses on FHCS financial statements. However, I am limited in the analysis because he gave no evidence about those needs.
- [88] After an analysis of the FHCS financial statements, I impute additional income available for child support from D.A.'s business totalling \$15,500: legal and accounting expenses (\$12,000), amortization (\$2,500) personal use of automobile expenses (\$1,000), and lastly, I impute income to him personally of \$1,000 per year from the movie business not recorded in the FHCS records.
- [89] Before I conclude what total income to impute to D.A., I will address the issue argued at trial by S.C. of D.A.'s alleged income from entertainment events.

1. Concert Income

- [90] S.C. argued that I should impute income to D.A. because he makes a business of selling tickets for entertainment events at Rogers Arena presented by Canucks Sport and Entertainment (formerly, Orca Bay). She urged me to consider his 2007 deposits of \$184,607 and 2008 deposits of \$118,113, less expenses as evidence of Mr. Arborgast's net unreported income of between \$36,500 and \$44,500 in those years.
- [91] D.A. described hosting friends and others at catered suites at Rogers Arena for concerts. The pattern began with D.A. learning about an upcoming concert that interested him. He contacted Canucks Sports and Entertainment and reserved a suite which would typically entitle him from 14 to 70 tickets depending on which suite is used. He would use his MBNA credit card to secure the tickets and the suite. Once the event was secured, D.A. contacted the prospective attendees and sold tickets to the event. He would arrange for catering to the event and charge an amount to cover his ticket costs and the cost of food.
- [92] In the spring of 2006, the parties obtained a line of credit #X-0449 to ease their financial difficulties (the "LOC"). They began to use that LOC for household expenses. In 2008 and 2009, the balance outstanding on that LOC was generally in the range of \$39,000 to \$41,000. This account was also used by D.A. as the source of cash resources to cover the expenditures of purchasing concert tickets and the suite. He used his MBNA credit card to make the initial payment to Orca Bay and would pay the credit card bill from his LOC. He eventually closed the LOC in July 2009.

- [93] The revenue from sales was deposited into the parties' joint account #X5944. Money from that account was then deposited into the LOC.
- [94] Revenues were not always an exact reflection of cost. D.A. said he lost money on 10 to 12 occasions and, in particular, lost between \$6,000 and \$6,500 in May 2009 when a Fleetwood Mac concert was canceled after he had secured his booking.
- [95] S.C. urged me to rely on the 2007 and 2008 deposits to accounts #X5944 and #X-2614 to assess D.A.'s income for those two years. She invited me to do this by subtracting from those amounts: S.C.'s payments towards living expenses (shown as "S. C. contributions"), the business deposits from FHCS, and other small transfers. She urged me to conclude that D.A. has unidentified deposits in these accounts. I assume that a portion of those amounts described as "undetermined income" are the amounts she asserts is available for support for C. and herself.
- [96] In total, S.C. claims that there were, in total, \$36,500 and \$44,500 in unaccounted for deposits for 2007 and 2008, respectively, which should be used to impute income to D.A.
- [97] I have reviewed the deposits to and withdrawals from D.A.'s Canada Trust account for 2007 and I do not accept that the information in his records is sufficient for me to conclude that his revenues amount to income for support purposes as suggested by S.C.
- [98] D.A. used his chequing account #X5944 to process most of his revenues and expenses. This account began 2007 with a balance of \$176 and ended 2007 with a balance of \$851. During the year, S.C. asserts that there were \$173,637 deposited to the account. From that account, D.A. paid \$67,650 to their outstanding LOC and a further \$14,621 to credit card debt, much of which was incurred to pay expenses related to his concert events.
- [99] In addition to concert income, D.A. deposited S.C.'s contributions to account #X5944 as well as his income from FHCS. In 2007, his net pay from FHCS was \$32,944 according to S.C.'s calculations. Lastly, he transferred \$9,500 from account #X-0449 to the chequing account.
- [100] In October 2007, D.A. received the sum of \$37,717 which S.C. characterized as an unidentified deposit. In fact, that amount of money corresponds with the bequest he received from his mother's estate. That money appears to have been to fund a GIC of \$50,000 which eventually formed the basis of the funds used to invest in the Mexican land venture which appears now to be lost.
- [101] Thus, it appears that the total deposits to the chequing account in 2007 excluding the amounts in paras. 99 and 100 above was \$79,893. This corresponds to the amounts paid to the LOC and credit cards in the amount of \$82,271. These calculations are the results of my examination of the evidence as I was able to reconstruct the documents available to me. On this analysis, I am not satisfied that D.A. earned any income from his concert activity. There is insufficient evidence to conclude that his earning capacity exceeds the amount he generates from FHCS and S.C. has not demonstrated that D.A. has unaccounted for income available for support purposes.

- [102] I also looked at records from 2008. I observed that the records for his regular account (#X5944) from August 1, 2008 to December 31, 2008 reflect deposits of approximately \$71,740. I have used the same time frame to analyze D.A.'s income from the concert events he managed. This data is representative of S.C.'s argument and is referenced in the documents she tendered to show that D.A.'s income exceeded his professed income.
- [103] S.C. did not suggest that either of the credit card expenses or the line of credit were for personal purposes. In fact, it seems as though the LOC was used exclusively to finance D.A.'s ticket purchases and expenses. During the period from August 2008 to December 2008, the LOC changed from an outstanding balance of \$38,071 to \$36,421. The amounts paid against LOC from account #X5944 were \$56,250. The deposits to and withdrawals from account #X5944 were approximately equal.
- [104] In 2008, the revenue deposited into account #X5944 also came from D.A.'s business, the monthly contributions from S.C. and the proceeds from ticket sales. It appears from the evidence that D.A. paid telephone bills, mortgage payments, telephone charges, and other regular expenses. There is little difference in the revenues received into that account and the monies paid to the LOC. If D.A. was in receipt of profit from ticket sales, that profit would appear as a surplus in account #X5944 or appear as withdrawals from that account for expenses other than the concert expenses. No surplus appears to have accumulated.
- [105] D.A. testified that he did not earn profit from ticket sales and concert events. His description of these events discloses a unique pattern of gathering friends and others to enjoy concerts in private premises. He used limousines for transportation to the events and provided a wide range of beverages, food and other things associated with the concerts. He hired staff to work in the suites and seems to have achieved extraordinary evenings of entertainment for himself, S.C., C., and their family friends.
- [106] D.A. agreed that direct costs for concerts at Rogers Arena were as follows:
- a. 2007 12 concerts \$63,400
 - b. 2008 7 concerts \$38,863
 - c. 2009 6 concerts \$39,845
 - d. 2010 6 concerts \$37,590.
- [107] As an example of other expenses associated with these concerts, D.A. said that for the AC/DC concert on October 15, 2008, he purchased 70 tickets. He gave away seven tickets as gifts, he purchased T-shirts and employed a host and five hostesses. He said ten tickets were unpaid for. S.C. and C. both attended the concert. He listed the types of expenses incurred in hosting this event: printed T-shirts, limousines, glow sticks, drinks, AC/DC paraphernalia, a plasma TV, and food catering. He said that the expenses incurred in hosting this lavish event exhausted the income he received. He provided similar explanations for the Fleetwood Mac concert.

- [108] The challenge presented by this evidence is that although he does not build any profit in calculating the charges to the attendees, he frequently receives sufficient money to pay for tickets for himself. He did not provide much in the way of detail of those concerts that resulted in losing money.
- [109] Ms. McNabb, an employee of Orca Bay, confirmed D.A.'s report of the process. She testified that most of the rental suites include food and beverage deliveries, which are paid for in advance by the client. She noted that the suites are regularly inspected by security during events. Smoking is not permitted in the suites. She receives regular reports on parties' behaviour and unruly patrons. She reported that there have been no complaints reported with respect to D.A. and his guests. In fact, Orca Bay rents suites to him in part because of his history of responsible conduct at concerts. There have been no problems with drugs or smoking in the units he has rented. She also confirmed that the beverage supplier, Aramark Canada, monitors alcohol consumption in addition to the arena security.
- [110] Importantly, Ms. McNabb explained that scalping tickets is forbidden. There has been no evidence of D.A. profiting from his concert ventures.
- [111] S.C.'s argument with regard to undisclosed income requires me to engage in a forensic analysis of the banking records and daily expenses incurred by D.A. I attempted to follow this analysis, but as I have indicated above, I am not satisfied on the balance of probabilities that D.A. has significant undisclosed income from his concert activities. I accept his evidence that there was no significant profit from these events and I am satisfied on the evidence before me that S.C. has not proven that D.A. earns additional income from his involvement in the entertainment events through Canucks Sport and Entertainment.
- [112] I observed that D.A. has not accumulated assets, other than his RRSP, the RESP, and things purchased from bequests, throughout this period. His budget for expenses rose from \$45,000 in 2010 to \$56,000 in 2011. His expenses correlate fairly closely to the income I have imputed to him from his business.
- [113] I decline to impute income to D.A. from his concert activities.

2. Conclusion on D.A.'s Income

- [114] Therefore, I will impute an income of \$16,500 to D.A. in addition to his line 150 income of \$36,148.75, for a total Guideline income of \$52,648.75 for child support purposes.

B. Conclusion on Child Support

- [115] Since the parents have joint custody of C., according to s. 8 of the Guidelines, the amount of child support order is the difference between the amount that each spouse would otherwise pay if a child support order were sought against each of the spouses (in this case, \$484.49 - \$362.82). Therefore, D.A. is ordered to pay \$121.67 in child support on a monthly basis to S.C. The parties will also be responsible to share the expenses referred to in s. 7 of the Guidelines in proportion to their incomes as I have set out in these reasons. If required, the

parties will have liberty to apply to address specific issues relating to special or extraordinary expenses.

IV. Spousal Support

- [116] S.C. seeks spousal support on compensatory and non-compensatory grounds. She argues that she has sacrificed her career for the sake of her relationship with D.A. and suffered a loss in wages of up to \$1,200 per month. She argues that the court should impute Spousal Support Advisory Guidelines [SSAG] income to D.A. at \$80,136 per year resulting in a range of spousal support from \$876 to \$1,550 per month.
- [117] S.C.'s records from 1993 to 1996 do not show any reduction in income. In fact, her income rose steadily until C.'s birth in 1997. There was an unexplained drop in her income in 1999; however, overall, her income seems to increase at the same level both before and during her relationship with D.A.
- [118] D.A. says that to be entitled to spousal support, S.C. must prove the following:
- i. an entitlement based on an established pattern of dependency, contract, compensatory or non-compensatory principles, and
 - ii. having established entitlement, she must establish a significant disparity in incomes of the parties.
- [119] D.A. rejects the theory that S.C. accepted an inferior position at BCAA for reasons related to their relationship. Further, he says that S.C. interrupted her employment for six months after C.'s birth during which time she received employment insurance leave benefits. There was no evidence of any kind that would engage the compensatory principle for spousal support.
- [120] He argues that there is also no basis for non-compensatory support since S.C. lacks the need for support. He says that a comparison between the parties' circumstances demonstrates absence of any disparity in their incomes or earning abilities. He argues that I should reject S.C.'s assertion that his annual income is in the order of \$80,136.
- [121] He argues that S.C. has failed to prove that she is entitled to support under either category and has failed to prove that D.A. has the capacity to pay spousal support.
- [122] For the reasons given above, I have concluded that D.A.'s income should be imputed at \$52,648 per annum. S.C.'s income for the years 2008, 2009 and 2010 was \$38,824, \$44,981 and \$38,541, respectively. In her financial statement sworn February 22, 2011, she indicated that her income for spousal or parental support was \$39,959.
- [123] The FRA provides for spousal support as follows:

Obligation to support spouse

89 (1) A spouse is responsible and liable for the support and maintenance of the other spouse having regard to the following:

- (a) the role of each spouse in their family;
- (b) an express or implied agreement between the spouses that one has the responsibility to support and maintain the other;
- (c) custodial obligations respecting a child;
- (d) the ability and capacity of, and the reasonable efforts made by, either or both spouses to support themselves;
- (e) economic circumstances.

[124] She argues that because she sacrificed her career for the sake of the relationship by stepping away from employment as a claims adjuster, she suffered a reduction in income.

[125] The claimant said that the position of a claims adjuster was a stressful occupation and the respondent did not appreciate the stress of her position. She said that she took the position of a club agent resulting in a decrease in pay of two levels within the BCAA structure. Initially, she said she did not know how much money was involved when she changed to the lower income position. She later suggested the reduction could have been \$1,200 per month. I do not accept that the reduction was of that magnitude; I accept that she does not recall the actual amount of the reduction.

[126] The evidence revealed that S.C.'s decision to relocate to a BCAA closer to her home was made before she was pregnant. There were significant benefits to her in this decision in that she saved time and expense in traveling from Burnaby to Surrey. I could not find any reliable evidence to indicate that this decision to accept a lesser position was driven by family considerations. At best, the decision was not of the type that meets the test of a loss deserving of compensation in terms of ongoing spousal support. Further, I do not accept S.C.'s argument that the wage difference between her position as a claims adjuster and that of the club agent was in the order of \$1,200 per month. The claimant could not remember the amount, and although I accept that there was some reduction in wage, it does not appear to me that the change in work was for the sake of her relationship. Her income tax records reflect that in each year after 1992, her income increased with the exception of 1997 and 1999; in 1995, her income increased more than 12%. It appears that other factors were involved in her 1997 tax year due to her maternity leave. She did not give reasons for the 1999 reduction.

[127] In addition to her current salary, S.C. receives five weeks of holiday, and medical and dental insurance coverage. Under cross-examination, the claimant acknowledged that when she changed jobs, the parties were living in the Surrey townhouse and she was commuting to Burnaby. She suffered from migraine headaches and continues to take medications for that condition.

- [128] She reports that her current job is easier than that of an adjuster and I am not satisfied that in the ten years since C. started school, she could have begun the process to improve her position at BCAA but did not.
- [129] Accordingly, I am of the view that S.C. has not demonstrated an entitlement to maintenance under the compensatory model. There was no express or implied agreement between the parties that D.A. would support her because she made this change in her work status. I conclude that her change of work status was a personal decision and was not driven by D.A.'s request or need. Further, the evidence does not disclose that she suffered any significant loss or reduction in income.
- [130] In my view, the claimant has failed to prove that she suffered any economic hardship resulting from her relationship with the plaintiff or the termination of that relationship. The income data in para. 192 below, shows an overall steady increase in wage.
- [131] The claimant cited *Chutter v. Chutter*, 2008 BCCA 507, as authority for her claim for support under the non-compensatory grounds. In *Chutter*, the wife appealed the dismissal of her claim for spousal support. The appellant's annual income was \$133,000; the respondent's annual income was \$214,000. The question was whether the appellant should have been expected to encroach on her capital in order to maintain a standard of living comparable to that of the marriage. Non-compensatory support becomes payable if there is some obligation or need for the recipient spouse to meet reasonable expenses.
- [132] To the extent that support engages an analysis of the standard of living during cohabitation and a spouse's post separation standard of living, the claimant in this case does not demonstrate any need or entitlement. She did not suffer any significant economic hardship from this relationship and she lives with an income very similar to that of D.A. Although her income is 20% less than D.A.'s income, she receives additional benefits that are not available to him. These further close the gap between their effective income circumstances.
- [133] The parties disclosed similar budgeted expenditures in their financial statements. S.C. estimates expenses of \$59,824 whereas D.A. estimates \$56,591.
- [134] I do not accept the claimant's suggestion that her standard of living is markedly different from the respondent's for any reason connected to their spousal relationship. Although the respondent remains in the family home, once the claimant has received her one-half interest in the home and other assets, they will be on equal footing in terms of the capital. Their respective incomes will be available to support similar standards of living. In that regard, they will have relatively equal circumstances. Moreover, D.A.'s responsibility for child support will further bring their relative circumstances closer to an equal footing.
- [135] S.C. testified that she is experiencing difficult financial circumstances in meeting her budgeted expenses and has incurred a debt to her parents as a result. However, she did not adequately explain why, in 2011, she purchased a \$54,000 ¾ ton pickup truck with borrowed money costing her \$572 per month. She traded in a 2006 Canyon pickup truck worth

\$20,000. On cross-examination, she was asked why she purchased this \$54,000 truck in face of the difficulties she was having feeding her son. She said the 2006 Canyon had numerous mechanical problems and she had a hard time getting auto repairs. She also said the Canyon truck was too small and she needed a 4x4 to drive on the tough logging roads to locations where she goes camping with her son. She said they go camping every second weekend and also for a two week period in the summer. Overall, I was not convinced why the larger and more expensive vehicle was necessary for family use.

[136] At that time, her rent was \$1,250 per month and expenses were an additional \$300 to \$400 per month. She also said her monthly budget for coffee was around \$200. She confirmed buying her son a dirt bike. She said it was important to have the dirt bike so that her son would be as happy at her house as he is at his father's house. She couldn't remember the cost of the Yamaha 125 but believed it was around \$2,000. She paid for this vehicle from a tax refund notwithstanding the fact that she had an outstanding obligation to Canada Revenue Agency ("CRA") for a reassessment of taxes for 2009.

[137] For the reasons above, I conclude that S.C. has not demonstrated an entitlement to spousal support.

V. Family Home

[138] The parties owned the home on Edal Street in Fort Langley as joint tenants. The parties are agreed that for the purposes of this proceeding, the home is to be valued at \$457,500.

[139] At the time of separation, the home was encumbered by a mortgage with an outstanding balance of \$154,069. At the time of trial, the mortgage balance was \$136,000.

[140] After the separation, S.C. did not make any payments towards the ongoing debt obligations nor did she contribute towards other costs for the maintenance and preservation of the house. She argues that during their time together, she contributed a disproportionate non-monetary contribution towards their joint venture by being primarily responsible for childcare and the domestic work around the home.

[141] The house is also encumbered by a home equity line of credit with a balance of \$40,000. S.C. argued that the balance owing on this loan was \$29,000 at the date of separation. The line of credit was used to fund D.A.'s practice of purchasing hospitality suites and reselling tickets to friends and others to entertainment events. The line of credit was also used to purchase the Mexican timeshare and to pay other expenses incurred by the parties.

[142] D.A. argues that the outstanding line of credit although temporarily reduced to \$29,000 on March 1, 2009, had previously been at \$40,000 over several years. He argues that there had been a receipt of funds for ticket sales to the Fleetwood Mac concert after separation but he did not pay for those tickets until May 1, 2009, at which time the debt owing on the line of credit increased to \$40,000. He explained the reason for the difference was that he was able to hold a suite and sell the tickets before paying for the suite. D.A. argues that it is unfair for

S.C. to take advantage of the temporary reduction in that outstanding balance at a time when he had an obligation to pay for tickets in May.

- [143] In the final analysis, D.A. says that for the purposes of the distribution of the value in the house, S.C. should receive the agreed on market value less the outstanding mortgage balance at the date of separation and the outstanding balance on the line of credit as of the time of separation.
- [144] D.A. was paying approximately \$562 each month against the principal balance of \$154,069 (now reduced to \$136,000) and \$768 in interest.
- [145] S.C. would like to sell the home; D.A. would like 30 days to buy the claimant's one half interest at the agreed-upon value.
- [146] D.A. argues that since separation, he has reduced the balance outstanding on the mortgage by \$18,000 and that in the division of the equity in the home, he should receive credit for that debt reduction.
- [147] D.A. argues that S.C. simply took all of her money and her assets and left the home in 2009. He was left to discharge the mortgage obligations and the line of credit obligations without any contributions from her.
- [148] S.C. argues that D.A.'s reduction of the outstanding balance due under the mortgage is offset by his continued occupation of the home to her exclusion. He argued that this is an equitable claim whereas S.C. is relying on the Partition of Property Act, R.S.B.C. 1996, c. 347.
- [149] In my view, by paying down the balance outstanding on the mortgage, D.A. paid a joint debt of the parties and is entitled to an adjustment in his favour to off-set the post-separation increase in the parties' equity in the home.
- [150] D.A. argued that the balance owing on the parties' line of credit which is secured against the family home at the time of separation did not reflect the accurate measure of that debt because he had received money for ticket sales prior to separation but incurred the debt for those tickets after separation. He had applied this revenue to the line of credit, thereby artificially reducing the debt.
- [151] This difference was approximately \$11,000. In my view, after D.A. had received the cash for tickets to be supplied in the future, he had a financial obligation to pay the funds for the purchase of the tickets. That obligation was historically paid for from the line of credit. It would be unfair to accord a benefit to S.C. without affecting the concurrent obligation customarily paid by use of the line of credit. Accordingly, the purpose of determining the equity in the family home, the amount of the line of credit will be the amount outstanding on the last day of the month before the receipt of the ticket sale proceeds. If the parties are unable to agree as to that amount, I would refer the issue to the Registrar for a determination of the amount received from ticket sales for the next concert activity.

- [152] S.C. seeks the partition and sale of the family home. The parties have agreed on the current market value of the house. In my opinion, it would be practical to permit one of the parties to buy the other's half interest based on the agreed on market value.

VI. Unjust Enrichment

- [153] S.C. provided the court with a revised schedule of assets and liabilities setting out the parties' properties and debts. S.C. claims monetary compensation from D.A. because he has been unjustly enriched by her efforts during their time together.
- [154] S.C. pleaded a claim for a declaration that D.A. held property in trust for her: the family home, Canada Pension Plan (CPP) entitlements, RRSPs and pensions generated by D.A. In argument, she limited her claim to monetary compensation reflecting her entitlement to her share in D.A.'s RRSP deposits of approximately \$154,000, his smaller cash deposits and insurance policy as at the date of separation. The claimant's pleadings did not specifically plead unjust enrichment, but her claim was argued as such. D.A. counterclaimed for relief under s. 65 of the FRA for a determination of family assets. He did not characterize his counterclaim as a set-off due to a mutual unjust enrichment; I construed his counterclaim to be based on a set-off in the event S.C. succeeds in her claims.
- [155] The parties requested that I deal only with D.A.'s RRSP balances and other financial assets and S.C.'s RRSP account and her pension as at the date of separation. By excluding consideration of other assets, the analysis is compromised because, if this is a joint family venture, I am restricted in considering the importance of various components to the family venture as are prescribed in the jurisprudence, as explained below. I will review the facts and attempt to resolve the issues outlined by the parties within the framework of the cases.

A. Findings of Fact

- [156] When the parties began living together, S.C. was employed as a BCAA claims adjuster, she owned a truck and was entitled to a pension through her employment. It appears she had no other assets, other than personal effects and furniture. She worked at BCAA full-time during the relationship (with the exception of a six month maternity leave).
- [157] S.C. owned a 1993 truck, which was purchased for approximately \$18,000. This truck was purchased with borrowed money.
- [158] In 1993, D.A. owned a condominium after receiving a gift from his grandmother in 1991. In 1992, D.A.'s mother paid off an \$83,000 mortgage on his home. He eventually repaid his mother all but \$35,000 of that advance but did not pay her interest. He owned several financial assets including an RRSP and a life insurance policy. He also owned some motor vehicles and his interest in an OK Tire store.

- [159] The parties joined their homes and lived in D.A.'s condominium until he and S.C. then joined in the purchase of a townhouse in 1994; she contributed \$10,000 and he paid \$12,000 toward the purchase of the townhouse. The parties jointly owned the townhouse and eventually sold it and jointly bought the family home in Fort Langley. They were co-debtors on the house mortgage and on the LOC. Other than these obligations, they kept their financial assets separate and did not mingle bank accounts or other resources.
- [160] Before embarking on FHCS, D.A. was unemployed for several months and attended to several of his son's activities including education, coaching soccer, and did other work around the home. Once his business was established, he worked full time, which S.C. described as "long hours".
- [161] He established FHCS after selling his OK Tire business in Surrey. He paid \$30,000 for the goodwill of this business; he used \$12,000 from the OK Tire business sale and the balance from his accumulated RRSP fund to make up the purchase price.
- [162] During their 16 years together, S.C. gave D.A. a sum of money (\$900 per month) and he paid the household bills. She said that the amounts she paid were calculated to be proportionate to their respective incomes.
- [163] The parties lived together until 2009 and S.C. held the personal view that, until then, this was a permanent relationship and she and D.A. would likely have retired together. Although not married, she formed the belief that their future was to be together. There was no express agreement or discussion about these matters with D.A. I infer that he likely shared some of her views because they had a child together, made joint wills and planned for the disposition of their estates to each other in the event of one of them dying, and designated each other as beneficiaries on their RRSP accounts.
- [164] I accept that S.C. performed something more than one half of the household chores including attending to C.'s needs. Those chores were not her exclusive domain but I am able to infer from the hours required of her BCAA work and those required of D.A.'s business, that she undertook more than one half share of domestic chores. Conversely, D.A. was responsible for the management of household expenses, mortgage payments, taxes, utilities, car repairs, and arranging family holidays.
- [165] After C. was born, S.C. said that she did the majority of the grocery shopping and childcare. She said D.A. was working six days a week. She did the cooking and attempted to arrange meals as a family. She would take their son to his day care and insure that he had food and other items necessary.
- [166] Both parties made significant financial contributions to their son's care and education. During their time together, D.A. paid for C.'s day care (except for one payment made by S.C.) and educational savings plan. S.C. paid for C.'s tutoring fees. S.C. acknowledged that the parties set up the Heritage Fund RESP for their son. D.A. made all payments into that fund.

- [167] S.C. believed her \$900 monthly payments covered her share of C.'s RESP, the mortgage, and utilities; she did not pay for their family holidays.
- [168] D.A. was an accomplished cook and prepared dinners for the family and friends, from time to time and when they entertained friends. They shared grocery shopping. D.A. would do lawn and garden work but S.C. felt that she was doing three quarters of the domestic work and childcare as well as making contribution to the household expenses. S.C. provided these descriptions of her duties without any specifics as to amount of time any detail involved. The parties shared shopping duties although S.C. said she did more of the shopping than D.A.
- [169] Both parties performed chores outside in the garden and on home maintenance. In 2002, D.A. paid \$6,600 to repair the roof of the house. He paid \$1,100 to repair the hot water system and \$400 to remove trees from the yard. S.C. did not contribute to those extraordinary expenses; her contribution to expenses was limited to the \$900 per month she paid to D.A.
- [170] D.A. owned several vehicles before and after the parties began their relationship. D.A. maintained his own vehicles, paid his own insurance and gas.
- [171] D.A. also paid for the Mexico timeshare expenses.
- [172] S.C. paid for costs associated with her own vehicles and her own insurance. She acknowledged that when she left the relationship she took her two vehicles and furniture she purchased on her own prior to separation. She acknowledged that D.A. had rebuilt the transmission in one of her vehicles and did other work on both vehicles. On separation, she took her vehicles and D.A. kept two vehicles registered in his name.
- [173] The parties have agreed upon the disposition of all motor vehicles.
- [174] I now turn to other assets of the parties during their relationship. S.C. confirmed that she received a sum of \$10,000 from an aunt who was disabled and incapable of managing her affairs. The plaintiff used some of this money to clean up her aunt's house and kept approximately \$5,000 for herself which she used to buy a truck for herself. This was S.C.'s only non-employment related revenue; she did not contribute from these funds to the parties' joint assets. Moreover, she did not provide any money directly to assist in the acquisition of D.A.'s RRSPs.
- [175] D.A. outlined the evolution of his financial circumstances during their relationship. He said:
- he made the original investment in a condominium prior to the relationship;
 - he received a \$5,000 gift from his grandmother to purchase the first apartment;
 - he received a \$35,000 gift from his mother to reduce the outstanding balance on his mortgage;

- he suffered the losses on the sale of the condominium and the townhouse without contribution or assistance from S.C.;
- he received a \$50,000 GIC in 1998 from his mother, which he used to buy the jet boat the family often used during holidays;
- he owned a tiger shark watercraft which was sold in 1998 for \$5,000;
- he received \$17,000 from this a motorcycle accident settlement in 1997;
- he received \$37,000 from his mother's estate in 2007. He used this money to invest in a Mexican real estate development. It appears that this investment may have been lost although there is ongoing litigation in regard to the property;
- he received \$10,000 from the sale of a Corvette motor vehicle in 2001, he used this money to move the family from the townhouse to their new home in Fort Langley;
- he received \$5,200 from a motorcycle he sold while living with the claimant;
- he received \$4,500 from the sale of a jet ski in 2001;
- he received \$10,000 from his sister in 2000;
- he paid 100% of the daycare expenses of between \$300 and \$650 per month for C.;
- he contributed \$5,800 to an RRSP in S.C.'s name and was trying to encourage her to add to that account;
- he made all the contributions to C.'s RESP;
- when he began living with S.C., his RRSPs were worth between \$50,000 and \$80,000 and together with subsequent contributions the value had grown to \$153,000 by the time they separated;
- the parties obtained a line of credit in 2006 to assist in meeting their expenses such as replacement of the septic field at their house. The line of credit fluctuated between \$39,000 and \$41,000 during 2008 and 2009;
- The balance outstanding on the house mortgage at the date of separation was \$154,000. The claimant has not paid any portion of the interest or principal since separation and the mortgage balance now stands at \$134,000; and
- The monthly mortgage payment made by D.A. when the parties separated in 2009 was \$1,700 per month. S.C. no longer made the \$900 contributions post separation.

[176] The parties owned the family home and the Mexican timeshare jointly.

[177] S.C. accumulated a pension at BCAA and the parties were agreed to a pre-tax value of the plan of between \$44,500 and \$61,800.

- [178] D.A. says that S.C. did not participate in the accumulation of his RRSP although he did give her money to purchase her own retirement plan; they kept these assets completely separate. He testified that he alone accumulated these funds over many years starting when he was 19 years old and living in Alberta.
- [179] S.C. confirmed the fact that D.A. had been saving RRSPs of his own since he was about 19 years of age. She did not know when he deposited monies to those accounts and was unable to confirm that D.A. interrupted his contributions to his RRSPs for several years because of financial difficulties.
- [180] D.A.'s RRSP related documents were incomplete and did not reflect the balances he owned in 1993. He stopped contributing to his RRSPs for some time and recommenced payment of \$150 per month in 2005 or 2006. He testified that when the parties started living together, he had between \$50,000 and \$80,000 in RRSP deposits that he began saving when he was about 19 years old. Based on documents tendered at trial, I have been able to determine D.A.'s RRSP contributions and some of his income data after the parties began living together as follows:

RRSP

Income

1994

\$7,689

1995

\$3,675

1996

\$6,320

1997

\$5,020

\$36,639

1998

\$3,733

1999

\$1,020

2002

\$20,395

2004

\$24,045

2005

\$26,377

2006

\$1,365

\$43,306

2007

\$2,450

\$42,756

2008

\$4,300

\$37,343

TOTAL

\$35,572

[181] This data is consistent with D.A.'s evidence that for some years before 2006, he did not contribute to his RRSP. The records tendered did not disclose contributions from 2002 to 2005 and there is no other evidence to reflect that he made contributions during those years.

[182] He made an RRSP contribution in 2009 of \$1,650.

[183] The records disclose that S.C.'s contribution to her company pension and voluntary company pension began in 1991. S.C.'s income and contributions to RRSPs and pensions beginning in 1991 are as follows:

RRSP

Income

Pension & Voluntary Contributions

1991

0

\$19,503

0

1992

0

\$22,461

0

1993

\$100

\$24,121

\$473

1994

\$2,000

\$25,194

\$866

1995

\$250

\$28,474

\$1,280

1996

\$1,300

\$28,184

\$1,228

1997

0

\$13,931

1998

\$1,100

\$29,334

\$1,750

1999

\$700

\$3,744

\$54

2000

0

\$29,543

\$1,742

2001

\$200

\$30,899

\$1,919

2002

\$1,909

\$33,257

\$2,019

2003

\$1,308

\$33,718

\$2,046

2004

0

\$32,522

\$2,167

2005

0

\$36,058

\$2,192

2006

0

\$36,914

\$2,189

2007

\$250

\$37,237

\$2,373

2008

\$600

\$38,824

\$2,375

2009

\$300

\$39,176

\$2,493

TOTAL

\$10,017

\$27,166

[184] At the time of separation, D.A. owned \$18,766 in three Toronto Dominion / Canada Trust accounts and a Sun Life insurance policy.

[185] After separation, S.C. withdrew \$5,804 from her RRSP account. D.A. has withdrawn most, if not all, of his accumulated RRSPs from his accounts.

B. Legal Principles

[186] A remedy for unjust enrichment can be given where the plaintiff establishes an enrichment of or benefit to the defendant, a corresponding deprivation to the plaintiff and the absence of a juristic reason for the enrichment (Kerr v. Baranow, 2011 SCC 10 at para. 32).

[187] The claims of these parties are to be resolved in accordance with the principles underlying unjust enrichment actions as set out in Kerr. In that case, the Court discussed the appropriate vehicle for addressing the financial consequences of a breakdown in a domestic relationship. Cromwell J. said at para. 24, "the common intention resulting trust has no further role to play in the resolution of domestic cases."

[188] The law of unjust enrichment is the primary vehicle to address claims of inequitable distribution of assets on the breakdown of the domestic relationship (Kerr at para 30). The claimant must establish three elements to achieve a remedy:

- a. an enrichment of or benefit to the defendant,
- b. a corresponding deprivation of the plaintiff, and
- c. the absence of a juristic reason for the enrichment.

(Kerr at para. 32; See also *Garland v. Consumers' Gas Co.*, 2004 SCC 25 at para. 30.)

[189] The framework for the analysis has been comprehensively set out in *Wilson v. Fotsch*, 2010 BCCA 226. The following is the basic outline recommended in Wilson:

[11] The basic outline for that analysis can be summarized this way:

1. Benefit/Enrichment
2. Detriment
3. Absence of a juristic reason for the enrichment
 - a. Established categories
 - i. Contract
 - ii. Disposition of law
 - iii. Donative intent
 - iv. Other valid common law, equitable, or statutory obligations
- b. Reason to deny recovery
 - i. Public policy considerations
 - ii. Legitimate expectations
 - iii. Potential new category

Defences

Change of position; estoppel; statutory defences; laches and acquiescence; limitation periods; counter-restitution not possible

Choice of Remedy

- a. Is a monetary remedy sufficient?
- b. Is a constructive trust required (or equitable damages for the value of the trust interest)?

Quantification of the Remedy

- a. Value received (quantum meruit basis)
- b. Value survived (proportionate share basis)

Set-Off (equitable and legal)

Pre-judgment interest

1. Enrichment / Detriment

[190] In order to succeed, the plaintiff must show that she gave something to the defendant which he received and retained. It must have enriched him, and must be capable of restoration to him in specie or by money. The benefit may be positive or negative in the sense that the benefit conferred on one defendant spares him or her an expense he or she would have had to undertake; it must be tangible (Kerr at para. 38).

[191] It will be unusual to find a domestic relationship in which both parties have not received some benefit from the other. At this stage of assessing the enrichment of either party, the flow of reciprocal benefits should not be considered. The balancing of those interests is also not appropriate at this stage.

[192] The plaintiff must establish that she has suffered a deprivation corresponding with the enrichment of the defendant. Deprivation may be observed in a transfer of wealth or an infringement of some other interest. Where a defendant receives the benefit of unpaid household or domestic services, the deprivation is in the fact that those services were delivered without complete compensation (D.P.S v. B.H.L., 2011 BCSC 327 at para. 48). In Wilson, the Court explained the benefits commonly given in a marriage-like relationship:

[13] It will be unusual for a court to find that a defendant has not received some benefit in a marriage-like relationship. Given the breadth of the definition of "benefit" and the sharing inherent in such a relationship, even one where the parties have carefully limited their contribution to joint expenses, something of value will usually have been received and retained not only by the defendant, but also by the plaintiff. This being so, courts must resist the urge to examine the flow of reciprocal benefits between the plaintiff and the defendant at this stage.

[193] In Wilson, the Court observed from Peter v. Beblow, [1993] 1 S.C.R. 980, that if an enrichment occurs in a long-term common-law relationship, a finding of deprivation is virtually automatic.

[194] The benefit to the defendant must be capable of restoration to the plaintiff in specie or by money.

- [195] It is important that the plaintiff establishes that the enrichment corresponds to a deprivation suffered by the plaintiff (Kerr at para. 39).
- [196] The difficulty in this case is the need to avoid confounding the question of unjust enrichment with issues relating to set-off and quantification of the remedy. In this case, both parties made significant advances of time, money and effort into the maintenance of their family and home. As Huddart J.A. said in *Wilson*, it will be unusual to find an absence of sharing of benefits in a marriage-like relationship.
- [197] D.A. received substantial sums from inheritances and some, if not all, of the money was expended on assets that were utilized by S.C. and C. as well as D.A.. He worked long hours in his business. S.C. shouldered more than one half of the household duties. I am satisfied on the evidence that S.C. did enrich D.A. in the domestic work she provided to their home. But for her effort, D.A. may have been compelled to provide more labour and services personally or pay for them. Conversely, S.C. suffered a detriment corresponding to the time and effort she committed to providing more than one half of the labour to the domestic work in and about the family home.
- [198] There will be further comment on the reciprocal benefits provided by both parties in the juristic reason analysis, the quantification of the remedy, and set-off discussions below.
- [199] There is, in my view, no doubt that the parties were in a long-term marriage-like relationship, and that both parties contributed to that relationship in many direct and indirect ways. The parties are not married; thus, there is no automatic entitlement to share in the assets of the other because of the decision to remain unmarried must be respected; a marriage-like arrangement is not tantamount to marriage (*Wilson* at para. 8).
- [200] The facts in this case demonstrate a common purpose in the decision to have a child and jointly attend to his needs. The evidence did not reveal the extent to which either party paid the child's expenses except that S.C. paid tutoring bills and D.A. paid for day care.
- [201] The evidence did not disclose any shared goals agreed on by the parties; S.C. held the view that she was in a permanent relationship and in essence, they would grow old together in a mutually supportive relationship. However, there was little evidence that this was a reciprocal expectation other than the creation of wills naming each other as beneficiary of their estates.
- [202] In this case, D.A. advances a position that there were reciprocal benefits exchanged during their domestic partnership. The treatment of reciprocal benefits must be managed in accord with the approach laid out in *Wilson* to ensure that the question of unjust enrichment is not confused with competing set-off claims.

2. Absence of Juristic Reason

- [203] Finally, to succeed, the plaintiff must show that there was no reason in law or justice for the defendant to retain the benefit conferred by the plaintiff, thus making its retention "unjust".

- [204] With regard to the third element, absence of juristic reason, Mr. Justice Cromwell stated in *Kerr v. Baranow*, at para. 40:
- [40] The third element of an unjust enrichment claim is that the benefit and corresponding detriment must have occurred without a juristic reason. To put it simply, this means that there is no reason in law or justice for the defendant's retention of the benefit conferred by the plaintiff, making its retention "unjust" in the circumstances of the case: see *Pettkus*, at p. 848; *Rathwell*, at p. 456; *Sorochan*, at p. 44; *Peter*, at p. 987; *Peel*, at pp. 784 and 788; *Garland*, at para. 30.
- [205] This third stage of the unjust enrichment analysis provides for due consideration of the autonomy of the parties, including factors such as "the legitimate expectation of the parties" and "the right of parties to order their affairs by contract".
- [206] The plaintiff must demonstrate that there is no juristic reason for the enrichment from the established categories of contract, disposition of law, donated intent, or another valid common-law, equitable, or statutory obligation (*Wilson* at para. 21).
- [207] A defendant can resist a claim by establishing another reason to deny recovery. Two factors should be considered: the "reasonable" or "legitimate" expectations of the parties and "public policy considerations". In *Wilson*, the Court discussed some policy considerations, such as the fact that natural love and affection do not provide a juristic reason for an enrichment; however, the statutory obligation of parents to support their children may do so.
- [208] In *Wilson*, the Court also said:
- [27] It may be that the statutory obligation of parents to support their children under the Divorce Act, R.S.C.1985, c. 3 (2nd supp.), the Family Relations Act, R.S.B.C.1996, c. 128, and the Criminal Code could provide a juristic reason, if the transfer of wealth from plaintiff to defendant is determined to be entirely or partly to provide for a child of their relationship, but that issue has not been considered in any authority of which I am aware and has not been suggested as applicable in this case.
- [28] In this case, the suggestion is made that reciprocal benefits received by the plaintiff come within the fourth established category (other valid obligations). This comes to a submission that "equitable set-off" is a juristic reason for a defendant to retain enrichment. Because the necessity to off-set reciprocal benefits arises out of the inherent nature of a marriage-like relationship, receipt of those benefits is not suited to constitute a juristic reason for enrichment. The receipt of reciprocal benefits does not have the same juridical force as a contract, a disposition of law or a donative intent. In most family cases reciprocal benefits will not be specifically pleaded, either by way of a counterclaim or as a defence (they were not in this case). Technically, equitable set-off (when not pleaded as a counterclaim) is a defence. Any reciprocal benefit qualifying for the application of equitable set-off should be treated as such in an unjust enrichment analysis and brought into account after the

enrichment has been valued.

- [209] If the plaintiff has established an enrichment and no juristic reason exists in the established categories, the defendant may still prove that the case falls outside the existing categories and the Court should take account of the legitimate expectations of the parties.
- [210] I am satisfied that there is no juristic reason for D.A.'s enrichment from the established categories that apply to deny S.C. a remedy.
- [211] The second step of the analysis is to determine if D.A. has established a juristic reason based on other circumstances including the reasonable expectations of the parties and public policy considerations.
- [212] In *Kerr*, Cromwell J. said that the reasonable or legitimate expectations of the parties should be considered in relation to whether there is a juristic reason for the enrichment. In *Wilson*, the Court said:
- [30] Whether seen as a proposed new category of juristic reason or as flowing from legitimate expectations of the parties, too narrow a focus on reciprocal benefits in the juristic reason analysis has the potential to blend the existence of enrichment with the question of its extent. While a court should be justifiably concerned with protecting a defendant from an excessive award where he or she has provided the plaintiff with benefits over the course of the relationship, that is not the question being asked at the juristic reason stage. The juristic reason analysis is intended to establish whether there is a reason for the defendant to retain a proven enrichment, not to determine its value or off-set reciprocal enrichment by the plaintiff. The issues of quantum and set-off are for the quantification of the award following a finding of unjust enrichment. By interposing the issue of extent into the juristic reason stage, the full unjust enrichment analysis is short-circuited.
- [213] The Court in *Wilson* explained the function of reasonable expectations as follows:
- [35] On an inquiry into the reasonable or legitimate expectations of parties in a marriage-like relationship, there are neither presumptions nor a default position. Although it is unlikely the absence of a legitimate expectation of a share in the value created during a relationship would be sufficient reason to deny recovery, regard must be had to the evidence of the nature of the particular relationship. The proper approach is to find the parties' expectations from the evidence of their particular relationship and evaluate this aspect of the juristic reason analysis in light of those findings. Reciprocal benefits may be relevant to that analysis, but they cannot be decisive. The questions at this step are those set down by Dickson J. (as he was then) in *Pettkus v. Becker*, [1980] 2 S.C.R. 834 at 848-49 and discussed in *Bruyninckx v. Bruyninckx* (1995), 4 B.C.L.R. (3d) 341 (C.A.) at para. 86: Did the plaintiff suffer prejudice in the expectation of an interest in property or a monetary reward? Did the defendant accept the benefit in circumstances where its retention would be unfair given his or her knowledge of that expectation?

- [214] Differing "legitimate expectations of the parties" is one factor to consider in the nature of the relationship. In *Ladouceur v. Kenchenten*, 2010 BCSC 761 at para. 171:
- [171] ... Reasonable expectations can differ when both parties pursue careers rather than participate in a "traditional" marriage in which one party sacrifices his or her economic independence for the advancement of the relationship: *J.A.B. v. H.W.C.*, 2008 BCSC 644, 58 R.F.L. (6th) 295 at para. 95; *Ford v. Werden* (1996), 27 B.C.L.R. (3d) 169 at 178-79, 25 R.F.L. (4th) 372 (C.A.). A court may also consider whether the parties kept their finances separate and acquired assets in their own names: *J.A.B.* at para. 137.
- [215] D.A. argued that the parties maintained separate bank accounts, retirement assets, and automobiles. They own the family home together but both parties worked full-time. They apparently contributed to the household costs in proportion to their incomes. If the parties had intended their relationship to be one of combined assets and earnings to achieve the joint purposes as argued by S.C., I do not think she would have simply contributed a sum in proportion to their respective incomes. They would have joined their banking and financial affairs in such a way as to jointly manage their household; they did not approach their affairs this way which is indicative of an intention to treat their relationship as a non-traditional marriage-like household.
- [216] D.A. was responsible for the cost of the family's recreational activity and vacations (albeit through his company). D.A. received very large sums from his mother's estate and much of that money was converted into assets which benefited the family but were not mingled with her assets. This was not a traditional marriage where one party sacrificed economic independence for the advancement of the relationship I rejected S.C.'s assertion that she moved from her BCAA job in Burnaby to Surrey for the sake of her relationship. There were equally compelling reasons for her to make that choice, including the avoidance of time and money involved in traveling. The pattern embraced by the parties was to keep most of their finances and assets separate.
- [217] In my view, the parties bestowed benefits on each other in such a manner as to obviate the conclusion that there was no juristic reason for the enrichment received by D.A. In *Thomas v. Fenton*, 2006 BCCA 299, Kirkpatrick J.A. said:
- [23] From the foregoing discussion in *Ford*, it is clear that a broad view of the relationship must be taken to determine whether or not a juristic reason for the enrichment exists. In this case, the trial judge was confronted with evidence in which both Ms. Fenton and Mr. Thomas bestowed benefits on the other. The trial judge appears to have concluded that the conferring of the benefits by Mr. Thomas (and the resultant deprivation) related specifically to the renovations was automatically without juristic reason.
- [24] However, looking at the whole of the relationship, there is nothing unfair or unjust in this arrangement. Ms. Fenton provided Mr. Thomas with essentially free room and board for almost 30 years. For 23 years of the relationship, Mr. Thomas provided some modest services. The renovations completed by him in 1986 were enjoyed by them both. By the time

the relationship ended in 2004, the value of Mr. Thomas' renovation work was essentially exhausted. Although Ms. Fenton continues to rent the home pending determination of Mr. Thomas' claim, it will be demolished when the re-zoning application is approved.

- [25] In my opinion, the trial judge erred in failing to give adequate consideration to the benefits conferred on Mr. Thomas by Ms. Fenton. It is manifestly clear that Ms. Fenton bestowed far more on Mr. Thomas than he bestowed on her.
- [218] There was little evidence about the precise measure or level of S.C.'s disproportionate shouldering of any domestic responsibilities. She asserted that she performed three quarters or more of the work without any meaningful analysis of a breakdown. This was not a traditional marriage and the parties enjoyed the contributions made by both parties while each accumulated separate assets.
- [219] In J.A.B., Smith J. said:
- [126] The conclusion in *Massincaud* that the benefits conferred on a party claiming in unjust enrichment should be considered under the lack of juristic reason analysis is consistent with the approach recently taken by the Court of Appeal in *Thomas v. Fenton* and with the Court of Appeal's direction indicated earlier in *Pickelein v. Gillmore*. I will therefore consider the benefits bestowed on the plaintiff when determining whether the plaintiff has established an absence of juristic reason for the defendant's enrichment and when considering the question of remedy.
- [Emphasis added.]
- [220] Although S.C. suggested that she envisioned her future with D.A. into retirement, there was no discussion or agreement between them about the future. In the context of this relationship, it does not appear to me that S.C. did domestic work in the expectation of an interest in D.A.'s retirement funds. The parties enjoyed a life of mutual support albeit in different areas of their lives. They mingled their affairs in some areas but kept separate and apart other aspects of their affairs.
- [221] D.A. argues that the parties were never married and did not share any bank accounts during their cohabitation. He said their decisions not to mingle savings were deliberate and that his RRSPs, condominium and business interests remained in his name alone during their time together. He says that S.C. never contributed to his RRSPs. Similarly, he did not contribute to S.C.'s employer-sponsored pension plan.
- [222] In *Kerr*, the Court discussed unjust enrichment issues involving unmarried couples and touched on the importance of the integration of the parties' economic interests at para. 92:
- [92] Another group of factors, related to those in the first group, concerns the degree of economic interdependence and integration that characterized the parties' relationship (*Birmingham*; *Pettikus*; *Nasser*). The more extensive the integration of the couple's finances, economic interests and economic well-being, the more likely it is that they should be

considered as having been engaged in a joint family venture. For example, the existence of a joint bank account that was used as a "common purse", as well as the fact that the family farm was operated by the family unit, were key factors in Dickson J.'s analysis in Rathwell. The sharing of expenses and the amassing of a common pool of savings may also be relevant considerations.

- [223] In this case, the parties did not engage in the joint acquisition of assets other than their residence. D.A. purchased a jet ski, a jet boat, and funded several family holidays without contributions from S.C.
- [224] They purchased and maintained cars of their own and do not appear to have looked to one another for financial support for these assets except that D.A. did auto repair work for S.C. She did not contribute to any of D.A.'s RRSPs although he did provide funds for her purchase of a \$5,800 RRSP. He said this was done in the hope that she would continue to make provisions for her future. They maintained substantially independent financial estates. They did not amass a package of "common assets" or maintain a "common purse". Their expenses were not paid or shared from a common bank account. The agreement that S.C. contributed a fixed sum monthly appears more in the nature of part performance of an agreement to keep their affairs separate. D.A. was responsible for the expenses and she simply made a monthly contribution.
- [225] I am mindful of the requirement to avoid considerations of set-off and quantification of the remedies at this stage. In the context of this relationship, I conclude that S.C. did not suffer prejudice in the expectation of a monetary or proprietary interest in assets of the other. Although I concluded that there was an enrichment and deprivation in this case, in the context of the lives of these people and their respective roles, I am not persuaded that the benefit bestowed on D.A. by way of a disproportionate delivery of domestic services would be unfair in the circumstances.
- [226] In my view, there was a juristic reason for S.C. shouldering something more than half the share of the domestic responsibilities. It is clear that both parties worked full time and gave time to their son's educational and recreational pursuits. Their financial relationship evolved in a non-traditional way and it is clear to me that they did not form a common intention with regard to share all of their assets. The decision to purchase a home together and to have a child, in the circumstances of this case, detract from the reasons they maintained separate estates.
- [227] In the result, I conclude that there was a juristic reason for S.C. to provide a larger measure of domestic work than contributed by D.A. Consequently, S.C.'s claim does not succeed.
- [228] In the event that I am incorrect in this conclusion, I will follow the balance of the analysis as prescribed in Wilson.

3. Defences

[229] In *Wilson*, the Court outlined five defenses including change of position, estoppel, statutory defences, laches and acquiescence, limitation periods and equitable considerations.

[230] The parties did not take any position with respect to these defences.

4. Remedy

[231] The first remedy to consider is always the monetary award. In most cases, a monetary order is sufficient to remedy an unjust enrichment and in the circumstances of this case, a monetary remedy is preferred by both parties.

5. Quantification of the Remedy

[232] In *Wilson*, the Court observed that the real issue is the choice between "value received" or "value survived" in quantifying an award. In assessing the value of an enrichment determined by the cost, the court recommends assessing the equivalent occupations of housekeepers, servants, and related occupations on an annualized basis, over the term of the relationship.

[233] When applying the value survived approach, an analysis is carried out of the value created in the asset by the plaintiff's contributions. In *Kerr*, the Court concluded that the value survived approach may more accurately reflect the nature of the relationship between unmarried people.

[234] I accept for the purposes of this case that the value survived approach is preferable. There was no evidence on which I could fairly evaluate the plaintiff's claim on the value received approach nor do I think it would be a fair measure of the conditions under which the parties lived during their relationship.

[235] In *Wilson*, the Court said:

Value Survived Approach

[60] On the value survived approach, there is no requirement to determine the precise value of the services and other benefits received by the defendant. As a general rule, a party's proportionate contribution to the value of an asset will entitle that party to a comparable share in its value. A ten percent contribution will yield a value equivalent to 10% of the asset; likewise a 50% contribution will yield a half-share. Once the proportionate share has been determined, it need only be assessed against the value of the asset to determine the quantum of the award. If equitable damages are to be awarded in lieu of a proprietary remedy, the value of the property at the date of trial will determine the quantum of the award, subject to any adjustments as between tenants in common for use and maintenance of the property following separation.

[61] The key features of the assessment on the value survived approach are the identification of the value available for apportionment and the parties' proportionate contributions to that value. There is no presumption of equality: Rathwell at 447-49.

[Emphasis added.]

[236] I observed the Court of Appeal's comment in Wilson that long marriages (12 years or more) are more likely to suggest a family venture, and an equal sharing of all family assets and this principle can be applied to marriage-like relationships.

[237] On the value survived approach, the parties' proportionate contribution to the value of the asset will entitle the party to a comparable share in its value. The key features are the assessment of the value available for apportionment and the parties' proportionate contributions to the value. There is no presumption of equality (Wilson at para. 61). The length of the relationship will be a factor in the apportionment stage as will the age of the parties. Case law suggests that marriage-like relationships exceeding 12 years likely suggest a family venture and equality of sharing of all family assets.

[238] In this case, I would have considered S.C. to be entitled to a one half interest in D.A.'s financial assets accumulated during their relationship. The only evidence of that accumulation is in the growth of his RRSP balance from new contributions and the returns earned on the capital from 1993 to 2009.

6. Set-Off

[239] After a remedy has been chosen in the value of the claim quantified, the court can take account of reciprocal claims pleaded or of evidence of mutual benefits conferred. Reciprocal claims of unjust enrichment arise where each party claims to have benefitted the other party as a result of the relationship. Reciprocal claims may be set-off against one another. At this stage, the absence of a claim for unjust enrichment by the defendant will not defeat the consideration of the claim. Equitable set-off accurately describes the setting-off of mutual enrichments in family cases.

[240] At this stage, only contributions to property that allow the other party to acquire, increase or maintain the value of an asset will be considered. The Court of Appeal in Wilson described the process as follows:

[81] In examining the contributions to property, only those contributions that allowed the other party to acquire, increase, or maintain the value of an asset will be considered. For example, with a vehicle, payment by the defendant to the plaintiff to buy the car in the first place would be a set-off. Payment by the defendant of the costs of maintenance (brake re-alignment) or new parts (carburetor; tires) that preserve or enhance the value of the vehicle would be set-off. Payment of the ordinary operating expenses (gas; AirCare; insurance) would not be set-off, because they do not enhance or maintain any value that is capable of surviving the end of the relationship. This will be a question to be determined on the evidence.

- [241] The value to be used is the value of the property at the end of the relationship. The property must survive the relationship. If property has been sold or lost before the end of the relationship, its value cannot be considered as an appropriate deduction. Relieving the other party of a gap or liability is also a proper set-off.
- [242] In this case, I am able to deal with D.A.'s RRSP to the exclusion of the other assets. I had little evidence to assist in assessing the extent or degree to which S.C.'s contributions to domestic chores contributed to D.A.'s ability to add to his RRSPs during their years together. In the circumstances of this relationship, I am not satisfied that there should be equal sharing of that asset based on the contributions made by S.C. The parties kept many of their assets separated. D.A. contributed to the maintenance of motor vehicles retained by S.C. She has kept her own pension and other property separate. Although this relationship had some of the features of a joint venture, it lacked the integration of their affairs that would accord with a mutual expectation of an equal sharing in their assets.
- [243] D.A.'s RRSP contributions made during the relationship or \$35,572. The parties did not tender evidence as to the "value survived" of that \$35,572. D.A.'s estimate that his accumulated RRSPs in October 1993 was between \$50,000 and \$80,000. The evidence was quite unhelpful in doing a proper assessment. The claimant argued that D.A.'s RRSPs were only \$12,000 when the parties joined their homes.
- [244] Based on a review of the mortgage expenses, taxes and utility costs, it is probable that one half of the household expenses well exceeded \$900 per month which were likely paid by D.A. He also paid for vacation expenses and used inherited money to buy the jet boat and other items used by the family.
- [245] D.A. did major repairs and improvements to the motor vehicles S.C. took with her at the end of the relationship. He paid for capital repairs to the house including a new roof and other expenses.
- [246] During the relationship, S.C. accumulated a work-organized RRSP and her pension plan.
- [247] The principle of set-off in family situations will be met where there is a mutual unjust enrichment. Where it is equitable to allow one party to recover in full for any unjust enrichment of the defendant, the failure to discount the plaintiff's award by a corresponding enrichment would amount to unfair compensation at the expense of the defendant. In *Wilson*, the Court said:
- [79] Equitable set-off provides the doctrinal and juridical basis for what has proven to be a necessary exercise in family cases. The application of this recognized doctrine at the assessment of damages stage avoids "up in the air" analyses at earlier stages of an unjust enrichment analysis and permits full consideration to be given to all the factors the Supreme Court has been at pains to set out as it developed the Canadian approach to unjust enrichment.

- [248] There was a paucity of evidence to inform me about the value of car repairs performed by D.A. There was oral evidence about the value of repairs he paid for at the home. I was able to discern the contributions made by S.C. to her RRSP and company pension plan through a review of her income tax returns.
- [249] During their time together, S.C. contributed \$26,166 to her pension/RRSP and \$9,917 to her personal RRSP.
- [250] D.A. contributed \$35,572 to his RRSP during the relationship. I accept his evidence that, his RRSP contributions had a value greater than \$12,000 when the parties began living together. His estimate of \$50,000-\$80,000 is of some concern; for the purposes of establishing a value survived amount, I will accept that his RRSP contributions were \$50,000. His contributions since 1993 total 41.5% of the total contributions to that plan. I have extrapolated forward to arrive at a current value of his contributions during their relationship in the amount of \$64,864 which is 41.5% of \$154,000.
- [251] Although it appears S.C. contributed \$9,917 to RRSPs, I was told that at the date of separation she had only \$5,800, which was cashed in. In my view, the agreement that her pension was valued between \$44,500 and \$61,800, the value of those two assets ought to be a set-off against the value by which D.A. was unjustly enriched. I did not have any reliable evidence to assist me in this assessment, and in making these calculations I have picked the midpoint of \$51,500 for S.C.'s pension and \$5,800 for her RRSP. D.A. would be entitled to a set-off of equal to one half of that amount or \$28,650.
- [252] In the result, D.A. would otherwise pay S.C. the difference between \$32,432 and \$28,650, that is, \$3,782.
- [253] After considering an appropriate set-off for D.A.'s set-off claim, I would value the unjust enrichment received by D.A. at \$3,782 before tax.

VII. Summary

A. Custody/Guardianship

- [254] D.A. and S.C. shall be joint guardians and custodians of C.
- [255] The following recommendations of Dr. Colby, with minor modifications, will form part of the order:
1. The current access schedule should be maintained without further intervention being required;
 2. Both parents will continue to be responsible for decision-making in regards to C.'s needs. The parenting process itself be engaged in as a parallel parenting process.
 3. S.C. should be primarily responsible for matters in relation to communication with the school and assuring C.'s academic progress;

4. Communications between the parents should be by e-mail to ensure that relevant information is exchanged without C. having access to them;
 5. C.'s passport should be freely provided with adequate notice in order to accommodate holidays and travels. Itineraries should be provided to the other parent in writing for any planned trips;
 6. Despite any other scheduling, C. should spend Father's Day with his father and Mother's Day with his mother;
 7. C.'s birthday should be spent with a parent who has access during the week of his birthday for this year and thereafter on alternating years;
 8. School holidays, including spring break and Christmas should be shared equally between the parties. Accommodation for time missed with the other parent should be added to that parent's time following the holidays;
 9. During summer holidays, C. should reside with his parents on monthly rotations with the non-access parent having weekly telephone contact at a specified time;
 10. C. must not be engaged in any way in matters relating to the dispute between the parties and neither party should speak negatively of the other to C.; and,
 11. C. and his mother will enter into counseling to address issues in their relationship.
- [256] S.C. will have decision-making authority with regard to C.'s education including schooling, tutoring, cultural, artistic and those kind of endeavours provided that D.A. will have an unfettered right to information relating to C.'s schooling, tutoring cultural, artistic and other endeavors and to be able to communicate with persons delivering those services to C.
- [257] In matters of C.'s medical health, each party will have decision-making authority during the time C. is in his or her care, provided that, if issues arise with regard to C.'s medical condition or treatment, the parent with whom C. resides at the time shall advise the other, by e-mail, of the details and proposed treatments relating to his health.
- [258] All communications between the claimant and respondent shall be via e-mail, and for more urgent matters, can be via text-messaging. All communication shall be courteous and respectful.
- [259] In matters of C.'s athletic activities and endeavors, D.A. has decision-making authority and both parties need to accommodate C.'s needs and requirements in regard to those activities.
- [260] If the parties are unable to agree on further arrangements, they are at liberty to appear before the court to make submissions regarding further terms, conditions or details of the parenting arrangements for C.

B. Child Support

- [261] D.A. will pay to S.C. the sum of \$121.67 per month for the support of C.. D.A. will pay retroactive support for C. at that rate from October 30, 2009 to the date of trial.
- [262] The parties will each contribute to the s. 7 expenses in proportion to their Guideline incomes as referred to in these reasons, that is, \$52,648 for D.A. and \$39,889 for S.C.

C. Unjust Enrichment

- [263] S.C.'s claim for monetary compensation for unjust enrichment is dismissed. If I were incorrect in this conclusion, I would order D.A. to pay S.C. the sum of \$3,782 representing the measure of the unjust enrichment claim.

D. Family Home

- [264] The family home will be listed for sale and sold at the agreed-upon market value less the balance owing on the financial charge is registered against the land as at the date of separation and D.A. will be compensated for one half of the reduction in principal outstanding on the mortgage as at the date the sale completes. It was my understanding that D.A. intends to purchase the property. If the parties are agreed that he shall be entitled to purchase the property at the agreed-upon value of \$457,500, within 30 days of the date of his judgment and the listing of the house for sale as referred to above, will be postponed 31 days after the date of this judgment.
- [265] D.A. will be entitled to a credit equal to the reduction in the principal owing on the first mortgage from the date of separation to the date of payment. On sale or transfer of the family home, the payment of the line of credit secured against the family home will not exceed the amount owing (as adjusted for by reason of the reduction in the line of credit from ticket sales and receipts, referred to in para. 151 above.)
- [266] If the parties are unable to agree upon the value at which D.A. can purchase S.C.'s interest in the family home, and the home is listed for sale, then either party should have the right of first refusal to purchase the house. In the event that both parties wish to purchase the house and they cannot resolve the sale issue between themselves, then the home should be sold under a joint listing for sale.
- [267] The parties are at liberty to address any issues relating to the disposition of the family home.
- [268] Except as provided for in this order, the parties shall be entitled to retain all rights and interest in the property in their possession.

E. Spousal Support

- [269] S.C.'s claim for spousal support is dismissed.

VIII. Costs

[270] The parties will be at liberty to address the Court on the issue of costs.

"Armstrong 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/12/10/2012BCSC1061.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/s-c-v-d-a-2012>

Prepared on 29 October 2026 · Esheria